

Gary A. Jack
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July 15, 2019

VIA HAND DELIVERY

Ms. Connie Graley
Executive Secretary
Public Service Commission of West Virginia
201 Brooks Street
PO Box 812
Charleston, WV 25323

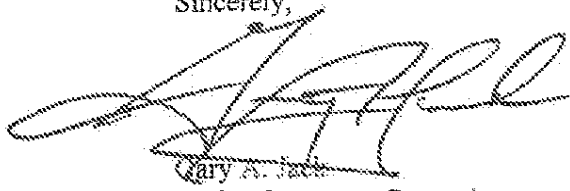
01:16 PM JUL 15 2019 EXEC SEC DIV

Re: **Case No 19-0551-T-GI**
General Investigation into Adopting and Implementing Rules
Governing Pole Attachments and Assumption of Commission
Jurisdiction over Pole Attachments

Dear Ms. Graley:

Enclosed for filing are the original and 12 copies of the Joint Initial Comments of Appalachian Power Company, Wheeling Power Company, Monongahela Power Company, and The Potomac Edison Company in the above-referenced matter.

Sincerely,



Gary A. Jack
Senior Corporate Counsel
Mon Power and PE
WV State Bar No. 1855

GAJ:dml
Enclosures

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

01:18 PM JUL 15 2019

CASE NO 19-0551-T-GI

General investigation into Adopting and
Implementing Rules Governing Pole
Attachments and Assumption of
Commission Jurisdiction Over Pole
Attachments

**JOINT INITIAL COMMENTS OF APPALACHIAN POWER COMPANY, WHEELING
POWER COMPANY, MONONGAHELA POWER COMPANY,
AND THE POTOMAC EDISON COMPANY**

COME NOW Appalachian Power Company (“APCo”), Wheeling Power Company (“WPCo”) (“collectively, the “AEP Companies”), Monongahela Power Company (“Mon Power”), and The Potomac Edison Company (“PE”) (collectively the “FirstEnergy Companies”) (all four companies collectively, the “Companies”) and together respectfully submit their initial comments on the General Investigation into Adopting and Implementing Rules Governing Pole Attachments and the Assumption of Commission Jurisdiction over Pole Attachments (“General Investigation”).

I. COMPANIES’ SUPPORT OF COMMISSION JURISDICTION

The Companies fully support the Public Service Commission of West Virginia (“Commission”) assuming jurisdiction of pole attachments from the Federal Communications Commission (“FCC”). The Commission already regulates, to some extent, the entities that attach to the poles. To the contrary, the FCC does not regulate electric companies and some of the other entities that attach to the poles. Second, West Virginia is more closely attuned to the

specifics of West Virginia and the problems it faces than a federal agency. The AEP Companies have some 485,415 customers in West Virginia and some 492,681 electric distribution poles. The FirstEnergy Companies have 535,000 customers in West Virginia and some 660,646 electric distribution poles. It is the Companies' belief that the Commission has a better understanding of electric distribution facilities than the FCC, whose expertise is, understandably, focused on the communication industry. The FCC's expertise does not include electric distribution safety and reliability, nor do the FCC's ratemaking and cost-recovery principles fairly consider the interests of West Virginia electric ratepayers. The Commission's expertise in the areas of electric distribution safety, reliability, ratemaking and cost recovery should provide a more balanced approach to pole attachment issues. While the Companies support the West Virginia Legislature's goal to expand broadband and wireless deployment, such expansion should give due consideration to the safe and reliable operation of electric utilities.

Further, the Commission regulates other rates of the Companies, so it is logical and consistent for the Commission to regulate rate recovery and operations involving pole attachments, in addition to electric distribution poles. To date, 20 states and the District of Columbia have opted to regulate pole attachments through reverse preemption of the FCC's pole attachment jurisdiction. For the AEP Companies, the states of Michigan, Ohio, Kentucky, Arkansas and Louisiana have reverse preempted the FCC's pole attachment jurisdiction. For the FirstEnergy Companies, the states of New Jersey, New York and Ohio have reverse preempted the FCC's jurisdiction over pole attachments¹.

As the Commission understands, electricity is essential in that it drives virtually all of the key components of modern life, yet the safe and efficient delivery of electric utility services is

¹ Pennsylvania is currently soliciting comment and considering asserting jurisdiction over utility pole attachments. See case styled "Assumption of Commission Jurisdiction over pole attachments from the FCC", Case L-2018-3002672.

dependent upon a highly complex, interrelated series of processes that continue to evolve with technological advances and public and regulatory expectations for reliability of service. Pole attachments, without proper oversight, pose a serious threat to the electric service delivery process, with broad implications for the personal safety of those who work on or near poles, attachments and energized lines, and for the reliability of the electric grid. Federal and state operating requirements for safe work and construction practices currently applicable to utilities must be incorporated into any Commission action and be required of the communications attachers. The Companies urge the Commission to continue to give great deference to electric utility construction and engineering standards and practices related to safety, reliability and cost recovery. Thus, in part because the Companies recognize the Commission's expertise developed over many decades of oversight of electric facilities and over the imperatives of electric safety and reliability, the Companies support the Commission's assertion of full jurisdiction over pole attachments.

II. SENATE BILL 3 SHOULD BE AMENDED IN 2020.

The statutory language in Senate Bill 3 conveying the authority to the Commission could and should have been written more carefully to avoid questions, confusion and conflict with existing law. While the Companies do not believe the Commission is required under the language of W.Va. Code § 31G-4-4 ("Section 31G-4-4") to adopt wholesale the FCC rules without change, including a wholly separate complaint protocol, the Companies believe that the statute can and should nonetheless be clarified in the 2020 West Virginia Legislative session. The Companies plan, at this point in time, to propose a bill on rate recovery for providing broadband services as a follow-up to enacted Section 31G-4-5 on developing feasibility studies.

The Companies believe that the necessary clarifications can be passed in the same 2020 bill and at the same time as the rate recovery portion on providing any intermediate broadband services by the Companies. Such an amendment would remove the uncertainty associated with the Commission process of adopting rules and authority.

III. THE COMMISSION CAN AND SHOULD DEVIATE FROM FCC RULES AND POLICIES.

The purpose of Section 31G-4-4 was to transfer jurisdiction over pole attachments from the FCC to the Commission. It was not meant, nor was it intended, to hamstring the Commission and remove necessary flexibility. First, the certification to the FCC, as required by the federal Pole Attachments Act (47 U.S.C. §224) and Senate Bill 3, is that the State of West Virginia: (1) regulates the rates, terms, and conditions related to pole attachments; and (2) the State has authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interest of the consumers of the services. 224(c)(2)(A) & (B); 31G-4-4 (c). If the Commission is simply abdicating its discretion to the FCC, it is not “regulating” the rates, terms and conditions for pole attachments. Second, there is a clear distinction between substantive matters and procedural protocol. The Commission has its own procedural protocol for processing cases which is separate and distinct from substantive law. Finally, even on substantive matters, the Companies assert that the Commission can and should deviate from FCC rules if there are state statutes, rules or policies that favor adoption of different regulatory treatment. The Companies will discuss each one of these three positions individually below.

A. INTENT OF THE WEST VIRGINIA LEGISLATURE

The purpose of Section 31G-4-4 was to transfer regulatory authority from the federal level to the state level. It would not have made sense for the West Virginia Legislature to direct the Commission to regulate pole attachments, but at the same time limit that jurisdiction in a way that would merely duplicate the existing federal regulations. West Virginia should follow the lead of other states, such as Arkansas, Ohio, and Louisiana, that have given their pole attachment regulatory bodies the discretion to implement their own rules. See Ark Section 23-4-1001-1006, whereby the Arkansas legislature left it to its public service commission to determine rates, terms and conditions that best fit its rural state rather than wholesale adoption of FCC rules. In fact, the Companies are unaware of any state that has directed its public service commission to adopt the FCC rules without change.

B. SUBSTANTIVE LAW IS DIFFERENT FROM PROCEDURAL PROTOCOL

The Commission has raised the question of whether it needs to adopt the FCC's complaint handling procedures. The Companies believe the answer is clearly "no." The Commission's Rules of Practice and Procedure provide the framework for handling complaints, discovery, hearings, briefing, and other procedural matters. Those rules provide due process to all litigants. It would be very confusing and cumbersome for the Commission to adopt a wholly separate procedural framework just for pole attachment complaints.

Moreover, in the Companies' state jurisdictions that have reverse preempted the FCC's jurisdiction over pole attachments, the Companies have seen very few complaint cases. For example, the AEP and FirstEnergy Companies' affiliates did not receive any pole attachment complaints in 2017 and 2018 at the state regulatory bodies that regulate pole attachments

Finally, if the Commission were to replace its existing jurisdiction with the FCC's new ILEC complaint rule, it would have the effect of reducing rather than expanding the Commission's jurisdiction because the FCC rule only addresses rates for ILEC attachments on electric utility poles; it does not address rates for electric utility attachments on ILEC poles or access by either party to the other's poles. The Commission not only has jurisdiction over the entirety of the "joint use" relationship between ILECs and electric utilities, but the Commission has exercised this jurisdiction in the past. See, e.g., *Appalachian Power Company and Wheeling Power Company v. Frontier West Virginia Inc.*, Case No. 12-0284-E-T-C; *Verizon West Virginia Inc. v. Appalachian Power Company and Wheeling Power Company*, Case No. 07-1279-E-C. Moreover, even the FCC has recognized the scope of the Commission's jurisdiction over joint use relationships and has stayed an FCC complaint in favor of the Commission's jurisdiction. See *Frontier West Virginia Inc. v. Appalachian Power Company and Wheeling Power Company*, March 25, 2013 FCC Enforcement Bureau Letter Order, File No. EB-12-MD-004, a copy of which is attached as Exhibit A.

C. THE COMMISSION CAN AND SHOULD DEVIATE FROM FCC SUBSTANTIVE GUIDANCE WHERE APPROPRIATE.

One of the advantages of state regulatory authority over federal regulatory authority is that West Virginia can tailor its substantive regulatory program to the particulars of its entities and circumstances. Commission pole attachment rules should pass through the West Virginia rulemaking procedures, subject to comment from all stakeholders and affected parties and due consideration by the Commission. It should not rely on automatic links to a corresponding FCC regulatory framework that is not attuned to West Virginia and for which affected parties may not recognize that FCC rulemakings would apply automatically in West Virginia. That would be contrary to the West Virginia Legislature's intent to have West Virginia assume jurisdiction over

pole attachments. More importantly, such an automatic amendment of Commission regulations by the FCC would contravene fundamental fairness and due process for West Virginia stakeholders. The Commission follows certain procedures outlined by the West Virginia Legislature regarding the promulgation of Commission rules. Those procedures were not meant to be circumvented by misinterpreting the wording of Senate Bill 3 regarding adoption of FCC rules.

When there is a state statute or rule different from the FCC rules, then that specific provision should govern rather than the broad and vague language in Section 31G-4-4. This is especially true when the intent of the Legislature was to confer authority on the Commission so that it could tailor regulation to fit West Virginia specifically.

As an example, West Virginia law prohibits the Commission from awarding damages and confers that authority on circuit courts. W.Va. Code § 24-4-7 and Carter v. Willis 117 SE 2d 594 (WV 1960). The state specific law should control. Additionally, any complainant seeking damages has alternative avenues: to file in West Virginia civil courts and/or to seek relief from the Commission that has the indirect effect of imposing damages, such as requesting that the Commission uphold suspension of new attachments as a penalty for non-payment of unauthorized attachment fees, make-ready construction costs, and annual rental payments.

In addition, adoption of the FCC regulations in total is inconsistent with the broad authority of the Commission to regulate joint use contracts between two public utilities. W.Va. Code §§ 24-2-3, 24-2-6, 24-2-7, 24-2-12. Broadly adopting the FCC rules could have the effect of upsetting existing contracts previously approved by the Commission.

The FCC rules are also inconsistent with Section 31G-4-1, which requires a new entrant to pay all make ready costs associated with its proposed attachment. The FCC rules relieve the

new entrant of such cost responsibility under certain circumstances. See 47 CFR 1.1411(d)(4) and 1.1415(b). The timeline to perform make ready work under Section 31G-4-2 is different from the timeline in 47 CFR 1.1411. Finally, the express prohibition for others working in the electric supply space, as set forth in Section 31G-4-3, is contrary to the FCC rules, which require rearrangement of electric facilities, including ones that may necessitate outages [prohibited by 31G-4-3(b)], and permit third parties the right to perform work themselves in the electric supply space under certain conditions.

IV. THE COMPANIES SUPPORT CHANGES TO THE FCC RULES.

The Companies support some state changes to the FCC rules. To that point, the FirstEnergy Companies submitted extensive Comments and Reply Comments during the FCC rulemaking as part of the Coalition of Concerned Utilities,² and on October 15, 2018 requested reconsideration of the FCC's August 3, 2018 Order as part of the same Coalition. Similarly, the AEP Companies submitted extensive Comments and Reply Comments during the FCC rulemaking process along with a group referenced simply as the "Electric Utilities" in the FCC's August 3, 2018 Order.³ Certain members of that group, including the AEP Companies, have challenged certain aspects of the FCC's new rules in a court proceeding pending in the United States Court of Appeals for the Ninth Circuit.⁴

The Companies highlight their concerns with the revised FCC regulations as follows:

- The FCC's regulations provide that if an electric utility fails to meet the new make-ready construction deadlines for attachers, the attacher may

² The Coalition of Concerned Utilities comprises Arizona Public Service, Consumers Energy, Eversource, Exelon Corporation, FirstEnergy Corp., Hawaiian Electric, Kansas City Power and Light, Northwestern Energy, Portland General Electric, Puget Sound Energy, South Carolina Electric & Gas, and The AES Corporation.

³ This group included Ameren Corporation, American Electric Power Service Corporation, Duke Energy Corporation, Entergy Corporation, Oncor Electric Delivery Company LLC, Southern Company, Tampa Electric Company and Westar Energy, Inc.

⁴ American Electric Power Service Corp., et al v. FCC, In the United States Court of Appeals for the Ninth Circuit, Docket No. 19-70490.

hire utility-approved contractors to perform make-ready work, not only in the communications space (which is the current rule) but also in the electric supply space, creating significant safety concerns. This is prohibited by W.Va. Code § 31G-4-3;

- The FCC seems to have a faulty understanding of the risks of overlashing. Overlashing existing communication cables with new or additional cables, though entirely in the communication space, presents serious pole loading issues, particularly during icing situations and wind events. The FCC would allow a communication company to overlash an existing communication cable without submitting any engineering analysis or requiring approval by the pole owner. The attaching company would only have to notify the pole owner. The FCC rules also do not allow an electric utility to recover the cost for performing a loading analysis for electric safety and reliability, thus shifting that cost to electric ratepayers. Even more alarming is that the FCC will allow overlashing on poles with pre-existing NESC violations.
- State rules should be adopted that equitably place the burden of pre-existing violations on the correct party. The FCC's rules attempt to shift this burden to the pole owner and purport to prohibit an electric utility from delaying or denying access for new attachments or overlashing where there are pre-existing violations—even when those violations present safety issues that require remediation prior to any further work on the pole.

- The FCC's regulations provide new rules relating to the rates paid by Incumbent Local Exchange Carriers ("ILECs") -- primarily traditional telephone utility companies -- for access to electric utility poles. The new rules include presumptions that ILECS are "similarly situated" to CATVs and Competitive Local Exchange Carriers ("CLECs") and that ILECs are entitled to the same rate as CATVs and CLECs. The rule also requires an electric utility to disprove these presumptions by "clear and convincing evidence." Even when the presumptions are rebutted, the FCC's new rule establishes an arbitrary limit on an electric utility's cost recovery, which may have the effect of shifting costs to electric ratepayers. Unlike the FCC, the Commission has more equitably allocated pole costs through recognition of the particular burden attaching parties place on the poles.

The Companies' specific concerns with the FCC's proposed regulations are consistent with the Companies' overall concern that the FCC's emphasis on communication industry expansion de-emphasizes electric safety and reliability without appropriately considering the effects on to electric utilities and their customers. Challenges continue to these FCC rules by interested parties, including the Companies.

V. ISSUES FOR CONSIDERATION BY THE COMMISSION

While the Commission has identified several important issues in its Order of June 4, 2019, there are other issues that should also be considered, either in this case or in another proceeding. Some of these issues are the following:

1. The proliferation of double wood poles is a problem and one generating a number of complaints about unsightliness. It would be worthwhile if the Commission would evaluate this and try to assist in streamlining the process and providing fair allocation of costs.
2. With more and more CLECs attaching to the poles, safety is a critical issue. The FCC has unfortunately been more attuned to the preferences of the CLECs and other communications attachers, and does not have experience with, or adequate knowledge of, electric utility operations or safety. The issues noted above in Section IV are examples of some issues the Commission should consider.
3. The fair and equitable allocation of the pole attachment costs, for capital, maintenance and make ready work, should be considered by the Commission.
4. Appropriate timetables are important for make ready work and the transfer of attachments to new poles. While the expansion of broadband is important, restoration of electric service and the provision of electric power to new customers are no less important. Additionally, many ILECs have no incentive -- and in fact a disincentive -- to move their attachments to new poles since it is usually caused by its competitors, CLECs, and cost recovery may be problematic.
5. Unauthorized attachments that are occurring without consent of payment to the pole owner for the attachment are creating hazardous conditions in the field and are causing electric utilities and their customers to pay a disproportionate share of pole costs.

VI. SUMMARY

The West Virginia Legislature has given the Commission the authority to regulate pole attachments. The Commission should regulate pole attachments as it regulates all other assets under its supervision ---- by providing due process to stakeholders and tailoring its rules and policy to fit West Virginia rather than by wholesale adoption of the FCC's regulatory scheme. While the Companies believe the Commission has the authority to adopt the rules it concludes are appropriate for West Virginia, and can do so without violating the Legislature's direction and intent in Section 31G-4-4, in order to remove any doubt, the Companies think it would be worthwhile to amend the state statute in the coming 2020 legislative session to remove any uncertainty. The Companies do not believe such amendment would be controversial. In the meantime, the Commission should move forward with the General Investigation or another proceeding to address rulemaking and the other important issues identified above.

WHEREFORE, the Companies respectfully request that the Commission carefully consider the Comments presented by the Companies as part of this General Investigation.

Dated this 15th day of July, 2019.

Respectfully submitted,

APPALACHIAN POWER COMPANY
WHEELING POWER COMPANY
MONONGAHELA POWER COMPANY
THE POTOMAC EDISON COMPANY

By Counsel



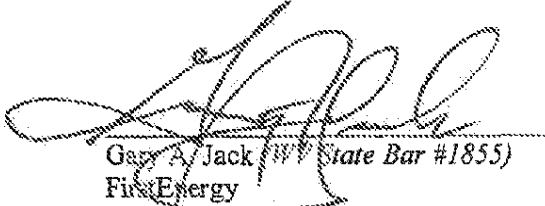
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FEDERAL COMMUNICATIONS COMMISSION
ENFORCEMENT BUREAU
MARKET DISPUTES RESOLUTION DIVISION
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WASHINGTON, DC 20554

March 25, 2013

By U.S. Mail and Email

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Counsel for Defendants

Re: Frontier West Virginia Inc. v. Appalachian Power Company and Wheeling Power Company, File No. EB-12-MD-004

Dear Counsel:

The Public Service Commission of West Virginia (WVPSC or PSC) filed a Petition to Intervene and Motion to Dismiss or Remand in the above-entitled action on November 1, 2012.¹ For the reasons set forth below, we hold the proceeding before us in abeyance until the case between the parties pending before the WVPSC is resolved.

In its FCC Complaint, Frontier West Virginia Inc. (Frontier), an incumbent local exchange carrier (ILEC), challenges the rate it pays for attachments to poles owned by Appalachian Power Company and Wheeling Power Company, affiliated electric utility companies serving portions of West Virginia (collectively, APCO).² The Complaint was filed pursuant to section 224(b) of the Communications Act,

¹ Petition to Intervene of the Public Service Commission of West Virginia and a Motion to Dismiss or Remand, File No. EB-12-MD-004 (filed Nov. 1, 2012) (Petition).

² See Pole Attachment Complaint, File No. EB-12-MD-004 at 5-6, paras. 2-5 (filed June 22, 2012) (Complaint). Other pleadings filed in this case are: Response to Pole Attachment Complaint, File No. EB-12-MD-004 (filed Aug. 17, 2012) (Response to Complaint); Response of Frontier West Virginia Inc. to the Motion to Dismiss or Remand Filed By the Public Service Commission of West Virginia, File No. EB-12-MD-004 (filed Dec. 6, 2012) (Frontier Response to Petition); Response to Public Service Commission of West Virginia's Petition to Intervene and Motion to Dismiss or Remand, File No. EB-12-MD-004 (filed Dec. 6, 2012) (APCO Response to Petition); Reply of Frontier West Virginia Inc. to the Response Filed by Appalachian Power Company and Wheeling Power Company to the Public Service Commission of West Virginia's Motion to Dismiss or Remand, File No. EB-12-MD-004 (filed Jan. 10, 2013) (Frontier Reply to APCO Response to Petition).

as amended (Act),³ and the FCC rules effective June 2011 which, for the first time, permitted ILECs to bring complaints challenging the reasonableness of pole attachment rates before the FCC.⁴

This pole attachment rate dispute has been ongoing for some time. Frontier initially filed a complaint before the WVPSC in 2007, requesting that the PSC establish reasonable rates governing its pole attachments.⁵ After developing a record, the PSC mediated the dispute, and the parties entered into a settlement agreement in 2008.⁶ The WVPSC entered an order approving the Settlement Agreement on December 4, 2008.⁷ As part of that settlement agreement, Frontier and APCO agreed that disputes arising under the settlement may be resolved by the WVPSC.⁸ Indeed, at that time, the FCC did not exercise jurisdiction over ILEC attachments.⁹

In March, 2012, APCO filed a complaint with the WVPSC, claiming that the parties were unable to come to acceptable terms regarding pole attachments rates and requesting, among other things, that the PSC establish interim pole rental pending the outcome of the proceeding.¹⁰ The PSC denied interim relief, but offered to mediate the dispute.¹¹ Frontier filed the instant Complaint with the FCC on June 22, 2012. Neither party moved to dismiss the matter filed with the WVPSC.

On November 1, 2012, the WVPSC filed its Petition, seeking to intervene in the instant case or to have it dismissed or remanded in favor of the “nearly identical” case currently before it.¹² Frontier contends that, because the PSC has not met the requirements of section 224(c) of the Act, the Commission is obligated to resolve Frontier’s Complaint.¹³ Although the PSC concedes that it has not certified that it regulates ILEC pole attachments, it is undisputed that the PSC has exercised jurisdiction over the dispute regarding pole attachment rates between Frontier and APCO since at least 2007. The Petition states that the WVPSC “has actively regulated pole attachments between Frontier WV and APCO for many years,” and “has been an available forum for oversight in this matter for decades.”¹⁴ And the Petition filed here demonstrates the PSC’s intent to continue adjudicating this dispute. Moreover, the

³ 47 U.S.C. §224(b).

⁴ See *Implementation of Section 224 of the Act, A National Broadband Plan for our Future*, Report and Order and Order on Reconsideration, 26 FCC Red 5240, 5243-44, para. 8, 5327-38, paras. 199-220 (2011) (*2011 Pole Attachment Order*), *aff’d*, *American Electric Power Service Corp. v. FCC*, – F.3d –, 2013 WL 673501 (D.C. Cir. Feb. 26, 2013); 47 C.F.R. § 1.1424.

⁵ See Response to Complaint, Ex. 4 (*Verizon West Virginia Inc., v. Appalachian Power Co. and Wheeling Power Co.*, No. 07-1279-B-C (WVPSC filed July 12, 2007)). Frontier was formerly known as Verizon West Virginia, Inc. Complaint at 5, para. 2.

⁶ See Response to Complaint at 2; Complaint, Ex. 4 (Settlement Agreement).

⁷ See Response to Complaint, Ex. 8 (WVPSC Order).

⁸ See Complaint, Ex. 4 (Settlement Agreement) at 3, § 2.

⁹ Prior to the *2011 Pole Attachment Order*, the FCC interpreted section 224(b) not to include complaints by ILECs. See *2011 Pole Attachment Order*, 26 FCC Red at 5328, para. 205.

¹⁰ See Complaint, Ex. 28 (*Appalachian Power Co. and Wheeling Power Co. v. Frontier West Virginia, Inc.*, Case No. 12-0284-E-T-C, at 4-5, para. 17 (WVPSC filed Mar. 2, 2012)).

¹¹ See Response to Complaint, Ex. 11 (Letter from WVPSC staff to Frontier and APCO offering mediation).

¹² See Petition at 4.

¹³ See Frontier Response to Petition at 1-2, Frontier Reply to APCO Response to Petition at 2-3 (citing 47 U.S.C. § 224(b), (c)).

¹⁴ See Petition at 1-2, 7.


2011 Pole Attachment Order appears to contemplate deferring to state proceedings: "We do not preclude parties from electing to pursue complaints before state commissions, rather than before the [FCC]."¹⁵

The WVPSC is already familiar with the parties and their dispute, which it has overseen since before the FCC exercised jurisdiction over ILEC pole attachment complaints. Under these unique circumstances, and in the interests of efficiency, economy, and comity, we believe that the most prudent course is to hold this proceeding in abeyance until the PSC resolves the case pending before it.

It is therefore ordered that this proceeding is held in abeyance until the case between the parties pending before the WVPSC is resolved. Should the PSC not resolve the matter pending before it, the parties may seek to re-open the matter here. We ask that the parties submit a joint report to the FCC staff every three months regarding the status of the PSC matter.

This letter-ruling is issued pursuant to sections 4(i), 4(j) and 224 of the Act, 47 U.S.C. §§ 154(i), 154(j), 224, and sections 1.1401-1.1424 of the Commission's rules, 47 C.F.R. §§ 1.1401-1.1424, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311.

Sincerely,



Rosemary H. McEnery
Chief, Market Disputes Resolution Division
Enforcement Bureau

cc: Matthew J. Minney
Richard E. Hitt

¹⁵ *2011 Pole Attachment Order*, 26 FCC Rod at 5337-38, para. 220.

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CERTIFICATE OF SERVICE

I certify the service of the Joint Initial Comments of Appalachian Power Company, Wheeling Power Company, Monongahela Power Company, and The Potomac Edison Company was made to the below persons on July 15, 2019, by United States First Class Mail, postage prepaid, as addressed:

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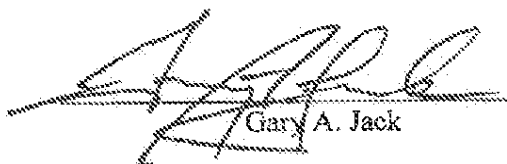
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Gary A. Jack

SEGRA™

July 15, 2019

VIA HAND DELIVERY

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Executive Secretary
Public Service Commission
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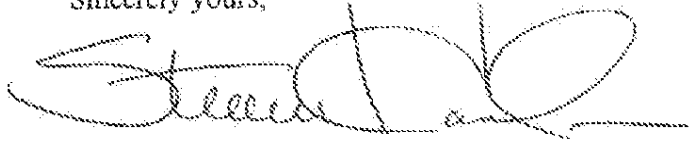
Re: Case No. 19-0551-T-GI
General Investigation into Adopting and Implementing
Rules Governing Pole Attachments and Assumption of
Commission Jurisdiction over Pole Attachments

Dear Ms. Ferrell:

Enclosed for filing on behalf of Lumos Networks LLC dba Segra and Lumos Networks of West Virginia Inc. dba Segra (collectively "Segra") in the above-captioned proceeding, please find the original and twelve (12) copies of the "Initial Comments of Segra".

If you have any questions, please feel free to contact me at your earliest convenience.

Sincerely yours,



STEVEN HAMULA (SB # 4580)
Associate General Counsel
Lumos Networks LLC dba Segra and
Lumos Networks of West Virginia Inc. dba Segra

SH/s

Enclosure

THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

02:23 PM JUL 15 2019 EXEC SEC DIV

CASE NO. 19-0551-T-GI

General Investigation into Adopting and
Implementing Rules Governing Pole
Attachments and Assumption of Commission
Jurisdiction over Pole Attachments

INITIAL COMMENTS OF SEGRA

I. Introduction

In accordance with the Commission Order of June 4, 2019 in the above-captioned proceeding, Lumos Networks, LLC dba Segra and Lumos Networks of West Virginia Inc. dba Segra (collectively "Segra"), by counsel, respectfully files these initial comments on the General Investigation initiated by the Commission into the adoption and implementation of rules governing the regulation of pole attachments in West Virginia.

II. Segra's Background

Perhaps now more than ever, it is critically important to remove artificially imposed barriers to telecom infrastructure investment so that facilities-based providers of broadband services like Segra can build, maintain, upgrade and expand their existing fiber networks. As a leading fiber based telecommunications provider in the Mid-Atlantic and Southeastern regions, Segra presently has more than 21,000 fiber route miles with more than 1 million total fiber strand miles located in Virginia, West Virginia, Pennsylvania, Maryland, Ohio, Kentucky, Tennessee, North Carolina, South Carolina and Georgia.

In order to facilitate the deployment of fiber optic facilities necessary for the provision of broadband services, Segra is oftentimes dependent on the timely processing of its pole attachment applications. Because it is not efficient or in some cases even possible for providers of broadband services to deploy their own poles, Segra is oftentimes dependent on pole attachments placed on incumbent local exchange carrier ("ILEC") and/or electric utility poles. However, the process of gaining timely access to ILEC and/or electric utility poles on reasonable terms and conditions has historically been fraught with challenges. These challenges have been occasioned largely because ILECs and/or electric utilities lack the incentive to provide competitors with timely access to their poles on reasonable terms and conditions.

III. FCC Actions on Pole Attachments

On April 7, 2011, the FCC unanimously adopted an order that comprehensively overhauled its pole attachment rules.¹ Among other things, the *2011 Pole Attachment Order* spelled out more specific rights and obligations for pole owners and attachers regarding access, including the establishment of a four-stage timeline to govern most steps of the pole attachment application and make-ready processes for both wireline and wireless attachers. Without question, the four-stage timeline adopted in the *2011 Pole Attachment Order*, coupled with the ability to hire an approved contractor to complete delinquent engineering survey and make-ready work, was a tremendous step in the right direction toward improving competitive access to ILEC and electric utility poles.

On April 20, 2017, the FCC initiated another proceeding involving pole attachments by adopting a *Notice of Proposed Rulemaking, Notice of Inquiry, and*

¹ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Red 5240, 5252, paras. 22-23 (2011) ("*2011 Pole Attachment Order*").

Request for Comment in which the FCC sought comment on a number of potential regulatory reforms to its rules and procedures to further accelerate deployment of next-generation networks and services. Among other things, the FCC sought comment on accelerating the pole attachment timeline; alternative pole attachment processes, including One-Touch Make-Ready (“OTMR”); and the creation of a presumption that the incumbent LEC (“ILEC”) attachers pay the same pole attachment rate as other telecommunications attachers. The FCC also sought comment on whether a moratoria on the deployment of telecommunications facilities was inconsistent with section 253(a) of the Telecommunications Act.²

On August 2, 2018, the FCC adopted a Third Report and Order (“Third R&O”) and Declaratory Ruling³ in its on-going wireline and wireless infrastructure proceedings aimed at removing barriers to broadband deployment. In the Third R&O, the FCC emphasized the importance of expediting the expansion of broadband coverage by significantly revising its rules and regulations governing the pole attachment “make-ready” process, including the establishment of an OTMR process. This new process is intended to shorten the multi-step method for processing pole attachments that the FCC adopted in 2011.

In the Third R&O, the FCC also clarified requirements related to overlashing, and in the Declaratory Ruling, the FCC indicated that it would preempt express and de facto state and local moratoria on the acceptance, processing, or approval of applications or

² *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Red 3266 (2017) (“*Wireline Infrastructure Notice*”).

³ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling*, WC Docket No. 17-84 and WT Docket No. 17-79, released August 3, 2018. <https://docs.fcc.gov/public/attachments/FCC-18-111A1.pdf> (“2018 Wireline Infrastructure Order”).

permits for telecommunications services or facilities. The FCC determined that state and local laws that contain such moratoria on telecommunications services are in violation of Section 253(a) of the Communications Act and ordered localities to review their laws and remove such moratoria.⁴

IV. Historical Regulation of Pole Attachments in West Virginia

Historically, pole attachment in West Virginia were subject to the exclusive jurisdiction of the Federal Communications Commission (“FCC”) pursuant to the requirements of the Telecommunications Act of 1996 (“TA96”). The FCC has extensive regulations governing access to utility poles by cable and telecommunications providers covering a wide array of potential pole attachment issues including rates, timelines for attachments, and complaint procedures.⁵ Additionally, the term “poles” extends to utility structures both above and below the ground, including poles, ducts, conduits, and other rights of way owned or controlled by the involved utility.

The TA96 provides that an individual state may assert primary jurisdiction over the regulation of pole attachments by notifying the FCC that the state jurisdiction is asserting what is referred to as “reverse preemption” and thereby assuming state jurisdiction over pole attachment regulation on a prospective basis.⁶ To date, 20 states and the District of Columbia have decided to assume the regulation of pole attachments through the reverse preemption doctrine.

⁴ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling*, WC Docket No. 17-84 and WT Docket No. 17-79, released August 3, 2018. <https://docs.fcc.gov/public/attachments/FCC-18-111A1.pdf>. (“2018 Wireline Infrastructure Order”).

⁵ See, 47 C.F.R §§ 1.1401 – 1.1418.

⁶ See, 47 U.S.C § 224 (c).

V. The Requirements of Enrolled Substitute for Senate Bill 3

As the Commission noted, on March 5, 2019, the West Virginia Legislature (the “Legislature”) passed Enrolled Substitute for Senate Bill 3 (“SB 3”), which was effective from passage. Among other things, SB 3 added a new Section 4 to Chapter 31G of the West Virginia Code granting unto the Commission regulatory jurisdiction over the provisions of Article 4 of Chapter 31G. More importantly, however, SB 3 required the Commission to adopt for use in West Virginia the provisions of 47 U.S.C §224, and the associated FCC regulations embodied in 47 C.F.R §§ 1.1401.01-1.1425, respectively.

In view of the Legislature’s statutory directive, the Commission noted that the federal statutes and FCC regulations on pole attachment matters differed in many significant respects from the Commission’s current procedural rules. For example, the Commission pointed out that West Virginia Code §31G-4-4(b) required the adoption of the FCC’s dispute resolution process, which is significantly more technical and rigid than the dispute resolution process that the Commission has employed historically to adjudicate informal and formal complaints for all public utilities subject to the Commission’s jurisdiction in West Virginia.

Similarly, the Commission stated that the FCC’s dispute resolution regulations included provisions related to the awarding of damages. This too represented a significant departure from the Commission’s historical regulatory role in West Virginia. Indeed, the Commission observed that it had not previously been a venue in which parties could seek the award of damages. Specifically, the Commission cited to West Virginia Code §24-4-7, which provides in pertinent part that individuals or entities seeking to recover damages from public utilities for violations of Chapter 24 are required to bring

suit in circuit court. Moreover, the Commission noted that the pursuit of damages in circuit court as opposed to the Commission had likewise been upheld by the West Virginia Supreme Court of Appeals on more than one occasion.⁷

In attempting to square the requirements of SB 3, the FCC's pole attachment regulations, and the Commission's existing procedural rules and state statutory and judicial limitations, the Commission sought comments and recommendations about how to best implement the FCC's dispute resolution regulations in light of the fact that certain of the FCC's regulations were unique to the FCC's operations. In addition, the Commission expressed interest in receiving comments regarding the extent to which it was permitted to implement damage awards given the statutory prohibition contained in West Virginia Code § 24-4-7.

VI. The Commission should promulgate rules in accordance with its current administrative capabilities and state statutory authority

Despite SB 3's requirement regarding the adoption of the FCC's pole attachment regulations, Segra believes that the Commission can only act – at least in the interim – in accordance with its current administrative and statutory capabilities. As the Commission noted, there does appear to be several areas where the current FCC regulations, which if adopted by the Commission, would be inconsistent with current Commission regulations. For example, Sections 1.720-1.740 of the FCC's regulations (47 CFR §§ 1.720-1.740) govern formal complaint proceedings under Sections 208 and 224. Moreover, sections 1.1401-1.1415 of the FCC's regulations provide additional procedural requirements pertaining specifically to pole attachment complaint proceedings. See 47 CFR §§ 1.1401

⁷ See, Wheeling Steel Corp. v. Public Service Commission, 90 W.Va. 74, 110 S.E. 489, 1922; and Carter v. Willis, 145 W.Va. 779, 117 S.E.2nd 594, 1960.

et seq. In this regard, the FCC's complaint procedures differ from this Commission's informal and formal complaint procedures as provided for in its Rules of Practice and Procedure.

As an initial matter, it is important to recognize steps taken by the FCC in the past few years to provide timely dispute resolution. First, in its 2017 Report and Order, Declaratory Ruling, And Further Notice of Proposed Rulemaking, the FCC adopted a new rule requiring the FCC to resolve pole attachment access complaints within 180 days.⁸ Then, in its 2018 Wireline Infrastructure Order, the FCC adopted new formal complaint procedures, including for pole attachment complaints. In so doing, the FCC also held that parties could request that pole attachment complaints be placed on the FCC's accelerated docket, which provides for resolution of complaints within 60 days.⁹ Finally, the FCC has adopted OTMR rules that further provide for resolution of issues without having to resort to dispute resolution.¹⁰ These measures as initiated by the FCC provide for greatly accelerated resolution of pole attachment disputes.

Given that the Commission will be taking on a new area of regulation with which it has little previous experience, it would appear unlikely that the Commission could mimic and successfully meet the dispute resolution procedures presently offered by the FCC. In fact, resolution of formal complaints between utilities under the Commission's existing procedural framework can often take considerably longer than the FCC's dispute resolution process. Moreover, unlike the FCC, which decides many issues "on paper,"

⁸ In re Accelerating Wireline Broadband Deployment By Removing Barriers to Infrastructure Investment, WC Docket 17-84, 32 FCC Rcd. 11128, 11132-34, ¶¶ 9-14 (Nov. 29, 2017) ("2017 Wireline Infrastructure Order").

⁹ In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling, Dkt. Nos. 17-79 and 17-84, FCC 18-111, (rel. Aug. 3, 2018) ("2018 Wireline Infrastructure Order").

¹⁰ See, 2018 Wireline Infrastructure Order, at ¶¶ 16-76.

the Commission does not currently have a formal complaint adjudication process that omits trial-type hearings, which can be both lengthy and costly, unless such complaints are ultimately settled by the parties involved prior to a formal hearing.

Segra is also concerned about the Commission's ability to handle the potential increase in workload that may accompany the adoption of the FCC's dispute resolution process for pole attachments. Certainly, exercising authority over pole attachment disputes will bring with it additional demands on the Commission's resources. For instance, utilization of the FCC's dispute resolution processes may well require the Commission to hire and train additional staff to both administer the increased caseload and to ensure that filed disputes are resolved in a timely fashion. Both the increased training necessary to familiarize existing Staff with the FCC's rules as well as the potential need bring on additional staff may unduly burden the Commission's existing resources.

In view of the foregoing, Segra is of the opinion that it may not be prudent for the Commission to exceed its current administrative capabilities in a rush to satisfy the requirements of SB 3. While perhaps not ideal, the Commission's current procedural rules for the processing of informal and formal complaints should be satisfactory for pole attachment related complaints – at least on an interim basis -- until the Commission gains more real world experience in the handling of such complaints.

However, even if the Commission opts to utilize its current procedural rules on an interim basis for resolution of pole attachment complaints, it is important that the Commission remain cognizant of the 180-day shot clock processing requirement, the retention of which as a resolution deadline is critical in Segra's view. In this regard,

Segra believes that 180 days provides a more than reasonable timeframe for the Commission to investigate and evaluate the particular facts of each pole complaint, especially those involving pole access, which is likely to be the most common type of pole attachment complaint coming before the Commission.¹¹

Additionally, a 180-day shot clock for pole attachment complaints, which commences upon the filing of a formal complaint, corresponds with the timeframe that is currently provided for reverse-preemption states to adjudicate pole attachment complaints under section 224(c)(3)(B) of the TA96. Furthermore, the Commission would be able to pause the shot clock in certain situations and/or exceed 180 days in extraordinary circumstances for good cause shown, which should ensure that the Commission could comprehensively evaluate any pole attachment dispute.

In order to further facilitate the timely processing of pole attachment formal complaints, especially those in which pole access is the center of the dispute, Segra would recommend that the Commission adopt a streamlined mediation process similar to what it currently employs in other types of formal complaint proceedings. Segra believes a 30-day mediation window beginning upon the receipt of the defendant's answer and running concurrently with the 180-day shot clock should be adequate for this purpose. Allowing the involved utility parties the opportunity to air their grievances with the participation of Commission Staff and/or a separate, independent mediator will likely result in the timely resolution of many pole attachment access complaints.

¹¹Because of the critical nature of providing attachers with timely pole access, it is extremely important that the Commission endeavor to resolve access related complaints in an expedited manner. In this regard, Segra recommends that the Commission consider the further reduction of the resolution deadline for pole attachment access complaints from 180-days to 90-days.

With regard to the potential award of damages as provided for under 47 C.F.R § 1.723, West Virginia Code § 24-4-7 expressly prohibits the Commission from awarding damages. Not only does Code § 24-4-7 prohibit as much, but as has been pointed out earlier herein, the West Virginia Supreme Court of Appeals has on several occasions held that the appropriate circuit court, and not the Commission, is the proper venue for entities seeking to recover damages involving matters otherwise within the jurisdiction of the Commission in West Virginia.

However, Segra does not believe that this particular prohibition on the award of damages would significantly affect the Commission's ability to properly adjudicate pole attachment complaints. Aggrieved entities could still lodge their pole attachment complaints with the Commission, and if the Commission determined that the factual circumstances supported an award of damages, the aggrieved entity could then proceed to circuit court to prosecute its damage claim. In this regard, the findings and conclusions documented in the adjudication of the administrative complaint proceeding before the Commission could be utilized in support of the associated damage claim in circuit court.

Therefore, where there is clear and obvious conflict with the FCC's current dispute resolution and damage award regulations, the Commission may wish to consider temporarily postponing the adoption of permanent rules in those areas, and instead undertake efforts next legislative session to amend West Virginia Code §31G-4-1, et seq., so that it aligns more realistically with the Commission's administrative capabilities and statutory requirements. Otherwise, the Commission should promulgate pole attachment rules in accordance with its current administrative capabilities and state statutory authority

VII. In its forthcoming rulemaking proceeding to establish regulations relative to pole attachments, the Commission should adopt the FCC's rules and any subsequent updates thereto promulgated by the FCC thereafter by reference

As Segra noted earlier in these initial comments, the FCC's rules relative to the regulation of pole attachments has been significantly updated over the last several years. Since the Commission has been directed by virtue of SB 3 to assume jurisdiction over pole attachments from the FCC in West Virginia, which the FCC refers to as reverse preemption,¹² it should move forward with the adoption of all of the FCC's rules currently in effect that do not substantially conflict with its own administrative capabilities and statutory requirements. Thus, with the exception of the dispute resolution and damage award provisions, Segra would recommend that the Commission otherwise adopt the FCC's current pole attachment rules, 47 C.F.R § 1.1401 - § 1.1425, by reference, including any subsequent modifications, updates or revisions.

There are numerous advantages to the Commission adopting the FCC's rules by reference rather than beginning the time-consuming process of developing its own pole attachment rules. At present, the FCC has jurisdiction to regulate and adjudicate pole attachment issues in approximately 30 states. Therefore, by adopting the FCC's rules by reference as Segra has proposed, the Commission will provide both attachers and pole owners with the certainty of knowing that attaching broadband and other infrastructure facilities to poles in West Virginia will be governed by virtually the same rules used in a majority of other states, thereby creating efficiency, predictability, and uniformity for multi-jurisdictional broadband providers such as Segra. Similarly, Segra's recommendation that the Commission follow the FCC's prospective updates of those

¹² See 47 U.S.C. § 224(c).

rules as well will allow attachers and pole owners in West Virginia to immediately take advantage of any regulatory developments as soon as such are codified by the FCC.

That said, Segra recognizes that rulemaking proceedings before the FCC are oftentimes long, time-consuming affairs addressing issues on a nationwide basis, and may not always be appropriate for blanket implementation in West Virginia. Thus, once initially adopted, the Commission should maintain its ability to consider customization of its pole attachment rules and procedures in the future – whether initiated by the Commission’s own motion or via a petition filed by an attacher, pole owner, or other interested party seeking to initiate a rulemaking for that purpose. This will preserve the ability of the Commission to expeditiously address any unique issues or circumstances that may require West Virginia-specific changes to the FCC’s existing regulatory framework.

One example of an area of customization that the Commission ought to consider in the context of the instant rulemaking involves the issue of pole replacements. Given the perceived complexities involved, the FCC has determined that pole replacements are not currently eligible for self-help.¹³ While Segra appreciates the FCC’s caution, Segra believes that pole replacement, especially in an instance in which the pole owner is claiming insufficient capacity as the reason for denial, should not be used as a vehicle to unfairly delay the processing of an otherwise valid application for attachment. Thus, if the pole owner is unwilling or unable to make the necessary pole replacement within the ninety (90) day timeframe currently provided for the completion of complex make ready work, potential attachers ought to be able to utilize self-help using an approved contractor qualified to perform such work. Clarification that standard make-ready timelines still

¹³ 2018 Wireline Infrastructure Order, at ¶ 101.

apply in instances where pole replacement is a necessary will eliminate a significant barrier to deployment of critical broadband facilities in West Virginia.

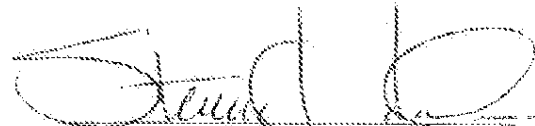
VIII. Conclusion

For all of the foregoing reasons, Lumos Networks LLC dba Segra and Lumos Networks of West Virginia Inc. dba Segra recommend that with certain limited exceptions as noted herein, the Commission adopt the Federal Communications Commission's current Pole Attachment rules and regulations -- 47 C.F.R § 1.1401 - § 1.1425 by reference.

Respectfully submitted this 15th day of July, 2019.

Lumos Networks LLC dba Segra and
Lumos Networks of West Virginia
Inc. dba Segra

By Counsel,



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July 15, 2019

Connie Graley
Acting Executive Secretary
Public Service Commission
PO Box 812
Charleston, WV 25323

03:13 PM JUL 15 2019 EXEC SEC DIV

RE: CASE NO. 19-0551-T-GI
General Investigation into Adopting and Implementing Rules
Governing Pole Attachments and Assumption of Commission
Jurisdiction Over Pole Attachments

Dear Ms. Graley:

Enclosed are an original and twelve (12) copies of the "STAFF INITIAL COMMENTS" to be filed in the above-referenced proceeding.

A copy has been provided to the parties of record by U.S. mail.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Bouvette".

Linda S. Bouvette
WV State Bar I.D. No. 5926

And

Chris Howard
WV State Bar No. 8688

LSB/cs

Enclosures

H:\L.Bouvette\CASES\2019\19-0551-T-GI\Staff Initial Comments

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

CASE NO. 19-0551-T-GI

General Investigation into Adopting and
Implementing Rules Governing Pole Attachments
And Assumption of Commission Jurisdiction
Over Pole Attachments

03:13 PM JUL 15 2019 EXEC SEC DIV

STAFF INITIAL COMMENTS

On June 4, 2019, the Commission initiated a general investigation into the adoption of rules governing pole attachment procedures pursuant to W.Va. Code §31G-4-4. The Commission noted that currently the Federal Communications Commission (FCC) regulates pole attachments in West Virginia pursuant to 47 U.S. Code §224 and the FCC implementing regulations set forth in 47 C.F.R. §§1.1401-1.1425.

SUMMARY

The Commission should adopt the FCC Rules with the understanding of and intent to resolve cases within the 180 day time period if possible but no later than 360 days from the date of filing of the complaint pursuant to 47 U.S.C. §224.

The Commission should not adopt the FCC procedural rules that conflict with W.Va. Code §24-1-1(f)(1) (Staff prohibited from holding decision-making authority); statutes limiting the Commission's authority to assess fees to specific items (See e.g., §24-1-5, authorizing the Commission to prescribe a schedule of fees for certification of

records and costs incurred with hearings; §24-2-11c, authorizing the Commission to charge filing fee for EWG siting certificates; §24-3-6, authorizing the Commission to levy special license fees;); W.Va. Code §24-1-7 (Commission to adopt procedural rules for all matters coming before it); and W.Va. Code §24-4-7 (Commission is prohibited from awarding monetary damages). The Commission should not adopt FCC procedural rules that conflict with the Commission's Procedural Rules; nor any FCC procedural rules for which the Commission does not currently have the physical capability to implement such as an electronic filing system. To require the Commission to adopt all of the FCC procedural rules would require the Commission to violate four separate statutory provisions -- without a specific intent expressed by the Legislature that it intended to repeal them as a result of its passage of SB 3. It would also require the Commission to create from scratch an electronic filing system just for make-ready pole attachment complaints -- a system that the Legislature did not expressly direct in SB 3.

DISCUSSION

On March 5, 2019, the West Virginia Legislature passed Enrolled Substitute for SB 3 (SB 3), effective from passage, that established and delineated the Commission's jurisdiction over make-ready pole access within the state, and required the Commission to "adopt the rates, terms and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S. Code §224 and 47 C.F.R. §§1.1401-1.1415..." and the "dispute resolution process incorporated by reference in those regulations."

In its order, the Commission expressed concern regarding the differences between

the Commission's existing dispute resolution process and the FCC process referenced in 47 C.F.R. §§1.1401-1.1415, and initiated the general investigation (GI) to receive comments and recommendations regarding the adoption of same. Staff's Initial Comments follow below.

I. The Commission is a creature of the Legislature and has no inherent authority.

As noted in Wilhite, et al. v. Public Service Commission, et al., 149 S.E.2d 273, 150 W.Va. 747 (1966),

[t]he Public Service Commission has no jurisdiction and no power or authority except as conferred on it by statute, and its power is confined to the regulation of public utilities. Eureka Pipe Line Co. v. Public Service Commission, 148 W.Va. 674, 137 S.E.2d 200; City of Bluefield v. Public Service Commission, 94 W.Va. 334, 118 S.E. 542. A Public Service Commission has no inherent power or authority but may, of course, have necessary implications from the statute. 73 C.J.S., Public Utilities, §38; Eureka Pipe Line Co. v. Public Service Commission, supra.

(*Id.* at 281.) The passage of SB 3 expands the Commission's jurisdiction and authority to include the regulation of the rates, terms and conditions of access to and use of poles, ducts, conduits and rights-of-ways owned and/or controlled by utilities. Prior to the passage of SB 3 the Commission's jurisdiction over pole attachments was limited to that provided in W.Va. Code §24-2-6 (regulation of pole attachments owned by public utilities). Although SB 3 specifically grants the Commission jurisdiction over pole attachments, it limits the Commission's authority and flexibility to set rates, terms and conditions by requiring the Commission to adopt the FCC rules set forth in 47 C.F.R. §1.1401 through §1.1.415, inclusive (herein referred to as the "FCC Rules") and the FCC's dispute resolution process set forth in 47 C.F.R. §§1.720-1.740, (herein referred to

as the “FCC procedural rules”) some of which are in direct conflict with West Virginia law, Commission rules and regulations and the Commission’s current regulation of pole attachments under W.Va. Code §24-2-6.

The intent of the Legislature was to establish and delineate “Public Service Commission jurisdiction over make-ready pole access within the state...” (See bill title.) The statute clearly sets forth the Commission’s jurisdiction over pole attachments and leaves little room to construe it differently.

“A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect. Syl. Pt. 2, State v. Epperly, 135 W.Va. 877, 65 S.E.2d 488 (1951). Syllabus Point 1, State v. Jarvis, 199 W.Va. 635, 487 S.E.2d 293 (1997). Syllabus Point 3, Albright v. White, 202 W.Va. 292, 503 S.E. 2d 860 (1998.)

Expedited Transportation Systems, Inc. v. Vieweg, 207 W.Va. 90, 529 S.E.2d 110 (2000.) Adoption of the actual make-ready pole access rules is relatively straightforward and meets the legislative intent as expressed in the bill. The only issue is adoption of the dispute resolution process set forth in 47 C.F.R. §§1.720-1.740 (FCC procedural rules) since it would require the Commission to violate four (4) statutory provisions and operate two separate formal complaint processes, an absurd result and clearly not the legislative intent.

2. **The FCC Dispute Resolution regulations directly conflicts with W.Va. Code §24-4-7 and established case law with regard to the award of damages and should not be adopted.**

In its order dated June 4, 2019, the Commission noted that the West Virginia Legislature’s passage of W.Va. Code §31G-4-4(b) required the adoption of the Federal

Communications Commission (FCC) regulations as provided in 47 U.S.C. §224 and 47 C.S.R. §1.1401-1.415, (FCC Rules) inclusive of the dispute resolution process incorporated by reference in those regulations and subsequent modifications or additions to the provisions of the United States Code or Code of Federal Regulations. The Commission further stated that the FCC rules are more technical and specific about form and content than the Commission's Rules of Practice and Procedure (Procedural Rules) and includes a provision for the award of damages.

Staff agrees with the Commission that the adoption of the FCC procedural rules would require the Commission to assess damages, an action that is prohibited by W.Va. Code §24-4-7, as delineated in cases before the West Virginia Supreme Court of Appeals. *See Wheeling Power Corp. v. Public Service Commission, 110 S.E. 489 (W.Va. 1922), Carter v. Ellis, 117 S.E. 2d 594 (W.Va. 1960).*

In the case of Wheeling Power Corp. v. Public Service Commission, 110 S.E. 489 (W.Va. 1922), the court determined

The jurisdiction and authority of the Public Service Commission extends no further than to prescribe proper rates, and proper practices, and to direct the public service corporations to comply with them in the future. If a public service corporation should then refuse compliance it would be necessary for the Public Service Commission, or some party interested, to invoke the aid of a court of competent jurisdiction to compel compliance with the order; and likewise, if by refusal to comply with an order of the Public Service Commission, or with a rate lawfully prescribed, injury has resulted, the injured party may recover compensation there for in any court of competent jurisdiction.

In the case of Carter v. Ellis, 117 S.E. 2d 594 (W.Va. 1960), Elisha Carter, instituted this action of trespass on the case in the Circuit Court of Raleigh County to

recover damages of the defendant, George W. Willis, trading and doing business as Willis Water Works, in the amount of \$10,000.00. The declaration alleged that defendant had obtained a certificate of convenience and necessity from the Public Service Commission to furnish water to the plaintiff and others, and, pursuant thereto, undertook to furnish water to the plaintiff in conformity with the rules and regulations of the Public Service Commission, but that, with reckless indifference and in total disregard of plaintiff's right to have and receive an adequate supply of water to satisfy his needs, defendant unlawfully, willfully and negligently failed to render such service.

The declaration further alleged that plaintiff was possessed of valuable residence property in which he resided with his wife, to whose society, assistance, companionship and services plaintiff was entitled at all times, but that, as a proximate result of the defendant's failure to perform his duties, plaintiff's wife was required to do and perform work and services in the performance of her household duties which she would not ordinarily be required to do; as a direct consequence of which his wife's health became impaired, thus depriving him of her comfort, society and services generally and requiring him to expend large sums of money for medical care.

Plaintiff further alleged that, as a result of defendant's failure, he was prevented from utilizing household appliances and equipment, from raising produce and garden products, was caused to expend money for damage to household appliances, suffered physical pain and mental anguish, was caused to perform work and labor to conserve water and in obtaining water from other sources; and, that the fair market value of

plaintiff's residence property has been continuously diminished over a nine year period in which defendant has failed to perform his duties.

The court determined that a user of the services of a public corporation who has been damaged thereby is not limited by recourse to the Public Service Commission and such relief as he may there receive. W. Va. Code §24-4-7 clearly provides that, in addition to making complaint to the Commission, he may "bring suit in his own behalf for the recovery of the damages for which such public utility may be liable under this chapter in any circuit court having jurisdiction."

This Court held in Wheeling Steel Corporation v. Public Service Commission, 90 W. Va. 74, 110 S.E. 489, that the authority of the Public Service Commission is limited to prescribing rates and practices, to directing public corporations to comply with them and that if such corporation refuses compliance the injured party must seek damages in a court of competent jurisdiction. This decision was predicated upon the provisions of W.Va. Code §24-4-7.

The Legislature through its enactment of W.Va. Code §31G-4-4(b), created an indirect conflict between 47 C.F.R §1.723 and W. Va. Code §24-4-7. The Legislature specifically withheld jurisdiction from the Commission to award damages. "It is worth repeating that the Public Service Commission is a creature of statute and has only such power as the Legislature has seen fit to give it." (Back Roads Tours, LLC, M.C. Case No. 30258-99-PC, Recommended Decision entered April 28, 2000, final on May 18, 2000.) The Commission cannot presume that it now has such jurisdiction by the adoption of the FCC Rules that contain a provision allowing for the award of damages.

It must be assumed that the law making body knew and had in mind the general system of law into which this statute was by it injected and that it intended to operate in harmony therewith.

Reeves v. Ross, 62 W. Va. 7, 57 S.E. 284 (1910).

When there is a conflict created through the adoption of a new statute against a preexisting statute, there exists a presumption against a change in the original statute. In this case, the conflict is between a federal regulation that is referenced in another federal regulation and a state statute that has been in effect since at least 1923. The Legislature, in its enactment of the Pole Attachment Act, gave no clear indication that as part of this adoption process, it intended to revoke W. Va. Code, §24-4-7, especially since the conflict only arises upon the adoption of the FCC Rules, and indirectly, the adoption of 47 C.F.R. §1.723.

Although, as a general rule, when two statutes are inconsistent and there is conflict, the latter statute in time prevails. Reeves v. Ross, 62 W. Va. 7, 57 S.E. 284 (1910). The adoption of this methodology would in effect eliminate W. Va. Code, §24-4-7. Staff finds it hard to fathom that the Legislature, through the adoption of the FCC Rules, intended to eliminate W. Va. Code, §24-4-7 and allow the Commission to assess and impose damages in all proceedings coming before it.

If a situation exists where there are two statutes in conflict, the proper approach would be to not dispose of the problem by mechanical rule, i.e., that the statute passed latter in time should be adopted, Edah v. Trident Seafoods Corp., 2007 U.S. Dist. LEXIS 22651 referencing Fanning v. United Fruit Co., 355 F.2d 147 (4th Cir. 1966), but rather ensure that a situation is not created that ends the general rule or provision.

Additionally, it is presumed in the absence of words therein specifically indicating the contrary that the Legislature did not intend to innovate upon, unsettle, disregard, alter, violate, repeal or limit a general statute or system of statutory provisions, the entire subject matter of which is not directly or necessarily involved in the act. "Repeal of statutes by implication is not favored." 58 Op.Atty.Gen. W.Va. 172 (1980). If a situation is created where the law is unsettled and an action of the Commission where it awarded damages pursuant to the FCC Rules is challenged, courts will adhere to the following test in determining whether there is an inconsistency in the law:

Therefore, the proper test by which to determine what they intended is to be found in the results to which adherence to the letter of the statute would lead. If destructive of, or obstructive to, any general purpose and design, made manifest by the terms of the constitution or the statutory system, viewed as a whole, or both, regarded as constituting one grand scheme, or productive of inconsistent and absurd situations, the consequences will compel the Court to so construe the statute, if possible, as to make it harmonize with the general law.

Webb v. Ritter, 60 W. Va. 193 (1906). "A valid rule or regulation may only implement the law, and regulations are valid only as subordinate rules and when found to be within the framework of the policy which the Legislature has sufficiently defined." 2 Am.Jur. 2d Administrative Law §300. In this case, we have an existing statute that clearly states the Commission has no jurisdiction to award damages. We also have a statute that requires the Commission to adopt rules, including a dispute resolution process that includes a damages section. The new statute does not specifically grant the Commission jurisdiction to award damages. "The Public Service Commission has no jurisdiction and no power or authority except as conferred on it by statute." The Commission cannot

magically confer to itself jurisdiction to award damages as part of the adoption of new rules and regulations. Excluding 47 C.F.R. §1.723 from the Commission's make-ready pole access rules would not prevent the Commission from exercising its new jurisdiction of regulating "the rates, terms and conditions of access to and use of poles, ducts, conduits and rights-of-ways" pole attachments. Therefore, Staff recommends that the damages section of the FCC procedural rules (47 C.F.R. §1.723) not be adopted as part of the Commission's rules governing make-ready pole access.

- 3. The wholesale adoption of the dispute resolution process referenced in 47 C.F.R. 1.1401-1.1415 will result in a number of conflicts with statutory provisions and the Commission's Procedural Rules.**

The Commission currently operates a formal complaint process for make-ready pole access under W.Va. Code §24-2-6 and for other formal complaints filed with it. This formal complaint process utilizes the Commission's Procedural Rules as required by W.Va. Code §24-1-7:

The Commission shall prescribe such rules and regulations as may be necessary to carry out the provisions of this chapter, including rules of procedure and for taking evidence in all matters that may come before it, and enter such orders as may be just and lawful;

The Procedural Rules are applicable to all matters before the Commission, including the make-ready pole access complaints filed under W.Va. Code §31G-4-4. Presumably the Legislature was aware of this existing formal complaint process and the Commission's Procedural Rules when it passed SB 3.

A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether

constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith. Syllabus Point 5, State v. Snyder, 64 W.Va. 659, 63 S.E. 385 (1908)." Syllabus Point 1, State ex rel. Simpkins v. Harvey, 172 W. Va. 312, 305 S.E.2d 268 (1983) [***2] superseded by statute on another point as stated in State ex rel. Hagg v. Spillers, 181 W.Va. 387, 382 S.E.2d 581 (1989).

Syllabus Point 2, Myers v. Cline, 190 W. Va. 103, 237 S.E.2d 267 (1993). If the Legislature thought the FCC rule and process worked, then there would be no need for the Commission to assert jurisdiction and adopt the FCC rules in full. Requiring the Commission to adopt the FCC procedural rules will result in a number of conflicts with existing statutory law.

First, the Commission is constrained in the use of its employees to those duties set forth in the statute. W.Va. Code §24-1-1(f)(1) requires the Commission to establish

[a] division within the Public Service Commission which shall include the office of the commissioners, the hearing examiners and such support staff as may be necessary to carry out the functions of decisionmaking and general supervision of the commission, which functions shall not include advocacy before the commission;

This statutory provision conflicts directly with certain of the FCC procedural rules that grant Staff the authority to make decisions in cases affecting the final outcome; while also allowing it to advocate its position before the Commission. Therefore, the Commission would be precluded from adopting any of the provisions in the FCC procedural rules that grants Commission staff **decision-making** authority¹.

¹ The Legal Division and Staff Attorneys shall act as advocates of the Staff position before the Commission for and in the public interest. GO 195.57, entered September 8, 2008.

As discussed in a separate section herein, adoption of the FCC procedural rules would allow the Commission to grant damages in a make-ready pole access complaint case. That provision would directly conflict with W.Va. Code §24-4-7 which requires complainants to seek monetary relief in the appropriate circuit court. The Commission could not adopt any provisions in the FCC procedural rules allowing the award of damages as more fully discussed in Section 2 hereinabove.

The FCC procedural rules also reference the use of an electronic filing system. The provisions in the FCC procedural rules requiring the use of an electronic filing system could not be immediately adopted by the Commission since it does not have such a system in place at this time but would have to create one using its existing labor and financial resources.

In addition, the FCC procedural rules require the payment of certain fees associated with the filing of a complaint. W.Va. Code §31G-4-4 does not grant the Commission authority to impose any fee on the filing of a complaint. The only fees charged by the Commission are those authorized by statute. See e.g., §24-1-5, authorizing the Commission to prescribe a schedule of fees for certification of records and costs incurred with hearings; §24-2-11c, authorizing the Commission to charge filing fee for EWG siting certificates; §24-3-6, authorizing the Commission to levy special license fees;). Those provisions in the FCC procedural rules requiring the payment of fees for filing a complaint could not be adopted by the Commission without specific authorization from the Legislature.

Finally, the FCC procedural rules conflict with the Commission's Procedural Rules – the rules the Commission is to use in “all matters that may come before it...” Those conflicts are detailed herein below in the review section of the FCC procedural rules.

Adoption of the FCC Rules and the FCC procedural rules will cause an absurd result by requiring the Commission to operate under two separate procedural rules. It would require the Commission to adopt procedural rules that violate four separate statutes passed by the Legislature – even though the Legislature did not express any intent to repeal these statutes when it passed SB 3. Finally, it would require the Commission to expand its jurisdiction and authority in violation of its stated jurisdiction.

It is the duty of a court so to construe a statute as to avoid absurd and inconsistent results, if possible. It is bound to give effect to every word in a statute if it can do so. After having found one clear purpose or function for a word, phrase or clause, it is not bound to give it any further effect and should not do so, if inconsistency or a departure from the purpose and spirit of the legislation would result therefrom. These propositions are so elementary and well known that citation of authority therefor is not necessary.

Coal & Coke Railway Company v. Conley, 67 W.Va. 129, 67 S.E. 613 (1910). The goal and intent of the Legislature is to reverse preempt the FCC in the regulation of pole attachments. That can easily be done without conflict by adopting the FCC Rules as required by the statute. With regard to the FCC procedural rules, it should only adopt those rules that do not conflict with applicable statutes and the Commission's Procedural Rules.

4. Only those portions of the FCC Rules that are consistent with the Commission's current practice should be adopted.

Staff reviewed each provision of the FCC Rules, including the dispute resolution process set forth in 47 C.F.R. 1.720-7.740, to determine the inconsistencies between them and the Commission's existing rules and regulations. That analysis follows. The issue is whether the Commission may deviate from these rules to the extent necessary to follow its existing Rules of Practice and Procedure to process pole attachment complaints.

Once a state has certified to the FCC that it now regulates pole attachments, the FCC is deprived of any regulatory authority over pole attachments within that state.

If a state so certifies, the reverse-preemption provision deprives the FCC of jurisdiction over "rates, terms and conditions, or access to poles, ducts, conduits, and rights-of-way... for pole attachments" in that state.

Bellsouth Telecommunications LLC v. Louisville/Jefferson County Metro Government, et al., Civil Action No. 3:16-cv-124-DJH, August 16, 2017. Therefore, once the Commission has pole attachment regulations in place and certifies to the FCC that it will govern pole attachments, the FCC has no authority over pole attachments in West Virginia and cannot challenge the Commission's rules.

The FCC pole attachment regulations set out in Sections 1.1401 through 1.1415 can be adopted with little to no conflict with the Commission's Procedural Rules other than the conflict with the final action due date.

5. Section 1.735 of the FCC procedural rules provides the Commission flexibility to use its Procedural Rules to process make-ready pole access cases.

The language of Section 1.735 of the FCC procedural rules are sufficient to allow

the Commission to use its own Procedural Rules to process make-ready pole access cases.

§ 1.735 Conduct of proceedings.

(a) The [FCC] Commission may issue such orders and conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice.

(b) The [FCC] Commission may decide each complaint upon the filings and information before it, may request additional information from the parties, and may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute.

Under this provision, the Commission may issue an order (either as a general order or in each individual make-ready pole access case) stating that the Commission will utilize its Procedural Rules in processing the case. The Commission would then be free to process the case using its current practices and policies to ensure “the proper dispatch of business and the ends of justice” in processing these cases. There are other places in the FCC rules that reference this flexibility in processing cases. For example, in the implementing statute (47 U.S.C. §224), states are given flexibility in entering a final order, so long as it is completed within 360 days of the filing of the complaint:

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

47 U.S.C. §224(3)(B)(ii). This section is also repeated in Section 1.1405(f)(2). Section 1.730(f) (Discovery) allows the Commission flexibility to allow additional discovery if warranted. Several other sections reference the Commission’s discretion in processing cases (Section 1.723(g) (Damages); Section 1.731(e) (Confidentiality of information

produced or exchanged); Section 1.732 (Other required written submissions); Section 1.733 (Status conference). Staff contends that the FCC Rules and the FCC procedural rules provide sufficient basis to permit the Commission to utilize its own Procedural Rules to process cases so long as they “will best conduce to the proper dispatch of business and the ends of justice.”

FCC Rules

Staff reviewed each of the FCC Rules referenced in W.Va. Code §31G-4-4 to determine whether conflicts with the Commission’s current rules exist. A discussion of each FCC Rule follows.

1.1401. Purpose. The stated purpose of the FCC Rules does not conflict with the Commission’s existing rules and regulations. Adoption in whole of this section is recommended. The “Definitions” section (1.1402) should include the definition of “incumbent local exchange carriers” as defined in 47 U.S.C. 251(h).

(h) "Incumbent local exchange carrier" defined.

(1) Definition. For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that--

(A) on the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996], provided telephone exchange service in such area; and

(B) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents. The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

- (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and
- (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

1.1402. Definitions. There are some conflicts in the “Definitions” section. Some definitions included in this section differ from definitions the Commission has adopted in its various rules and regulations. To avoid the conflict, the Commission should adopt this section and clarify that the definitions adopted pursuant to W.Va. Code §31G-4-4 are specific to the make-ready pole access complaint cases only. The Commission should also define the term “Incumbent local exchange carrier.”

1.1403. Duty to provide access. There is no provision contained in this section that is in conflict with the Commission’s current policies and procedures. The Commission should adopt this provision with no change.

1.1404. Pole attachment complaint proceedings. The only change that would need to be made is the elimination of Section 1.1.404(c), since the Commission will have already certified to the FCC that it will regulate the rates, terms and conditions for pole attachments.

1.1405. Dismissal of pole attachment complaints for lack of jurisdiction. Most of this section will be moot once the Commission certifies to the FCC that it will regulate the rates, terms and conditions for pole attachments. The only issue that the Commission must be aware of is the 180 day clock for the resolution of complaints which conflicts with the Commission’s Procedural Rules. This conflict may be resolved by considering the language included in Section 1.1405(e) which allows the Commission to extend the

final action due date to 360 days. This ability to extend the final action due date is also supported by language contained in 47 U.S.C. 224(c)(3)(B)(i):

For purposes of this subsection, a State will not be considered to regulate the rates, terms and conditions for pole attachments—

- (A) Unless the State has issued and made effective rules and regulations implementing the State’s regulatory authority over pole attachments; and
- (B) With respect to any individual matter, unless the State takes final action on a complaint regarding such matter—
 - (i) Within 180 days after the complaint is filed with the State; or
 - (ii) Within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint;

Id. Staff contends that this language and the language contained in Section 1.405(e) provide ample authority for the Commission to reconcile the FCC final action deadlines with its current case processing so long as final action on the case occurs by day 360 from the date of filing of the complaint. Per the regulation, the Commission may adopt its own time period for make-ready pole access complaints so long as the complaints are resolved within the 360 day time period. Therefore, the Commission’s current complaint process with slight modifications to include the additional filing information should be sufficient to accommodate the make-ready pole access complaints. This section should be adopted by the Commission, subject to modifying Section 1.1405(e) to reference the Commission’s current complaint process.

1.1406. Commission consideration of the complaint. The only provision new to the Commission in this section is the formulas for calculating rates. The Commission's staff is trained to calculate rates that reflect the true cost of service. In calculating rates for make-ready pole attachment cases, Staff must ensure that rate payers are not subsidizing the services being provided by the attachers. Therefore, some flexibility in the formulas must be allowed. The rest of the section concerns the shifting burden of proof between the parties which the Commission currently addresses in its rules. There appears to be no conflict with the Commission's existing rules. This section should be adopted by the Commission with the caveat that the formulas must ensure that rates recover the true cost of the attachment so ratepayers are not subsidizing non-utility services.

1.1407. Remedies. The remedies proposed in this section are remedies the Commission currently uses in dealing with complaints and do not conflict with the Commission's existing rules. This section should be adopted by the Commission.

1.1408. Imputation of rates; modification costs. The provisions of this section appear reasonable, do not conflict with the Commission's existing rules and are comparable to the relief provided by the Commission in current complaint cases. As mentioned in the commentary to Section 1.1406, Staff must have the ability to ensure that ratepayers are not subsidizing non-utility services. This section should be adopted by the Commission with that caveat.

1.1409. Allocation of Unusable Space Costs. The provisions of this section appear reasonable, do not conflict with the Commission's existing rules and should be

adopted by the Commission with the caveat that Staff must have the ability to ensure that ratepayers are not subsidizing non-utility services.

1.1410. Use of presumptions in calculating the space factor. The provisions of this section appear reasonable, do not conflict with the Commission's existing rules and should be adopted by the Commission with the caveat that Staff must have the ability to ensure that ratepayers are not subsidizing non-utility services.

1.1411. Timeline for access to utility poles. The provisions of this section appear reasonable, do not conflict with the Commission's existing rules and should be adopted by the Commission.

1.412. Contractors for survey and make-ready. The provisions of this section appear reasonable, do not conflict with the Commission's existing rules and should be adopted by the Commission.

1.1413. Complaints by incumbent local exchange carriers. The provisions of this section appear reasonable, do not conflict with the Commission's existing rules and should be adopted by the Commission.

1.414. Review period for pole attachment complaints. In this regulation, the Commission is limited to a 180 day period to resolve complaints involving the denial of access to a pole, duct, conduit or right-of-way owned or controlled by a utility². While the word "should" is not mandatory, if a state intends to reverse-preempt the FCC Rules, under 47 USC §224(c)(3)(B)(i) final action on a complaint must take place within 180

² All other types of pole attachment complaints are to be resolved in 270 days as provided in Section 1.740.

days after the complaint is filed or “(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.” In addition, the Commission may extend the final decision date in situations where actions outside its control are responsible for delaying review of a pole attachment complaint.

The provisions of this section in conjunction with those of 47 USC §224(c)(3)(B)(i) allow a state to extend the final action due date from 180 days to 360 days in the rules. Since complaint cases are currently processed in approximately 211 days or less, the Commission would either have to adopt the 180 day time period for “denial of access” complaints or provide in its rules that the final decision date must occur within 360 days from the date the complaint was filed. If the Commission elects to retain the 180 day decision due date, it could identify the “denial of access” complaints in a manner different from regular complaints to ensure that final action on the complaint takes place within the 180 day time period.

1.415. Overlashing. The provisions of this section appear reasonable, do not conflict with the Commission’s existing rules and should be adopted by the Commission.

FCC procedural rules

Staff reviewed each of the FCC procedural rules referenced in W.Va. Code §31G-4-4 to determine whether conflicts with the Commission’s current Procedural Rules exist. A discussion of each FCC procedural rule follows.

1.720. Purpose. The purpose explains that the rules apply to a number of statutory provisions, including pole attachment complaint proceedings under 47 U.S.C. §224. The provisions of this section appear reasonable, do not conflict with the Commission's existing rules and should be adopted by the Commission to the extent they apply to pole attachment complaint proceedings under 47 U.S.C. §224.

1.721. General pleading requirements. The rule states that formal complaint proceedings are resolved on the pleadings: a verified complaint, answer, reply and a "joint statement of stipulated facts, disputed facts and key legal issues, along with all associated evidence in the record." *Id.* Each pleading must be verified as provided for in Section 1.52 and filed electronically with the FCC. Specified details as to the preparation of the pleadings are found in 47 C.F.R. §1.49 as referenced in Section 1.721(a); Section 1.50 provides information on the preparation and filing of briefs, while Section 1.51 provides information on the number of copies of different pleadings to be filed. Section 1.721(n) provides that Staff may waive any of the rules governing formal complaints.

There are significant differences between what the Commission requires in a formal complaint proceeding and what the FCC requires in a formal complaint proceeding. The Commission should adopt the provisions of Section 1.721 (including its references to Sections 1.49, 1.50, 1.51 and 1.52) to the extent they do not conflict with the Commission's current complaint procedures and statutory provisions that prohibit Staff from having decision-making authority in cases pending before the Commission.

1.722. Format and content of complaints. This section allows a complainant to state a claim for damages including the amount of damages being sought. It also

discusses filing fees paid to the FCC. The issue of damages has been discussed hereinabove and will not be repeated herein. The Legislature did not grant the Commission authority to charge a fee for processing a pole attachment complaint in its passage of SB 3. See discussion hereinabove. Therefore, the provisions for damages and fee collection in this section should not be adopted by the Commission since doing so would exceed the Commission's jurisdiction and authority. The Commission should adopt the provisions of this section to the extent they do not conflict with the Commission's current Procedural Rules and statutory provisions that prohibit the Commission imposing fees and awarding damages.

1.723. Damages. This section deals entirely with damages. Without a specific statute granting the Commission authority to award damages, the Commission is without jurisdiction to hear damage complaints. Therefore, this section cannot be adopted by the Commission. See discussion in Section 2 hereinabove.

1.724. Complaints governed by section 208(b)(1) of the Act. This section is not applicable to the Commission.

1.725. Joinder of complainants and causes of action. The Commission currently joins parties and causes of action in its formal complaint case procedures. This section does not conflict with the Commission's Procedural Rules and should be adopted.

1.726. Answers. The only provision contained in this section that is contrary to the Commission's current formal complaint procedure is that answers are to be filed thirty (30) calendar days following service rather than the ten (10) days following the date of service of the complaint and Commission order. The Commission should adopt

the provisions of this section that do not conflict with the Commission's Procedural Rules.

1.727. Cross-complaints and counterclaims. This section prohibits cross-complaints and counterclaims which conflicts with the Commission's Procedural Rules that allows both cross-complaints and counterclaims. The Commission should not adopt this provision.

1.728. Replies. This section allows a complainant to file a reply within ten (10) calendar days of service of the answer unless otherwise directed by the FCC. Replies are mandatory when an affirmative defense is made in the answer. While the Commission's Procedural Rules do not specifically address the filing of replies in formal complaint cases, the Commission routinely allows parties to file responses to pleadings at their will. The only issue is whether the failure to reply to an affirmative defense should be deemed as an admission. The Commission should adopt the provisions of this section that do not conflict with the Commission's Procedural Rules.

1.729. Motions. This section allows a party to file a variety of motions. Responses to motions must be made within 5 business days after the motion is served which conflicts with the Commission's policy of providing ten days after service for a response. (Procedural Rule 9.2). The Commission also permits a reply to the response if made within ten days after service of the response. (Procedural Rule 9.3). The Commission may act on a motion without waiting for responses or replies to the pleadings. (Procedural Rule 9.4). Section 1.729 states that a reply may be filed "under the direction of commission staff." (Section 1.729(f)). The Commission should adopt

the provisions of this section that do not conflict with the Commission's Procedural Rules and statutory provisions that prohibit Staff from having decision-making authority.

1.730. Discovery. While discovery is limited to ten (10) data requests for each party, with the complainant allowed to file five (5) more with its reply, Section 1.730(f), allows the Commission to provide parties an opportunity to expand their discovery. The Commission should adopt the provisions of this section that do not conflict with the Commission's Procedural Rules.

1.731. Confidentiality. There are some conflicts between this rule and the Commission's Procedural Rules 4.1.5 and 4.1.6 regarding the treatment of confidential documents. The section also refers to the use of the FCC electronic filing system which the Commission does not currently have. While the Commission could establish an electronic filing system, a number of issues must be considered and addressed first, including, but not limited to, the cost to print out pleadings for hearings, the ability of pro se complainants to make electronic filings, especially in counties where internet service is spotty or non-existent.

Further the section refers to the federal Freedom of Information Act (FOIA) rather than the West Virginia version which applies to filings with the Commission. The Commission should adopt the provisions of this section that do not conflict with the Commission's Procedural Rules.

1.732. Other required written submissions. This section allows the Commission to require parties to file briefs and any other additional information it deems

appropriate. The provisions of this section appear reasonable, do not conflict with the Commission's existing rules and should be adopted by the Commission.

1.733. Status conference. This section allows the Commission to hold status conferences with the parties. The provisions of this section appear reasonable, do not conflict with the Commission's existing rules and should be adopted by the Commission

1.734. Fee remittance; electronic filing; copies; service; separate filings against multiple defendants. The Legislature did not grant the Commission the authority to charge a fee for pole attachment complaint cases. Section 1.734(a) is in conflict with the Commission's Procedural Rule 6.2.1, which allows a complainant to file against multiple defendants so long as the allegations involve substantially the same violation of law and like set of facts. In addition, this section requires various methods of service on parties in the case which conflicts with the Commission's policy on service. The Commission should adopt the provisions of this section that do not conflict with the Commission's Procedural Rules.

1.735. Conduct of proceedings. This section provides the Commission flexibility in processing cases "as will best conduce to the proper dispatch of business and the ends of justice." The provisions of this section appear reasonable, do not conflict with the Commission's existing rules and should be adopted by the Commission. This provision also provides additional support for the position taken by Staff that the Commission should adopt only those FCC procedural rules that do not conflict with the Commission's Procedural Rules.

1.736. Accelerated Docket Proceedings. This section provides for an accelerated docket proceeding that allows for a mini-trial or hearing on the complaint within 40-45 days of its filing. Either an administrative law judge or staff may preside at the mini-trial or hearing. The Commission should not adopt the provisions of this section since it conflicts with the Commission's Procedural Rules and statutory prohibitions on Staff having decision-making authority.

1.737. Mediation. This section provides for mediation if requested by the parties. Staff determines whether a complaint is suitable for mediation. The Commission should adopt the provisions of this section that do not conflict with the Commission's Procedural Rules and statutory prohibitions on Staff having decision-making authority.

1.738. Complaints filed pursuant to 47 U.S.C. 271(d)(6)(B). This section is not applicable.

1.739. Primary jurisdiction referrals. This section involves referrals of cases from courts pursuant to the primary jurisdiction doctrine. Once the Commission certifies to the FCC that it meets the requirements for reverse preemption, the courts will refer cases to the Commission under the primary jurisdiction doctrine. The Commission can then process the case as a pole-attachment complaint case. The Commission should adopt the provisions of this section that do not conflict with the Commission's Procedural Rules.

1.740. Review period for section 208 formal complaints not governed by section 208(b)(1) of the Act. This section is not applicable.

CONCLUSION

The Commission should adopt the FCC Rules modifying the final action date as necessary to comply with 47 U.S.C. §224. The Commission should adopt the FCC procedural rules that do not conflict with existing statutes. *See* W.Va. Code §24-1-1(f)(1) (Staff prohibited from holding decision-making authority); Those statutes that limit the Commission's authority to impose fees. (*See* e.g., W.Va. Code §§§24-1-5, 24-2-11c, 24-3-6; §24-1-7 (Commission to adopt procedural rules for all matters coming before it); and §24-4-7 (Commission prohibited from awarding monetary damages). The Commission should not adopt any of the FCC Rules and FCC procedural rules that conflict with the Commission's Procedural Rules or the Commission's duty and obligation to approve rates that are based on the true cost of service so ratepayers are not subsidizing non-utility services; and finally, any FCC procedural rules for which the Commission does not currently have the existing physical capability (electronic filing system.)

Respectfully submitted this the 15th day of July 2019.

STAFF OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA

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**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 19-0551-T-GI

**General Investigation into Adopting and
Implementing Rules Governing Pole Attachments
And Assumption of Commission Jurisdiction
Over Pole Attachments**

CERTIFICATE OF SERVICE

I, Linda S. Bouvette, Counsel for the Public Service Commission of West Virginia, do hereby certify that a copy of the foregoing "STAFF INITIAL COMMENTS" has been served upon the following parties of record by First Class, United States Mail; postage prepaid, and by electronic mail correspondence, this the 15th day of July, 2019.

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July 15, 2019

Ms. Connie Graley
Acting Executive Secretary
Public Service Commission
of West Virginia
201 Brooks Street
Charleston, West Virginia 25301

03:26 PM JUL 15 2019 EXEC SEC DIV

RE: CASE NO. 19-0551-T-GI
General Investigation into Adopting and
Implementing Rules Governing Pole Attachments
and Assumption of Commission Jurisdiction Over
Pole Attachments

Dear Ms. Graley:

Enclosed herein for filing in the above-referenced matter, please find the original and twelve (12) copies of Initial Comments on Behalf of the City of New Martinsville, City of Philippi and Craig-Botetourt Electric Cooperative (collectively, the "Public Systems").

As evidenced by the Certificate of Service attached thereto, a copy of the document is being served upon all parties on the official service list. Please include both Robert R. Rodecker and me on the official service list as counsel for the Public Systems.

Sincerely,

John R. McGhee, Jr
WV State Bar No. 5205

enclosure

cc: David White
Jeremy Drennen
Shawn Hildebrand

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

03:26 PM JUL 15 2019 EXEC SEC DIV

CASE NO. 19-0551-T-GI

General Investigation into Adopting and
Implementing Rules Governing Pole Attachments
and Assumption of Commission Jurisdiction over
Pole Attachments

**INITIAL COMMENTS ON BEHALF OF
CITY OF NEW MARTINSVILLE, CITY OF PHILIPPI
AND CRAIG-BOTETOURT ELECTRIC COOPERATIVE**

Now come the City of New Martinsville, City of Philippi and Craig-Botetourt Electric Cooperative (hereinafter referred to collectively as "Public Systems"), by counsel, and submit Initial Comments regarding the Commission's establishment of a General Investigation into the adoption and implementation of the Pole Attachment Act ("PAA"), 47 U.S.C. §224, the Federal Communications Commission's ("FCC's") regulations pursuant to the PAA and the FCC's formal complaint procedures regarding pole attachments, pursuant to the Order entered by the Commission on June 4, 2019 ("June 4 Order") authorizing interested parties to file Comments on or before July 5, 2019; which deadline was extended to July 15, 2019 by Order entered June 27, 2019.

The Public Systems submit these comments notwithstanding the fact that the Commission's June 4 Order specifically excluded municipally owned utilities and

cooperatives from receiving notice of this proceeding.¹ As will be explained below, the Public Systems, which operate as electric utilities regulated by this Commission and own poles and rights-of-way that are used for their own utility purposes and by third parties for other purposes, are potentially affected by the issues raised in the June 4 Order. Most importantly, the Public Systems are concerned that they may become subject to the Commission's decision and rules arising from this proceeding without having had the opportunity to participate in this proceeding.

Background

The Commission's June 4 Order was entered as a result of three related events.

First, in 2017, the West Virginia Legislature enacted House Bill ("HB") 3093. HB 3093 added a new article to the Broadband Enhancement and Expansion Policies at Chapter 31G of the West Virginia Code.² The new Article 4 was entitled "Make-Ready Pole Access".³ The purpose of Article 4 was to supplant federal regulations under the PAA by establishing a make-ready process for utility poles in West Virginia.

¹ See, June 4, 2019 Order at Conclusion of Law 2.:

"2. Because the PAA and FCC regulations define 'utility' as 'any person that is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way, used, in whole or in part, for any wire communications,' **notice should be provided to all public utilities in West Virginia except railroads, public service districts, municipal utilities and cooperatives.**' (Emphasis added)

² See, *West Virginia Code* §§31G-4-1 through 3 (2017).

³ The term "make-ready" is defined for purposes of the PAA and Article 4 at 47 CFR §1.1402(o) as: "the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the utility pole."

Second, on July 7, 2017, Frontier West Virginia, Inc. and West Virginia Cable Telecommunications Association Inc. filed separate actions in the United States District Court for the Southern District of West Virginia seeking declaratory and injunctive relief from the provisions of Article 4 on the grounds that the state was preempted from enforcing Article 4 by virtue of the existence of the PAA and FCC's regulations. In a response to a Motion for Summary Judgement filed on April 17, 2018, the Commission Defendants acknowledged that "they have not certified to the FCC that they will regulate pole attachments nor are they aware of any other West Virginia state agency that has made the certification."⁴ Further, the Commission Defendants stated:

. . . federal law does not require any state, including West Virginia, to adopt rules that mirror and conform to the FCC pole attachment rules. **West Virginia may regulate the "rates, terms, conditions, or access to poles, ducts, conduits, and rights-of-way" of pole attachments as it deems appropriate** to ensure the timely expansion of broadband and other communication facilities throughout the state of West Virginia.⁵ (Emphasis added)

The Commission's representations to the Court were significant with regard to its jurisdiction over pole attachments due to the fact that Section 224(b) of the PAA establishes Federal jurisdiction over such matters unless a State or any political subdivision or instrumentality thereof certifies to the FCC that it regulates the rates, terms, and conditions for pole attachments.⁶

⁴ See, "Commission Defendants' Response to Plaintiffs' Motion for Summary Judgment" filed April 17, 2018 in *Frontier West Virginia, Inc. et al. v. Justice et al.*; Civil Action No.'s 2:17-cv-03500 and 2:17-cv-03650, at 2.

⁵ *Id.*

⁶ This process of certification, sometimes referred to as "reverse preemption", is set forth in Section 224(c) of the PAA.

On June 14, 2018, Chief Judge Johnston entered an order declaring that Article 4 was preempted by federal law as applied to privately owned utility poles, and the defendants, including the Commission, were enjoined from enforcing, applying or otherwise giving effect to Article 4 as applied to privately owned utility poles.⁷

The third event was the passage by the West Virginia Legislature of Senate Bill ("SB") 3 on March 5, 2019. SB 3 included an amendment to Article 4 of Chapter 31G of the *West Virginia Code* to add a new Section 4 (*Code* §31G-4-4). Unlike HB 3093 in 2017, Section 4 requires the Commission to assume the FCC's jurisdiction under the PAA; including adoption of the dispute resolution procedures referenced in the FCC's regulations under the PAA. Compliance with the language of Section 4 would result in the effectuation of reverse preemption.

In its June 4 Order, the Commission asserts that the requirement to implement the FCC's formal complaint procedures for pole attachment disputes supplants the Commission's existing complaint process under its Procedural Rules and for that reason, the Commission is seeking comments and recommendations about the implementation of the dispute resolution process found in the FCC regulations and the FCC formal complaint rules.

⁷ The Court's restriction of its injunction to privately owned utility poles presumably relates to the fact that Section 224(a)(1) of the PAA states that with regard to the ownership of "poles, ducts, conduits, or rights-of-way. . . for wire communications" the term "utility" as used in Section 224 excludes "any person who is cooperatively organized, or any person owned by . . . any State", and Section 224(a)(3) states that "[t]he term 'State means any State, . . . , or any political subdivision, agency, or instrumentality thereof.'" (Emphasis added)

Comments

It is clear that the Commission has jurisdiction over municipal and cooperatively organized electric utilities for pole attachment purposes.

The Public Systems operate as electric utilities. As utilities, they are subject to the Commission's jurisdiction for their operations except where specifically provided by law.

Code §24-2-1(a) states in pertinent part:

The jurisdiction of the Commission extends to all public utilities in the state and shall extend to any utility engaged in any of the following public services:

. . . ; generation and transmission of electrical energy by hydroelectric or other utilities for service to the public, whether directly or through as distributing utility; **supplying . . . electricity by municipalities or others;** . . .

While recent legislative action has limited the Commission's jurisdiction over the rates of municipal electric utilities,⁸ the Commission retains jurisdiction for other aspects of their electric utility operations. In particular, as amended by SB 10 in 2018, *Code* §24-2-2 states in pertinent part as follows:

(a) The commission may **investigate all . . . methods, and practices of public utilities subject to the provisions of this chapter**; to require them to conform to the laws of this state and to all rules, regulations and orders of the commission not contrary to law; and to require copies of all reports, rates, classifications, schedules, and timetables in effect and used by the public utility or other person to be filed with the commission, and all other information desired by the commission relating to the investigation and requirements, including inventories of all property in the form and detail as the commission prescribes. The commission may compel obedience to its lawful orders by mandamus or injunction or other proper proceedings in the name of the state in any circuit court having jurisdiction of the parties or of

⁸ In 2018, Senate Bill 10 enacted *Code* §§ 8-19-2, 2a and 2b which removed Commission jurisdiction over the rates of municipal electric utilities.

the subject matter, or the Supreme Court of Appeals directly, and the proceedings shall have priority over all pending cases. **The commission may . . . change or prohibit any practice, device, or method of service in order to prevent undue discrimination or favoritism between persons and between localities and between commodities for a like and contemporaneous service. . . .** Every order entered by the commission shall continue in force until the expiration of the time, if any, named by the commission in the order, or until revoked or modified by the commission, unless the order is suspended, modified, or revoked by order or decree of a court of competent jurisdiction: (Emphasis added)

* * *

(d) Notwithstanding any other provision of this code to the contrary, the jurisdiction of the commission does not extend over the setting or adjustment of rates, fees, and charges of municipal power systems. The rates, fees, charges and rate-making process of municipal power systems is governed by the provisions of §8-19-2a of this code

Further, Code §24-2-6 provides in pertinent part as follows:

Whenever, after hearing, upon notice, the Public Service Commission shall determine that public convenience or necessity requires that **conduits, subways, poles or other equipment on, over or under any street or highway belonging to or used by any public utility should be used in part by another public utility for the operation of its property in any locality not reached by the lines or connections of one of such utilities, or a municipality,** the Public Service Commission may, by order, fix the just and reasonable terms and conditions of such use, and prescribe the compensation to be paid therefor. And, whenever, after hearing, upon notice, the Public Service Commission shall determine that public convenience and necessity require a physical connection for the establishment of a continuous line of communication between any two or more public utilities regularly engaged in the conveyance of telephone or telegraph messages, for the conveyance of such messages between different localities, which are not reached by the lines or connections of one of such utilities, the Public Service Commission, may, by order, ascertain, determine and fix the just and reasonable terms and conditions of such physical connection, including just and reasonable rules and regulations and the just and reasonable charge that shall be made to the public for the use of such continuous line between such localities and the division of the charge between such two or more public utilities, and the apportionment of

the cost of making such physical connection between such public utilities, and it shall be the duty of such public utility thereafter to conform to such order of the Public Service Commission. (Emphasis added)

And, with regard to all utilities under the Commission's jurisdiction, Code §24-2-7(a) states:

(a) Whenever, under the provisions of this chapter, the commission shall find any **regulations, measurements, practices, acts or service** to be unjust, unreasonable, insufficient or unjustly discriminatory, or otherwise in violation of any provisions of this chapter, or shall find that any service is inadequate, or that any service which is demanded cannot be reasonably obtained, the commission shall determine and declare, and by order fix reasonable measurement, regulations, acts, practices or services, to be furnished, imposed, observed and followed in the state in lieu of those found to be unjust, unreasonable, insufficient, or unjustly discriminatory, inadequate or otherwise in violation of this chapter, and shall make such other order respecting the same as shall be just and reasonable.

Finally, the Public Systems, including the Cities, are required to provide the Commission with information on rates, fees and charges⁹ and to adhere to the Commission's *Rules for the Government of Electric Utilities* ("Electric Rules"), 150 CSR 3.

The Commission has previously exercised complaint jurisdiction in pole attachment matters.

The Commission's online records show very limited instances of the Commission's exposure to pole attachment matters, and none involving municipalities. However, in *Verizon West Virginia Inc. v. Appalachian Power Company and Wheeling Power Company, dba American Electric Power*, Case No. 07-1279-E-C, (Order entered April 22, 2008), the Commission, over the objections of the electric utility defendants, determined

⁹ See Code §§ 8-19-2a and 24-2-9.

that it had jurisdiction over a pole attachment contract dispute between the telephone utility and the electric utilities and referenced the Commission's authority under *Code §24-2-6* to deny the electric utilities' motion to dismiss even though a civil action regarding the matter was pending in Circuit Court. The Commission stated as follows:

The Commission agrees generally with the Staff and the Complainant that the Commission has jurisdiction over the issues in the complaint and that this matter should proceed regardless of the civil action pending in the Circuit Court.

Thus, notwithstanding the existence of the PAA, the Commission exercised its jurisdiction over a dispute between parties to a pole attachment agreement involving a telecommunications utility and electric utilities.¹⁰

If the Commission adopts the FCC's dispute resolution procedures pursuant to *Code §31G-4-4(b)*, the Commission's exercise of jurisdiction over pole attachments under the provisions of *Code §31G-4-4* should not be extended to municipalities and electric cooperatives.

The Commission's June 4 Order suggests that, under its reading of the PAA, all railroads, municipalities and electric cooperatives are exempt from the PAA, and the FCC's regulations.

The fact that the Commission excluded the Public Systems from receiving notice of, and potential participation in, this proceeding also suggests that if a make-ready dispute should arise regarding a Public System's exercise of authority over the control of

¹⁰ The Staff Attorney, in a Further Final Joint Staff Memorandum dated February 14, 2008 in the *Verizon* case, recommended that the Commission conclude that the Commission is not preempted by the FCC with regard to establishing pole attachment rates involving ILECs. However, the Commission's April 22, 2008 Order asserting jurisdiction failed to cite that as the basis for its ruling.

its electric utility poles which may be challenged as inconsistent with Code §31G-4-1 through 3, the Commission has already concluded either that it does not have jurisdiction to resolve any pole attachment dispute filed with the Commission involving one of the Public Systems; or, at a minimum, even if the Commission should determine that it has jurisdiction to resolve a make-ready issue under its jurisdiction under Code §§24-2-2, 24-2-6, or 24-2-7, it would not utilize the complaint provisions of Code §31G-4-4(b) in addressing such dispute.

The Public Systems believe that regardless of whether the Commission ultimately establishes a pole attachment dispute resolution process for non-exempt electric utilities consistent with the FCC's rules as required by Code §31G-4-4(b) or not, the Commission should clearly state that such FCC rules do not apply to municipalities and electric cooperatives subject to its jurisdiction. The process adopted by the Commission to resolve pole attachment disputes as a result of the passage of SB 3 should not be seen to include electric utilities that are currently exempt from the PAA and the FCC's regulations.

Notwithstanding the Commission's exercise of jurisdiction in the *Verizon* case, *Supra.*, and its assertion in the *Frontier* case, *Supra.* that "West Virginia may regulate the 'rates, terms, conditions, or access to poles, ducts, conduits, and rights-of-way' of pole attachments as it deems appropriate", prior to the effective date of SB 3, the only electric utilities subject to the Commission's jurisdiction for the resolution of pole attachment disputes were municipalities and electric cooperatives. With the enactment of Code §31G-4-4(b), the Commission is required to certify its reverse preemption of regulation of non-exempt utilities under the PAA to the FCC.

The public Systems are concerned that, while the PAA exempts municipalities and electric cooperatives, the Commission may, as it has in the past, decide to include such utilities under its purview under *Code §31G-4-4*.¹¹

It is unclear from the Commission's June 4 Order just what the Commission is seeking comments upon.

At page 4 of the June 4 Order the Commission states that it is seeking comments and recommendations regarding the provisions of *Code §31G-4-4* requiring the Commission to implement the dispute resolution process found in the FCC regulations and the FCC formal complaint rules.

It is unclear to the Public Systems as to: a) whether the Commission is seeking comments and recommendations regarding the ability of the Legislature to require the Commission to adopt the FCC's procedures for dealing with pole attachment issues; b) whether the Commission is seeking comments as to whether there is a legal defect in the passage of SB 3; or, c) whether the Commission is seeking support for its apparent conviction that the Commission's general dispute resolution process is superior to though inconsistent with the FCC's procedure, prior to "initiating a rulemaking proceeding to adopt the PAA and FCC regulations." Regarding each of those issues, the Public Systems state as follows:

¹¹ Previously, the Commission has asserted jurisdiction over municipalities and electric cooperatives on a similar basis with investor owned electric utilities in matters involving net metering (G.O. 258, order entered June 30, 2010); and, fuel source diversity and fossil fuel efficiency generation standards (Case No. 07-1496-E-GI) even though jurisdiction over the Public Systems in such matters was not required by statute.

a) The Legislature has the authority to require the Commission to carry out federal laws and policies.

It is well-established that the Commission has no inherent power or authority. It has no jurisdiction and no power or authority except as conferred on it by statute. Syllabus Pt. 1 Wilhite v. Public Service Commission, 150 W.Va. 747, 149 S.E.2d 273 (1966). It is also well-established that the Legislature can, and has, required the Commission to assume the responsibility of carrying out federal legislation.¹² It is also well-established that the Legislature can impose, and has in the past imposed, procedural timelines and strictures on the Commission that are not consistent with, or part of, the Commission's *Rules of Practice and Procedure*, 150 CSR 1 *et seq.* ("Procedural Rules").¹³ The fact that such federal statutes and rules implemented by the Commission may have provisions which are different than, and perhaps are inconsistent with, provisions of other statutes and rules affecting the Commission has not been found to be inconsistent with the Commission's regulatory responsibilities.

¹² See, Code §24-2-13. The Commission has been charged with the duty to enforce the provisions of the United States "Federal Railroad Safety Act" and the "Uniform Motor Carrier Identification Act". The Commission is also required to perform those duties conferred upon a state regulatory authority by the "National Energy Conservation Policy Act of 1978," "Power Plant and Industrial Fuel Use Act of 1978," and the "Public Utilities Regulatory Policy Act of 1978." The Commission is also required to carry out other federal acts, including portions of the "Natural Gas Policy Act of 1978."

¹³ See, e.g.: Code §24-2-1(b)(6) establishes time periods for the filing of a request for investigation of a dispute between a political subdivision of the state and its wholesale customer involving water or sewer utility matters, and the time for period for resolving the dispute; Code §24-2-2 establishes time periods for the filing of complaints against municipalities between a political subdivision of the state and its wholesale customer involving water or sewer utility matters and the time for period for resolving the complaint; and, provisions of the Cable Television Systems Act including Code §§24D-1-26 which establishes that the cable television industry is not regulated as a utility, 24D-1-16 which establishes provisions for credits and refunds for interrupted service, and 24D-1-22 relating to complaints against operators of cable systems.

b) Legal sufficiency of SB 3 with regard to Code §31G-4-4.

With regard to whether there may have been a defect with the passage of SB 3, a review of the title of the preamble to SB 3 could lead to a conclusion similar to that reached by the West Virginia Supreme Court of Appeals in the case of C.C. "Spike" Copley Garage, Inc. v. Public Service Commission, 171 W.Va. 489, 300 S.E.2d 485 (1983). The Supreme Court of Appeals in the Copley case, found that Code §24A-2-2a was unconstitutional because its purpose and effect were not adequately set forth in the title of the act of the Legislature. Code §24A-2-2a was part of an omnibus statute which radically changed the authority and operating procedures of the Commission. Code §24A-2-2a had the effect of deregulating the business of towing, hauling or carrying wrecked or disabled vehicles. The Court found that the title to the act was misleading because while very specific and including a brief description of every major change that the act made, it was silent about deregulation of wrecker services.

Here, the title to SB 3 contained a list of specific sections of the Code being affected, and included a brief description of some of the sections. However, the sole statement regarding Code §31G-4-4 was the following: "establishing and delineating Public Service Commission jurisdiction over make-ready pole access within the state." There was no mention of the Commission assuming FCC's jurisdiction generally, or the supplanting of the Commission's complaint procedure with the FCC's regulations specifically. Thus, it could be argued that Code §31G-4-4 is unconstitutional because its purpose and effect were not adequately set forth in the title to SB 3.

c) There are advantages and disadvantages to both the Commission's complaint procedures and the FCC's dispute resolution process.

The Commission emphasizes certain differences between the Commission's complaint procedures and those of the FCC, including the award of damages. In its June 4 Order, the Commission cited two decisions regarding the Commission's lack of jurisdiction to award damages. However, both of those cases were decided under a different paradigm than is being established under Code §31G-4-4. That section establishes a new avenue for specific types of cases and specifically requires the Commission to adopt the FCC's dispute resolution rules. As a result, the prior case law, as well as the Commission's complaint procedure, is being supplanted in the case of pole attachment disputes involving heretofore FCC jurisdictional electric utilities..

While the June 4 Order focuses on the damages issue under the FCC's rules, no mention is made of the time periods set forth in the FCC's rules that are absent from the Commission's Procedural Rules. One of the positive features of the FCC's rules is the fact that the FCC rules provide specific time periods for the resolution of complaints regarding pole attachments. 47 CFR 1.1414 (a) sets forth a period of 180 days for resolution of most pole attachment complaints while subsection (b) refers to 47 CFR 1.740 for the others. The time period for resolution of complaints under 47 CFR 1.740 is 270 days.

As referenced earlier, reported decisions regarding pole attachments before the West Virginia Commission are limited. However, in the Verizon case *Supra*, the Complaint was filed on July 12, 2007 and the final order dismissing the case as settled was entered December 4, 2008; a period of approximately 491 days. That time period

was substantially longer than the FCC time periods and that case was settled prior to a scheduled evidentiary hearing which would have led to additional time. The Commission could benefit from establishing specific time periods for resolution of pole attachment disputes for the Public Systems.

Whatever is eventually decided by the Commission with regard to the adoption of the FCC rules, the Commission should make clear that such rules do not apply to the Public Systems.

Respectfully submitted,

CITY OF NEW MARTINSVILLE
CITY OF PHILIPPI
CRAIG-BOTETOURT ELECTRIC COOPERATIVE

By Counsel



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CERTIFICATE OF SERVICE

I, John R. McGhee, Jr., counsel for the Cities of News Martinsville and Philippi and Craig-Botetourt Electric Cooperative, do hereby certify that copies of the foregoing Initial Comments have been served upon the following parties of record on this 15th day of July, 2019, in the manner so indicated:

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July 15, 2019

Via Hand Delivery

Connie Graley
Acting Executive Secretary
Public Service Commission
201 Brooks Street
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03:25 PM JUL 15 2019 EXEC SEC DIV

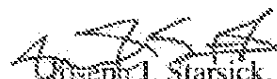
Re: 19-0551-T-GI
General Investigation into Adopting and Implementing Rules Governing Pole
Attachments and Assumption of Commission Jurisdiction Over Pole Attachment

Dear Ms. Graley:

Please find enclosed for filing in the original plus 12 copies of the **Initial Comments of Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, D/B/A Frontier Communications of West Virginia** in the above-referenced matter.

Thank you for your attention to this matter.

Sincerely,


Joseph J. Starsick, Jr.
(State Bar No. 3576)

JJSjr/sc
Enclosure

cc: Linda Bouvette, Esquire
Christopher Howard, Esquire
Service List

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

03:25 PM JUL 15 2019 EXEC SEC DIV

CASE NO. 19-0551-T-GI

General Investigation into Adopting and
Implementing Rules Governing Pole Attachments and Assumption of Commission
Jurisdiction Over Pole Attachments

INITIAL COMMENTS OF FRONTIER WEST VIRGINIA INC. AND CITIZENS
TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA, D/B/A FRONTIER
COMMUNICATIONS OF WEST VIRGINIA

I. Introduction

Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, d/b/a Frontier Communications of West Virginia (collectively, "Frontier") greatly appreciate the opportunity to comment on the Commission's implementation of West Virginia Code § 31G-4-4 ("Section 4"). Section 4 requires the Commission to "adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. §224 and 47 C.F.R. §§1.1401 – 1.1415, inclusive, of the dispute resolution *process* incorporated by reference in those regulations."¹ The Commission has expressed concern that Section 4 requires it to adopt a broad range of the FCC's regulations under the Pole Attachment Act, 47 U.S.C. §224 ("PAA"), *in whole*, even when those regulations conflict with existing West Virginia law and the Commission's established rules and practices.² As explained below, however, Section 4 does not require that the Commission adopt the FCC's peculiar procedural rules *in toto*, including those

¹ West Virginia Code § 31G-4-4 (emphasis added). Any reference to "pole attachments" or "attachments" in these comments also includes conduit occupancy and rights-of-way access.

² *General Investigation into Adopting and Implementing Rules Governing Pole Attachments and Assumption of Commission Jurisdiction Over Pole Attachments*, Case No. 19-0551-T-GI, Commission Order (June 4, 2019) ("Commission Order"), p. 3.

applicable to electronic filing, discovery, and like matters – nor must the Commission adopt rules that, both on their face, may apply only to the FCC, not this Commission (e.g., 47 C.F.R. §§ 1.1404(c) and 1.1405 – FCC action related to state certification). Instead, the Commission can reasonably interpret Section 4 to avoid absurd results, and adopt the FCC’s regulations *specifically applicable* to the actual substantive process for setting the rates, terms, and conditions for attachments. In all other respects, the Commission can administer pole attachment cases consistent with West Virginia law and the Commission’s own rules and practices.

II. Discussion

The Commission has expressed concern that Section 4 requires it to adopt the FCC’s PAA regulations in full.³ But the actual language of Section 4 does not support this view. Instead, the statute only requires that the Commission “adopt the *rates, terms, and conditions of access to and use of* poles, ducts, conduits, and rights-of-way as provided in” the FCC’s regulations.⁴ Thus, the Commission need not adopt those provisions within the FCC’s pole attachment regulations that do not specifically address the setting of pole attachment rates, terms, and conditions.

This more limited reading of Section 4 leads to a far more reasonable construction of the statute that is consistent with existing West Virginia law and the Commission’s established rules and practices. As the West Virginia Supreme Court of Appeals reiterated just last month:

A statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part; it is presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.⁵

³ *Id.*

⁴ W. Va. Code § 34G-4-4 (emphasis added).

⁵ *Christopher J. v. Ames*, 2019 W. Va. LEXIS 311, *17-18 (June 20, 2019) (quoting Syl. pt. 5, *State v. Snyder*, 64 W. Va. 659 (1908)).

Consequently, “[w]here a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made.”⁶

Indeed, the Commission recognized in its Order that adopting the FCC’s PAA regulations in full would result in certain absurdities.⁷ For example, the Commission noted that its adoption of the FCC’s regulations in full would “authorize FCC staff to make rulings on discovery disputes” in attachment proceedings before the Commission and “require parties to utilize the FCC electronic filing system for most filings.”⁸ The Legislature could not have intended such unheard-of results.

Even beyond the provisions that the Commission cited, the FCC’s PAA regulations contain procedural requirements that are applicable only to the FCC, not this Commission. For example, 47 C.F.R. § 1.1404(c) requires that a pole attachment complaint “contain a statement that the State has not certified to the [FCC] that it regulates the rates, terms and conditions for pole attachments.” 47 C.F.R. § 1.1405 similarly states that the FCC will dismiss a pole attachment complaint for lack of jurisdiction when a State has certified that it regulates pole attachments and that jurisdiction will revert to the FCC for an individual complaint if a state commission does not take final action on the matter within a set time period.

Simply put, the Commission should reasonably interpret Section 4 to adopt only those provisions of the FCC’s PAA regulations that actually apply to the *specific* process for setting rates, terms and conditions of pole attachments – not purely procedural rules applicable only the FCC’s peculiar procedures. To that end, Frontier has included, as Exhibit A, a redlined version of the FCC PAA regulations which identifies those regulations that the Commission should adopt –

⁶ *Id.* at *18 (quoting Syl. pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774 (1938)).

⁷ Commission Order, p. 3.

⁸ *Id.*, pp. 3-4.

all of which may be implemented under existing West Virginia law and established Commission procedures.

On a related note, the Commission expressed concern over its belief that the FCC's PAA regulations allow for damages, which the Commission is not authorized to award.⁹ In actuality, the FCC's PAA regulations expressly preclude any damages awards in attachment proceedings. Instead, 47 C.F.R. § 1.1407 sets forth the limited remedies available in such proceedings, which only include: (a) the termination of the unjust or unreasonable rate, term, or condition; (b) the substitution in the pole attachment agreement of the just and reasonable rate, term, or condition as established by the Commission; and (c) the issuance of a refund or payment representing the difference between the amount paid under the unjust or unreasonable rate, term, or condition and the amount that would have been paid under the just and reasonable rate, term or condition, as established by the Commission.¹⁰ West Virginia law has long recognized the Commission's authority in various contexts to (a) terminate unjust and unreasonable rates, terms, or conditions, (b) substitute in just and reasonable rates, terms or conditions, and (c) issue refunds.¹¹ Therefore, Section 4's grant of such authority in attachment proceedings is consistent with both existing West Virginia law and the Commission's established rules and practices.

⁹ *Id.*

¹⁰ 47 C.F.R. § 1.1407(a).

¹¹ See, e.g., W. Va. Code § 24-2-6 (setting forth the Commission's authority to set just and reasonable rates, terms, and conditions for any public utility to jointly use the conduits, subways, or poles of another public utility within public rights-of-way); W. Va. Code § 24-2-4a(b) ("Any refund determined to be due and owing as a result of any difference between any final rates approved by the commission and the rates placed into effect subject to refund shall be refunded by the public service district as a credit against each customer's account ... after entry of the commission's final order."); W. Va. Code § 24-2-4b(d) ("Any refund determined to be due and owing as a result of any difference between any final rates approved by the commission and the rates placed into effect subject to refund shall be refunded by the public service district as a credit against each customer's account ... after entry of the commission's final order."); W. Va. C.S.R. § 150-2-33.7.f (setting forth the conditions under which certain motor carriers must issue refunds to their customers and adjust their rates); *McElhinney v. W. Va. Pub. Serv. Comm'n.*, 214 W. Va. 454, 457-58 (2003) (ordering the Commission to direct a public utility to issue a refund to its customer); *State ex rel. Chesapeake & Potomac Tel. Co. v. Ashworth*, 190 W. Va. 547, 551 (1993) ("W. Va. Code 24-4-7 confers concurrent jurisdiction on the PSC and the circuit court in a limited number of cases – namely, those cases seeking a refund based on rules and practices of the PSC that are clear and unambiguous.")

III. Conclusion

As set forth above and in the attached Appendix A, the Commission can avoid absurd results and still effectuate the Legislature's intent. Indeed, the Commission can implement Section 4 in a manner that is consistent both with existing West Virginia law and the Commission's established rules and practices – simply by adopting a reasonable interpretation of W.Va. Code § 31G-4-4.

Respectfully submitted,

**FRONTIER WEST VIRGINIA INC. AND CITIZENS
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VIRGINIA, D/B/A FRONTIER COMMUNICATIONS OF
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EXHIBIT A

Code of Federal Regulations > TITLE 47 -- TELECOMMUNICATION > CHAPTER I -- FEDERAL COMMUNICATIONS COMMISSION > SUBCHAPTER A -- GENERAL > PART 1--PRACTICE AND PROCEDURE > SUBPART J -- POLE ATTACHMENT COMPLAINT PROCEDURES

§ 1.1401 Purpose.

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable. They also provide complaint and enforcement procedures for incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)) to ensure that the rates, terms, and conditions of their access to pole attachments are just and reasonable.

§ 1.1402 Definitions.

- (a) The term utility means any person that is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person that is cooperatively organized, or any person owned by the Federal Government or any State.
- (b) The term pole attachment means 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.
- (c) With respect to poles, the term usable space means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility. With respect to conduit, the term usable space means capacity within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable and associated equipment for telecommunications or cable services, and which includes capacity occupied by the utility.
- (d) The term complaint means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable. It also means a filing by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable.
- (e) The term complainant means a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, an association of telecommunications carriers, an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers who files a complaint.
- (f) The term defendant means a cable television system operator, a utility, or a telecommunications carrier against whom a complaint is filed.
- (g) The term State means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.
- (h) For purposes of this subpart, the term telecommunications carrier means 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 incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)).

- (i) The term conduit means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.
- (j) The term conduit system means a collection of one or more conduits together with their supporting infrastructure.
- (k) The term duct means a single enclosed raceway for conductors, cable and/or wire.
- (l) With respect to poles, the term unusable space means the space on a utility pole below the usable space, including the amount required to set the depth of the pole.
- (m) The term attaching entity includes cable system operators, telecommunications carriers, incumbent and other local exchange carriers, utilities, governmental entities and other entities with a physical attachment to the pole, duct, conduit or right of way. It does not include governmental entities with only seasonal attachments to the pole.
- (n) The term inner-duct means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.
- (o) The term make-ready means the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the utility pole.
- (p) The term complex make-ready means transfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments. Any and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers, are to be considered complex.
- (q) The term simple make-ready means make-ready where existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment.
- (r) The term communications space means the lower usable space on a utility pole, which typically is reserved for low-voltage communications equipment.

§ 1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.

- (a) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding this obligation, a utility may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.
- (b) Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.
- (c) A utility shall provide a cable television system or telecommunications carrier no less than 60 days written notice prior to:
 - (1) Removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the cable television system operator's or telecommunications carrier's pole attachment agreement;

(2) Any increase in pole attachment rates; or

(3) Any modification of facilities by the utility other than make-ready noticed pursuant to § 1.1411(e), routine maintenance, or modification in response to emergencies.

(d) A cable television system operator or telecommunications carrier may file a "Petition for Temporary Stay" of the action contained in a notice received pursuant to paragraph (c) of this section within 15 days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of cable television service or telecommunication service, a copy of the notice, and certification of service as required by § 1.1404(b). The named may file an answer within 7 days of the date the Petition for Temporary Stay was filed. No further filings under this section will be considered unless requested or authorized by the Commission and no extensions of time will be granted unless justified pursuant to § 1.46.

(e) Cable operators must notify pole owners upon offering telecommunications services.

§ 1.1404 Pole attachment complaint proceedings.

~~(a) Pole attachment complaint proceedings shall be governed by the formal complaint rules in subpart E of this part, §§ 1.720-1.740, except as otherwise provided in this subpart J.~~

(b) The complaint shall be accompanied by a certification of service on the named defendant, and each of the Federal, State, and local governmental agencies that regulate any aspect of the services provided by the complainant or defendant.

~~(c) In a case where it is claimed that a rate, term, or condition is unjust or unreasonable, the complaint shall contain a statement that the State has not certified to the Commission that it regulates the rates, terms and conditions for pole attachments.~~ The complaint shall include a statement that the utility is not owned by any railroad, any person who is cooperatively organized or any person owned by the Federal Government or any State.

(d) The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable television system operator or telecommunications carrier and the utility. If there is no present pole attachment agreement, the complaint shall contain:

(1) A statement that the utility uses or controls poles, ducts, or conduits used or designated, in whole or in part, for wire communication; and

(2) A statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits, or rights-of-way.

(e) The complaint shall state with specificity the pole attachment rate, term or condition which is claimed to be unjust or unreasonable and provide all data and information supporting such claim. Data and information supporting the complaint (including all information necessary for the Commission to apply the rate formulas in § 1.1406 should be based upon historical or original cost methodology, insofar as possible. Data should be derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies (identify source). The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.

(f) A utility must supply a cable television system operator or telecommunications carrier the information required in paragraph (e) of this section, as applicable, along with the supporting pages from its ARMIS, FERC Form 1, or other report to a regulatory body, and calculations made in connection with these figures, within 30 days of the request by the cable television system operator or telecommunications carrier.

(g) If any of the information and data required in paragraphs (e) and (f) of this section is not provided to the cable television system operator or telecommunications carrier by the utility upon reasonable request, the cable

television system operator or telecommunications carrier shall include a statement indicating the steps taken to obtain the information from the utility, including the dates of all requests. No complaint filed by a cable television system operator or telecommunications carrier shall be dismissed where the utility has failed to provide the information required under paragraphs (e) and (f) after such reasonable request.

~~§ 1.1405 Dismissal of pole attachment complaints for lack of jurisdiction.~~

~~(a) The complaint shall be dismissed for lack of jurisdiction in any case where a suitable certificate has been filed by a State pursuant to paragraph (b) of this section. Such certificate shall be conclusive proof of lack of jurisdiction of this Commission. A complaint alleging a denial of access shall be dismissed for lack of jurisdiction in any case where the defendant or a State offers proof that the State is regulating such access matters. Such proof should include a citation to state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum. A complaint against a utility shall also be dismissed if the utility does not use or control poles, ducts, or conduits used or designated, in whole or in part, for wire communication or if the utility does not meet the criteria of § 1.1402(a).~~

~~(b) It will be rebuttably presumed that the state is not regulating pole attachments if the Commission does not receive certification from a state that:~~

~~(1) It regulates rates, terms and conditions for pole attachments;~~

~~(2) In so regulating such rates, terms and conditions, the state has the authority to consider and does consider the interests of the consumers of the services offered via such attachments, as well as the interests of the consumers of the utility services; and~~

~~(3) It has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state).~~

~~(c) Upon receipt of such certification, the Commission shall give public notice. In addition, the Commission shall compile and publish from time to time, a listing of states which have provided certification.~~

~~(d) Upon receipt of such certification, the Commission shall forward any pending case thereby affected to the state regulatory authority, shall so notify the parties involved and shall give public notice thereof.~~

~~(e) Certification shall be by order of the state regulatory body or by a person having lawful delegated authority under provisions of state law to submit such certification. Said person shall provide in writing a statement that he or she has such authority and shall cite the law, regulation or other instrument conferring such authority.~~

~~(f) Notwithstanding any such certification, jurisdiction will revert to this Commission with respect to any individual matter, unless the state takes final action on a complaint regarding such matter:~~

~~(1) Within 180 days after the complaint is filed with the state, or~~

~~(2) Within the applicable periods prescribed for such final action in such rules and regulations of the state, if the prescribed period does not extend beyond 360 days after the filing of such complaint.~~

§ 1.1406 Commission consideration of the complaint.

(a) The complainant shall have the burden of establishing a prima facie case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. 224(f). If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate. In a case involving a denial of access, the utility shall

have the burden of proving that the denial was lawful, once a prima facie case is established by the complainant.

(b) The Commission shall determine whether the rate, term or condition complained of is just and reasonable. For the purposes of this paragraph, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way. The Commission shall exclude from actual capital costs those reimbursements received by the utility from cable operators and telecommunications carriers for non-recurring costs.

(c) The Commission shall deny the complaint if it determines that the complainant has not established a prima facie case, or that the rate, term or condition is just and reasonable, or that the denial of access was lawful.

(d) The Commission will apply the following formulas for determining a maximum just and reasonable rate:

(1) The following formula shall apply to attachments to poles by cable operators providing cable services. This formula shall also apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \text{Space Factor} \times \frac{\text{Net Cost of a Bare Pole}}{\text{Carrying Charge Rate}}$$

Where

$$\text{Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}}$$

(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (d)(2)(i) or (d)(2)(ii) of this section.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph (d)(2)(ii) of this section:

$$\text{Rate} = \text{Space Factor} \times \text{Cost}$$

Where Cost

in Service Areas where the number of Attaching Entities is 5 = 0.66 X (Net Cost of a Bare Pole X Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 4 = 0.56 X (Net Cost of a Bare Pole X Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 3 = 0.44 X (Net Cost of a Bare Pole X Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 2 = 0.31 X (Net Cost of a Bare Pole X Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is not a whole number = N X (Net Cost of a Bare Pole X Carrying Charge Rate), where N is interpolated from the cost allocator associated with the nearest whole numbers above and below the number of Attaching Entities.

$$\text{Where Space Factor} = \frac{\left(\frac{\text{Space Occupied}}{\text{Pole Height}} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}}$$

(ii) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph (d)(2)(i) of this section:

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\frac{\text{Maintenance and Administrative}}{\text{Carrying Charge Rate}} \right]$$

$$\text{Where Space Factor} = \frac{\left(\frac{\text{Space Occupied}}{\text{Pole Height}} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}}$$

(3) The following formula shall apply to attachments to conduit by cable operators and telecommunications carriers:

$$\text{Maximum Rate per Linear Ft./m.} = \left[\frac{1}{\text{Number of Ducts}} \times \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \right] \times \left[\frac{\text{No. of Ducts} \times \text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \right] \times \text{Carrying Charge Rate}$$

(Percentage of Conduit Capacity) (Net Linear Cost of a Conduit)

(4) If no inner-duct is installed the fraction, "1 Duct divided by the No. of Inner-Ducts" is presumed to be 1/2.

(e) A price cap company, or a rate-of-return carrier electing to provide service pursuant to § 61.50 of this chapter, that opts-out of part 32 of this chapter may calculate attachment rates for its poles, ducts, conduits, and rights of way using either part 32 accounting data or GAAP accounting data. A company using GAAP accounting data to compute rates to attach to its poles, ducts, conduits, and rights of way in any of the first twelve years after opting-out must adjust (increase or decrease) its annually computed GAAP-based rates by an Implementation Rate Difference for each of the remaining years in the period. The Implementation Rate Difference means the difference between attachment rates calculated by the carrier under part 32 and under GAAP as of the last full year preceding the carrier's initial opting-out of part 32 USOA accounting requirements.

§ 1.1407 Remedies.

(a) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(1) Terminate the unjust and/or unreasonable rate, term, or condition;

(2) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission; and/or

(3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations.

(b) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms, and conditions.

§ 1.1408 Imputation of rates; modification costs.

(a) A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(b) The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

§ 1.1409 Allocation of Unusable Space Costs.

(a) With respect to the formula referenced in § 1.1406(d)(2), a utility shall apportion the cost of providing unusable space on a pole so that such apportionment equals two-thirds of the costs of providing unusable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(b) All attaching entities attached to the pole shall be counted for purposes of apportioning the cost of unusable space.

(c) Utilities may use the following rebuttable presumptive averages when calculating the number of attaching entities with respect to the formula referenced in § 1.1406(d)(2). For non-urbanized service areas (under 50,000 population), a presumptive average number of attaching entities of three. For urbanized service areas (50,000 or higher population), a presumptive average number of attaching entities of five. If any part of the utility's service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities.

(d) A utility may establish its own presumptive average number of attaching entities for its urbanized and non-urbanized service area as follows:

(1) Each utility shall, upon request, provide all attaching entities and all entities seeking access the methodology and information upon which the utilities presumptive average number of attachers is based.

(2) Each utility is required to exercise good faith in establishing and updating its presumptive average number of attachers.

(3) The presumptive average number of attachers may be challenged by an attaching entity by submitting information demonstrating why the utility's presumptive average is incorrect. The attaching entity should also submit what it believes should be the presumptive average and the methodology used. Where a complete inspection is impractical, a statistically sound survey may be submitted.

(4) Upon successful challenge of the existing presumptive average number of attachers, the resulting data determined shall be used by the utility as the presumptive number of attachers within the rate formula.

§ 1.1410 Use of presumptions in calculating the space factor.

With respect to the formulas referenced in § 1.1406(d)(1) and (d)(2), the space occupied by an attachment is presumed to be one foot. The amount of usable space is presumed to be 13.5 feet. The amount of unusable space is presumed to be 24 feet. The pole height is presumed to be 37.5 feet. These presumptions may be rebutted by either party.

§ 1.1411 Timeline for access to utility poles.

(a) Definitions.

(1) The term "attachment" means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(2) The term "new attacher" means a cable television system or telecommunications carrier requesting to attach new or upgraded facilities to a pole owned or controlled by a utility.

(3) The term "existing attacher" means any entity with equipment on a utility pole.

(b) All time limits in this subsection are to be calculated according to § 1.4.

(c) Application review and survey--(1) Application completeness. A utility shall review a new attacher's attachment application for completeness before reviewing the application on its merits. A new attacher's attachment application is considered complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in requirements that are available in writing publicly at the time of submission of the application, to begin to survey the affected poles.

(i) A utility shall determine within 10 business days after receipt of a new attacher's attachment application whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the utility rejects the application as incomplete but fails to specify any reasons in its response, then the application is deemed complete. If the utility timely notifies the new attacher that its attachment application is not complete, then it must specify all reasons for finding it incomplete.

(ii) Any resubmitted application need only address the utility's reasons for finding the application incomplete and shall be deemed complete within 5 business days after its resubmission, unless the utility specifies to the new attacher which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The new attacher may follow the resubmission

procedure in this paragraph as many times as it chooses so long as in each case it makes a bona fide attempt to correct the reasons identified by the utility, and in each case the deadline set forth in this paragraph shall apply to the utility's review.

(2) Application review on the merits. A utility shall respond to the new attacher either by granting access or, consistent with § 1.1403(b), denying access within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in paragraph (g) of this section). A utility may not deny the new attacher pole access based on a preexisting violation not caused by any prior attachments of the new attacher.

(3) Survey.

(i) A utility shall complete a survey of poles for which access has been requested within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in paragraph (g) of this section).

(ii) A utility shall permit the new attacher and any existing attachers on the affected poles to be present for any field inspection conducted as part of the utility's survey. A utility shall use commercially reasonable efforts to provide the affected attachers with advance notice of not less than 3 business days of any field inspection as part of the survey and shall provide the date, time, and location of the survey, and name of the contractor performing the survey.

(iii) Where a new attacher has conducted a survey pursuant to paragraph (j)(3) of this section, a utility can elect to satisfy its survey obligations in this paragraph by notifying affected attachers of its intent to use the survey conducted by the new attacher pursuant to paragraph (j)(3) of this section and by providing a copy of the survey to the affected attachers within the time period set forth in paragraph (c)(3)(i) of this section. A utility relying on a survey conducted pursuant to paragraph (j)(3) of this section to satisfy all of its obligations under paragraph (c)(3)(i) of this section shall have 15 days to make such a notification to affected attachers rather than a 45 day survey period.

(d) Estimate. Where a new attacher's request for access is not denied, a utility shall present to a new attacher a detailed, itemized estimate, on a pole-by-pole basis where requested, of charges to perform all necessary make-ready within 14 days of providing the response required by paragraph (c) of this section, or in the case where a new attacher has performed a survey, within 14 days of receipt by the utility of such survey. Where a pole-by-pole estimate is requested and the utility incurs fixed costs that are not reasonably calculable on a pole-by-pole basis, the utility present charges on a per-job basis rather than present a pole-by-pole estimate for those fixed cost charges. The utility shall provide documentation that is sufficient to determine the basis of all estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate.

(1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.

(2) A new attacher may accept a valid estimate and make payment any time after receipt of an estimate, except it may not accept after the estimate is withdrawn.

(3) Final invoice: After the utility completes make-ready, if the final cost of the work differs from the estimate, it shall provide the new attacher with a detailed, itemized final invoice of the actual make-ready charges incurred, on a pole-by-pole basis where requested, to accommodate the new attacher's attachment. Where a pole-by-pole estimate is requested and the utility incurs fixed costs that are not reasonably calculable on a pole-by-pole basis, the utility may present charges on a per-job basis rather than present a pole-by-pole invoice for those fixed cost charges. The utility shall provide documentation that is sufficient to determine the basis of all estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate.

(4) A utility may not charge a new attacher to bring poles, attachments, or third-party equipment into compliance with current published safety, reliability, and pole owner construction standards guidelines if

such poles, attachments, or third-party equipment were out of compliance because of work performed by a party other than the new attacher prior to the new attachment.

(e) Make-ready. Upon receipt of payment specified in paragraph (d)(2) of this section, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

(1) For attachments in the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready in the communications space that is no later than 30 days after notification is sent (or up to 75 days in the case of larger orders as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that if make-ready is not completed by the completion date set by the utility in paragraph (e)(1)(ii) in this section, the new attacher may complete the make-ready specified pursuant to paragraph (e)(1)(i) in this section.

(v) State the name, telephone number, and email address of a person to contact for more information about the make-ready procedure.

(2) For attachments above the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State that if make-ready is not completed by the completion date set by the utility in paragraph (e)(2)(ii) in this section (or, if the utility has asserted its 15-day right of control, 15 days later), the new attacher may complete the make-ready specified pursuant to paragraph (e)(1)(i) of this section.

(vi) State the name, telephone number, and email address of a person to contact for more information about the make-ready procedure.

(3) Once a utility provides the notices described in this section, it then must provide the new attacher with a copy of the notices and the existing attachers' contact information and address where the utility sent the notices. The new attacher shall be responsible for coordinating with existing attachers to encourage their completion of make-ready by the dates set forth by the utility in paragraph (e)(1)(ii) of this section for communications space attachments or paragraph (e)(2)(ii) of this section for attachments above the communications space.

(f) A utility shall complete its make-ready in the communications space by the same dates set for existing attachers in paragraph (e)(1)(ii) of this section or its make-ready above the communications space by the same dates for existing attachers in paragraph (e)(2)(ii) of this section (or if the utility has asserted its 15-day right of control, 15 days later).

(g) For the purposes of compliance with the time periods in this section:

(1) A utility shall apply the timeline described in paragraphs (c) through (e) of this section to all requests for attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.

(2) A utility may add 15 days to the survey period described in paragraph (c) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(3) A utility may add 45 days to the make-ready periods described in paragraph (e) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(4) A utility shall negotiate in good faith the timing of all requests for attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(5) A utility may treat multiple requests from a single new attacher as one request when the requests are filed within 30 days of one another.

(h) Deviation from the time limits specified in this section.

(1) A utility may deviate from the time limits specified in this section before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(2) A utility may deviate from the time limits specified in this section during performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete make-ready within the time limits specified in this section. A utility that so deviates shall immediately notify, in writing, the new attacher and affected existing attachers and shall identify the affected poles and include a detailed explanation of the reason for the deviation and a new completion date. The utility shall deviate from the time limits specified in this section for a period no longer than necessary to complete make-ready on the affected poles and shall resume make-ready without discrimination when it returns to routine operations. A utility cannot delay completion of make-ready because of a preexisting violation on an affected pole not caused by the new attacher.

(3) An existing attacher may deviate from the time limits specified in this section during performance of complex make-ready for reasons of safety or service interruption that renders it infeasible for the existing attacher to complete complex make-ready within the time limits specified in this section. An existing attacher that so deviates shall immediately notify, in writing, the new attacher and other affected existing attachers and shall identify the affected poles and include a detailed explanation of the basis for the deviation and a new completion date, which in no event shall extend beyond 60 days from the date the notice described in paragraph (e)(1) of this section is sent by the utility (or up to 105 days in the case of larger orders described in paragraph (g) of this section). The existing attacher shall deviate from the time limits specified in this section for a period no longer than necessary to complete make-ready on the affected poles.

(i) Self-help remedy--(1) Surveys. If a utility fails to complete a survey as specified in paragraph (c)(3)(i) of this section, then a new attacher may conduct the survey in place of the utility and, as specified in § 1.1412, hire a contractor to complete a survey.

(i) A new attacher shall permit the affected utility and existing attachers to be present for any field inspection conducted as part of the new attacher's survey.

(ii) A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than 3 business days of a field inspection as part of any survey it conducts. The notice shall include the date and time of the survey, a description of the work involved, and the name of the contractor being used by the new attacher.

(2) Make-ready. If make-ready is not complete by the date specified in paragraph (e) of this section, then a new attacher may conduct the make-ready in place of the utility and existing attachers, and, as specified in § 1.1412, hire a contractor to complete the make-ready.

(i) A new attacher shall permit the affected utility and existing attachers to be present for any make-ready. A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than 5 days of the impending make-ready. The notice shall include the date and time of the make-ready, a description of the work involved, and the name of the contractor being used by the new attacher.

(ii) The new attacher shall notify an affected utility or existing attacher immediately if make-ready damages the equipment of a utility or an existing attacher or causes an outage that is reasonably

likely to interrupt the service of a utility or existing attacher. Upon receiving notice from the new attacher, the utility or existing attacher may either:

(A) Complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage; or

(B) Require the new attacher to fix the damage at its expense immediately following notice from the utility or existing attacher.

(iii) A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole. The notice shall provide the affected utility and existing attachers at least 90 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage or code violations caused by make-ready conducted by the new attacher on their equipment. If the utility or an existing attacher notifies the new attacher of such damage or code violations, then the utility or existing attacher shall provide adequate documentation of the damage or the code violations. The utility or existing attacher may either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations or require the new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher.

(3) Pole replacements. Self-help shall not be available for pole replacements.

(j) One-touch make-ready option. For attachments involving simple make-ready, new attachers may elect to proceed with the process described in this paragraph in lieu of the attachment process described in paragraphs (c) through (f) and (i) of this section.

(1) Attachment application.

(i) A new attacher electing the one-touch make-ready process must elect the one-touch make-ready process in writing in its attachment application and must identify the simple make-ready that it will perform. It is the responsibility of the new attacher to ensure that its contractor determines whether the make-ready requested in an attachment application is simple.

(ii) The utility shall review the new attacher's attachment application for completeness before reviewing the application on its merits. An attachment application is considered complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission of the application, to make an informed decision on the application.

(A) A utility has 10 business days after receipt of a new attacher's attachment application in which to determine whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the utility rejects the application as incomplete but fails to specify any reasons in the application, then the application is deemed complete.

(B) If the utility timely notifies the new attacher that its attachment application is not complete, then the utility must specify all reasons for finding it incomplete. Any resubmitted application need only address the utility's reasons for finding the application incomplete and shall be deemed complete within 5 business days after its resubmission, unless the utility specifies to the new attacher which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The applicant may follow the resubmission procedure in this paragraph as many times as it chooses so long as in each case it makes a bona fide attempt to correct the reasons identified by the utility, and in each case the deadline set forth in this paragraph shall apply to the utility's review.

(2) Application review on the merits. The utility shall review on the merits a complete application requesting one-touch make-ready and respond to the new attacher either granting or denying an

application within 15 days of the utility's receipt of a complete application (or within 30 days in the case of larger orders as described in paragraph (g) of this section).

(i) If the utility denies the application on its merits, then its decision shall be specific, shall include all relevant evidence and information supporting its decision, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards.

(ii) Within the 15-day application review period (or within 30 days in the case of larger orders as described in paragraph (g) of this section), a utility may object to the designation by the new attachers' contractor that certain make-ready is simple. If the utility objects to the contractor's determination that make-ready is simple, then it is deemed complex. The utility's objection is final and determinative so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, made in good faith, and explains how such evidence and information relate to a determination that the make-ready is not simple.

(3) Surveys. The new attacher is responsible for all surveys required as part of the one-touch make-ready process and shall use a contractor as specified in § 1.1412(b).

(i) The new attacher shall permit the utility and any existing attachers on the affected poles to be present for any field inspection conducted as part of the new attacher's surveys. The new attacher shall use commercially reasonable efforts to provide the utility and affected existing attachers with advance notice of not less than 3 business days of a field inspection as part of any survey and shall provide the date, time, and location of the surveys, and name of the contractor performing the surveys.

(ii) [Reserved].

(4) Make-ready. If the new attacher's attachment application is approved and if it has provided 15 days prior written notice of the make-ready to the affected utility and existing attachers, the new attacher may proceed with make-ready using a contractor in the manner specified for simple make-ready in § 1.1412(b).

(i) The prior written notice shall include the date and time of the make-ready, a description of the work involved, the name of the contractor being used by the new attacher, and provide the affected utility and existing attachers a reasonable opportunity to be present for any make-ready.

(ii) The new attacher shall notify an affected utility or existing attacher immediately if make-ready damages the equipment of a utility or an existing attacher or causes an outage that is reasonably likely to interrupt the service of a utility or existing attacher. Upon receiving notice from the new attacher, the utility or existing attacher may either:

(A) Complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage; or

(B) Require the new attacher to fix the damage at its expense immediately following notice from the utility or existing attacher.

(iii) In performing make-ready, if the new attacher or the utility determines that make-ready classified as simple is complex, then that specific make-ready must be halted and the determining party must provide immediate notice to the other party of its determination and the impacted poles. The affected make-ready shall then be governed by paragraphs (d) through (i) of this section and the utility shall provide the notice required by paragraph (e) of this section as soon as reasonably practicable.

(5) Post-make-ready timeline. A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole. The notice shall provide the affected utility and existing attachers at least 90 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the

new attacher of any damage or code violations caused by make-ready conducted by the new attacher on their equipment. If the utility or an existing attacher notifies the new attacher of such damage or code violations, then the utility or existing attacher shall provide adequate documentation of the damage or the code violations. The utility or existing attacher may either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations or require the new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher.

§ 1.1412 Contractors for survey and make-ready.

(a) Contractors for self-help complex and above the communications space make-ready. A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform self-help surveys and make-ready that is complex and self-help surveys and make-ready that is above the communications space on its poles. The new attacher must use a contractor from this list to perform self-help work that is complex or above the communications space. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in paragraphs (c)(1) through (5) of this section and the utility may not unreasonably withhold its consent.

(b) Contractors for simple work. A utility may, but is not required to, keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and simple make-ready. If a utility provides such a list, then the new attacher must choose a contractor from the list to perform the work. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in paragraphs (c)(1) through (5) of this section and the utility may not unreasonably withhold its consent.

(1) If the utility does not provide a list of approved contractors for surveys or simple make-ready or no utility-approved contractor is available within a reasonable time period, then the new attacher may choose its own qualified contractor that meets the requirements in paragraph (c) of this section. When choosing a contractor that is not on a utility-provided list, the new attacher must certify to the utility that its contractor meets the minimum qualifications described in paragraph (c) of this section when providing notices required by § 1.1411(i)(1)(ii), (i)(2)(i), (j)(3)(i), and (j)(4).

(2) The utility may disqualify any contractor chosen by the new attacher that is not on a utility-provided list, but such disqualification must be based on reasonable safety or reliability concerns related to the contractor's failure to meet any of the minimum qualifications described in paragraph (c) of this section or to meet the utility's publicly available and commercially reasonable safety or reliability standards. The utility must provide notice of its contractor objection within the notice periods provided by the new attacher in § 1.1411(i)(1)(ii), (i)(2)(i), (j)(3)(i), and (j)(4) and in its objection must identify at least one available qualified contractor.

(c) Contractor minimum qualification requirements. Utilities must ensure that contractors on a utility-provided list, and new attachers must ensure that contractors they select pursuant to paragraph (b)(1) of this section, meet the following minimum requirements:

(1) The contractor has agreed to follow published safety and operational guidelines of the utility, if available, but if unavailable, the contractor shall agree to follow National Electrical Safety Code (NESC) guidelines;

(2) The contractor has acknowledged that it knows how to read and follow licensed-engineered pole designs for make-ready, if required by the utility;

(3) The contractor has agreed to follow all local, state, and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Persons under the requirements of the Occupational and Safety Health Administration (OSHA) rules;

(4) The contractor has agreed to meet or exceed any uniformly applied and reasonable safety and reliability thresholds set by the utility, if made available; and

(5) The contractor is adequately insured or will establish an adequate performance bond for the make-ready it will perform, including work it will perform on facilities owned by existing attachers.

(d) The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

§ 1.1413 Complaints by incumbent local exchange carriers.

(a) A complaint by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a local exchange carrier or that a utility's rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this part.

(b) In complaint proceedings challenging utility pole attachment rates, terms, and conditions for pole attachment contracts entered into or renewed after the effective date of this section, there is a presumption that an incumbent local exchange carrier (or an association of incumbent local exchange carriers) is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system providing telecommunications services for purposes of obtaining comparable rates, terms, or conditions. In such complaint proceedings challenging pole attachment rates, there is a presumption that incumbent local exchange carriers (or an association of incumbent local exchange carriers) may be charged no higher than the rate determined in accordance with § 1.1406(e)(2). A utility can rebut either or both of the two presumptions in this paragraph (b) with clear and convincing evidence that the incumbent local exchange carrier receives benefits under its pole attachment agreement with a utility that materially advantages the incumbent local exchange carrier over other telecommunications carriers or cable television systems providing telecommunications services on the same poles.

§ 1.1414 Review period for pole attachment complaints.

~~(a) Pole access complaints. Except in extraordinary circumstances, final action on a complaint where a cable television system operator or provider of telecommunications service claims that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a utility should be expected no later than 180 days from the date the complaint is filed with the Commission. The Enforcement Bureau shall have the discretion to pause the 180-day review period in situations where actions outside the Enforcement Bureau's control are responsible for delaying review of a pole access complaint.~~

~~(b) Other pole attachment complaints. All other pole attachment complaints shall be governed by the review period in § 1.740.~~

§ 1.1415 Overlashing.

(a) Prior approval. A utility shall not require prior approval for:

(1) An existing attacher that overlashes its existing wires on a pole; or

(2) For third party overloading of an existing attachment that is conducted with the permission of an existing attacher.

(b) Preexisting violations. A utility may not prevent an attacher from overloading because another existing attacher has not fixed a preexisting violation. A utility may not require an existing attacher that overloads its existing wires on a pole to fix preexisting violations caused by another existing attacher.

(c) Advance notice. A utility may require no more than 15 days' advance notice of planned overloading. If a utility requires advance notice for overloading, then the utility must provide existing attachers with advance written notice of the notice requirement or include the notice requirement in the attachment agreement with the existing attacher. If after receiving advance notice, the utility determines that an overload would create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the party seeking to overload within the 15 day advance notice period and the party seeking to overload must address any identified issues before continuing with the overload either by modifying its proposal or by explaining why, in the party's view, a modification is unnecessary. A utility may not charge a fee to the party seeking to overload for the utility's review of the proposed overload.

(d) Overloaders' responsibility. A party that engages in overloading is responsible for its own equipment and shall ensure that it complies with reasonable safety, reliability, and engineering practices. If damage to a pole or other existing attachment results from overloading or overloading work causes safety or engineering standard violations, then the overloading party is responsible at its expense for any necessary repairs.

(e) Post-overloading review. An overloading party shall notify the affected utility within 15 days of completion of the overload on a particular pole. The notice shall provide the affected utility at least 90 days from receipt in which to inspect the overload. The utility has 14 days after completion of its inspection to notify the overloading party of any damage or code violations to its equipment caused by the overload. If the utility discovers damage or code violations caused by the overload on equipment belonging to the utility, then the utility shall inform the overloading party and provide adequate documentation of the damage or code violations. The utility may either complete any necessary remedial work and bill the overloading party for the reasonable costs related to fixing the damage or code violations or require the overloading party to fix the damage or code violations at its expense within 14 days following notice from the utility.

CERTIFICATE OF SERVICE

I, Joseph J. Starsick, Jr., Counsel for Defendant Frontier West Virginia Inc. and Citizens Telecommunications Company Inc, d/b/a Frontier Communications of West Virginia, do hereby certify that I have served the foregoing Initial Comments of Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, D/B/A Frontier Communications of West Virginia upon the parties of record by depositing a true copy thereof in an envelope in the United States mail, return receipt requested, this 15th day July 2019, addressed as follows:

VIA HAND DELIVERY:

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Chris Howard, Esquire
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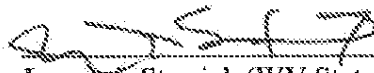
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July 9, 2019

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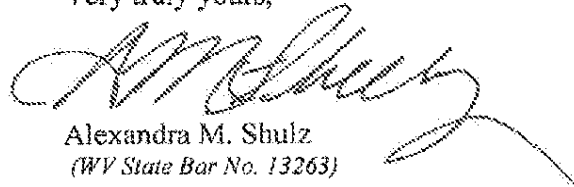
*Re: Case No. 19-0551-T-GI
General Investigation into Adopting and Implementing Rules
Governing Pole Attachments and Assumption of Commission
Jurisdiction Over Pole Attachments*

Dear Ms. Graley:

Please find enclosed for filing in the above-referenced proceeding, the original and twelve (12) copies of the "*Initial Comments of the West Virginia Broadband Enhancement Council*"

Should you have any questions, please do not hesitate to contact us.

Very truly yours,



Alexandra M. Shulz
(WV State Bar No. 13263)

AMS/dlm
Enclosure

cc: Linda Bouvette, Esquire
Christopher Howard, Esquire
Service List

PUBLIC SERVICE COMMISSION
WEST VIRGINIA
CHARLESTON

CASE NO. 19-0551-T-GI

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General Investigation into Adopting and
Implementing Rules Governing Pole
Attachments and Assumption of Commission
Jurisdiction Over Pole Attachments

INITIAL COMMENTS OF THE
WEST VIRGINIA BROADBAND ENHANCEMENT COUNCIL

Introduction

The West Virginia Broadband Enhancement Council (“Council”) was formed by an Act of the Legislature in 2016 to provide for and oversee the development of plans, processes and procedures for extending broadband access into unserved and underserved areas of West Virginia.

The Council supports the implementation of the Make Ready Pole Access Statute, *W. Va. Code* §31G-4-1, *et seq.*, as amended by Senate Bill 3 (“SB 3”) in the 2019 Legislative session.

In the June 4, 2019 order initiating the above-captioned proceeding, the Public Service Commission (“PSC”) expressed concern about two aspects of SB 3. First, the PSC expressed concern about the requirement that the PSC adopt the dispute resolution process of 47 C.F.R. §1.1401-1.1415 (“FCC Rules”), which differs from the PSC’s *Rules of Practice and Procedure* 150 W. Va. C.S.R. Series 1 (“PSC Rules”). Second, under the federal pole attachment dispute resolution procedures, the Federal Communications Commission (“FCC”) may award damages, whereas it has long been held that the PSC may not award damages.

Improving the reach and quality of broadband is absolutely vital to West Virginia’s efforts to attract and retain businesses and residents. SB 3 is appealing to broadband providers because it adopts a known framework. Many broadband providers operate on an interstate basis, and

distinctive state rules are a deterrent to entry and expansion. While retaining the substance of FCC procedures, SB 3 provides more accessible justice by giving the PSC jurisdiction to hear disputes.

The principal value of SB 3 is providing the known framework of the FCC Rules. While there is considerable activity on poles among the various users of those poles, and disputes do arise, the vast majority of those disputes get resolved without the need for any party to file a formal complaint with a regulatory body. In the past two full calendar years, the FCC, with jurisdiction over pole attachment disputes in as many as 29 states¹, has issued only fourteen final orders in pole attachment dispute cases. The principal value of the FCC Rules is the shadow that they cast, which allows the parties to work out disputes knowing the FCC substantive and procedural rules will apply in the event the dispute is not resolved consensually. The actual mechanics of the FCC dispute resolution process are seldom exercised, and that is likely to be the PSC's experience when it adopts them.

Damages issues arise even less frequently in pole attachment cases. Only two of the FCC's fourteen final pole attachment orders issued in 2017 and 2018 involved a claim for damages, and one of those was resolved by the issuance of a refund. The Commission has long held that it has authority to order refunds.² The FCC Rules also contemplate that a party may bring a claim for damages before another tribunal.³ This has long been the procedure in West Virginia for claims against a utility that involve damages. Therefore, the Commission's adoption of the FCC Rules is workable in West Virginia, and the Council urges the Commission to promptly initiate a

¹ The last report by the FCC on the number of states that had reverse pre-empted the Federal Pole Attachment Act was issued in 2010, and at that time the FCC retained jurisdiction over twenty-nine states. *States That Have Certified That They Regulate Pole Attachments*, 25 F.C.C. Rcd. 5541, 5541 (2010).

² E.g., *RCS Trucking and Freight, Inc. v. William A. Young dba Mitch's 24 Hour Towing and Storage*, Case No. 18-0441-MC-FC (March 12, 2019 Commission Order).

³ 47 C.F.R. 1.722(h).

rulemaking adopting the FCC Rules to promote the expansion and improvement of broadband in the State.

Addressing Procedural Discrepancies

Senate Bill 3 requires the PSC to adopt the dispute resolution process in the FCC Rules.⁴ This will make West Virginia practices consistent with existing federal practice and promote uniformity with federal law. This will also create a local forum for pole attachment issues that is more accessible for dispute resolution than the FCC. Uniform practices and a local dispute resolution forum create an ease of doing business, which is not only good for the broadband providers currently operating in West Virginia, but will also help attract more providers to the state.

The statutory language does not give the PSC the option of applying the PSC Rules to a pole attachment dispute, as the PSC Rules are often incongruous with the process contained in the FCC Rules—most significantly when concerning the due dates for certain actions to occur. While it may be an unwelcome adjustment for the PSC, the PSC is obligated to adopt a separate set of procedural rules that will apply only to pole attachment dispute cases. It is likely that few such cases will be filed with the PSC, as very few pole attachment cases are filed with the FCC, which has jurisdiction over pole attachment disputes in twenty-nine states as of the FCC's last report on the matter.⁵ The FCC currently has only ten cases pending before the Market Disputes Resolution Division, which hears Section 208 Formal Complaints, Roaming Formal Complaints, as well as Section 224 Pole Attachment Complaints.⁶ Only four of these pending complaints concern

⁴ W. Va. Code §31G-4-4(b).

⁵ *States That Have Certified That They Regulate Pole Attachments*, 25 F.C.C. Rod. 5541, 5541 (2010).

⁶ *EB - Market Disputes Resolution Division Pending Complaints*, Federal Communications Commission (June 25, 2019), <https://www.fcc.gov/general/eb-market-disputes-resolution-division-pending-complaints>.

Section 224.⁷ Therefore, the principal value in adopting the FCC Regulations is the informative effect they will have on the conduct of parties using poles, which will drive them to reach consensual solutions because of the understood framework. The Council acknowledges that the PSC will need to stand ready to receive pole attachment complaints and to apply a distinct set of rules, but on a day-to-day basis, the PSC's pole attachment rules are unlikely to place much demand upon the Commission's resources.

The Council believes that the PSC should adopt the FCC Rules largely as is, with only a few modifications to reflect staffing structure differences between the FCC and the PSC. Under the FCC Rules, the Staff of the FCC may make oral rulings on discovery disputes at status conferences, whereas at the PSC, only the Commissioners or an Administrative Law Judge may resolve a discovery dispute, which is accomplished through a written order.⁸ It would not distort the FCC process for the PSC's pole attachment rules to provide that only Administrative Law Judges or the Commissioners may resolve discovery disputes, as assigning responsibility for a function under the FCC Rules to a different job title does not substantively modify the FCC process. Also, the PSC could adhere to its practice of making nearly all rulings in writing, as the FCC Rules make oral rulings at status conferences discretionary.

The FCC Rules require parties to pre-file a complaint with the FCC's Market Disputes Resolution Division and hold a conference with the parties and FCC Staff before formally filing a complaint, whereas the PSC Rules have no pre-filing requirement.⁹ The PSC does not have a division comparable to the FCC's Market Disputes Resolution Division. However, the PSC does

⁷ *Id.* (Zuo Canton, LLC v. PPL Electric Utilities Corp., EB 17-284; MAW Communications, Inc. v. PPL Electric Utilities Corp., EB 19-29; AT&T Alabama v. Alabama Power Co., EB 19-119; Crown Castle Fiber LLC (Access) v. Commonwealth Edison Co., EB 19-169)

⁸ 47 C.F.R. 1.733(d).

⁹ 47 C.F.R. 1.724.

have a member of the Administrative Law Judge Division whose primary role is to participate in mediations. The PSC could have this Administrative Law Judge perform the pre-filing mediation role required under the FCC Rules.

Another procedural discrepancy is that the FCC Rule contemplates the use of the FCC docket, under which parties can electronically file pleadings and other materials directly onto the FCC web docket.¹⁰ The PSC has an excellent web docket. However, under the PSC Rules, all filings are made on paper, and the PSC's Executive Secretary's Office uploads the filings to the PSC web docket. The PSC accepts fax filings so long as they are followed by paper filings. This difference in administrative practices is not a significant departure from the FCC's dispute resolution process, and the PSC can retain its existing docketing practice for pole attachment cases. Alternatively, the PSC could amend its Procedural Rules to begin accepting electronic filing of pleadings, as many courts and agencies are doing, for all filings with the PSC.

This new set of rules would apply only to pole attachment cases, thus not affecting the manner in which the PSC exercises its jurisdiction over other subject matters. Furthermore, adopting the FCC Rules would not violate any West Virginia statute, thus the PSC's adoption of such rules should also withstand a legal challenge.

Damages Are Not an Obstacle

Under the FCC Rules, the FCC has jurisdiction to award damages, however several long-standing decisions of the West Virginia Supreme Court of Appeals hold that the PSC does not have jurisdiction to award damages.¹¹

¹⁰ 47 C.F.R. 1.734(f).

¹¹ *Wheeling Power Corp. v. Pub. Serv. Comm'n*, 110 S.E. 487 (W. Va. 1922); *Carter v. Ellis*, 117 S.E.2d 594 (W. Va. 1960).

Under the FCC Rules, the FCC is not the only forum in which a party that believes it has been harmed by another party's wrongful actions concerning a pole attachment can seek damages. The FCC Rules contemplate that a party may file a claim for damages with another tribunal.¹² Any well-advised client in West Virginia would follow that same practice. The issue of the PSC awarding damages may remain theoretical for many years. In a future legislative session, the Legislature may give the PSC authority to grant damages in pole attachment cases only.

The FCC Rules allow the FCC to bifurcate pole complaint cases, with the FCC addressing whether a violation of the pole attachment rules has occurred in Phase I, and if a violation is established in Phase I, damages are considered and determined in Phase II.¹³ The FCC Rule does not state that it is the FCC that determines damages in Phase II. The PSC rules could retain a similar format, where the PSC addresses whether a violation has occurred in Phase I, and if it determines a violation has occurred, then the PSC could direct the aggrieved party to seek a determination of damages in Circuit Court. A party primarily interested in obtaining relief, as distinguished from an interest in expending funds on legal fees to make law, will likely follow this course.

If the PSC adopts rules that include this bifurcation approach, a challenge to those rules could not be brought until a party brought a pole attachment dispute to the PSC. Pursuant to established West Virginia case law, a party may not bring an action for declaratory judgment to challenge a statute unless a "justiciable controversy exists between the parties."¹⁴ The purpose of a declaratory judgment proceeding is to adjudicate "real controversies," and courts cannot consider future, contingent, or hypothetical events. *Id.* Therefore, a party cannot bring an action for

¹² 47 C.F.R. 1.722(h).

¹³ 47 C.F.R. 1.723(d).

¹⁴ *Bd. of Ed. of Wyoming Cty. v. Bd. of Pub. Works*, 109 S.E.2d 552, 556 (W. Va. 1959).

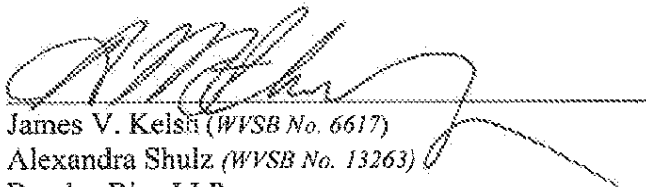
declaratory judgment against the PSC for adopting rules that are allegedly inconsistent with other state law or the FCC Rules until it has filed a pole attachment dispute with the PSC and an actual controversy exists as to the proper venue for determining damages.

Conclusion

The Commission must keep the prize in mind. The PSC exists to promote the public interest, not to rigidly adhere to its established practices. The PSC should accept a new and somewhat different responsibility to promote the public interest in more extensive broadband deployment in the state. Adoption of the FCC Rules with only slight modifications will create a framework that will support and encourage the expansion of broadband service in West Virginia.

WEST VIRGINIA BROADBAND
ENHANCEMENT COUNCIL

By Counsel



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PUBLIC SERVICE COMMISSION
WEST VIRGINIA
CHARLESTON

CASE NO. 19-0551-T-GI

General Investigation into Adopting and
Implementing Rules Governing Pole
Attachments and Assumption of Commission
Jurisdiction Over Pole Attachments

CERTIFICATE OF SERVICE

I, Alexandra Shulz, counsel for the West Virginia Broadband Enhancement Council (“Council”), do hereby certify that on this 9th day of July, 2019, copies of the foregoing “*Initial Comments of the West Virginia Broadband Enhancement Council*” was served upon the parties and/or counsel of record in this proceeding, and addressed as follows:

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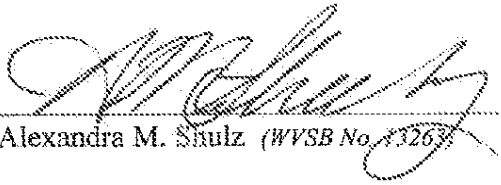
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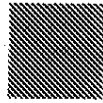
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July 15, 2019

VIA HAND DELIVERY

Connie Graley
Executive Secretary
Public Service Commission
201 Brooks Street
Charleston, WV 25301

04:08 PM JUL 15 2019 EXEC SEC DIV

Re: Case No. 19-0551-T-GI
General Investigation into Adopting and
Implementing Rules Governing Pole Attachments
and Assumption of Commission Jurisdiction
Over Pole Attachments.

Dear Ms. Graley:

On behalf of CTIA, please accept this letter as the **Initial Comments of CTIA** in response to the Commission Order issued June 4, 2019. An original and twelve (12) copies of this letter are provided.

Sincerely,

David B. Hanna
WV State Bar # 8813
dhanna@hannalawpllc.com

DBH/dh

Enclosures

cc: C. Howard, Esq.
L. Bouvette, Esq.
J. Roberts, Esq.

infrastructure deployment. Small cells are being deployed across the nation today to support these networks, and access to infrastructure, such as utility poles, is essential to such deployments. Wireless carriers' overall site deployments increased by 25,000 in 2018,³ and Accenture projects that small cell deployments will escalate rapidly from a nationwide cumulative deployment of roughly 52,000 in 2017 to over 800,000 nationwide by 2026.⁴ Accenture also projects that this investment will lead to \$500 billion in national GDP growth, three million jobs created, and over \$275 billion invested in 5G wireless infrastructure nationwide,⁵ but only if wireless infrastructure can be deployed efficiently. Wireless providers' capital expenditures in 2018 totaled \$27.4 billion, and total over \$253 billion since 2010.⁶

The wireless industry is a driver of West Virginia's economy, and deployment of 5G networks will only enhance the wireless industry's contributions to West Virginia's economy. There are already over 9,000 wireless-related jobs in West Virginia, and the wireless industry is responsible for a \$669 million contribution to West Virginia's GDP.⁷ Going forward, Accenture estimates that in Charleston, 5G deployment will lead to an estimated 447 new jobs and \$73 million in new GDP; in Huntington, 5G deployment will lead to an estimated 439 new jobs and \$42 million in new GDP; and in Morgantown, 5G deployment will lead to an estimated 285 new jobs and \$25 million in new GDP.⁸

³ See CTIA.org, "2019 Annual Survey Highlights" (June 20, 2019), available at <https://www.ctia.org/news/2019-annual-survey-highlights> ("CTIA Annual Survey for 2019") (last accessed July 12, 2019).

⁴ See accenturestrategy, "Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities" (February 2017) at 11, available at <https://api.ctia.org/wp-content/uploads/2017/02/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf> ("Smart Cities Report") (last accessed July 12, 2019).

⁵ See accenturestrategy, "Impact of Federal Regulatory Review on Small Cell Deployment" (March 12, 2018) at 3, available at <https://api.ctia.org/docs/default-source/default-document-library/small-cell-deployment-regulatory-review-costs-3-12-2018.pdf> (last accessed July 12, 2019).

⁶ See CTIA Annual Survey for 2019.

⁷ See Smart Cities Report; see also CTIA.org, "Positions: Infrastructure," available at <https://www.ctia.org/positions/infrastructure> (last accessed July 12, 2019).

⁸ See *id.*

To that end, the FCC's pole attachment rules and regulations have proven successful to promote deployment in the thirty states subject to federal jurisdiction over utility pole attachments, and adopting them will promote deployment in West Virginia. The FCC's pole rate methodologies have proven fair and effective, and courts have held that they result in rates that are just and reasonable for owners and attachers.⁹ The FCC's "shot-clock" timelines for make-ready, which the FCC recently streamlined,¹⁰ help to remove unnecessary delay in the attachment process. Further, West Virginia's adoption of the FCC's pole attachment regulations will help to create a consistent framework from state to state, which in turn will help facilitate broadband deployment. Neighboring Pennsylvania, for example, is also considering reverse-preempting the FCC's pole attachment jurisdiction in a similar proceeding to this, and has proposed wholesale adoption of the FCC's regulations and associated precedent.¹¹

However, the Commission is correct to note that there are some provisions of the rules that conflict with existing West Virginia statute. For example, the Order notes the conflict between venues for damages, suits for which may only be brought in circuit court according to statute, rather than the Commission.¹² Other examples include a requirement to file complaints via the FCC's online complaint portal and a requirement that the FCC's Market Disputes Resolution Division handle primary jurisdiction referrals.

⁹ See Fed. Comms. Comm'n, *In the Matter of Implementation of Section 224 of the Act: A National Broadband Plan for Our Future*, WC Docket No. 07-245, Report and Order and Order on Reconsideration (April 7, 2011) at ¶ 183 & n.569 (listing cases in which federal courts found the cable rate to be fully compensatory" to pole owners and concluding that "in virtually all cases the new telecom rate will recover at least an equivalent amount of costs").

¹⁰ See Fed. Comms. Comm'n, *In the Matter of Accelerating Wireline Broadband Deployment to Infrastructure Investment*, Third Report and Order, WC Docket No. 17-84 (released August 3, 2018), and Fed. Comms. Comm'n, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79 (released September 27, 2018).

¹¹ See, e.g., Comments of CTIA on Notice of Proposed Rulemaking before the Pennsylvania Public Utility Commission, Docket No. L-2018-3002672 (October 29, 2018).

¹² See Order at 3.

Although the Order notes that SB3 “does not authorize the Commission to adopt its own rules... or to adopt only those sections of the FCC formal complaint rules that are consistent with State law,”¹³ the inherent conflicts demand some sort of resolution, as suggested by the request for comment in the Order. It is a well-established tenet of statutory interpretation that statutes should be read to harmonize, when possible.¹⁴ Additionally, where the plain language creates conflicts, as it does here, courts look to legislative intent in order to determine the meaning of the statute.¹⁵

In this case, the Legislature could not have intended for the Commission to adopt rules that are in conflict with West Virginia statute, or contain provisions that make no sense. Instead, CTIA contends the Legislature intended for the Commission, as the state’s expert agency on the subject matter, to have discretion to adopt the FCC rules in a manner that harmonizes with the existing rule and statute. For example, as the Order points out, the FCC formal complaint rules require use of the FCC’s electronic filing system.¹⁶ To infer that this was the intent of the Legislature would create absurd (and impossible) results, as West Virginia pole complaints cannot be submitted via the FCC’s online portal. Similarly, as the state’s expert agency, the Commission is empowered to determine a reasonable resolution of the issue regarding damage awards, and it would be reasonable to decide in favor of the long-standing exclusive jurisdiction of the circuit courts over damage awards.

¹³ *Id.*

¹⁴ See, e.g., State ex rel. Pinson v. Vamey, 142 W.Va. 105, 109, 96 S.E.2d 72, 74 (1956) (holding that “where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions.”)

¹⁵ See, e.g., Ohio County Comm’n v. Manchin, 171 W.Va. 552, 301 S.E.2d 183 (1983) (holding “the initial step in such interpretative inquiry [of a statute] is to ascertain legislative intent”); State ex rel. McGraw v. Scott Runyon Pontiac-Buick, Inc., 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (1995).

¹⁶ See Order at 4.

Accordingly, the Commission should adopt the FCC's pole attachment rules and use its discretion as the expert agency to resolve any conflicts. CTIA also urges the Commission to adopt the FCC's interpretations of its rules as precedent, as well as any future changes to the FCC's pole attachment rules, or future interpretations thereof, on an automatic basis. CTIA supports this approach because it eliminates the potential uncertainty that a rulemaking at the state level might cause. Automatic adoption means each party gets one "bite of the apple" to contest a rule at the FCC, and not another chance at the state level. Keeping West Virginia regulations consistent with the FCC regulations will also lessen the likelihood that there will be redundant litigation over pole attachment regulations and the interpretation thereof, creating efficiency and ensuring fair application of a consistent set of rules, which will encourage deployment. If the Commission reaches the conclusion that it cannot automatically adopt future changes to the FCC rules due to conflict with West Virginia statute, the Commission could alternately promulgate a rule requiring it to open a rulemaking to adopt new FCC rules within a time certain. If there are no objections, the proposed changes could become effective, and if there are objections, the ordinary rulemaking process could apply. It cannot be emphasized enough, however, that consistency with the FCC regulations is important to promote regulatory certainty and the efficiency that it creates.

CTIA looks forward to continuing to working with the Commission to achieve the goal of making infrastructure deployment more efficient in West Virginia.

CTIA
By Counsel



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July 15, 2019

CERTIFICATE OF SERVICE

I, David B. Hanna, counsel for CTIA hereby certify that copies of the foregoing
Comments of CTIA, have been served upon the following, by first class United States
mail, postage prepaid, this 15th day of July 2019:

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VIA HAND DELIVERY

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Linda Bouvette, Esq.
Legal Division
Public Service Commission
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Charleston, WV 25301



DAVID B. HANNA

**BEFORE THE
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
CHARLESTON, WV**

In the Matter of)
)
General Investigation into Adopting and)
Implementing Rules Governing Pole) Case No. 19-0551-T-GI
Attachments and Assumption of Commission)
Jurisdiction Over Pole Attachments)

01:57 PM JUL 16 2019 EXEC SEC DIV

COMMENTS OF CROWN CASTLE

Pursuant to the Public Service Commission of West Virginia's (the "PSC") June 4, 2019 Order (the "Order") in the above-captioned proceeding initiating a general investigation into the adoption of rules governing pole attachment procedures as required by W.Va. Code § 31G-4-4, Crown Castle Fiber LLC ("Crown Castle") submits these comments regarding the adoption and implementation of the Pole Attachment Act, which was codified at 47 U.S.C. § 224, and attendant Federal Communications Commission ("FCC" or the "Commission") regulations, 47 C.F.R. §§ 1.1401-1.1425, and the FCC formal complaint procedures regarding pole attachments, as required by W.Va. Code § 31G-4-4. Specifically, Crown Castle provides comments and recommendations regarding how certain mechanics of the FCC's formal complaint procedures that are unique to the FCC operations can be implemented in West Virginia, as well as the PSC's new authority to adopt the FCC Rules that govern awarding damages and refunds, 47 C.F.R. § 1.723.

I. BACKGROUND REGARDING CROWN CASTLE

Crown Castle is one of the country's largest independent owners and operators of shared telecommunications infrastructure, with more than 60,000 distributed antenna system ("DAS") and small cell installations, and approximately 70,000 route miles of fiber. Crown Castle or its affiliates hold Certificates of Convenience and Necessity ("CCNs") or their equivalent in 48

states, Puerto Rico and the District of Columbia. Among other offerings, Crown Castle provides telecommunications services via attachments to utility poles, making it uniquely qualified to comment on the issues raised in the instant proceeding.

Crown Castle was first granted a CCN to provide interexchange and local telecommunications services within the State of West Virginia by the PSC on September 4, 2014.¹ Today, Crown Castle provides telecommunications services over fiber optic lines that it either owns or has rights to use in West Virginia and has DAS and small cell networks operating or in development in several communities in West Virginia. Crown Castle offers a host of telecommunications services in West Virginia, including a variety of enterprise and wholesale telecommunications services serving institutional, governmental, educational, and carrier customers via its fiber optic lines. Crown Castle currently has fiber deployed in at least two counties in West Virginia, and is actively marketing to expand its footprint.

Thus, Crown Castle has a direct interest in this proceeding, as it provides telecommunications services via facilities attached to utility poles, underground conduits, and in utility rights-of-way

II. THE PSC MUST ADOPT THE FCC DISPUTE RESOLUTION RULES

Newly-added Section 31G-4-4 of the West Virginia Code *requires* the PSC to adopt the federal Pole Attachment Act (which is codified at Section 224 of the Communications Act of 1934, as amended), and the FCC regulations governing pole attachments, inclusive of the dispute resolution process incorporated by reference in those regulations. Presumably, the legislature mandated adoption of these rules and procedures because it recognized that the FCC's procedures are specifically designed to create a streamlined process that facilitates and expedites

¹ The PSC issued the order granting Crown Castle's application for a CCN on August 15, 2014, which became final on September 4, 2014.

dispute resolution. Undoubtedly, the fact that the legislature required adoption of the FCC rules under the plain language of Section 31G-4-4 means the legislature intended for the PSC to adopt the FCC rules, in their entirety. However, the PSC raises questions in the Order regarding how it can implement some of the FCC rules that contain procedures, for example, that are “unique to FCC operations.”²

As discussed below, Crown Castle submits that the plain language of the statute requires the PSC to adopt the FCC rules as written. Only in certain very limited circumstances, can the PSC not strictly replicate aspects of the FCC procedures. Those limited circumstances exist where the language of the FCC rule is clearly intended to apply solely to FCC proceedings (such as using the FCC electronic filing system). However, in those cases, the PSC nonetheless must adopt regulations that follow the spirit and intent of the FCC rule, while adjusting the procedure only to the extent necessary to make the rule PSC-specific. Notwithstanding the foregoing, it is clear that the PSC will be required to update or overhaul some of its existing processes and rules to comply with the mandate of the Legislature.

A. The Legislature Mandated Adoption of Section 224 and the Specific FCC Rules Because They Provide an Efficient, Effective Framework for the Regulation of Pole Attachments

The FCC has approximately forty years of experience dealing with the complexities surrounding pole attachments and has developed appropriately tailored rules and regulations that provide an efficient and effective framework for regulation of pole attachments and resolving disputes. Indeed, in July 2018, the FCC issued a Report and Order creating an updated, uniform

² Order at 4.

set of procedural rules for formal complaint proceedings.³ The purpose was to “streamline[] and consolidate[] the procedural rules governing formal complaints.” (emphasis added).⁴ Pole attachment complaint proceedings are governed by these rules, along with proceedings brought against common carriers, and those concerning advanced communications services and equipment.⁵ According to the FCC, the revisions announced in the *2018 Formal Complaint Rules Order* “build off the best practices and experience of this staff” and “provid[e] greater transparency to parties involved in disputes before the agency.”⁶

Under the FCC’s rules, cases are not assigned to an Administrative Law Judge (“ALJ”). Instead, they are typically resolved by the FCC on the written record and involve only a complaint, answer, and reply, with some limited discovery and case management procedures built in.⁷ While motions to dismiss are permitted, such motions will not suspend any other filing deadlines under the rules unless staff issues an order suspending such deadlines, and the Commission has taken the position that such motions are “rarely warranted.”⁸

This streamlined process adopted by the Commission was intended to eliminate the many inefficiencies that occur in administrative law proceedings, which can involve protracted and costly proceedings, extensive discovery, and trial-type hearings. The need for “simple and

³ *In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enft Bureau*, Report and Order, 33 F.C.C. Rcd. 7178 (2018) [hereinafter *2018 Formal Complaint Rules Order*].

⁴ *Id.* at ¶ 1.

⁵ 47 C.F.R. § 1.1404(a).

⁶ *FCC Streamlines Formal Complaint Processes*, 2018 WL 3414798, at *1 (OHMSV July 12, 2018).

⁷ See *2018 Formal Complaint Rules Order*, *supra* note 2, at §1.721.

⁸ 47 C.F.R. § 1.1729(d); *2018 Formal Complaint Rules Order*, ¶¶ 12-14.

expeditious”⁹ procedures to adjudicate pole attachment disputes has been a key component of Section 224 since its inception. In the *FCC Notice of Proposed Rulemaking* that followed the addition of Section 224 to the Communications Act, the FCC emphasized:

It is clear from Section 224 and the Senate Committee Report that expeditious consideration should be given to complaints and that the Commission should have broad discretion to establish a simple procedure for evaluating complaints. Typically, we would expect that these complaints can be resolved on the basis of the filings. . . . Evidentiary hearings would be contemplated only in very exceptional cases where other simpler procedures would not be appropriate. The rules anticipate that the Commission would use the simplest and most expeditious procedures appropriate to each case, consistent with the complexity of the case and the importance of the issue involved. Further, Congress has given the Commission authority to establish guidelines for just and reasonable rates, terms and conditions for pole attachments. Once the Commission has established such guidelines, it can apply them on a case by case basis without formal proceedings.
16

As noted by current FCC Chairman, Ajit Pai, in his Statement accompanying the *2018 Formal Complaint Rules Order*, “[t]hese updates will simplify and expedite the process for handling formal complaints that will both serve the public better and make more efficient use of staff resources.”¹¹

By adding Section 31G-4-4, the Legislature clearly recognized that the FCC’s simplified procedures make it easier for attaching parties to obtain prompt relief. It therefore mandated adoption of the FCC’s dispute resolution rules, and the PSC can, should, and must adopt these rules in their entirety, with rare modification, as discussed below.

⁹ *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Notice of Proposed Rulemaking, 68 F.C.C.2d 3, 4-5 (1978).

¹⁰ *Id.* at 6-7.

¹¹ *2018 Formal Complaint Rules Order*, *supra* note 2, at *37.

B. The PSC Need Not Adopt Language that is Purely FCC-Specific, But Must Adopt Rules That Achieve the Same Result

As the PSC's Order recognizes, the West Virginia Rules of Practice and Procedure contained in 150 C.S.R. 1 (the "West Virginia Commission Procedural Rules") are generally less specific than the FCC's rules. The FCC rules also have provisions that differ and may sometimes conflict with PSC procedures.

To the extent that the FCC's rules are more specific, the PSC must adopt those rules as mandated by the Legislature. However, the PSC can make minor modifications to those FCC rules involving purely logistical matters that are "unique to FCC operations." Nonetheless, to the extent the PSC alters the FCC rules, the PSC's rules must achieve the same result. For example, the PSC's Order points to FCC formal complaint rules requiring parties to utilize the FCC's electronic filing system for most filings.¹² The PSC should alter the language of the FCC rules to reference its own filing system. To the extent that the PSC currently only accepts hard-copy filings for complaints, Crown Castle supports the PSC adopting an electronic filing option.

Another example, would be 47 C.F.R. § 1.721(l), which provides that "Pleadings shall be served on all parties to the proceeding in accordance with § 1.734 and shall include a certificate of service."¹³ Obviously, the PSC's rules do not have a "§ 1.734," but the PSC can and should adopt Section 1.721(l), but change "§ 1.734" to reference the rule number adopted by the PSC when it adopts 47 C.F.R. 1.734. Indeed, the PSC can and must adopt the substantive requirements of 47 C.F.R. § 1.734, such as the means of service. Other non-substantive FCC

¹² See 47 C.F.R. §§ 1.731, 1.734.

¹³ 47 C.F.R. § 1.721(l).

rules that may be altered to fit into the PSC's procedural framework include rules regarding filing fees, required copies, and the filing of confidential information.¹⁴

The PSC also may omit the FCC Rules that do not apply to pole attachment complaints. For example, 47 C.F.R. § 1.724 applies only to complaints governed by Section 208(b)(1) of the Communications Act, which are complaints against common carriers under a specific 5 month time clock.¹⁵ Thus, the requirements of 47 C.F.R. § 1.724, including matters such as pre-filing notice, do not apply to pole attachment complaints and are not relevant to the PSC's pole attachment regulation. Similarly, 47 C.F.R. § 1.738 applies to complaints filed pursuant to 47 U.S.C. § 271(d)(6)(B), which concerns procedures for Bell Operating Company provision of InterLATA services, is unrelated to pole attachment regulation. And 47 C.F.R. § 1.739 addresses how the FCC will deal with "primary jurisdiction referrals," which are also unrelated to pole attachment regulation.

However, for rules that are not facially inapplicable to pole attachment complaints or that involve a mere substitution of the PSC's counterpart to an FCC reference, if the FCC process differs from existing PSC process, the PSC must amend its procedures accordingly. Among other things, the FCC's rules lay out specific pleading requirements and provisions regarding the format and content of formal complaints, answers, replies, and motions.¹⁶ Those specific requirements have been developed by the FCC for a reason, and the Legislature intended that the PSC copy them. For instance, the FCC rules require defendants to answer a complaint filed against them within 30 days after service, and complainants must file a reply within ten days

¹⁴ See *id.* at §§ 1.722(k), 1.734.

¹⁵ 47 U.S.C. § 208(b)(1).

¹⁶ *Id.* at §§ 1.720-1.729.

thereafter.¹⁷ The FCC’s experience with pole attachment complaint proceedings has shown that these time frames provide defendants with sufficient time to “carefully and completely respond to a complex fact-based formal complaint,” and also “provides parties with a full opportunity to address the answer and to engage in discussions to narrow the facts and issues in dispute.”¹⁸ In addition, the rules require “executive level” pre-filing settlement discussions in all formal complaint proceedings, and codify the FCC Enforcement Bureau’s practice of providing staff-supervised mediation services to parties wishing to negotiate settlement of their dispute.¹⁹ The rules also provide FCC staff with the authority to order an initial status conference, and institute a uniform 270-day shot clock for resolution of formal complaints (except for those complaints already subject to a shorter deadline).²⁰ Such requirements, in the FCC’s experience, have “significantly improved prospects for resolving [pole attachment] disputes quickly” and have been found to be “an effective vehicle for refining the matters in dispute, addressing discovery requests, and exploring settlement options.”²¹ The PSC can and must adopt all such rules.

The FCC rules also adopt a uniform approach to discovery, thereby giving parties greater certainty regarding the discovery process and available discovery mechanisms.²² For instance, a complainant may serve up to ten written interrogatories with a complaint; defendants may serve up to ten with their answer; and complainants may serve five additional written interrogatories with their reply.²³ Permission is not needed, but the party requesting discovery must include an

¹⁷ *Id.* at §§ 1.726(a), 1.728(a); *2018 Formal Complaint Rules Order*, *supra* note 2, at ¶¶ 5-6.

¹⁸ *2018 Formal Complaint Rules Order*, *supra* note 2, at ¶¶ 5-6.

¹⁹ 47 C.F.R. §§ 1.722(g), 1.737; *2018 Formal Complaint Rules Order*, *supra* note 2, at ¶¶ 16-17.

²⁰ 47 C.F.R. § 1.733, 1.740; *2018 Formal Complaint Rules Order*, *supra* note 2, at ¶¶ 18, 20-23.

²¹ *2018 Formal Complaint Rules Order*, *supra* note 2, at ¶¶ 16, 18.

²² 47 C.F.R. § 1.730; *2018 Formal Complaint Rules Order*, *supra* note 2, at ¶ 9.

²³ *Id.*

explanation of why the information is relevant and not available from any other source.

Commission staff has discretion to allow additional discovery, such as depositions and document productions.²⁴

In contrast, in West Virginia, discovery is not specifically provided for in the context of formal complaint proceedings, and “[t]he Commission will not resolve discovery disputes unless a motion is filed seeking Commission action.”²⁵ The FCC’s rules seek to avoid engaging in such costly discovery motions. They provide for discovery in formal complaint proceedings and permits staff to “rule in writing on the scope of, and schedule for answering, any disputed interrogatories . . .”²⁶ As with the FCC procedures regarding pleadings, the FCC’s enhanced discovery mechanisms create a streamlined, predictable process that facilitates narrowing the facts and issues in dispute.²⁷ Section 31G-4-4 mandates that the PSC adopt the precise procedures and rules in the FCC’s Rules.

III. WEST VIRGINIA’S STATUTE GRANTS THE PSC AUTHORITY TO CALCULATE REFUNDS AND DAMAGES

In the Order, the PSC seeks comments on “the extent to which the Commission is authorized to implement damage awards pursuant to 47 C.F.R. § 1.723.”²⁸ The PSC notes that the West Virginia Supreme Court has in the past held that venue for damages is in the courts.²⁹ However, Crown Castle believes that with Section 31G-4-4, the Legislature has granted the PSC authority to award refunds and damages.

²⁴ *Id.*

²⁵ West Virginia Commission Procedural Rules § 150-1-13.6.6.

²⁶ 47 C.F.R. § 1.730.

²⁷ 2018 Formal Complaint Rules Order, *supra* note 2, at ¶¶ 1, 9.

²⁸ Order at 4.

²⁹ *Id.* at 3.

By granting the PSC authority, indeed, mandating the PSC to adopt the FCC's Rules in their entirety, Section 31G-4-4 inherently grants the PSC broad authority to calculate refunds and damages. First, subsection 31G-4-4(a) grants the PSC authority, stating that the PSC "shall possess and exercise regulatory jurisdiction over the provisions of this article." Second, subsection 31G-4-4(b) states that the PSC "shall adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. § 224 and 47 C.F.R. § 1.1401 – 1.1415." Combined, these provisions grant the PSC authority sufficient to engage in the same refund and damages calculations as the FCC.³⁰

In general, a complainant in a formal FCC complaint proceeding may request damages under Section 1.723 of the FCC's rules.³¹ Section 1.1407, governing pole attachments, also permits the Commission to "[o]rder a refund or payment, if appropriate."³² While the FCC is authorized to make an award of damages, it lacks enforcement powers. Instead, "Section 407 of the Communications Act provides a remedy in the federal district courts for the nonpayment of

³⁰ As noted in the PSC's June 4, 2019 Order, on June 14, 2018, the United States District Court for the Southern District of West Virginia enjoined the enforcement of Article 4 of West Virginia Code Chapter 31G. *See Frontier W. Virginia Inc. v. Justice*, No. 2:17-CV-03560, 2018 WL 3018174 (S.D. W. Va. June 14, 2018). The Court narrowly held that because defendants did not dispute plaintiff's contentions as to whether Article 4 conflicts with the FCC's regulatory regime governing pole attachments, or whether it is preempted under the Supremacy Clause of the United States Constitution, "there is no issue for this Court to determine" and as a result it "must enjoin the enforcement of Article 4" and grant plaintiff's motion for summary judgment. *Id.* at *2. The Court then explained that "[s]ubsequent developments or actions taken by the West Virginia Legislature or other appropriate entities could lead to the dissolution of the injunction, however further action by this Court will have to wait until such developments have occurred." *Id.* The legislature did as much on March 5, 2019, when it passed Section 31G-4-4, which mandates that the PSC adopt the provisions and practices of the PAA and FCC regulations related to pole attachments, and certify to the FCC that the state will regulate the rates, terms, and conditions related to pole attachments.

³¹ 47 C.F.R. § 1.723.

³² 47 C.F.R. § 1.1407.

money by a common carrier as required by an FCC order.”³³ Thus, if a party refuses to pay the damages ordered by the FCC pursuant to a formal complaint proceeding, the party who prevailed in the FCC action must petition the courts to enforce the agency’s order.³⁴ As the PSC notes in the Order, in West Virginia, the authority of the PSC has historically been limited to “prescribing rates and practices, to directing public corporations to comply with them and that if such corporation refuses compliance the injured party must seek damages in a court of competent jurisdiction.”³⁵

Thus, while neither the FCC nor the PSC has the power to enforce a damages award, prior to the enactment of Section 31G-4-4, the West Virginia PSC also lacked the ability to make any finding of damages, or to order a refund. Indeed in its Order, the PSC points to two cases from 1922 and 1960 that held that the authority of the PSC is limited to prescribing rates and practices, and that aggrieved parties must seek damages from a court of competent jurisdiction.³⁶ With the passage of Section 31G-4-4, however, the Legislature has effectively granted the PSC the same authority held by the FCC, which is sufficiently broad to allow the Commission to grant requests by parties for damages and refunds.

Enforcement of an award of damages may still ultimately involve the prevailing party seeking enforcement of the PSC’s award in court. In such cases, the findings of the PSC should

³³ See *Authority of the district courts to enforce the Communications Act and FCC orders— Enforcement of FCC orders for the payment of money*, 9 Bus. & Com. Litig. Fed. Cts. § 97:48 (4th ed.); 47 U.S.C. § 407 (“If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States . . . or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises.”).

³⁴ *Id.*

³⁵ *Carter v. Willis*, 145 W. Va. 779, 783 (1960). See also *Wheeling Steel Corp. v. Pub. Serv. Comm’n*, 110 S.E. 489, 491 (1922).

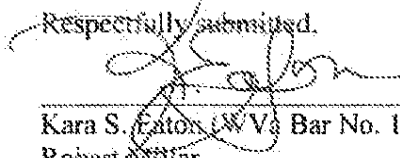
³⁶ *Id.*

serve as conclusive evidence of the legitimacy of the petitioner's claims such that enforcement by the courts would essentially be automatic.³⁷ The FCC rules also permit the Commission to order a defendant to post a bond or deposit into an escrow account a "a sum equal to the amount of damages which the Commission finds, upon preliminary investigation, is likely to be ordered after the issue of damages is fully litigated, or some lesser sum which may be appropriate . . ."³⁸ Section 31G-4-4 now grants the PSC the same authority by reference.

IV. CONCLUSION

For the reasons discussed herein, Crown Castle respectfully submits these comments and recommendations regarding how the FCC's formal complaint rules can be implemented at the state level in West Virginia considering that many provisions are unique to FCC operations, as well as the extent to which the PSC is authorized to implement damages awards pursuant to 47 C.F.R. § 1.723.

Respectfully submitted,

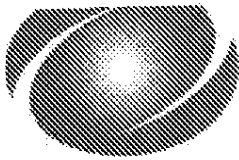

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July 15, 2019

³⁷ 47 U.S.C. § 407 ("Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suits the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated . . .").

³⁸ 47 C.F.R. § 1.723(f).



WVCTA
The Internet &
Television Association

Mark Polen
Executive Director
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July 12, 2019

Connie Graley
Director, Executive Secretary Division
West Virginia Public Service Commission
201 Brooks Street
Charleston, WV 25301

VIA HAND DELIVERY

03:34 PM JUL 12 2019 EXEC SEC DIV

CASE NO. 19-0551-T-GI

**General Investigation into Adopting and Implementing Rules Governing Pole Attachments
and Assumption of Commission Jurisdiction Over Pole Attachments**

Dear Ms. Graley:

I am writing on behalf of the members of the West Virginia Cable Telecommunications Association (WVCTA). The Association's membership comprises the largest providers of video, broadband and advanced telecommunications services operating in West Virginia.

WVCTA has no initial comments to file in this matter but we respectfully reserve the right to file reply comments at the appropriate time. Thank you very much for your consideration.

Sincerely,

Mark Polen
Executive Director



Mobile
Connectivity
Everywhere

July 10, 2019

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Admitted to the Practice of Law in
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Via Overnight Courier

Connie Graley
Acting Executive Secretary
Public Service Commission
of West Virginia
201 Brooks Street
Charleston, WV 25301

12:11 PM JUL 12 2019 EXEC SEC DIV

Re: General Investigation into Adopting and Implementing Rules Governing Pole Attachments and Assumption of Commission Jurisdiction Over Pole Attachments
Case No. 19-0551-T-G1

Initial Comments of ExteNet Systems, Inc.

Dear Ms. Graley:

Enclosed for filing, please find an original and twelve (12) copies of the Initial Comments of ExteNet Systems, Inc. in the above-captioned proceeding. Proof of Service upon the parties of record is also enclosed.

If you have any questions in this matter, please do not hesitate to contact me. I can be reached at (630) 245-2064 or via e-mail at <hrashes@extenetsystems.com>.

Very truly yours,



Haran C. Rashes

Enclosures

cc: Parties of Record

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 19-0551-T-GI

General Investigation into Adopting and
Implementing Rules Governing Pole
Attachments and Assumption of
Commission Jurisdiction Over Pole
Attachments

12:11 PM JUL 12 2019 EXEC SEC DIV

**INITIAL COMMENTS OF
EXTENET SYSTEMS, INC.**

ExteNet Systems, Inc. ("ExteNet"), pursuant to the Public Service Commission of West Virginia's ("Commission") June 4, 2019 Commission Order initiating a general investigation into the adoption of rules governing pole attachment procedures as required by W.VA. CODE §31G-4-4 ("Commission Order"), and a subsequent scheduling order issued on June 27, 2019, hereby respectfully submits the following comments and suggestions regarding the adoption of rules governing pole attachment procedures in West Virginia and the assumption of Commission jurisdiction over pole attachments from the Federal Communications Commission ("FCC").

I. INTRODUCTION

In the Telecommunications Act of 1996 (the "Act"), Congress granted the FCC the obligation to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."¹ However, "in any case where such matters are regulated by a State," Congress stated that FCC

¹ 47 U.S.C. §224(b)(1).

jurisdiction shall not apply.² States that sought to exercise jurisdiction over pole attachments were required to certify³ to the FCC that they have promulgated “rules and regulations implementing the State’s regulatory authority over pole attachments” and have a procedure in place to resolve complaints within 180 days (unless the State’s rules and regulations for such complaints allow additional time, but not more than 360 days).⁴ To date, twenty states and the District of Columbia have opted out of Commission regulation of pole attachments in their jurisdictions.⁵ These states are commonly referred to as “non-FCC states”

In the remaining states, including West Virginia, where the FCC has jurisdiction over pole attachments, the FCC has developed a series of procedures developed through FCC Orders⁶ and generally codified in the Code of Federal Regulations.⁷

On March 5, 2019, the West Virginia Legislature passed Enrolled Substitute for Senate Bill 3 (“SB3”). SB 3 was effective from passage and was signed into law by Governor Jim Justice

² 47 U.S.C. §224(c)(1).

³ 47 U.S.C. §224(c)(2).

⁴ 47 U.S.C. §224(c)(3).

⁵ The following jurisdictions have certified that they regulate pole attachments: Alaska, Arkansas, California, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Utah, Vermont, and, Washington. WC Docket No. 10-101, Public Notice, 25 FCC Red 5541, 5541-42 (WCB 2010).

⁶ See primarily: In The Matter of Implementation of Section 224 of the Act, WC Docket No. 07-245; A National Broadband Plan for Our Future, GN Docket No. 09-51 (April 7, 2011) (“2011 FCC Pole Order”), *aff’d*, *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013); In The Matter of Implementation of Section 224 of the Act, WC Docket No. 07-245; A National Broadband Plan for Our Future, GN Docket No. 09-51; FCC 15-151 (Nov. 17, 2015) (“2015 FCC Pole Order”); and, In the Matter of: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC 17-84; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT 17-79; FCC 18-11, Aug. 2, 2018 (“2018 FCC Pole Order”).

⁷ 47 C.F.R. §§1.1401 - 1.1425.

on March 27, 2019. SB3 added a new Section 4 to Chapter 31G of the West Virginia Code granting the Commission regulatory jurisdiction over pole attachments.

SB3 specifically required the Commission to:

adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. §224 and 47 C.F.R. §§1.1401 - 1.1415, inclusive, of the dispute resolution process incorporated by reference in those regulations and any subsequent modifications or additions to the provisions of the United States Code or Code of Federal Regulations provisions referenced herein.⁸

SB 3 further required the Commission to:

certify to the Federal Communications Commission that this state, as evidenced by the enactment of this article, hereby exercises jurisdiction over the regulation of pole attachments. The certification shall include notice that the State of West Virginia hereby:

- (1) Regulates the rates, terms, and conditions related to pole attachments; and
- (2) In so regulating such rates, terms, and conditions, the state has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the services.⁹

To the best of ExteNet's understanding and belief, the Commission has yet to certify to the FCC that West Virginia "regulates such rates, terms, and conditions" of pole attachments, pursuant to 47 C.F.R. §224(c)(2). It is ExteNet's understanding that this Commission has delayed doing so until it has conducted a "general investigation for the purpose of receiving comments and

⁸ W.VA. CODE §31G-4-4(b).

⁹ W.VA. CODE §31G-4-4(c).

recommendations about the adoption and implementation of pole attachment rules as required by W.VA. CODE §31G-4-4 as discussed” in the Commission Order.¹⁰

II. ABOUT EXTENET SYSTEMS, INC.

ExteNet has a vital interest in whether this Commission or the FCC regulates the terms and conditions upon which ExteNet attaches to utility poles within the State of West Virginia and how any such proceedings under such regulations are conducted.

ExteNet designs, builds, owns, manages and operates indoor and outdoor distributed network systems to help meet the growing demand for improved mobile and wireless broadband coverage and capacity in key strategic markets across the United States – including many such markets here in West Virginia. Distributed network systems bring wireless network elements such as low-powered wireless antennas and access points closer to the user to ensure ubiquitous and high-capacity wireless broadband connectivity. Utilizing distributed antenna systems, remote radio heads, small cells, Wi-Fi and distributed core soft-switching technologies, ExteNet enables wireless service providers, enterprises and venues to better serve their subscribers, customers, workers, residents, tenants and communities.

ExteNet owns and operates multi-carrier – often referred to as “neutral-host” – and multi-technology distributed network systems to ensure multiple wireless service providers can provide wireless telecommunication and eventually 5G services in the most effective and efficient manner. Utilizing its neutral host facilities, ExteNet also provides the necessary pathways for provision of licensed and/or unlicensed spectrum to the general public on a nondiscriminatory basis. ExteNet creates a scalable network design utilizing its high-bandwidth fiber network to

¹⁰ Commission Order, p. 5.

ensure that wireless network densification needs of users and wireless service providers are met and can evolve over time as user demands dictate.

Typically, ExteNet installs distributed network systems on existing utility poles, street lights, and other existing facilities located in the public right-of-way. In addition, ExteNet attaches its ExteNet owned backhaul fiber to these facilities and to conduit located in the public rights-of-way. These utility poles and conduit are often owned by the public utility companies under the regulatory jurisdiction of the Commission. Non-discriminatory and equitable access to these public utility company owned and controlled utility poles, conduit, and rights-of-way are essential not only to ExteNet but to all telecommunications providers offering service to the people of West Virginia who are clamoring for additional wireless access and bandwidth.

A. ExteNet's Authority to Operate in West Virginia

This honorable Commission granted ExteNet a certificate of public convenience and necessity ("CPCN") to provide competitive facilities-based and resold (i) local exchange, (ii) access and (iii) interexchange telecommunications services throughout the State of West Virginia on September 5, 2018 in Case No. 18-0895-T-CN.

Based on the authority granted in its CPCN, ExteNet has been able to negotiate pole attachment agreements with Appalachian Power Company, Monongahela Power Company, Potomac Edison Company, and Wheeling Power Company – each of which are public utilities under the jurisdiction of this Commission. These agreements permit the placement of fiber, antennae and wireless equipment on utility-owned poles within the public rights-of-way.

III. COMMISSION JURISDICTION

The new addition of Section 4 to Chapter 31G of the West Virginia Code, while granting the Commission regulatory jurisdiction over pole attachments, limited the methodology by which the Commission may regulate such to "the rates, terms, and conditions of access to and use of

poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. §224 and 47 C.F.R. §§1.1401 - 1.1415, inclusive, of the dispute resolution process incorporated by reference in those regulations and any subsequent modifications or additions to the provisions of the United States Code or Code of Federal Regulations provisions referenced herein.”¹¹ Thus the Commission may not utilize its own pre-existing *Rules of Practice and Procedure*, as adopted by the Commission in W.VA. CODE STATE R. tit. 150, §1-1 *et seq.*

The specific sections of the Code of Federal Regulations that the Legislature ordered the Commission to adopt include the following, by heading:

- 1.1401 Purpose.
- 1.1402 Definitions.
- 1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.
- 1.1404 Complaint.
- 1.1405 File numbers.
- 1.1406 Dismissal of complaints.
- 1.1407 Response and reply.
- 1.1408 Fee remittance; electronic filing; service; number of copies; form of pleadings; and proprietary materials.
- 1.1409 Commission consideration of the complaint.
- 1.1410 Remedies.
- 1.1411 Meetings and hearings.
- 1.1412 Enforcement.
- 1.1413 Forfeiture.
- 1.1414 State certification.
- 1.1415 Other orders.

However, the Legislature, either intentionally or unintentionally failed to include the following pertinent sections of the Code of Federal Regulations, including those sections that specifically establish a time table for review of pole access complaints.

- 1.1416 Imputation of rates; modification costs.
- 1.1417 Allocation of Unusable Space Costs.
- 1.1418 Use of presumptions in calculating the space factor.

¹¹ W.VA. CODE §31G-4-4(b).

- 1.1420 Timeline for access to utility poles.
- 1.1422 Contractors for survey and makeready.
- 1.1424 Complaints by incumbent local exchange carriers.
- 1.1425 Review period for pole access complaints.

It is not clear from the Legislative History of SB 3¹² why the legislature limited the applicability of sections of the Code of Federal Regulations or required the Commission to utilize the FCC's procedures. Section 4 was added in the House after Senate passage of what was originally only the Small Wireless Facilities Deployment Act. On February 25, 2019, the House Technology & Infrastructure Committee recommended an initial amendment that would give the Commission reverse preemption rights under 47 U.S.C. §224 and the right to regulate pole attachments. Notably that amendment did not include the adoption of 47 C.F.R. §§1.1401-1.1415 and would have given the Commission authority to promulgate its own rules:

§31G-4-4. Public Service Commission jurisdiction; rulemaking; enforcement.

- (a) The Public Service Commission shall possess and exercise regulatory jurisdiction over the provisions of this article. The commission shall administer and adjudicate disputes relating to the issues and procedures provided for under this article.
- (b) The commission shall promulgate rules and regulations necessary to effectuate the provisions of the article.
- (c) The commission shall certify to the Federal Communications Commission that this state, as evidenced by the enactment of this article, hereby exercises jurisdiction over the regulation of pole attachments. The certification shall include notice that the State of West Virginia hereby:
 - (1) Regulates the rates, terms, and conditions related to pole attachments, and
 - (2) In so regulating such rates, terms, and conditions, the state has the authority to consider and does consider the interests

¹² See, West Virginia Legislature, Bill Status - 2019 Regular Session, SB 3 at <http://www.wvlegislature.gov/Bill_Status/bills_history.cfm?INPUT=3&year=2019&sessiontype=RS>.

of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the services.¹³

Two days later, the House Judiciary Committee apparently recommended that the language that now appears in Section 4 be adopted.¹⁴ This amendment and language, including the limitation on what sections of the Code of Federal Regulations should be adopted by the Commission, was adopted by the House on March 2, 2019.¹⁵

The charge given to parties wishing to comment in this proceeding includes:

IT IS THEREFORE ORDERED that the Commission opens a general investigation for consideration of comments and recommendations about the adoption and implementation of the Pole Attachment Act, 47 U.S.C. §224, and attendant FCC regulations, 47 C.F.R. §§1.1401-1.1425, and the Federal Communication Commission formal complaint procedures regarding pole attachments as required by W.Va. Code §31G-4-4.

In ExteNet's opinion, without further action by the Legislature this Commission is enjoined from adopting 47 C.F.R. §§1.1416 through 1.1425. However, the Commission is required by Section 4 to Chapter 31G to adopt and incorporate 47 C.F.R. §§1.1401 through 1.1415.

IV. EXTENET URGES THE COMMISSION TO CERTIFY TO THE FCC AS SOON AS POSSIBLE.

The new addition of Section 4 to Chapter 31G of the West Virginia Code, which was effective March 5, 2019, required the Commission to:

(c) The commission shall certify to the Federal Communications Commission that this state, as evidenced by the enactment of this

¹³ See, West Virginia Legislature, Bill Status - 2019 Regular Session, SB 3 at <http://www.wvlegislature.gov/legisdocs/chamber/2019/RS/com_amends/SB3%20HT_I%20AM%202-25.htm>.

¹⁴ See, West Virginia Legislature, Bill Status - 2019 Regular Session, SB 3 at <http://www.wvlegislature.gov/legisdocs/chamber/2019/RS/com_amends/SB3%20HJUD%20AM%202-27%20_1.htm>.

¹⁵ West Virginia Legislature, Journal of the House of Delegates, 84th Legislature, pp. 1318-1332, March 2, 2019.

article, hereby exercises jurisdiction over the regulation of pole attachments. The certification shall include notice that the State of West Virginia hereby:

(1) Regulates the rates, terms, and conditions related to pole attachments; and

(2) In so regulating such rates, terms, and conditions, the state has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the services.

As noted above, it is ExteNet's understanding and belief, the Commission has yet to certify to the FCC that West Virginia "regulates such rates, terms, and conditions" of pole attachments, pursuant to 47 C.F.R. §224(c)(2) and is waiting for the outcome of this investigation to do so.

ExteNet has concerns that if this Commission waits, attachers and pole owners could hypothetically end up in a protracted legal limbo over any pole attachment disputes. ExteNet does not anticipate any pole attachment disputes in the near future. However, if a pole attachment dispute were to arise and ExteNet (or another attacher) were to file a complaint with the FCC, in all likelihood, the pole owner would argue that this Commission has jurisdiction under W.VA. CODE §31G-4-4. Yet, in light of the Memorandum Opinion in *Frontier West Virginia, Inc. et al. v Governor Jim Justice, et al.*,¹⁶ it can be argued that this Commission does not have jurisdiction "because the state of West Virginia failed to 'satisfy statutory conditions for reverse preemption of federal authority, 47 U.S.C. §224 precludes West Virginia from regulating the rates, terms, and conditions of the pole attachments under the FCC's jurisdiction.'"¹⁷

Any potential dispute, as envisioned above, would easily be preempted if this Commission would forthwith certify to the Commission that West Virginia "regulates such rates, terms, and

¹⁶ No. 2:17-cv-03560, Mem. Op. (S.D. W.Va. June 14, 2018).

¹⁷ *Id.*

conditions” of pole attachments, pursuant to 47 C.F.R. §224(c)(2), as required by W.Va. Code §31G-4-4(c). Following certification, the Commission, through the instant proceeding, and recommendations made therein, can request modification to Section 4 and or interpret the Commission’s roles and obligations therein.

V. RECOMMENDATIONS TO THE COMMISSION

In its Order, the Commission stated that

Because of the apparent conflict between W.VA CODE §§31G-4-4 and 24-4-7 and cases decided thereunder, the Commission is particularly interested in comments regarding the extent to which the Commission is authorized to implement damage awards pursuant to 47 C.F.R. §1.723. The Commission is also interested in receiving comments and recommendations about how, in general, the FCC formal complaint rules can be implemented at the state level in West Virginia, considering that many of the provisions of the FCC complaint rules are unique to FCC operations.

A. Implementation of FCC Complaint Rules and Damages

The Supreme Court of Appeals of West Virginia has noted that,

The Public Service Commission was created by the legislature for the purpose of exercising regulatory authority over public utilities. Its function is to require such entities to perform in a manner designed to safeguard the interests of the public and the utilities. Its primary purpose is to serve the interests of the public . . .¹⁸

As a creation of the legislature, “[t]he Public Service Commission of West Virginia has no inherent jurisdiction, power or authority and can exercise only such jurisdiction, power and authority as is authorized by statute.”¹⁹ In Section 4, the legislature very specifically stated that the Commission . . .

shall adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in

¹⁸ *Boggs v. Public Service Commission*, 154 W.Va. 146, 154; 174 S.E.2d 331 (W. Va. 1970).

¹⁹ *West Virginia-Citizen Action Group v. Public Service Com'n of West Virginia*, 175 W.Va. 39, 43; 330 S.E.2d 849, (W. Va. 1985).

47 U.S.C. §224 and 47 C.F.R. §1.1401 – 1.1415, inclusive, of the dispute resolution process incorporated by reference in those regulations and any subsequent modifications or additions to the provisions of the United States Code or Code of Federal Regulations provisions referenced herein.

There can be no dispute about what the legislature stated and ordered the Commission to adopt.

Under the rules of statutory construction, where different statutes speak to the same subject matter but conflict with one another, the more specific statute governs. The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.²⁰

The West Virginia Supreme Court has long held that “[i]n the enactment of a statute the Legislature must be presumed to have acted with full knowledge of the provisions of all prior statutes dealing with the same subject matter.”²¹ Further the Supreme Court has held that “[i]n construing statutes, courts must presume knowledge on the part of the Legislature of the provisions of the organic law of the state, relating to the subject-matter thereof, as well as of the principles of the common law, and will not impute to that body any intention to obstruct or impede the operation of constitutional provisions, or to innovate upon the settled policy of the law.”²² Thus it must be presumed that when the legislature adopted Section 4, the legislature was well aware that the FCC “dispute resolution process incorporated by reference in those regulations” included damages under 47 C.F.R. §1.723.

Thus, the question that should be posed by this Commission is which statute is more specific., W.VA CODE §24-4-7 provides, in part:

²⁰ *In re Chevie V.*, 700 S.E.2d 815, 821 (W. Va. 2010) (citations omitted).

²¹ *State v. Jackson*, 120 W.Va. 521, 199 S.E. 876, *syl. no. 1* (W. Va. 1938).

²² *Webb v. Ritter*, 60 W.Va. 193, 194; 54 S.E. 484, (W. Va. 1906).

Any person, firm or corporation claiming to be damaged by any violation of this chapter by any public utility subject to the provisions of this chapter, may make complaint to the commission, as provided herein, and bring suit in his own behalf for the recovery of the damages for which such public utility may be liable under this chapter in any circuit court having jurisdiction. (emphasis added).

It must be presumed that the legislature had a reason to give this Commission authority to regulate the rates, terms, and conditions for pole attachments in Chapter 31G – Broadband Enhancement and Expansion Policies and not in Chapter 24 – Public Service Commission. As emphasized above, in W.VA CODE §24-4-7, the prohibition on this Commission awarding damages is limited to liabilities “under this chapter” – Chapter 24 of the West Virginia Code. Thus, the specificity of such resolves the conflict between Chapter 24 and Chapter 31G over the ability to award damages in a proceeding regarding pole attachments. This Commission has the legal ability and authority to award damages pursuant to W.VA. CODE §31G-4-4.

ExteNet acknowledges the Commission’s concerns with how “the FCC formal complaint rules can be implemented at the state level in West Virginia, considering that many of the provisions of the FCC complaint rules are unique to FCC operations.”²³ Unfortunately, until the Commission and parties have real life experience with such ExteNet demurs from opining on such.

B. Request for Legislative Action

ExteNet recommends that this Commission lobby and propose that the West Virginia Legislature, in either a special session or in the next regular session amend Section 4 to incorporate all of the applicable sections of the Code of Federal Regulations, as discussed above, and to allow for variation from such.

²³ Commission Order at 4.

Recognizing the extensive nature of comments that contribute to an FCC declaratory ruling and report and order, issues that are appropriate for nation-wide implementation may not always fit the needs of West Virginians. Customization of the FCC's rules and regulations should be anticipated and this Commission should advocate for the right to do so with the legislature.

ExteNet proposes that at a minimum the legislature should be urged to adopt the following redline amendments.

§31G-4-4. Public Service Commission jurisdiction; rulemaking; enforcement.

(a) The Public Service Commission shall possess and exercise regulatory jurisdiction over the provisions of this article. The commission shall administer and adjudicate disputes relating to the issues and procedures provided for under this article.

(b) The commission shall adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. § 224 and 47 C.F.R. § 1.1401 – ~~1.1415~~ 1.1425, inclusive, of the dispute resolution process incorporated by reference in those regulations and any subsequent modifications or additions to the provisions of the United States Code or Code of Federal Regulations provisions referenced herein.

~~e) 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 C.F.R. §§ 1.1401 – 1.1425, may at any time petition the Public Service Commission for a rulemaking proceeding for such purpose pursuant to W. Va. Code § 329a-3, et seq. The Commission shall, in its sole discretion, by formal vote of its members, determine whether to initiate such a rulemaking proceeding.~~

~~(e)~~(d) The commission shall certify to the Federal Communications Commission that this state, as evidenced by the enactment of this article, hereby exercises jurisdiction over the regulation of pole

attachments. The certification shall include notice that the State of West Virginia hereby:

(1) Regulates the rates, terms, and conditions related to pole attachments; and

(2) In so regulating such rates, terms, and conditions, the state has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the services.

However, ExteNet also notes that most if not all of the issues raised in the Commission Order would have been addressed if the legislature had adopted the House Technology & Infrastructure Committee initial amendment.²⁴

VI. CONCLUSION

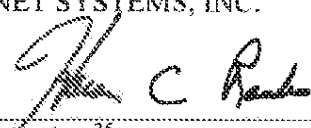
ExteNet commends this honorable Commission for taking the steps necessary to assert West Virginian control and jurisdiction over the regulation of the rates, terms, and conditions for pole attachments and appreciates the opportunity to submit the foregoing comments and

²⁴ See, supra at 8 and West Virginia Legislature, Bill Status - 2019 Regular Session, SB 3 at <http://www.wvlegislature.gov/legisdocs/chamber/2019/RS/com_amends/SB3%20HT_I%20AM%202-25.htm>.

suggestions. We look forward to working with the Commission to implement rates, terms, and conditions for pole attachments in the State of West Virginia/

Respectfully Submitted,
EXTENET SYSTEMS, INC.

By: _____


Haran C. Rashes²⁵
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(630) 245-2064 – Office
(734) 660-9283 – Mobile
hrashes@extenetsystems.com

Dated: July 10, 2019

.....
²⁵ Haran C. Rashes is not admitted to the practice of law in the State of West Virginia.

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

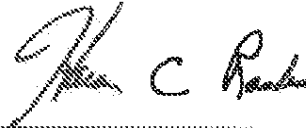
CASE NO. 19-0551-T-GI

General Investigation into Adopting and
Implementing Rules Governing Pole
Attachments and Assumption of
Commission Jurisdiction Over Pole
Attachments

PROOF OF SERVICE

Haran C. Rashes affirms that on July 10, 2019 he served copies of ExteNet Systems, Inc.'s Initial Comments in the above-captioned matter upon the persons listed on the attached service list, via United States Postal Service First Class Mail.

Respectfully Submitted,



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July 10, 2019

**Public Service Commission of West Virginia
Case No. 19-0551-T-GI
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Senior Corporate Counsel

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July 25, 2019

VIA HAND DELIVERY

Ms. Connie Graley
Executive Secretary
Public Service Commission of West Virginia
201 Brooks Street
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Charleston, WV 25323

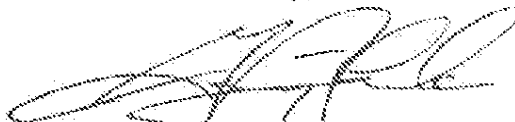
02:49 PM JUL 25 2019 EXEC SEC DIV

**Re: Case No 19-0551-T-GI
General Investigation into Adopting and Implementing Rules
Governing Pole Attachments and Assumption of Commission
Jurisdiction over Pole Attachments**

Dear Ms. Graley:

Enclosed for filing are the original and 12 copies of the Joint Reply Comments of Appalachian Power Company, Wheeling Power Company, Monongahela Power Company, and The Potomac Edison Company in the above-referenced matter.

Sincerely,



Gary A. Jack
Senior Corporate Counsel
Mon Power and PE
WV State Bar No. 1855

GAJ:dml
Enclosures

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

CASE NO 19-0551-T-GI

02:49 PM JUL 25 2019 EXEC SEC DIV

General investigation into Adopting and
Implementing Rules Governing Pole
Attachments and Assumption of
Commission Jurisdiction Over Pole
Attachments

**JOINT REPLY COMMENTS OF APPALACHIAN POWER COMPANY, WHEELING
POWER COMPANY, MONONGAHELA POWER COMPANY,
AND THE POTOMAC EDISON COMPANY**

COME NOW Appalachian Power Company ("APCo"), Wheeling Power Company ("WPCo") ("collectively, the "AEP Companies"), Monongahela Power Company ("Mon Power"), and The Potomac Edison Company ("PE") (collectively the "FirstEnergy Companies") (all four companies collectively, the "Companies") and together respectfully submit their reply comments in this General Investigation into Adopting and Implementing Rules Governing Pole Attachments and the Assumption of Commission Jurisdiction Over Pole Attachments ("General Investigation").

I. GENERAL COMMENTS

It appears that the commenting parties either support the Public Service Commission of West Virginia ("Commission") assuming jurisdiction of pole attachments from the Federal Communications Commission ("FCC") or at least do not object.¹ It also appears that a distinct majority of commenters believe that the Commission has the authority to deviate from FCC rules

¹ Broadband Council p. 2; Segra p. 12.

and should so deviate when appropriate.² A few commenters, such as Crown Castle and the Broadband Enhancement Council, take a rigid view that the Commission is either forced or should adopt the FCC rules without change.³ But most of the commenters recognize the practicality and common sense of West Virginia having its own rules on pole attachments if it is going to be the responsible agency regulating the subject matter. This is similar to the many West Virginia state agencies that consider federal guidance in administering state programs even though formulating their own state-specific rules, e.g., the West Virginia Department of Environmental Protection having its own environmental rules even though it looks to U.S. EPA and its rules for guidance.

Even aside from this, as noted in the Companies' initial comments, there are certain sections of existing West Virginia statutory law that expressly conflict with the FCC's current pole attachment rules. Initial Comment of Companies, p. 7. As noted by ExteNet Systems in its initial comments:

Under the rules of statutory construction, where different statutes speak to the same subject matter but conflict with one another, the more specific statute governs. The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled. In re Chevie V., 700 S.E. 2d 815, 821 (WV 2010).

Here, the West Virginia legislature's express and specific statutory pronouncements in 31G-4-1, 31G-4-2, 31G-4-3, and elsewhere should govern the general language of 31G-4-4 granting the Commission jurisdiction to regulate the rates, terms and conditions for pole attachments.

² Frontier p. 3, Staff p. 14, Segra p. 6.

³ For example Crown Castle states: (1) the Commission must adopt the FCC rules as written including the FCC's dispute resolution rules p.2 – 3; (2) the PSC cannot have results different than the FCC even though West Virginia is granted the power to regulate the entirety of the subject, p. 6; and (3) West Virginia law on Commission jurisdiction on damages should be ignored, p. 9.

II. COMMENTS ON SPECIFIC FCC RULES AND OTHER ISSUES SHOULD BE PART OF A FULL RULEMAKING PROCEEDING

Some of the commenters, such as Staff and ExteNet, made evaluations of specific sections of the FCC's rules to determine what FCC rules should and should not be adopted. This is helpful to the process. The Companies believe the Commission needs to initiate a full rulemaking to hear from all interested parties what the West Virginia rules should be and to elicit specific regulatory language proposals for the rules. Many commenters have identified issues, and the Commission should conduct such a full rulemaking proceeding to consider the issues around pole attachments and draft regulatory language in a process that considers the FCC rules but that ensures equitable treatment and practical workability from a West Virginia perspective.

III. IMPROVMENTS AND BALANCE TO THE POLE ATTACHMENT RULES

Moreover, now that the Commission is charged with regulating pole attachments, the analysis should go beyond a determination of which portions of the FCC Rules are consistent with Commission current practice and West Virginia law. While the Companies support such an upfront analysis, the Commission should not wholesale adopt FCC rules but should seek comment on potential changes in light of the Commission's regulatory responsibility and its requirement to afford participants due process in rulemakings. Wholesale adoption of FCC rules would not be consistent with West Virginia procedure on Commission rule-making (See: W. Va. Code 24-1-7, 29A-1-3(b).) While the Wireless Association asserts that Pennsylvania is considering wholesale adoption as part of its reverse preemption (p. 3), the FirstEnergy Companies assert, as a participant through affiliates in that case, that Pennsylvania is very unclear on that issue and that the electric utilities in Pennsylvania are asserting that any state

rules need to go through the Pennsylvania rule making process rather than being blindly adopted. The Pennsylvania Commission has yet to rule.

While there are many improvements that can be embodied to West Virginia rules, the Companies and others noted in their initial comments several specific areas that could be reviewed as part of a rulemaking. One issue that could be investigated and addressed by the Commission is joint use agreements, which are the infrastructure cost sharing agreements between electric utilities and telephone companies pursuant to which the parties share space on each other's pole networks to reduce costs and avoid duplication of networks. The Companies have joint use agreements with Frontier and other incumbent local exchange carrier ("ILEC") telephone companies that have long been subject to the Commission's jurisdiction and should be presumed fair and reasonable.

The FCC's current ILEC complaint rule suffers from at least three major flaws. First, the rule presumes there is no difference between an ILEC joint user and a cable television attacher. Second, the rule addresses only the rates that ILECs pay on electric utility poles—not vice versa. Third, the rule puts the burden on the electric utility to demonstrate that the existing joint use agreement—many of which have been in place for decades—is just and reasonable. See Rule 1.1413(b). In some respects, the FCC's tilt toward favoring communication companies to the detriment of electric utilities is not surprising as the FCC rules are promulgated by a federal communication agency without expertise or real interest in regulating or being responsible for electric utilities and their poles. Nor is the FCC familiar with the particular circumstances of West Virginia, making it inappropriate for blanket implementation of its rules.⁴ Therefore, the Companies look forward to a more balanced approach for the future by the Commission.

⁴ Segra p. 12

Moreover, it can be a future that focuses on the particularities of West Virginia and the interested parties in this state rather than applying a one-size-fits-all national standard.

IV. CERTIFICATION

ExteNet raises a good question on whether the Commission should certify to the FCC as soon as possible.⁵ After discussion, the Companies believe that the Commission should certify only after it is prepared to move forward with actual regulation. ExteNet wisely recommends that the West Virginia Legislature should adopt changes to allow for variation from the FCC Rules.⁶ The Companies agree and believe that certification should probably wait until after the 2020 Legislative session to determine if changes are made to the statutory provisions. The Companies again pledge to work with the Commission and interested parties on proposed legislation that would remedy the uncertainties created by Senate Bill 3.

V. POLE ATTACHMENT RATE EQUITY

As the Companies alluded to in their initial comments, there are many issues related to pole attachments, not the least of which is rate equity between the pole owners and pole attachers. This is probably the most important issue to the electrics, at least insofar as financial matters are concerned. There are two specific aspects of this issue. First, as referenced above, the Commission should continue to evaluate the justness and reasonableness of cost sharing provisions in joint use agreements between electric utilities and ILECs on a case-by-case basis, rather than through generally applicable presumptions which are at odds with actual facts. In short, the Commission should not adopt FCC Rule 1.1413. Second, the Commission should independently determine the appropriate rate formula applicable to non-ILEC attachers. Though some states that have reverse preempted the FCC's pole attachment jurisdiction have utilized the

⁵ ExteNet p. 8.

⁶ ExteNet p. 12.

FCC's rate formula, other states have not. Further, the Commission may want to consider whether the rate formula—and whatever other regulations it adopts—should be applicable to a broader class of attaching entities than those covered by the FCC's rules. The FCC's rules apply only to cable television companies and telecom carriers. Most notably, the rules do not apply to broadband-only entities (like Google Fiber), which would frustrate the underlying purpose of Chapter 31G (broadband enhancement and expansion).

If the Commission is concerned with promoting broadband deployment, protecting electric infrastructure and ensuring equitable cost sharing, the Commission should not adopt the FCC's rules without more careful review, consideration and opportunity for comment. The Commission should initiate a new rulemaking for the purpose of evaluating these important issues.

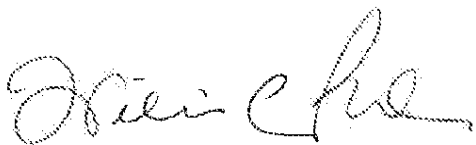
WHEREFORE, the Companies respectfully request that the Commission carefully consider the Comments presented by the Companies as part of this General Investigation.

Dated this 25th day of July, 2019.

Respectfully submitted,

APPALACHIAN POWER COMPANY
WHEELING POWER COMPANY
MONONGAHELA POWER COMPANY
THE POTOMAC EDISON COMPANY

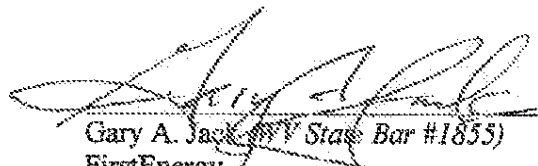
By Counsel



William C. Porth (*WV State Bar #2943*)
Heather G. Harlan (*WV State Bar #8986*)
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Counsel for Appalachian Power Company and
Wheeling Power Company

A handwritten signature in black ink, appearing to read "Gary A. Jack", is written over a horizontal line.

Gary A. Jack (WV State Bar #1855)
FirstEnergy
5001 NASA Boulevard
Fairmont, WV 26554

Counsel for Monongahela Power Company and The Potomac Edison Company

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CERTIFICATE OF SERVICE

I certify service of Reply Comments of Appalachian Power Company, Wheeling Power Company, Monongahela Power Company, and The Potomac Edison Company was made to the below persons on July 25, 2019, by United States First Class Mail, postage prepaid, as addressed:

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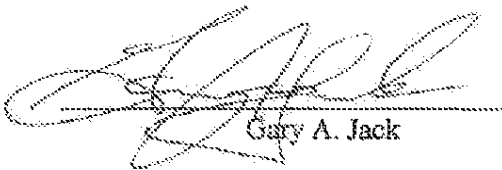
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Gary A. Jack

SEGRA

July 25, 2019

VIA HAND DELIVERY

Connie Graley
Acting Executive Secretary
Public Service Commission of West Virginia
201 Brooks Street, P.O. Box 812
Charleston, WV 25323

03:18 PM JUL 25 2019 EXEC SEC DIV

Re: Case No. 19-0551-T-GI
General Investigation into Adopting and Implementing
Rules Governing Pole Attachments and Assumption of
Commission Jurisdiction over Pole Attachments

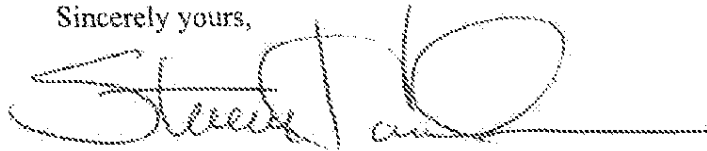
Dear Ms. Graley:

Enclosed for filing on behalf of Lumos Networks LLC dba Segra and Lumos Networks of West Virginia Inc. dba Segra (collectively "Segra") in the above-captioned proceeding, please find an original and twelve (12) copies of the "Reply Comments of Segra".

A copy of this document has today been served upon all Parties of Record via United States First Class Mail and upon Commission Staff via hand delivery.

If you any questions regarding this filing, please feel free to contact me at your earliest convenience.

Sincerely yours,



STEVEN HAMULA (SB# 4580)
Associate General Counsel
Lumos Networks LLC dba Segra and
Lumos Networks of West Virginia Inc. dba Segra

SH/s

cc: Parties of Record

THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

CASE NO. 19-0551-T-GI

General Investigation into Adopting and
Implementing Rules Governing Pole
Attachments and Assumption of Commission
Jurisdiction over Pole Attachments

03:18 PM JUL 25 2019 EXEC SEC DIV

REPLY COMMENTS OF SEGRA

I. Introduction

Overall, the majority of commenters in this proceeding support the Commission's initial adoption of the FCC's existing pole attachment regulations for application in West Virginia.¹ In so doing, these commenters, like Segra, recognize that investment in and timely deployment of broadband services in West Virginia will almost certainly foster economic growth and technological innovation. Up to now, broadband has been the vehicle driving the development of innovative services and capabilities such as the cloud, smart homes and communities, distance vocation and education, rural healthcare and telemedicine, as well as contributing to law enforcement and national security applications. In the future, broadband will no doubt serve as the precursor for the technologies of the future, such as 5G, and the applications that will rely on 5G speeds and latency.

However, some parties – as reflected primarily in the joint initial comments filed by the electric power companies² (“EPCs”) – appear to be trying to use this general investigation proceeding to obtain yet another opportunity to advocate for positions already thoroughly

¹ See, Initial Comments of Frontier WV at pp. 3-4; Comments of Crown Castle at p. 3; Initial Comments of ExteNet Systems at p. 8; Comments of CTIA at p. 5; Initial Comments of Broadband Enhancement Council at p. 4; Staff Initial Comments at p. 1;

² Joint Initial Comments of Appalachian Power Company, Wheeling Power Company, Monongahela Power Company & The Potomac Edison Company.

considered by the FCC. In this regard, expediting broadband deployment does not seem to be their primary motivation. Instead, the EPC's comments focus on reasserting their own parochial positions rather than in improving badly needed broadband access for consumers in West Virginia. The EPC's effort to circumvent the FCC's current pole attachment rules are varied, but they share the common trait of promoting an unstable regulatory climate while creating state-specific barriers to deployment that would make West Virginia less attractive to broadband investment – the exact opposite of the result SB 3 intended to achieve.

In order to continue to move forward in a reasonable timeframe with the deployment of facilities necessary to deliver broadband services, competitive providers like Segra require the placement of facilities on poles owned by other entities who oftentimes have a business incentive to either delay Segra's pole attachment applications or otherwise make pole access burdensome. In an effort to combat the difficulties faced by broadband providers seeking access to pole attachments, the FCC has done an admirable job in both the *2011 Pole Attachment Order*³ and most recently in the *2018 Wireline Infrastructure Order*⁴ of adopting regulations intended to accelerate the deployment of critical broadband facilities. It is thus vitally important in the context of the instant proceeding that the Commission do no harm to the thoughtful work already completed by the FCC when ultimately adopting its own pole attachment regulations in West Virginia.

II. THE COMMISSION SHOULD ADOPT THE FCC'S EXISTING RULES AND ANY UPDATES THERETO RELATIVE TO THE REGULATION OF POLE ATTACHMENTS IN WEST VIRGINIA

³ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5252, paras. 22-23 (2011) ("*2011 Pole Attachment Order*").

⁴ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling*, WC Docket No. 17-84 and WT Docket No. 17-79, released August 3, 2018. <https://docs.fcc.gov/public/attachments/FCC-18-111A1.pdf> ("*2018 Wireline Infrastructure Order*").

As Segra noted in its initial comments, the simplest and most expedient way for the Commission to assume jurisdiction over pole attachments from the FCC is to move forward with its recommendation to adopt all of the FCC's rules by reference, including any subsequent updates thereto. Segra's proposal will allow the Commission to take advantage of the FCC's "fully vetted" regulations, minimizing disruption to attachers thereby providing predictability and uniformity necessary to promote investment in broadband facilities. This proposed approach would likewise conserve valuable Commission resources by removing the need to develop pole attachment rules from scratch and would promote efficiency by allowing providers and pole owners that do business in more than one state to resolve disputes under a single set of rules.

Thus, Segra strongly opposes any recommendation that the Commission initially deviate from the current FCC rules in order to re-litigate issues that have already been extensively considered by the FCC. For example, the EPCs cite current make-ready deadlines and the ability of attachers to utilize a contractor to complete make-ready if such deadlines are missed, overlashing, the financial implications associated with remedying pre-existing violations on poles, and the rates to be charged to ILECs as issues currently being challenged by the EPCs in federal court.⁵ Similarly, the EPCs continually referenced safety concerns as justification for the Commission reconsidering some of the issues that the FCC has already addressed.⁶

The Commission should reject this attempt to revisit and/or water down the FCC's rules by claiming that the FCC either did not properly consider or was not capable of considering their electrical safety and reliability concerns. In fact, in its 2018 Wireline Infrastructure Order, the FCC made clear that it listened to and carefully considered the arguments of the EPCs and adjusted its rules accordingly. There is simply no benefit gained by letting the EPCs reargue

⁵ EPCs Initial Comments at pp. 8-10.

⁶ EPCs Initial Comments at pp. 8-10.

these matters again in the instant proceeding or by altering the FCC's rules at the outset to make it more difficult for attachers to operate in West Virginia.

Similarly, make-ready completion and the provisions contained within the FCC's current regulations allowing for the utilization of contractors to perform one-touch and/or self-help make-ready work in certain circumstances are not issues of first impression, and the FCC did not ignore them. The FCC has already considered these same arguments and inserted safeguards into its rules specifically to address electric utilities' concerns about safety and equipment integrity for self-help work performed in the electric space.

According to the FCC, "[w]e recognize the valid concerns of utilities regarding the importance of safety and equipment integrity, particularly in the electric space, and we take several steps to address these important issues."⁷ The FCC set appropriate guidelines, including a 90-day period (135 for larger requests) for the electric utility to complete work before the "self-help" remedy is triggered and other safeguards relating to contractor qualifications and the like that specifically address utilities' safety and reliability concerns.⁸

In addition, the FCC noted "the utility will have full control over the contractor pre-approval process and therefore will be able to require that contractors who wish to be placed on the utility approved list adhere to utility protocols for working in the electric space, even when the contractor is retained by a third-party communications attacher," and further that "utilities may prevent self-help from being invoked by completing make-ready on time."⁹ Thus, the Commission should not permit the EPCs to reargue those issues in the context of the instant proceeding.

⁷ 2018 Wireline Infrastructure Order § 99.

⁸ *Id.*

⁹ *Id.*

Similarly, the EPCs seem to object to the FCC's findings that utilities cannot require prior approval for "overlapping."¹⁰ However, the FCC was only "codify[ing] our longstanding policy that utilities may not require an attachor to obtain its approval for overlapping," and its holdings were already "[c]onsistent with [FCC] precedent."¹¹ To address the EDCs' concerns, however, the FCC added a new requirement that "allows utilities to establish reasonable advance notice requirements."¹² The FCC considered and rejected the electric utilities' arguments for utility pre-approval, finding that "[p]re-approval is not currently required, and the record does not demonstrate that significant safety or reliability issues have arisen from the application of the current policy. Rather, the record reflects that an advance notice requirement has been sufficient to address safety and reliability concerns, as it provides utilities with the opportunity to conduct any engineering studies or inspections either prior to the overlap being completed or after completion."¹³

In seeking the Commission's review in the context of the instant proceeding, the EPCs also fail to mention the significant benefits of the FCC's rule on overlapping. The FCC found that "the ability to overlap often marks the difference between being able to serve a customer's broadband needs within weeks versus six or more months when delivery of service is dependent on a new attachment," and that by adding the reasonable advance notice safeguard, "we seek to promote faster, less expensive broadband deployment while addressing important safety concerns relating to overlapping."¹⁴ In short, the FCC has already reasonably considered and addressed the EPC's concerns on overlapping, and there is no reason to further deprive West Virginia of this important option to accelerate broadband deployment.

¹⁰ EPC's Initial Comments at p. 9.

¹¹ 2018 Wireline Infrastructure Order at ¶ 115.

¹² *Id.*

¹³ *Id.* at ¶ 117.

¹⁴ *Id.* at ¶ 115.

The EPCs also noted that the rule changes accompanying the FCC's 2018 Wireline Infrastructure Order are currently on appeal or subject to petitions for reconsideration, implying that the Commission should not adopt these rules until they are settled and all appeals exhausted.¹⁵ The Commission should reject these arguments and adopt the FCC rules as currently effective, even if legal appeals are still pending. As the Commission is aware, FCC and federal court proceedings can take years to complete and a very high standard would have to be met for either the FCC or a federal court to stay rules pending an appeal. As a result, any rules at the center of such legal challenges will likely remain effective while these proceedings play out. Simply put, West Virginia cannot afford to lose time by deviating from the current FCC regulations at this crucial moment in the deployment of next generation broadband facilities. Even if the Commission ultimately adopted FCC's rules subject to legal challenge later, the potentially lengthy lag prior to actual implementation could set back broadband investment and deployment in West Virginia to a point at which it may never fully recover.

Furthermore, if any changes to the existing FCC rules result from a successful legal appeal, the automatic adoption recommendation Segra has proffered in its initial comments will ensure that those changes become effective in West Virginia at the same time that they take effect at the federal level. The Commission should thus adopt the current FCC pole attachment rules in their entirety as part of this proceeding or a subsequent rulemaking. Any future changes to those rules, whether via FCC action or because of court action, should be automatically adopted and implemented by the Commission.

¹⁵ Joint Initial Comments of Appalachian Power Company, Wheeling Power Company, Monongahela Power Company & The Potomac Edison Company at p. 8.

III. The Dispute Resolution Process Before the Commission Should Not Be Made More Difficult For Attachers

Segra addressed the issue of dispute resolution in depth in its initial comments, noting that the Commission should resolve disputes within the 180-day shot clock set forth in the FCC rules, especially for disputes involving pole access. Moreover, Segra encouraged the Commission to take action faster than the FCC if possible, and to offer alternative dispute resolution options such as a 30-day mediation window running concurrently within the shot clock in an effort to resolve pole attachment disputes in an expedited manner. To the extent it wishes to offer creative dispute resolution options, however, the Commission will have to consider what works best based on the nature of the dispute.

That being said, the Commission should resist any arguments to use a dispute resolution process, whether culled from the FCC's rules or the Commission's own procedural rules, to make it more difficult for attachers to operate in West Virginia. For example, the Commission Staff seemed to go back and forth on the requisite timeframes for resolving pole attachment disputes. Ultimately, Staff concluded that the language contained in 47 U.S.C § 224(c)(3)(B)(i), in conjunction with the language contained in 47 C.F.R §1.405(e), provided ample authority for the Commission to reconcile the FCC final action deadlines with its current case processing so long as final action on the case occurs by day 360 from the date of filing of the complaint.¹⁶

Because the timely resolution of pole attachment related disputes is critically important, Segra does not believe that the aforementioned 360-day timeframe is reasonable especially for pole access related complaints. Accordingly, Segra strongly encourages the Commission to adopt the FCC's shot clocks, including the most recent changes from the FCC's July 18, 2018 procedural rules order, and adapt its internal complaint processing procedures to fit the

¹⁶ Staff Initial Comments at p. 18.

parameters of these shot clocks. In this regard, it should be noted that 47 U.S.C. § 224(c)(3), as it relates to the doctrine of reverse preemption, requires the Commission to make certain commitments as to the timeliness of its complaint resolution.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

Consistent with this federal statute, the FCC's regulations further provide for jurisdiction to potentially revert back to the FCC if the state does not meet the statutory deadline in any individual case. Specifically, 47 C.F.R. § 1.1405 provides in pertinent part that:

(f) Notwithstanding any such certification, jurisdiction will revert to this Commission with respect to any individual matter, unless the state takes final action on a complaint regarding such matter:

(1) Within 180 days after the complaint is filed with the state, or

(2) Within the applicable periods prescribed for such final action in such rules and regulations of the state, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

The FCC has also adopted shot clocks for its own resolution of pole attachment complaints, which are set forth in the regulations that Segra urges the Commission to adopt. In November 2017, the FCC established a 180-day shot clock to decide complaints alleging denial of access.¹⁷ Thereafter, in July 2018, the FCC established that a 270-day shot clock applies to pole attachment complaints alleging unjust and unreasonable rates, terms, and conditions.¹⁸ These shot clocks are codified at 47 C.F.R. § 1.1414 and 47 C.F.R. § 1.740, respectfully.

At a minimum, the Commission's processing of complaints in West Virginia should correspond with these federal shot clocks. However, these federal shot clocks represent maximum processing timeframes. In all formal complaint situations, the Commission should endeavor to resolve these complaints more quickly than the FCC. Indeed, in order to promote administrative efficiency, Segra would recommend that the Commission simply adopt a 180-day shot clock for the processing of all pole attachment related complaints in order to provide a better dispute resolution environment in West Virginia.

IV. The Commission should adopt only those provisions of the FCC's Pole Attachment Regulations that actually apply to the process necessary for setting rates, terms and conditions of pole attachments

As the Commission is keenly aware, Segra and Frontier have not always seen eye to eye on many regulatory issues. However, Frontier's analysis regarding SB 3's requirements as they relate to the adoption of the FCC's current pole attachment regulations seems logical and should be given due consideration by the Commission. Specifically, Frontier stated that the Commission could reasonably interpret West Virginia Code §31G-4-4 in such a manner as to avoid so-called "absurd" results, and adopt the FCC's current pole attachment regulations

¹⁷ *In the Matter of Accelerating Wireline Broadband Deployment By Removing Barriers To Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd 11128, 11132, para. 9 (2017).

¹⁸ *In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, Report and Order, EB Docket No. 17-245, Released July 18, 2018.

specifically applicable to the actual substantive process for setting rates, terms and conditions for attachments.¹⁹

In this regard, Frontier pointed out the FCC's pole attachment regulations contain procedural requirements that are applicable only to the FCC, but not to the Commission. For example, 47 C.F.R. 5 1.1404(c) requires that a pole attachment complaint "contain a statement that the State has not certified to the FCC that it regulates the rates, terms and conditions for pole attachments." Similarly, Frontier pointed out several other areas within the FCC regulations that clearly would not be applicable in West Virginia such as the FCC Staff issuing rulings on discovery disputes or requiring parties to pole attachment disputes to utilize the FCC's electronic filing system for the submission of filings.²⁰

Thus, Frontier asserted that the Commission should reasonably interpret Section 4 to require the adoption of only those provisions of the FCC's pole attachment regulations that actually apply to the specific process for setting rates, terms and conditions of pole attachments in West Virginia, and not the purely procedural rules applicable only to the FCC's particular procedures.²¹ In the furtherance of this effort, Frontier provided as Exhibit A to its initial comments a redlined version of the FCC's current pole attachment regulations (47 C.F.R. §1.1401 - § 1.1415) that identifies those regulations that Frontier maintains may be implemented under existing West Virginia statutory laws and established Commission procedures and strikes those inconsistent therewith.²²

After having reviewed Frontier's Exhibit A redline, with one exception, Segra is of the opinion that Frontier's proposed modifications to the current FCC pole attachment regulations is

¹⁹ Initial Comments of Frontier at p. 2.

²⁰ Id. at p. 3.

²¹ Id.

²² Id. at pp. 3-4 and Exhibit A.

logical and consistent with the legislative intent of SB 3, West Virginia statutory law, and the Commission's established procedures. The lone exception would be Frontier's proposed deletion of §1.1405(f)(1) and (2), which allows for jurisdiction over an individual complaint to revert back to the FCC if this Commission failed to take action within the prescribed timeframes. Otherwise, Segra would recommend that the Commission adopt Frontier's proposed modifications in this proceeding or in a future rulemaking proceeding.

V. Conclusion

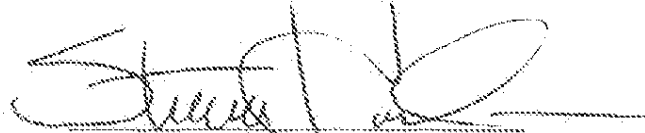
In moving forward with the pole attachment rulemaking required by SB 3, Segra urges the Commission to maintain uniformity to the extent reasonably practicable by adopting the FCC existing rules -- excepting those portions of said rules either not procedurally applicable to the Commission or clearly at odds with the Commission's statutory requirements -- together with the automatic adoption of future changes once approved by the FCC. Proceeding in this manner will create a consistent, predicable, and stable regulatory environment in West Virginia that will make it more attractive for broadband investment and innovation.

Insofar as dispute resolution is concerned, the Commission should adopt a process at least as fast and efficient as the shot clocks currently contained in the FCC rules while striving to resolve such disputes complaints more quickly than the FCC. Additionally, Segra believes that the Commission should also consider other alternative or supplementary dispute resolution options that could potentially expedite or improve the Commission's dispute resolution process relative to pole attachments. The adoption of Segra's recommendations herein will greatly advance continued broadband deployment in West Virginia.

Respectfully submitted this 25th day of July, 2019.

Lumos Networks LLC dba Segra and
LumosNetworks of West Virginia Inc. dba Segra

By Counsel,

A handwritten signature in black ink, appearing to read "Steven Hamula", is written over a horizontal dotted line.

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CERTIFICATE OF SERVICE

I, Steven Hamula, counsel for Lumos Networks LLC dba Segra and Lumos Networks of West Virginia Inc. dba Segra do hereby certify that copies of the foregoing document have been served upon the following parties of record by First Class United States Mail, postage prepaid, on this 25th day of July 2019.



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July 25, 2019

Connie Graley
Acting Executive Secretary
Public Service Commission
PO Box 812
Charleston, WV 25323

12:41 PM JUL 25 2019 EXEC SEC DIV

RE: CASE NO. 19-0551-T-GI
General Investigation into Adopting and Implementing Rules
Governing Pole Attachments and Assumption of Commission
Jurisdiction Over Pole Attachments

Dear Ms. Graley:

Enclosed are an original and twelve (12) copies of the "STAFF REPLY COMMENTS" to be filed in the above-referenced proceeding.

A copy has been provided to the parties of record by U.S. mail.

Sincerely,

A handwritten signature in cursive script, appearing to read "L. S. Bouvette".

Linda S. Bouvette
WV State Bar I.D. No. 5926

And

Chris Howard
WV State Bar No. 8688

LSB/cs
Enclosures
H:\L.Bouvette\CASES\2019\19-0551-T-GI\Staff Reply Comments

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 19-0551-T-GI

**General Investigation into Adopting and
Implementing Rules Governing Pole Attachments
And Assumption of Commission Jurisdiction
Over Pole Attachments**

STAFF REPLY COMMENTS

On or before July 15, 2019, ten responses to the Commission’s request for Initial Comments in the instant case were received. The responses came from the West Virginia Broadband Council; ExteNet Systems, Inc.; West Virginia Cable Telecommunications Association; Appalachian Power Company, Wheeling Power Company, Monongahela Power Company and The Potomac Edison Company (joint filing); Lumos Networks LLC dba Segra and Lumos Networks of West Virginia, Inc. dba Segra (joint filing); Crown Castle Fiber LLC; City of New Martinsville, City of Philippi and Craig-Botetourt Electric Cooperative (joint filing); Frontier West Virginia, Inc. and Citizens Telecommunications Company of West Virginia, dba Frontier Communications of West Virginia (joint filing); CTIA-The Wireless Association; and the Staff of the Public Service Commission.

Most of the Initial Comments recognized that the Commission could not reasonably adopt the FCC Rules and FCC procedural rules wholesale but suggested the Commission exercise its discretion in adopting those rules that aligned with the Commission’s existing Procedural Rules. Others were more emphatic that the statute required the full adoption of the FCC Rules and the FCC procedural rules. Staff

discusses each filing in turn and then makes its final recommendation. (Please note: Reference hereinbelow to the “FCC Rules” refer to the rules set forth in 47 C.F.R. §§1.1401-1.1415 and reference to the “FCC procedural rules” refer to the rules set forth in 47 C.F.R. §§1.720-1.740.)

SUMMARY OF STAFF REPLY COMMENTS

The Commission is not expected to adopt wholesale the FCC Rules and FCC procedural rules, but is required to adopt those rules that do not conflict with the Commission’s existing Procedural Rules and statutes. Staff acknowledges that uniformity in pole attachment regulation across the states is necessary for the rapid expansion of broadband services throughout West Virginia and the United States. Therefore, the Commission should minimize deviations from the FCC Rules and FCC procedural rules to the extent possible to maintain that uniformity. However, Staff contends that the FCC procedural rules allow flexibility in the timelines to resolve complaints, either through hearings or mediation.

SUMMARY OF INITIAL COMMENTS

West Virginia Broadband Council (Council). The Council noted that “[i]mproving the reach and quality of broadband is absolutely vital to West Virginia’s efforts to attract and retain businesses and residents.” (Initial Comments, p. 1.) It claimed that SB 3 provides a known framework which encourages parties to resolve their disputes or be subject to the FCC substantive and procedural rules. The Council determined that adoption of the FCC substantive and procedural rules was workable in West Virginia and that damage claims could be referred to the appropriate circuit court to avoid conflicts

with W.Va. Code §24-4-7. The Council emphasized that [u]niform practices and a local dispute resolution forum create an ease in doing business....” (Initial Comments, p. 3.)

The Council took the position that the statute does not allow the Commission to apply its Procedural Rules to a pole attachment dispute but that the Commission is obligated to adopt a separate set of procedural rules for pole attachment cases. The Council recognized that certain modifications to the FCC Rules and FCC procedural rules must be made, such as eliminating the provisions giving Staff the authority to resolve discovery disputes and adopting its current procedure of issuing written decisions rather than oral rulings. Since the Commission does not have a “Market Disputes Resolution Division”, it could utilize its mediation services to perform the pre-filing mediation role required under the FCC Rules and FCC procedural rules. The Council also found acceptable the Commission’s current practice of requiring all filings to be in paper form, acknowledging that the Commission could revert to electronic filing at a later date.

As for damages, the Council noted that the Commission was not the only forum available to an injured party. Resort to an appropriate circuit court is always an option. It opined that the Commission’s referral of damage claims to a circuit court could not be challenged except by someone with an active case before the Commission, a rare occurrence.

ExteNet Systems, Inc. ExteNet took the position that the “Commission may not utilize its own pre-existing *Rules of Practice and Procedure* as adopted by the Commission in W.VA. CODE STATE R. tit. 150 §1-1 *et seq.*” (Initial Comments, p. 6.) It noted that the Legislature failed to require adoption of all the FCC Rules relating to make-ready

pole attachment cases, namely, the provisions set forth in 47 C.F.R. §1.1416-1.425 in passing SB 3, and further noted that the Commission was enjoined from adopting those provisions without further legislative action. (Initial Comments, p. 8.) ExteNet recommended that the Commission certify to the FCC as soon as practicable its ability to regulate make-ready pole access to avoid attachers and pole owners ending up on a protracted legal limbo concerning which agency has jurisdiction over the dispute.

ExteNet contended that since the prohibition on damages awards was contained in Chapter 24, it would not apply to damages awarded under Chapter 31G and the Commission has legal authority to award damages under W.Va. Code §31G-4-4. ExteNet declined to address the issue of conflicts between the Commission's current complaint process and the FCC complaint process. It further recommended that the Commission pursue legislation allowing it to adopt the provisions set forth in 47 C.F.R. §1.1416-1.425 and proposed language to amend W.Va. Code §31G-4-4, accordingly.

West Virginia Cable Telecommunications Association (WVCTA). The WVCTA declined to file Initial Comments but reserved the right to timely file Reply Comments.

Appalachian Power Company, Wheeling Power Company, Monongahela Power Company and The Potomac Edison Company (joint filing) (the "Electric Companies"). The Electric Companies supported the granting of jurisdiction over make-ready pole access to the Commission because they felt the Commission would give greater consideration of their electric distribution safety and reliability concerns and the interests of the West Virginia ratepayers in setting rates. The Electric Companies also took the position that the Commission did not have to "adopt wholesale the FCC Rules

without change” but recommended that the Commission seek clarification from the Legislature in the 2020 regular session. In fact, the Electric Companies will be seeking a cost recovery mechanism for the “middle mile” or intermediate broadband services in the 2020 legislative session and will include a request for clarification of W.Va. Code §31G-4-4.

The Electric Companies took the position that the Legislature did not intend for the Commission to duplicate existing federal regulations since nothing would be gained. They noted that no other state has been directed by its legislature to adopt wholesale the FCC Rules without change. The Electric Companies stated that the Commission may use its existing Procedural Rules as a “framework for handling complaints, discovery, hearings, briefings, and other procedural matters.” (Initial Comments, p. 5.) They noted that it would be confusing to have two separate sets of procedural rules. They also claim that a wholesale adoption of the FCC Rules would limit the Commission’s jurisdiction since it addresses only rates for ILEC attachments on electric utility poles – it does not address “rates for electric utility attachments on ILEC poles or access by either party to the other’s poles,” jurisdiction it already has and exercises. (Initial Comments, p. 6.)

The Electric Companies contend that the Commission should adopt make-ready pole access rules following its normal rulemaking procedure, subject to comments from stakeholders and affected parties, to “ensure fundamental fairness and due process for West Virginia stakeholders.” (Initial Comments, p. 7.) The Electric Companies supported their position by stating that a specific state statute should control over the broad and vague language set forth in W.Va. Code §31G-4-4, especially with regard to

damages and contracts between two public utilities. The Electric Companies also noted a number of inconsistencies between W.Va. Code §31G, et seq. and the FCC Rules regarding payment of make ready costs, timeline to perform make ready work and the express prohibition for others working in the electric supply space. The Electric Companies noted that they had filed extensive comments with the FCC during its rulemaking, and some of the Electric Companies later challenged the FCC Rules in a court proceeding.

The Electric Companies expressed their concern that the FCC Rules focus on the communication industry expansion while de-emphasizing electric safety and reliability. Finally, the Electric Companies noted a number of additional concerns they believe the Commission should consider in approving final rules. (Initial Comments, p. 11).

Lumos Networks LLC dba Segra and Lumos Networks of West Virginia, Inc. dba

Segra. Segra took the position that the Commission can act only in accordance with its current administrative and statutory capabilities, meaning it cannot and should not adopt those FCC regulations that would be inconsistent with the Commission's current rules. Segra expressed concern that the Commission could not timely resolve formal complaints between utilities under its existing procedural framework because it does not decide issues on paper, but requires an opportunity for a hearing and a written decision with findings of fact and conclusions of law. It also expressed concern that the Commission was understaffed to handle the potential increase in workload once it certifies to the FCC that it would assume jurisdiction for pole attachment cases. It recommended that the Commission take its time in processing these cases until it "gains more real world

experience in the handling of such complaints.”

Segra emphasized that regardless whether the Commission continued to use its Procedural Rules or adopted the FCC procedural rules, it must comply with the 180 day ‘shot clock’ processing requirement. It also recommended that the Commission adopt a streamlined mediation process to resolve pole attachment cases quickly. It recommended a 30-day mediation window beginning with the filing of a complaint. Segra did not believe that the Commission’s inability to award damages to be a great concern since parties can appeal to the appropriate circuit court. Its final recommendation was for the Commission to temporarily postpone the adoption of any provision that conflicts with its Procedural Rules and attempt to have W.Va. Code §31G-4-4 amended in the 2020 legislation session to eliminate the conflicts. The Commission should adopt those FCC “rules currently in effect that do not substantially conflict with its own administrative capabilities and statutory requirements.” (Initial Comments, p. 11.) That will ensure certainty for both the attachers and pole owners that pole attachments will be governed by the same rules used by a majority of the states.

Segra also suggested that the Commission consider customization of its pole attachment rules and procedures in the future, to include provisions concerning pole replacements.

Crown Castle Fiber LLC. Crown Castle takes the position that the Commission is required to adopt the federal Pole Attachment Act and the FCC regulations governing pole attachments, including the FCC procedural rules. It claims that the Legislature recognized that the FCC Rules and FCC procedural rules have streamlined the make-

ready pole attachment process and expedites dispute resolution. (Initial Comments, p. 2.) Crown Castle stated that only in certain limited circumstances could the Commission deviate from the FCC Rules and FCC procedural rules.

Crown Castle claims that the Commission must adopt the more specific FCC Rules over its general rules but can make “minor modifications to those FCC rules involving purely logistical matters that are ‘unique to FCC operations.’” (Initial Comments, p. 6.) Any alteration to the FCC Rules must achieve the same result. It also claimed that the Commission must adopt the substantive provisions of Section 47 C.F.R. §1.734 such as the means of service. The Commission must adopt the specific pleading requirements and provisions regarding format and content of formal complaints, answers and other pleadings because the Legislature intended for the Commission to copy them. The FCC developed its rules based on its experience in regulating pole attachment cases, experience that the Commission should rely on in adopting pole attachment rules.

Crown Castle also takes the position that the Commission has the authority to award refunds and damages under W.Va. Code §31G-4-4. By passing this provision, the Legislature granted to the Commission the same authority held by the FCC.

City of New Martinsville, City of Philippi and Craig-Botetourt Electric Cooperative

(jointly) (Cities). The Cities acknowledge that the Commission retains jurisdiction over municipally-owned and operated electric utilities except in the area of rate regulation. (Initial Comments, p. 5.) The Cities’ concern is that any disputes regarding pole attachments on its municipally-owned poles would not be subject to W.Va. Code §31G-4-4 since 47 U.S.C. 224 specifically excludes “any person who is cooperatively

organized, or any person owned by...any State” with State being defined as any political subdivision, agency or instrumentality thereof. (Initial Comments, p. 4, 8.) The Cities recommended that the Commission include in any rules it adopts regarding pole attachments, a statement that the electric utilities currently exempt from the Pole Attachment Act and the FCC Rules and FCC procedural rules will remain exempt under the Commission’s pole attachment rules.

The Cities also raise an issue of whether SB 3 would pass constitutional muster since the purpose and effect of W.Va. Code §31G-4-4 were not adequately set forth in the title to SB 3. While the bill stated that the purpose was to give the Commission jurisdiction over make-ready pole access it failed to state that the Commission would be required to adopt the FCC Rules and FCC procedural rules and that the Commission’s complaint process would be supplanted by the FCC complaint process.

Finally, the Cities noted that the time periods for the resolution of complaints should be adopted by the Commission and that the Commission may now have jurisdiction to award money damages under W.Va. Code §31G-4-4.

Frontier West Virginia, Inc. and Citizens Telecommunications Company of West Virginia, dba Frontier Communications of West Virginia (joint filing) (Frontier). Frontier claims that the Commission does not have to adopt the FCC Rules and procedural rules in full, stating that the Commission is only required to “adopt the *rates, terms, and conditions of access to and use of* poles, ducts, conduits, and rights-of-way as provided in” the FCC regulations. (Initial Comments, p. 2, emphasis in the original.)

The Commission is not required to adopt any FCC Rule or FCC procedural rule

that “does not specifically address the setting of pole attachment rates, terms, and conditions.” (*Id.*) Frontier believes this more narrow reading of the statute is far more reasonable than one that required the wholesale adoption the FCC Rules and FCC procedural rules. It summarized its position by stating that the Commission should adopt only those provisions of the FCC Rules and FCC procedural rules that “actually apply to the **specific** process for setting rates, terms and conditions of pole attachments...” (Initial Comments, p. 3, emphasis in the original.) Frontier provided a redlined version of the FCC Rules and FCC procedural rules, identifying those rules that the Commission should adopt.

Finally, Frontier noted that the limited remedies available in attachment proceedings do not include damage awards. 47 C.F.R. §1.1407. Those remedies are currently within the Commission’s authority and have been used by the Commission for a number of years.

CTIA – The Wireless Association. CTIA recommended that the Commission use its discretion as the expert agency to identify those FCC Rules and FCC procedural rules that do not conflict with existing West Virginia statutes and adopt them to handle pole attachment dispute cases. CTIA noted the importance of streamlining and facilitating the expansion of broadband services in West Virginia. The FCC Rules and FCC procedural rules have been successful in promoting broadband expansion in the states regulated by the FCC. CTIA claimed that the FCC pole rate methodology was fair and effective and supported by the courts as being just and reasonable for owners and attachers. The FCC’s timelines ensure the stream-lined handling of cases and removes unnecessary

delay. Standardization of West Virginia's pole attachment rules with surrounding states will encourage broadband expansion.

CTIA noted that the Commission was concerned with certain conflicts between its Procedural Rules and the FCC Rules and FCC procedural rules. CTIA noted a "well-established tenet of statutory interpretation that statutes should be read to harmonize, when possible." (Initial Comments, p. 4.) CTIA noted further that when the "plain language creates a conflict... courts look to legislative intent to determine the meaning of the statute." (Id.)

CTIA stated that the Legislature could not have intended for the Commission to adopt rules in conflict with West Virginia statutes or rules that make no sense. CTIA contended that the Legislature intended that the Commission, as the expert agency, use its discretion to adopt the FCC Rules and procedural rules in a manner that "harmonizes with the existing rule and statute." CTIA recommended that the Commission adopt the FCC Rules and FCC procedural rules, using its discretion to resolve any conflicts. It further recommended that the Commission adopt future updates to the FCC Rules on an automatic basis, since those affected by the updates will have had an opportunity to comment and challenge them at the FCC level. CTIA ended with an admonition that "consistency with the FCC regulations is important to promote regulatory certainty and the efficiency that it creates." (Initial Comments, p. 5.)

Staff Final Comments. Staff is in agreement with the majority of the Initial Comments filed by the parties that the Commission is not expected to adopt wholesale the FCC Rules and procedural rules, but that it is required to adopt those rules that do not conflict

with the Commission's existing Procedural Rules and statutes. Staff acknowledges the concern expressed by CTIA in particular that uniformity in pole attachment regulation across the states is necessary for the rapid expansion of broadband services throughout West Virginia and the United States. Therefore, the Commission should minimize deviations from the FCC Rules and FCC procedural rules to the extent possible to maintain that uniformity but retain the ability to set timelines to ensure expedited resolution of complaints, either through hearings or mediation.

Staff suggests that the Commission initiate a rule-making proceeding using the recommendations set forth in its Initial Comments and in Frontier's Initial Comments as to which FCC Rules and FCC procedural rules should be adopted. The parties to the proceeding will then be able to provide comment on the actual proposed pole attachment rules.

However, the Commission must note that some parties took the position that W.Va. Code §31G-4-4 required the wholesale adoption of the FCC Rules and FCC procedural rules. The Commission's final rules may be challenged on the basis that the specific rules identified by the Legislature in W.Va. Code §31G-4-4 were not adopted wholesale.

CONCLUSION

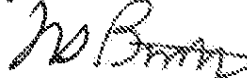
The Commission should initiate a rulemaking with proposed pole attachment rules based on the Staff recommendations set forth in its Initial Comments. The parties can then identify additional provisions that should be added or deleted and provide support for same. The Commission should minimize deviations from the FCC Rules and FCC

procedural rules to the extent possible to maintain uniformity with the FCC Rules in effect in surrounding states. Finally, the Commission should specifically adopt timelines that will ensure expedited resolution of complaints, either through hearings or mediation. The Commission should also pursue legislation in the 2020 Regular Session to clarify the issues raised in the Initial Comments.

Respectfully submitted this the 25th day of July 2019.

STAFF OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA

By Counsel,



LINDA S. BOUVETTE
Staff Attorney
WV State Bar No. 5926

AND

CHRIS HOWARD
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**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 19-0551-T-GI

**General Investigation into Adopting and
Implementing Rules Governing Pole Attachments
And Assumption of Commission Jurisdiction
Over Pole Attachments**

.....
CERTIFICATE OF SERVICE
.....

I, Linda S. Bouvette, Counsel for the Public Service Commission of West Virginia, do hereby certify that a copy of the foregoing "STAFF REPLY COMMENTS" has been served upon the following parties of record by First Class, United States Mail; postage prepaid, and by electronic mail correspondence, this the 25th day of July, 2019.

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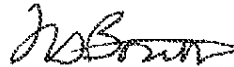
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July 25, 2019

Ms. Connie Graley
Acting Executive Secretary
Public Service Commission
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201 Brooks Street
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04:08 PM JUL 25 2019 EXEC SEC DIV

RE: CASE NO. 19-0551-T-GI
General Investigation into Adopting and
Implementing Rules Governing Pole Attachments
and Assumption of Commission Jurisdiction Over
Pole Attachments

Dear Ms. Graley:

Enclosed herein for filing in the above-referenced matter, please find the original and twelve (12) copies of Reply Comments on Behalf of the City of New Martinsville, City of Philippi and Craig-Botetourt Electric Cooperative (collectively, the "Public Systems").

As evidenced by the Certificate of Service attached thereto, a copy of the document is being served upon all parties on the official service list.

Sincerely,

Robert R. Rodecker
WV State Bar No. 3145

enclosure

ecc: David White
Jeremy Drennen
Shawn Hildebrand

C H A R L E S T O N • M O R G A N T O W N • M A R T I N S B U R G

 MERITAS LAW FIRMS WORLDWIDE

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

CASE NO. 19-0551-T-GI

General Investigation into Adopting and
Implementing Rules Governing Pole Attachments
and Assumption of Commission Jurisdiction over
Pole Attachments

04:09 PM JUL 25 2019 EXEC SEC DIV

**REPLY COMMENTS ON BEHALF OF
CITY OF NEW MARTINSVILLE, CITY OF PHILIPPI
AND CRAIG-BOTETOURT ELECTRIC COOPERATIVE**

Now come the City of New Martinsville, City of Philippi and Craig-Botetourt Electric Cooperative (hereinafter referred to collectively as "Public Systems"), by counsel, and submit Reply Comments in the above-referenced proceeding pursuant to the Commission Order entered June 27, 2019.

On July 15, 2019, the Public Systems submitted comments which were intended to make clear that, if the Commission adopts the FCC rules as required by the enactment of the revisions to Article 4 of Section 31G by Senate Bill 3 ("SB 3"), they want the Commission to establish that such rules will not apply to them. The Public Systems believe that any effort to apply the FCC rules to the Public Systems would result in the elimination of their exemption to such rules that is established by 47 U.S.C. §224(a). As stated in the Public Systems' Initial Comments, their concern stems from prior experience where the Commission, on its own, has elected to make rules applicable to other electric utilities, applicable to the Public Systems, although not required by statute. The Initial

Comments filed by a number of other parties provides further basis to support the appropriateness of this concern.

Those comments to which the Public Systems respond below, all indicate a willingness to cede to the Commission an authority to disregard statutory language without providing legislative or decisional support for their positions. The Public Systems do not want to be subject to the FCC rules regarding pole attachments and do not want the Commission to adopt the FCC rules and make them applicable to the Public Systems without specific authority therefor.

Reply Comments

In its June 4, 2019 Order ("June 4 Order"), the Commission requested comments and recommendations about the dispute resolution process required by the revisions to the *West Virginia Code* created by the enactment of §31G-4-4. Among other things, §31G-4-4 requires the Commission to:

- (a) . . . administer and adjudicate disputes relating to the issues and procedures provided for under this article.

and,

- (b) . . . adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. §224 and 47 C.F.R. §§1.1401 – 1.1415, **inclusive, of the dispute resolution process incorporated by reference in those regulations and any subsequent modifications or additions to the provisions of the United States Code or Code of Federal Regulations provisions referenced herein.** (Emphasis added)

Numerous parties that filed Initial Comments on July 15, 2019 commented on the fact that at least part of *Code* §31G-4-4 is inconsistent with the Commission's current practice regarding pole attachment disputes. While there does not appear to be a consensus of how the Commission should work within the constraints placed upon it by the legislation, a number of parties suggest a piecemeal approach to a rule making procedure.

Staff Comments.

The Staff of the Commission recognizes that the Commission's own Procedural Rules are inconsistent with the FCC's rules and counsels the Commission as follows:

The Commission should not adopt FCC procedural rules that conflict with the Commission's Procedural Rules; nor any FCC procedural rules for which the Commission does not currently have the physical capability to implement such as an electronic filing system. To require the Commission to adopt all of the FCC procedural rules would require the Commission to violate four separate statutory provisions – without a specific intent expressed by the Legislature that it intended to repeal them as a result of its passage of SB 3.¹

Thereafter, the Staff discusses the conflict between the Commission's rules and the FCC rules and recommends that the Commission disregard certain aspects of the FCC rules specifically referenced in *Code* §31G-4-4(b).²

¹ Staff Initial Comments at 2.

² *E.g.* Staff Initial Comments at 10 ("Staff Recommends that the damages section of the FCC procedural rules [47 C.F.R. §1.723] not be adopted as part of the Commission's rules governing make-ready pole access"); and, at 14 ("Only those portions of the FCC Rules that are consistent with the Commission's current practice should be adopted.")

The only support for deviation from the provisions of the FCC rules provided by the Staff is a reference to language in the decision of Bellsouth Telecommunications LLC v. Louisville/Jefferson County Metro Government et al., Civil Action No.3:16-cv-124-DJH, August 16, 2017 which provides, in part, that the reverse-preemption provision of 47 U.S.C. §224 deprives the FCC of jurisdiction in that state; and thus, the FCC cannot challenge the Commission's rules. However, the Bellsouth case did not involve statutory language that required the Kentucky reverse-preemption action to adopt the FCC regulations and any subsequent modifications or additions to the federal statutes and rules as required by the enactment of Code §31G-4-4(b).

Comments of AEP Companies and FirstEnergy Companies.

The AEP Companies and the FirstEnergy Companies ("the Companies") support the Commission's assumption of jurisdiction over pole attachments from the FCC but suggest that SB 3 be amended in 2020 and state that they "do not believe the Commission is required under the language of W.Va. Code §31G-4-4 ('Section 31G-4-4') to adopt wholesale the FCC rules without change".³ Like the Staff, the Companies, without providing support for their assertion, state that "[t]he Commission can and should deviate from FCC Rules and Policies" with regard to procedural and substantive regulatory matters set forth by SB 3.⁴

³ See Joint Initial Comments of AEP Companies and FirstEnergy Companies at 3.

⁴ *Id.* at 4.

Comments of Frontier Communications.

Frontier Communications ("Frontier") believes the requirement of Code §31G-4-4(b) that the Commission adopt the FCC rules regarding pole attachments, including the FCC procedural rules, can be reasonably interpreted to avoid absurd results and concludes that §31G-4-4 is consistent with existing West Virginia law and regulations.⁵ As with the recommendations of Staff and the Companies, Frontier proposes selective editing of the FCC rules.

Comments of Segra.

Lumos Networks, LLC dba Segra and Lumos Networks of West Virginia Inc., dba Segra (collectively "Segra") recognizes the inconsistencies between the Commission's Procedural Rules and the FCC's rules but believes that the Commission can only act in accordance with its current administrative and statutory capabilities.⁶ Segra takes the position that "where there is clear and obvious conflict with the FCC's current dispute resolution and damage award regulations, the Commission may wish to consider temporarily postponing the adoption of permanent rules in those areas. . . ."⁷ No support is provided for piecemeal adoption of the FCC rules.

⁵ Initial Comments of Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, d/b/a Frontier Communications of West Virginia, at 4-5.

⁶ Initial Comments of Segra at 6.

⁷ *Id.* at 10.

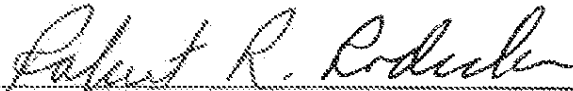
CONCLUSION

As stated in their Initial Comments, whatever is eventually decided by the Commission with regard to the adoption of the FCC rules, the Commission should make clear that such rules do not apply to the Public Systems.

Respectfully submitted,

CITY OF NEW MARTINSVILLE
CITY OF PHILIPPI
CRAIG-BOTETOURT ELECTRIC COOPERATIVE

By Counsel



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CERTIFICATE OF SERVICE

I, Robert R. Rodecker, counsel for the Cities of News Martinsville and Philippi and Craig-Botetourt Electric Cooperative, do hereby certify that copies of the foregoing Reply Comments have been served upon the following parties of record on this 25th day of July, 2019, in the manner indicated:

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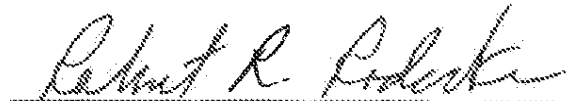
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July 25, 2019

Via Hand Delivery

Connie Graley
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03:40 PM JUL 25 2019 EXEC SEC DIV

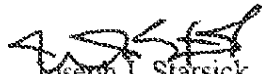
Re: 19-0551-T-GI
General Investigation into Adopting and Implementing Rules Governing Pole Attachments and Assumption of Commission Jurisdiction Over Pole Attachment

Dear Ms. Graley:

Please find enclosed for filing in the original plus 12 copies of the **Reply Comments of Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, D/B/A Frontier Communications of West Virginia** in the above-referenced matter.

Thank you for your attention to this matter.

Sincerely,


Joseph J. Starsick, Jr.
(State Bar No. 3576)

JJSjr/sc
Enclosure

cc: Linda Bouvette, Esquire
Christopher Howard, Esquire
Service List

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

03:40 PM JUL 25 2019 EXEC SEC DIV

CASE NO. 19-0551-T-GI

General Investigation into Adopting and
Implementing Rules Governing Pole Attachments and Assumption of Commission
Jurisdiction Over Pole Attachments

REPLY COMMENTS OF FRONTIER WEST VIRGINIA INC. AND CITIZENS
TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA, D/B/A FRONTIER
COMMUNICATIONS OF WEST VIRGINIA

I. Introduction

Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, d/b/a Frontier Communications of West Virginia (collectively, "Frontier") reiterate their appreciation of the opportunity to comment on the Commission's implementation of West Virginia Code § 31G-4-4 ("Section 4"). While there exists some variation on the specifics, all of the initial comments agree generally that the Commission has the authority under Section 4 to adopt those FCC's regulations implementing the federal Pole Attachment Act, 47 U.S.C. § 224 ("PAA"), that *specifically apply* to the substantive process for setting the rates, terms, and conditions for attachments and to award refunds in pole attachment proceedings.¹ And only one set of comments

¹ See, e.g. *Comments of Crown Castle*, pp. 3, 6-7, 9-12 (setting forth when the Commission may deviate from the FCC's PAA regulations and addressing its authority to award refunds); *Initial Comments of the West Virginia Broadband Enhancement Council*, p. 4 ("the PSC should adopt the FCC Rules largely as is, with only a few modifications to reflect staffing structural differences between the FCC and PSC"); *Staff Initial Comments*, pp. 16 – 27 (addressing the FCC pole attachment regulations that the Commission's Staff believes the Commission should adopt); *Initial Comments of Segra*, p. 11 (the Commission "should move forward with the adoption of all of the FCC's rules currently in effect that do not substantively conflict with its own administrative capabilities and statutory requirements"); *Initial Comments of CTIA*, p. 5 ("the Commission should adopt the FCC's pole attachment rules and use its discretion as the expert agency to resolve any conflicts" between the PAA and existing West Virginia law); *Joint initial Comments of Appalachian Power Company, Wheeling Power Company, Monongahela Power Company, and the Potomac Edison Company*, p. 3 ("the Companies support the Commission's assertion of full jurisdiction over pole attachments"); *Initial Comments on behalf of City of New Martinsville, City of Philippi and Craig-Botetourt*

– those filed by the State’s investor-owned power companies – suggests that the Commission can and should deviate from the FCC’s substantive PAA regulations.² As explained below, however, the Power Companies’ position on this point lacks merit. Instead, Section 4 sets forth the Commission’s jurisdiction over pole attachment and requires it to adopt the FCC’s substantive PAA regulations.

II. Discussion

In its Initial Comments, Frontier explained the Commission should reasonably interpret Section 4 as requiring that it adopt those provisions of the FCC’s PAA regulations that actually apply to the specific *substantive* process for setting rates, terms and conditions of pole attachments.³ On this point, all commenters agree that the Commission has the authority to take such action.⁴ Indeed, only the Power Companies have suggested that “on substantive matters, the Commission can and should deviate from FCC rules.”⁵ In actuality, Section 4 allows for no such deviation.

“The Public Service Commission has no jurisdiction and no power or authority except as conferred on it by statute.”⁶ Here, Section 4 provides, in relevant part, that the Commission “*shall* adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-

Electric Cooperative, p. 9 (recognizing the Commission’s authority under Section 4 to adopt the FCC’s PAA regulations but noting that those regulations should not apply to municipalities and cooperatives). ExteNet Systems, Inc. also recognizes the Commission’s authority to implement Section 4. However, its comments reference the FCC’s PAA regulations that were in effect prior to October 4, 2018, not the FCC’s current PAA regulations. *Initial Comments of ExteNet Systems, Inc.*, pp. 6-8. As a result, ExteNet mistakenly states that the Commission is precluded from implementing certain PAA regulations – specifically, 47 C.F.R. §§ 1.1416 – 1.1425 – that are no longer in effect. *Id.*

² *Joint Initial Comments of Appalachian Power Company, Wheeling Power Company, Monongahela Power Company, and the Potomac Edison Company* (“Power Companies Joint Initial Comments”), p. 5-6. Appalachian Power Company, Wheeling Power Company, Monongahela Power Company and the Potomac Edison Company are collectively referred to as the “Power Companies.”

³ *Initial Comments of Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia*, pp. 2-3.

⁴ See n. 1 above.

⁵ Power Companies Joint Initial Comments, p. 4.

⁶ *Staff Initial Comments*, p. 3 (quoting *Wilhite v. Public Serv. Commission*, 149 S.E.2d 273, 281 (W.Va. 1966)).

way as provided in 47 U.S.C. §224 and 47 C.F.R. §§1.1401 – 1.1415.”⁷ As the Staff noted, and Frontier agrees, “[a]doption of the [FCC’s] actual make-ready pole access rules is relatively straightforward and meets the legislative intent as expressed in the bill.”⁸

Ignoring the express language of Section 4, the Power Companies claim that the Commission should deviate from the FCC’s PAA regulations and refuse adopt the rule governing complaints by incumbent local exchange carriers (“ILECs”) set forth at 47 C.F.R. § 1.1413.⁹ According to the Power Companies, adoption of this rule “would have the effect of reducing rather than expanding the Commission’s jurisdiction because the FCC rule only addresses rates for ILEC attachments on electric utility poles; it does not address rates for electric utility attachments on ILEC poles or access by either party to the other’s poles.”¹⁰ This assertion simply lacks merit.

Utilizing 47 C.F.R. § 1.1413 to determine whether an incumbent local exchange carrier is being charged just and reasonable pole attachment rates neither reduces nor negates the Commission’s authority under W. Va. Code § 24-2-6 to determine that public convenience or necessity require one utility to be allowed to utilize another utility’s poles along a street or highway or to set just and reasonable terms and conditions for such use. Indeed, when the Staff reviewed 47 C.F.R. § 1.1413, it properly concluded that “[t]he provisions of this section appear reasonable, do not conflict with the Commission’s existing rules and should be adopted by the Commission.”¹¹ Accordingly, the Commission can and should implement the FCC’s PAA regulations that *substantively* address the rates, terms, and conditions for pole attachments, including 47 C.F.R. § 1.1413.

⁷ W. Va. Code § 31G-4-4(b) (emphasis added).

⁸ *Staff Initial Comments*, p. 4.

⁹ Power Companies Joint Comments, pp. 5-6.

¹⁰ *Id.*, p. 6.

¹¹ *Staff Initial Comments*, p. 20.

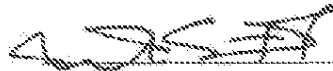
Otherwise, the Commission has the freedom to maintain the *functional* (electronic filing, etc.) aspects of its established administrative processes. Various parties have varying degrees of specificity as to how to accomplish this end or similar ends – Frontier has even offered a redlined version of the FCC's rules – but this end can indeed be accomplished.

III. Conclusion

As set forth above and in Frontier's Initial Comments, the Commission need only exercise its authority under Section 4 to adopt those FCC PAA regulations setting forth the substantive process for setting the rates, terms, and conditions for attachments, otherwise leaving the Commission free to maintain its established ministerial and operational functions. Exhibit A to Frontier's Initial Comments illustrates how straightforwardly doing so can be accomplished.

Respectfully submitted,

FRONTIER WEST VIRGINIA INC. AND CITIZENS
TELECOMMUNICATIONS COMPANY OF WEST
VIRGINIA, D/B/A FRONTIER COMMUNICATIONS OF
WEST VIRGINIA



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*Attorney for Frontier West Virginia Inc. and
Citizens Telecommunications Company of West
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Initial Comments of the Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, d/b/a Frontier Communications of West Virginia* was served upon the following parties of record this 25th day of July, 2019, via electronic transmission, hand-delivery or first-class U.S. mail, postage prepaid.

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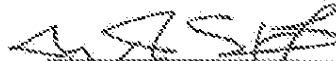
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James V. Kelsh
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July 25, 2019

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Connie Graley, Acting Director
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Public Service Commission of West Virginia
201 Brooks St.
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HAND DELIVERY

03:49 PM JUL 25 2019 EXEC SEC DIV

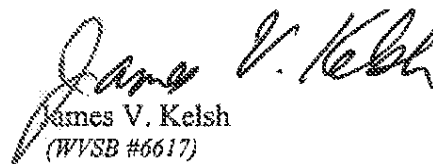
Re: Case No. 19-0551-T-GI

Dear Ms. Graley:

Enclosed herein for filing on behalf of the West Virginia Broadband Enhancement Council ("Council"), please find the original and twelve (12) copies of the "Reply Comments of the West Virginia Broadband Enhancement Council" in the above-referenced matter.

Should you have any question regarding this filing, please do not hesitate to contact me.

Yours very truly,


James V. Kelsh
(WVSB #6617)

JVK/dlm
Enclosures
cc: Service List

PUBLIC SERVICE COMMISSION
WEST VIRGINIA
CHARLESTON

CASE NO. 19-0551-T-GI

03:50 PM JUL 25 2019 EXEC SEC DIV

General Investigation into Adopting and
Implementing Rules Governing Pole
Attachments and Assumption of Commission
Jurisdiction Over Pole Attachments

REPLY COMMENTS OF THE
WEST VIRGINIA BROADBAND ENHANCEMENT COUNCIL

Introduction

Based upon the responses to the Public Service Commission's ("Commission") June 4, 2019 Order, it appears that all of the entities that filed Initial Comments are in favor of the Commission acquiring jurisdiction of pole attachments in West Virginia. However, the degree to which the entities support adopting and implementing the Federal Communications Commission ("FCC") regulations varies. Although some believe more guidance is needed from the Legislature to implement *West Virginia Code* § 31G-4-4, the Council believes that the existing legislation is legally adequate for the Commission to implement the substance and procedural structure of the FCC regulations, with limited changes to reflect differing staffing structures between the FCC and the Commission, and the different posture of a filing at the Commission as compared to one at the FCC.

Addressing Procedural Discrepancies in the Dispute Resolution Process

The Council's position regarding potential procedural discrepancies generally aligns with those expressed in the Initial Comments of Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, d/b/a Frontier Communications of West Virginia (collectively, "Frontier"), Crown Castle Fiber, LLC ("Crown Castle"), and ExteNet Systems, Inc.

("ExteNet"). The Council believes that the Commission should adopt the FCC's procedural rules, as directed by *W. Va. Code* § 31G-4-4, and simply exclude those portions that would yield an absurd result in the state regulatory context. The Council generally agrees with Frontier's argument that "the Commission should reasonably interpret Section 4 to adopt only those provisions of the FCC's PAA regulations that actually apply to the specific process for setting rates, terms and conditions of pole attachments -- not purely procedural rules applicable only to the FCC's peculiar procedures."¹ To this end, the Council also generally agrees with Frontier's suggested changes to the FCC regulations for adoption by the Commission.²

The Council disagrees with the contention of the Staff of the Commission that the Commission's *Rules of Practice and Procedure*, 150 W. Va. Code R. Series 1 ("*Procedural Rules*") are "applicable to all matters before the Commission,"³ and therefore it should adopt only the FCC rules that "do not conflict with applicable statutes and the Commission's *Procedural Rules*."⁴ The Commission has dozens of sets of State rules, including sets of rules with their own procedural parameters, such as the *Rules Governing Siting Certificates for Exempt Wholesale Generators*, 150 W. Va. Code R. Series 30, and the *Rules Governing the Transportation of Natural Gas*, 150 W. Va. Code R. Series 16, both of which contain procedural requirements and deadlines which differ from those in the *Procedural Rules*. It is fair to infer from Senate Bill 3 that the Legislature anticipated the Commission would adopt a separate set of State Rules for pole attachment matters, rather than to shoehorn the FCC Rules into an existing set of State Rules administered by the Commission. The Commission should follow the same model

¹ See Frontier Initial Comments at 3.

² See Frontier Initial Comments, Exhibit A.

³ See Staff Initial Comments at 10.

⁴ See Staff Initial Comments at 13.

with the pole attachment rules it adopts from the FCC. As noted in the Council's Initial Comments, application of the new set of Pole Attachment Rules is not expected to create much of a burden for the Commission. Furthermore, using the FCC's well-defined and efficient procedures eliminates uncertainty for interstate businesses looking to enter West Virginia.

Minor administrative tweaks will allow the Commission to adopt the FCC Rules in substance and spirit, despite differences in terminology or titles. For example, under the FCC Rules, FCC Staff may make oral rulings on discovery disputes at status conferences, whereas, at the Commission, only the Commissioners or an Administrative Law Judge may resolve a discovery dispute, which is accomplished through a written order. The Commission can adopt the spirit of the FCC rules by allowing Administrative Law Judges, rather than Commission Staff, to make rulings on discovery matters. Furthermore, the differences between the FCC's administrative practices and the Commission's administrative practices related to electronic filings are trivial. The Council encourages the Commission to begin accepting electronic pleadings and filings generally, as many courts and agencies around the country have already done, however that is not a critical issue for the Commission's adoption of pole attachment rules consistent with the FCC Rules.

The Commission exists to promote the public interest, not to rigidly adhere to its established practices. By adopting the FCC Rules, the Commission will promote uniformity of practice, thereby encouraging interstate broadband providers to enter West Virginia with confidence and promote more robust and extensive broadband service in West Virginia.

Addressing the Commission's Ability to Award Damages

Some of the entities who filed Initial Comments, including the Commission Staff, believe that adopting the FCC regulations allowing the Commission to award damages conflicts with existing West Virginia law. However, the Council's position more closely aligns with that of

ExteNet.⁵ The prohibition against the Commission awarding damages applies only to violations of *West Virginia Code* Chapter 24.⁶ In contrast, the legislation contemplated here concerns Chapter 31G of the *West Virginia Code*. As noted by ExteNet, the West Virginia Supreme Court of Appeals has long held that, “[i]n the enactment of a statute the Legislature must be presumed to have acted with full knowledge of the provisions of all prior statutes dealing with the same subject matter.”⁷ Therefore, when the Legislature enacted *W. Va. Code* § 31G-4-4 specifically requiring the adoption of 47 C.F.R. § 1.723, the Legislature understood what it was doing and did not intend to “innovate upon the settled policy of the law.”⁸

The Council’s position also aligns closely with that of Frontier. Even if the prohibition against awarding damages did apply to matters under Chapter 31G, there is no conflict with West Virginia law because although the FCC regulations do refer to “damages,” a closer reading of the FCC Rules shows that these are not conventional, civil litigation damages, but rather more limited monetary relief in the form of refunds.⁹ As noted by Frontier,

[T]he FCC’s PAA regulations expressly preclude any damages awards in attachment proceedings. Instead, 47 C.F.R. § 1.1407 sets forth the limited remedies available in such proceedings, which only include: (a) the termination of the unjust or unreasonable rate, term, or condition; (b) the substitution in the pole attachment agreement of the just and reasonable rate, term, or condition as established by the Commission; and (c) the issuance of a refund or payment representing the difference between the amount paid under the unjust or unreasonable rate, term, or condition and the amount

⁵ See ExteNet Initial Comments at 12.

⁶ “Any person, firm or corporation claiming to be damaged by any violation of this chapter by any public utility subject to the provisions of this chapter, may make complaint to the commission, as provided herein, and bring suit in his own behalf for the recovery of the damages for which such public utility may be liable *under this chapter* in any circuit court having jurisdiction.” *W. Va. Code* § 24-4-7 (emphasis added).

⁷ ExteNet Initial Comments at 11 (citing *State v. Jackson*, 120 W. Va. 521 (1938)).

⁸ ExteNet Initial Comments at 11 (citing *Webb v. Ritter*, 60 W. Va. 193 (1906)).

⁹ 47 C.F.R. § 1.1407(a).

that would have been paid under the just and reasonable rate, term or condition, as established by the Commission.

See Frontier Initial Comments at 4 (emphasis added). It is already well established under West Virginia law that the Commission is authorized to award refunds.¹⁰

Furthermore, the FCC Rules allow the bifurcation of pole dispute cases. In Phase I, the FCC determines whether a violation has occurred. If a violation is found, damages are assessed in Phase II.¹¹ This model is easily replicable in West Virginia without violating existing state law. The Commission has jurisdiction and authority to determine whether a violation has occurred and, if a violation is found, the complaining party may seek damages in circuit court.

Conclusion

Some of the entities that submitted Initial Comments expressed the opinion that the FCC Rules should not be adopted where the FCC Rules do not fully comport with existing West Virginia law or Commission procedures. However, the Legislature clearly intended that the Commission adopt the FCC Rules and procedures to create uniformity between West Virginia practices and federal practices, thereby encouraging more interstate businesses to enter West Virginia with confidence. In reviewing all of the comments that are filed, the Council urges the Commission to keep foremost in its mind the critical importance of expansion and improvement of broadband to West Virginia's economic future. If existing West Virginia rules and procedures are allowed to remain in place of FCC rules and procedures, this will create uncertainty, discourage investment and expansion of broadband in the State, and defeat the purpose of adopting the FCC regulations as mandated by *W. Va. Code* § 31G-4-4. The challenges presented by the Legislature's direction

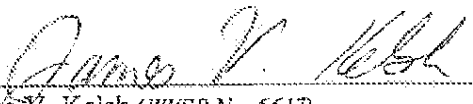
¹⁰ See *W. Va. Code* § 24-2-4a(b); *W. Va. Code* § 24-2-4a(d); *W. Va. Code St. R.* § 150-2-33.7.f; *McElhinney v. W. Va. Pub. Serv. Comm'n*, 214 *W. Va.* 454, 457-58 (2003); *State ex rel. Chesapeake & Potomac Tel. Co. v. Ashworth*, 190 *W. Va.* 547, 551 (1993).

¹¹ 47 C.F.R. 1.723(d).

to the Commission that it adopt the FCC Rules can be met, and should be met promptly, to promote the economic vitality of the State.

WEST VIRGINIA BROADBAND
ENHANCEMENT COUNCIL

By Counsel



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PUBLIC SERVICE COMMISSION
WEST VIRGINIA
CHARLESTON

CASE NO. 19-0551-T-GI

General Investigation into Adopting and
Implementing Rules Governing Pole
Attachments and Assumption of Commission
Jurisdiction Over Pole Attachments

CERTIFICATE OF SERVICE

I, James V. Kelsh, counsel for the West Virginia Broadband Enhancement Council ("Council"), do hereby certify that on this 25th day of July, 2019, copies of the foregoing "*Reply Comments of the West Virginia Broadband Enhancement Council*" was served upon the parties and/or counsel of record in this proceeding, and addressed as follows:

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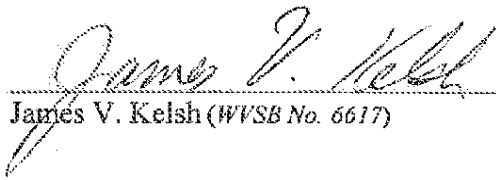
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July 25, 2019

VIA HAND DELIVERY

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04:13 PM JUL 25 2019 EXEC SE

Re: Case No. 19-0551-T-GI
General Investigation into Adopting and
Implementing Rules Governing Pole Attachments
and Assumption of Commission Jurisdiction
Over Pole Attachments.

Dear Ms. Graley:

On behalf of CTIA, enclosed are an original and twelve (12) copies of the **Reply Comments of CTIA**.

Sincerely,

David B. Hanna
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dhanna@hannalawpllc.com

DBH/dh
Enclosures

cc: C. Howard, Esq.
L. Bouvette, Esq.
J. Roberts, Esq.

Before the
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

General Investigation into Adopting and)	
Implementing Rules Governing Pole)	Case No. 19-0551-T-GI
Attachments and Assumption of Commission)	
Jurisdiction over Pole Attachments)	
)	

REPLY COMMENTS OF CTIA

CTIA respectfully submits its reply comments in response to the Public Service Commission of West Virginia’s (“Commission’s”) Commission Order (“Order”) entered June 4th, 2019 in the above-captioned docket.

The overarching theme amongst nearly all the initial comments in this proceeding is that while Senate Bill 3 (“SB3”) instructed the Commission to adopt the Federal Communications Commission’s (“FCC’s”) pole attachment rules in their entirety,¹ the plain language of the bill, apparent legislative intent, and canons of statutory construction all strongly suggest that where adoption of certain sections would lead to illogical or unworkable results, it is the *substance* of those rules, rather than the *procedure*, that the Commission should focus on.

As demonstrated by Frontier in its initial comments, the FCC rules can be adopted almost completely by the Commission, with only minor procedural deletions to prevent conflicts and absurd results.² CTIA therefore reiterates its belief, as stated in its initial comments, that the Commission should adopt the FCC’s rules and associated interpretations, as well as future FCC

¹ See West Virginia Code § 31G-4-4.

² See, e.g., Initial Comments of Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, d/b/a Frontier Communications of West Virginia, Case No. 19-0551-T-GI (July 15, 2019) at Appendix A.

amendments to its rules, to the extent they do not conflict with existing West Virginia statute, and use its discretion as the expert agency to resolve any conflicts.³

In that vein, the Commission should reject interpretations, such as that of Appalachian Power Company *et al.* (the “Electric Companies”),⁴ which go beyond the Commission’s authority by straying from the key points of the FCC’s rules the Legislature specifically mandated: *i.e.*, their rates, terms, and conditions.

As discussed in Commission Staff’s comments, SB3 clearly requires the Commission to “adopt the rates, terms and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S. Code §224 and 47 C.F.R. §§1.1401-1.1415...” and the “dispute resolution process incorporated by reference in those regulations.”⁵ Further, Staff makes it clear that the Commission’s authority is limited to that granted to it by the Legislature, and “SB 3 ... limits the Commission’s authority” over the substantive portions of the FCC’s rules -- namely, the “rates, terms, and conditions” of pole attachments.⁶

In spite of SB3’s very plain language, the Electric Companies suggest that the Commission somehow has the authority to pick and choose which FCC rules to implement. For example, apparently the Electric Companies believe that the Commission should consider re-allocation of pole attachment costs,⁷ ignoring the plain language of SB3 which explicitly ordered the Commission to adopt the FCC’s pole attachment rate methodologies.

³ See Comments of CTIA, Case No. 19-0551-T-GI (July 15, 2019) at 1.

⁴ See Joint Comments of Appalachian Power Company, Wheeling Power Company, Monongahela Power Company, and the Potomac Edison Company, Case No. 19-0551-T-GI (July 15, 2019) (“Electric Companies Comments”).

⁵ See Staff Initial Comments, Case No. 19-0551-T-GI (July 15, 2019) (“Staff Comments”) at 2.

⁶ See *Id.* at 3.

⁷ See Electric Companies Comments at 11.

The Electric Companies are flatly incorrect when they state that “it would not have made sense for the West Virginia Legislature to direct the Commission to regulate pole attachments, but at the same time limit that jurisdiction in a way that would merely duplicate the existing federal regulations.”⁸ SB3 clearly does just that on its face. Because the Commission is a creature of the Legislature, as discussed by Staff,⁹ the Legislature can limit the Commission’s jurisdiction in any way it pleases. The Legislature’s desire that the Commission, and not the FCC, should have jurisdiction over pole attachment complaints in West Virginia is in no way inconsistent with the Legislature’s acknowledgement that the FCC’s rates, terms and conditions for pole attachments have proven fair and efficient and, as dictated by SB3, must be adopted by the Commission.

Even if, as the Electric Companies note, some of the FCC orders and regulations are under review,¹⁰ the FCC rules as they are today must be the foundation on which the Commission builds its rules in conformance with statute. Furthermore, the vast majority of FCC pole attachment rules have already passed muster before courts of competent jurisdiction, up to and including the Supreme Court.¹¹ CTIA opposes any gutting and relitigation of the FCC’s wholly appropriate regime addressing the rates, terms, and conditions of attachment, which -- in addition to being flatly against the Legislature’s instructions -- is only likely to produce the same results while wasting all parties’ time and resources.

In the interest of encouraging deployment by keeping the Commission’s jurisdictional transition to as short a time as possible, CTIA recommends that the Commission open a formal

⁸ *Id.* at 5.

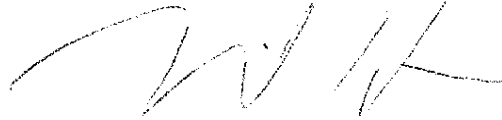
⁹ See Staff Comments at 3, citing Wilhite et al. v. Public Service Commission, et al., 149 S.E.2d 273, 150 W.Va. 747 (1966).

¹⁰ See Electric Companies Comments at 8-10.

¹¹ See, e.g., Arlington v. Fed. Comm’n Comm’n, 569 U.S. 290 (2013), Am. Electric Power Serv. Corp. v. Fed. Comm’n Comm’n, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 118 (2013).

rulemaking as soon as reasonably practical, preferably with preliminary draft rules for consideration, so that interested parties can offer concrete, specific suggestions for consideration and Commission adoption.

CTIA
By Counsel

A handwritten signature in black ink, appearing to read 'D. Hanna', is written over a horizontal dashed line.

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July 25, 2019

CERTIFICATE OF SERVICE

I, David B. Hanna, counsel for CTIA hereby certify that copies of the foregoing
Reply Comments of CTIA, have been served upon the following, by first class United
States mail, postage prepaid, this 25th day of July 2019:

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VIA HAND DELIVERY

Chris Howard, Esq.
Linda Bouvette, Esq.
Legal Division
Public Service Commission
201 Brooks Street
Charleston, WV 25301



DAVID B. HANNA



Crown Castle Fiber LLC
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Canonsburg, PA 15317
(510) 290-3086

July 25, 2019

Public Service Commission of West Virginia
Attn: Executive Secretary
201 Brooks Street
Charleston, WV 25301

WV PUBLIC SERVICE
COMMISSION
OFFICE OF THE SECRETARY

2019 JUL 26 AM 9:09

RECEIVED

Re: *Reply Comments of Crown Castle Fiber LLC, Case No. 19-0551-T-G1*

Dear Executive Secretary:

On behalf of Crown Castle Fiber LLC ("Crown Castle"), enclosed herein for filing are an original and twelve (12) copies of Crown Castle's Reply Comments for case number 19-0551-T-G1. I hereby certify that service has been made on all other parties included on the case service list for this proceeding.

If you have any questions, please feel free to contact me at your earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Kara S. Eaton".

Kara S. Eaton (WVa Bar No. 12470)

cc: Robert Millar, Associate General Counsel
Rebecca Hussey, Utility Relations Counsel

Attorneys for Crown Castle

BEFORE THE
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
CHARLESTON, WV

WVA PUBLIC SERVICE COMMISSION
OFFICE OF THE CLERK
1000 MARKET STREET
CHARLESTON, WV 25301

2019 JUL 26 AM 9:09

RECEIVED

In the Matter of)
)
General Investigation into Adopting and)
Implementing Rules Governing Pole) Case No. 19-0551-T-GI
Attachments and Assumption of Commission)
Jurisdiction Over Pole Attachments)

REPLY COMMENTS OF CROWN CASTLE

Pursuant to the Public Service Commission of West Virginia's (the "PSC" or "Commission") June 4, 2019 Order (the "Order") in the above-captioned proceeding initiating a general investigation into the adoption of rules governing pole attachment procedures as required by W.Va. Code § 31G-4-4, Crown Castle Fiber LLC ("Crown Castle") submits these Reply comments addressing the issues raised by other commenters regarding the adoption and implementation of the Pole Attachment Act ("PAA"), which was codified at 47 U.S.C. § 224, and attendant Federal Communications Commission ("FCC") regulations, 47 C.F.R. §§ 1.1401-1.1425, and the FCC formal complaint procedures regarding pole attachments, as required by W.Va. Code § 31G-4-4.

I. INTRODUCTION

On July 15, 2019, Crown Castle submitted its initial Comments and recommendations regarding how the FCC's formal complaint rules can be implemented at the state level in West Virginia considering that many provisions are unique to FCC operations. It also weighed in as to the extent to which the PSC is authorized to implement damages awards pursuant to 47 C.F.R. § 1.723.

Eight other parties also submitted comments. In general, many of the other parties were in agreement with the substance of Crown Castle's comments regarding the Legislature's

requirements. Several of those parties agree that under Section 31G-4-4 of the West Virginia Code, the Commission *must* adopt the PAA and FCC rules and regulations governing pole attachments, inclusive of the dispute resolution rules and damages provisions contained therein. However, a minority of commenters put forth arguments that are incongruent with the Legislature's directive. For instance, some argue that the Commission is not required to follow the FCC's rules and that the Commission should either substantively change the FCC rules or, in some cases, ignore them altogether. As discussed below, those arguments conflict with the plain language of Section 31G-4-4 and, pursuant to the legislative directive, may not be followed.

Overall, it is clear that the PSC will be required to update or amend some of its existing processes and rules to comply with the mandate of the Legislature. Although change is not always seamless and will likely involve a period of adjustment for all parties, the FCC's rules are time-tested, and the Legislature presumably mandated that the PSC adopt them because they provide for an efficient, uniform framework for the regulation of pole attachments.

II. THE PSC MUST ADOPT THE FCC DISPUTE RESOLUTION RULES

As Crown Castle discussed in its opening Comments, newly-added Section 31G-4-4 of the West Virginia Code *requires* the PSC to adopt the federal PAA (which is codified at Section 224 of the Communications Act of 1934, as amended), and the FCC regulations governing pole attachments, inclusive of the dispute resolution process incorporated by reference in those regulations.¹ Numerous other parties recognize the same point.² For instance, the West Virginia Broadband Enhancement Council's Comments state that the statute "requires the PSC to adopt the dispute resolution process in the FCC Rules" and that "[t]he statutory language does not give

¹ Crown Castle Cmts. at § II.

² See, e.g., West Virginia Broadband Enhancement Council Cmts. at 3; Frontier Cmts. at 1; CTIA Cmts. at 1; City of New Martinsville, City of Philippi, and Craig-Botetourt Electric Cooperative (collectively, "Public Systems") Cmts. at 4, 13; ExteNet Systems, Inc. Cmts. at 8.

the PSC the option of applying the PSC Rules to a pole attachment dispute.”³ Likewise, the Public Systems’ Comments recognize that Section 31G-4-4 “establishes a new avenue for specific types of cases and specifically requires the Commission to adopt the FCC’s dispute resolution rules. As a result, the prior case law, as well as the Commission’s complaint procedure, is being supplanted in the case of pole attachment disputes involving heretofore FCC jurisdictional electric utilities.”⁴

However, a minority of commenters argue that the Commission is not required to follow the FCC’s rules, and that the PSC should either substantively change FCC rules or, in some cases, ignore them altogether. Crown Castle addresses specific arguments below. However, the issue is resolved unequivocally by the plain language of Section 31G-4-4. The statute provides the PSC “shall adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. § 224 and 47 C.F.R. § 1.1401 – 1.1415, inclusive, of the dispute resolution process incorporated by reference in those regulations and any subsequent modifications or additions. . . .” The language is mandatory, stating that the Commission “shall adopt.” The language is not voluntary. It does not say the Commission “may” adopt the rules.

The statute is also specific and explicit in identifying the regulations that the Legislature requires the Commission to adopt and implement. The Legislature identified the specific federal statutory and rule sections it was requiring the Commission to adopt. The statute requires adoption of the rules in 47 C.F.R. § 1.1401-1.1415, and the statute explicitly states the Legislature requires the adoption of the “dispute resolution process incorporated by reference in

³ West Virginia Broadband Enhancement Council Cmts. at 3.

⁴ Public Systems Cmts. at 13.

those regulations.”⁵ Section 1.1404(a) of the FCC’s rules states that “Pole attachment complaint proceedings shall be governed by the formal complaint rules in Subpart E of this part, §§ 1.720-1.740, except as otherwise provided in this subpart J.”⁶ Thus, when the Legislature explicitly stated that the PSC must also adopt the complaint procedures “incorporated by reference in those regulations,” it was explicitly referencing the incorporation by reference of Sections 1.720-1.740.⁷ Finally, Section 31G-4-4 also plainly states that the PSC must adopt “any subsequent modifications or additions to the provisions of the United States Code or Code of Federal Regulations provisions referenced herein.”⁸

The language of Section 31G-4-4(b) is unambiguous and, therefore, must be implemented as plainly stated, without amendment based on what some parties argue the Legislature must have actually intended. In many cases, those arguments reflect the commenting party’s displeasure with the substance of what the Legislature required. However, any disagreement with the Legislature requires amendment by the Legislature. The PSC cannot rewrite the statute.

A. The PSC Must Adopt FCC Dispute Resolution Rules, With Rare Exception

In its opening comments, Crown Castle discussed how Section 31G-4-4 mandates adoption of the FCC dispute resolution rules in their entirety, with rare exception.⁹ Other

⁵ W. Va. Code § 31G-4-4(b).

⁶ 47 C.F.R. § 1.1404(a).

⁷ Although Crown Castle agrees with many of Frontier’s comments, to the extent that Frontier does not acknowledge the statute’s explicit requirement to adopt the FCC dispute resolution procedures, Crown Castle believes Frontier’s discussion is inaccurate. See Frontier Cmts. at 2.

⁸ W. Va. Code § 31G-4-4(b).

⁹ Crown Castle Cmts. at § II.B.

commenters recognize the same point.¹⁰ However, some commenters suggest that the PSC has more latitude to depart from the FCC's dispute resolution rules, either in part or even entirely. As discussed above, generally, those comments conflict with the plain language of the statute. Crown Castle addresses some of the more specific arguments below.

For example, Staff argues that the PSC cannot adopt the FCC dispute resolution rules because to do so would "violate four (4) statutory provisions."¹¹ Staff also argues that having a separate procedure for pole attachment disputes would be an "absurd result" that it claims was "clearly not the legislative intent."¹² Staff's assertions are erroneous.

First, adoption of a specific, expedited procedure for pole attachment disputes that differs from the procedure for other types of disputes before the PSC is not an "absurd result". Indeed, it is a highly logical result. Certain types of disputes may require expedited procedures, such as in this case, where time is of the essence because the Legislature has explicitly expressed the policy and intent to promote the rapid deployment of broadband.¹³ Moreover, there is no practical reason why the PSC cannot have different procedures for different disputes. Such a scheme is not uncommon, particularly where certain issues can and should be resolved on an expedited basis.¹⁴ As Staff notes, the Legislature was well aware of the fact that the PSC has a current set of procedures. Thus, the Legislature's intent was clearly to require a change.

¹⁰ See, e.g., West Virginia Broadband Enhancement Council Cmts. at 4-5; Frontier Cmts. at 1-2.

¹¹ Staff Cmts. at 4.

¹² *Id.*

¹³ W.Va. Code § 31G-1-1(1).

¹⁴ See, e.g., 21 C.F.R. § 56.110 and 45 C.F.R. § 46.110 (FDA and HHS regulations allow Institutional Review Boards to review certain categories of research through an expedited procedure); 39 C.F.R. § 955.13 (providing for expedited and accelerated procedures for Postal Service Board of Contract Appeals regarding disputes under a certain monetary threshold); 15 C.F.R. § 768.8 (Bureau of Industry and Security provides expedited licensing procedures for

Second, adoption of the FCC rules would not violate West Virginia law. As a threshold matter, it is entirely possible for the Legislature to grant the PSC authority in Section 31G-4-4 for pole attachments that may be different from the authority granted (or limits on the PSC's authority) set forth in other statutory provisions. For example, Staff argues that the FCC rules would require the PSC to assess damages, "an action that is prohibited by W.Va. Code § 24-4-7. . . ."¹⁵ Yet, Section 24-4-7 does not "prohibit" the PSC from ever assessing damages. Nothing in Section 24-4-7 prohibits the Legislature from granting the PSC authority in a separate provision to assess damages in a particular class of cases, as is the case here. As Staff points out, "when two statutes are inconsistent and there is conflict, the latter statute in time prevails."¹⁶ Thus, the latter in time statute in this case, Section 31G-4-4 controls to grant the Commission new authority, even if it may conflict with prior statutes. Likewise, there is no "conflict" between W.Va. Code § 24-7-1 providing the Commission general rulemaking authority to adopt rules of procedure and the latter adoption of § 31G-4-4(b) in which the Legislature specifies specific procedures for a particular class of cases.

On other issues where Staff argues there is a conflict, for example the imposition of filing fees, as Crown Castle and other commenters noted, the Commission can omit such non-substantive provisions.¹⁷ Such a non-substantive "conflict" between the FCC's rules and the Commission's authority is not grounds for wholesale rejection of the clear statutory requirement to adopt the FCC's pole attachment dispute resolution procedures.

reviewing and processing license applications for the export of an eligible item to a non-controlled country within statutory time limits).

¹⁵ Staff Cmts. at 5.

¹⁶ *Id.* at 8.

¹⁷ Crown Castle Cmts. at 6-7; West Virginia Broadband Enhancement Council Cmts. at 4-5; Frontier Cmts. at 1-2.

Third, Staff's assertion that 47 C.F.R. § 1.735 is an opening for the Commission to completely reject all of the FCC's dispute resolution procedures is incorrect.¹⁸ Section 1.735(a) provides that the FCC "may issue such orders and conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice."¹⁹ Staff suggests that the Commission could use Section 1.735(a) to either adopt a General Order or in each individual pole complaint case²⁰ adopt an order stating that the Commission will utilize its Procedural Rules.²¹ In other words, Staff suggests the Commission use Section 1.735(a) as a loophole to evade the Legislature's mandate to follow FCC procedures.

Section 1.735(a) is not so broad as Staff suggest. Section 1.735(a) allows the Commission some discretion in the conduct of its proceedings, but it cannot plausibly be read to mean that the Commission may completely disregard all of the formal complaint procedures that the Legislature specifically mandated that the Commission adopt. To argue as much would lead to an absurd result in which the Commission "adopts" the FCC's dispute resolutions rules from 47 C.F.R. §§ 1.720-1.740 only to then use one of those rules, § 1.735, to bypass all of the others and, in so doing, ignore the Legislature's clear directive and the plain language of Section 31G-

¹⁸ Staff Cmts. at 14-16.

¹⁹ 47 C.F.R. § 1.735(a).

²⁰ There appears to be some confusion regarding the involvement of "make ready" and "access" in pole attachment disputes. Although Article 4 of Chapter 31G is entitled "make-ready pole access," not every dispute regarding pole attachments involves make ready or access. Some disputes may involve only the annual rate, for example. Other disputes may involve whether a particular term or condition of attachment is just and reasonable.

²¹ Staff Cmts. at 14. From a purely practical perspective, Staff's suggestion would not work on a case-by-case basis because the case would be initiated by the complainant filing a complaint under the pole attachment dispute procedures, which would assume certain substantive requirements (*e.g.*, under the FCC rules, the complaint must set forth the party's entire case and proof), only to then have the Commission declare that the rules and assumptions will not apply.

4-4.²² Moreover, that some of the FCC's rules allow some level of "flexibility" or "discretion" in processing cases cannot logically be interpreted as an invitation to the Commission to completely ignore Section 31G-4-4's explicit directive in favor of retaining the current practices and procedures that the Legislature clearly indicated it must give up.

B. The Commission Cannot Re-Write The FCC Rules

Despite the plain language of Section 31G-4-4, several parties argued that the Commission should change the substance of the FCC's rules. Those arguments are mistaken and fundamentally conflict with the statute. As demonstrated above, the plain language of Section 31G-4-4(b) explicitly requires the Commission to adopt the FCC rules, and any future amendment thereto. The statute leaves no room for the Commission to alter the substance of the FCC's rules, which the Legislature clearly intended the PSC to specifically follow.

The comments from the electric utilities²³ are entirely erroneous and must be disregarded. Their comments are not responsive to the Commission's Order, but rather, are targeted at attacking the substance of the FCC's rules. In addition to being wrong factually, legally, and as a public policy matter, the Electric Utilities' comments are irrelevant.

The Legislature has clearly stated that the Commission is required to adopt the FCC's rules, in their entirety. The Electric Utilities' argument appears to recognize this, but posits that they are going to seek legislative change.²⁴ However, the Electric Utilities' hopes for future legislation are not grounds for the Commission to disregard the plain language of Section 31G-4-

²² See W.Va. Code § 31G-4-4 (stating the Commission "shall adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. § 224 and 47 C.F.R. § 1.1401 – 1.1415, inclusive, of the dispute resolution process incorporated by reference in those regulations . . .").

²³ Appalachian Power Company, Wheeling Power Company, Monongahela Power Company, and the Potomac Edison Company (collectively the "Electric Utilities").

²⁴ Electric Utilities Cmts. at 3.

4(b) mandating the adoption of the FCC's pole rules, including dispute resolution procedures.²⁵ The Electric Utilities argue that the sole purpose of Section 31G-4-4 was to "transfer regulatory authority from the federal level to the state level."²⁶ But that argument mischaracterizes and inaccurately minimizes the plain language of Section 31G-4-4. First, there is no such indication of intent. To the contrary, the Legislature's explicitly states that the "primary goal" of Chapter 31G is to promote the expedited deployment of broadband Internet communications. Section 31G-1-1(1) states "it is the primary goal of the Governor, the Legislature and the citizens of this state, by the year 2020, to make every municipality, community, and rural area in this state, border to border, accessible to Internet communications through the expansion, extension and general availability of broadband services and technology."²⁷ Section 31G-4-4 grants the Commission regulatory authority over pole attachments, as set forth in Chapter 31G, Article 4, specifically to facilitate the "primary goal" of expediting Internet deployment. The Legislature clearly mandated adoption of the FCC's pole attachment rules because they provide specific timelines for deployment by pole owners and also expedited dispute resolution procedures. As Crown Castle demonstrated in its opening comments, in July 2018, the FCC issued a Report and Order creating an updated, uniform set of procedural rules for formal complaint proceedings.²⁸ The purpose was to "*streamline[] and consolidate[]* the procedural rules governing formal

²⁵ The Electric Utilities' assertion that the language of Section 31G-4-4(b) is "vague" is untenable. As discussed above, Section 31G-4-4(b) is explicit and clear, identifying specific sections in the C.F.R. that the Legislature requires be adopted. The statute is not remotely vague.

²⁶ Electric Utilities Cmts. at 5.

²⁷ W. Va. Code § 31G-1-1(1).

²⁸ *In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enft Bureau*, Report and Order, 33 F.C.C. Rcd. 7178 (2018) [hereinafter *2018 Formal Complaint Rules Order*].

complaints.” (emphasis added).²⁹ By adding Section 31G-4-4, the Legislature clearly recognized that the FCC’s simplified procedures make it easier for attaching parties to obtain prompt relief. The Legislature, therefore, mandated adoption of the FCC’s dispute resolution rules, and the PSC can, should, and must adopt these rules in their entirety, with rare modification, as discussed below.

Similarly, Staff’s suggestion that the Commission can alter the substance of FCC rules conflicts with the language and intent of Section 31G-4-4. For example, Staff suggests that “some flexibility” should be permitted for Staff to alter the FCC’s well-established pole rate formulas.³⁰ At a minimum, Staff’s position conflicts with the plain language of Section 31G-4-4(b). The assertion is also based on a false premise; specifically, Staff reference the “true cost” of attachment and wanting the ability to ensure ratepayers are not “subsidizing” the services provided by the attachers. But the FCC’s formula, which has existed for decades, recovers the cost of attachments and does not provide a subsidy. Instead, it has survived many challenges, and been upheld as recovering the actual costs imposed. As repeatedly found by the FCC and courts, the FCC’s fully allocated rent formula more than fully compensates pole owners for the cost of accommodating pole attachments.³¹ In its 2011 Pole Order, the FCC again rejected

²⁹ *Id.* at ¶ 1.

³⁰ Staff Cmts. at 19-20.

³¹ See, e.g., *AEP v. FCC*, 708 F.3d 183, 189 (D.C. Cir. 2013) (citing *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002) (“[A]ny implementation of the (FCC cable pole attachment rate) (which provides for much more than marginal cost) necessarily provides just compensation.”)); *Amendment of Commission’s Rules & Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Red 12103, ¶¶ 15-25 (2001); *Trenton Cable TV, Inc. v. Missouri Pub. Serv. Co.*, PA-81-0037, ¶ 4 (rel. Jan. 25, 1985) (“Since any rate within the range [i.e., marginal cost to Cable Rate formula] assures that the utility will receive at least the additional costs which would not be incurred but for the provision of cable attachments, that rate will not subsidize cable subscribers at the expense of the public.”). This fact was recognized by Congress when it enacted the 1978 Pole Attachment Act. See S. Rep. No. 95-580, at 16 (1977), reprinted in 1978 U.S.C.C.A.N. 109, 124 (“1977 Senate Report”) (“CATV offers an

arguments claiming that its updated rental rate formula would cause utility rate payers to subsidize non-utility attachments. The FCC explained:

The new telecom rate is compensatory and is designed so that utilities will not be cross-subsidizing attachers, as it ensures that utilities will recover more than the incremental cost of making attachments. The record provides no evidence indicating that there is any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate.³²

....

We find no evidence in the record that supports the utilities' assertions that the lower-bound telecom formula results in rates so low that it forces electric ratepayers to subsidize third-party attachment rates. Under economic and legal principles, a given service is not subsidized by other services if the rate for the service produces revenues that cover all of the costs caused by the service. In this case, neither the firm that provides the given service and other services, nor the customers of those other services, are made worse off by the firm incurring costs to supply the service. The given service (e.g., access to poles) does not subsidize other services (e.g., electric service) if its rate produces revenues that cover the incremental costs of providing the service.³³

In short, the FCC rules do not make subscribers subsidize non-utility services. The Legislature understood this and did not intend to allow the Commission or Staff to abandon and re-invent over forty years' worth of FCC expertise and experience.

The Electric Utilities' argument that adoption of the FCC regulations in total is inconsistent with the Commission's broad authority and could upset existing contracts previously approved by the Commission is unsupported and irrelevant.³⁴ First, the Electric Utilities cite no

income-producing use of an otherwise unproductive and often surplus portion of the plant.") The United States Supreme Court upheld the Cable Rate in 1987. *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).

³² *In re Implementation of Section 224 of the Act*, FCC 11-50, 26 FCC Rcd. 5240 ¶ 182 (2011).

³³ *Id.* at ¶ 184 (citing *Alabama Power Co. v. FCC*, 311 F.3d at 1370. See also William J. Baumol and Dietrich Fischer, *Super Fairness: Applications and Theory*, Ch. 6 (1986); Gerald R. Faulhaber, *Cross-Subsidization: Pricing in Public Enterprises*, 65 AM. ECON. REV. 966, 966-77 (1975)).

³⁴ Electric Utilities Cmts. at 7.

factual or other support for their assertion.³⁵ Second, in any event, any existing agreement governing attachment of cable or telecommunications facilities to utility poles is already subject to the FCC's pole attachment rules. If a current pole attachment agreement would be "upset" by the FCC's rules, then the agreement already is unlawful.

The Electric Utilities' argument that the FCC's rules conflict with the make ready cost recovery in Section 31G-4-1 is also inaccurate.³⁶ The Electric Utilities argue that Section 31G-4-1 requires a new entrant to pay "all make ready costs," and that Sections 1.1411(d)(4) and 1.1415(b) of the FCC's rules relieve the new attaching party of certain costs. Section 1.1411(d)(4) of the FCC's rules provides that a utility company may not charge a new attacher "to bring poles, attachments, or third-party equipment into compliance with current published safety, reliability, and pole owner construction standards guidelines if such poles, attachments, or third-party equipment were out of compliance because of work performed by a party other than the new attacher prior to the new attachment."³⁷ Section 1.1415(b) does not deal with costs at all, but rather provides that a utility cannot deny an attacher the ability to overlash due to preexisting violations caused by another attaching party, or require that new overlapping party to fix preexisting violations caused by other attachers.³⁸ Those FCC rules, which recognize the axiomatic proposition that a new attaching party should not be responsible for fixing violations caused by other parties, do not conflict with Section 31G-4-1. Section 31G-4-1(3) provides that

"Make Ready Costs" means the costs incurred by an Attacher associated with the transfer of the facilities, antenna, lines or equipment of a Pre-Existing Third Party User, undertaken by an Attacher to enable attachment to the utility pole or similar structure. Make-Ready Costs that are to be paid by an Attacher include, without

³⁵ *Id.*

³⁶ Electric Utilities Cmts. at 7-8.

³⁷ 47 C.F.R. § 1.1411(d)(4).

³⁸ *Id.* at § 1.1415(b).

limitation, all costs and expenses to relocate or alter the attachments or facilities of any Pre-Existing Third Party User *as may be necessary to accommodate an Attacher's attachment.*³⁹

Section 31G-4-1(3) includes the same concept as provided in the FCC's rules. The attacher is only required to pay costs to relocate or alter pre-existing attachments "as may be necessary to accommodate an Attacher's attachment."⁴⁰ Fixing a pre-existing violation of standard safety or engineering rules is not "necessary to accommodate" the new attaching party's attachment. Rather, a pre-existing violation should have already been corrected at the cost of the party causing the violation; it was necessary to correct violations regardless of any new attachment.

Moreover, if Section 31G-4-1(3) conflicts with federal rules, it is preempted and unenforceable.

C. The PSC Need Not Adopt Language that is Purely FCC-Specific, But Must Adopt Rules That Achieve the Same Result

Crown Castle agrees with the position of other parties that "the PSC should adopt the FCC Rules largely as is, with only a few modifications. . . ."⁴¹ As Crown Castle explained in its opening Comments, to the extent the FCC's rules are more specific than the West Virginia Rules of Practice and Procedure contained in 150 C.S.R. 1 (the "West Virginia Commission Procedural Rules"), the PSC still must adopt those rules, as mandated by the Legislature. While the Commission can make limited modifications to those FCC rules involving purely logistical matters that are "unique to FCC operations," any alteration of the FCC's rules must endeavor to maintain the rules' purpose. The clearest example of this is rules referencing the FCC's

³⁹ W.Va. Code § 31G-4-1(3) (emphasis added).

⁴⁰ *Id.*

⁴¹ West Virginia Broadband Enhancement Council Cmtns. at 4. *See also* Frontier Cmtns. at 1-2 ("Section 4 does not require that the Commission adopt the FCC's peculiar procedural rules *in toto* . . . nor must the Commission adopt rules that, both on their face, may apply only to the FCC, not this Commission.").

electronic filing system.⁴² The Commission can alter the language of the FCC rules to reference its own filing system, but to the extent it currently only accepts hard-copy filings for complaints, it should also consider adopting an electronic filing option.

For rules that are not facially inapplicable to pole attachment complaints or that involve a mere substitution of the PSC's counterpart to an FCC reference, however, the FCC developed specific pleading requirements for a reason, and the Legislature intended for the PSC to copy them. This includes rules related to the time of answers and replies⁴³; "executive level" pre-filing settlement discussions⁴⁴; the provision of staff-supervised mediation services⁴⁵; initial status conferences⁴⁶; and the institution of a uniform 270-day shot clock for resolution of formal complaints.⁴⁷ In the FCC's experience, such requirements have, among other things, "significantly improved prospects for resolving [pole attachment] disputes quickly" and have been found to be "an effective vehicle for refining the matters in dispute, addressing discovery requests, and exploring settlement options."⁴⁸

Crown Castle also agrees with the West Virginia Broadband Enhancement Council's Comments that a "principal value" of the FCC rules is that they "allow[] the parties to work out

⁴² See 47 C.F.R. §§ 1.731, 1.734.

⁴³ *Id.* at §§ 1.726(a), 1.728(a); *In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enft's Bureau*, Report and Order, 33 F.C.C. Red. 7178 (2018) [hereinafter *2018 Formal Complaint Rules Order*], at ¶¶ 5-6.

⁴⁴ 47 C.F.R. § 1.722(g); *2018 Formal Complaint Rules Order*, *supra* note 43, at ¶ 16.

⁴⁵ 47 C.F.R. § 1.737; *2018 Formal Complaint Rules Order*, *supra* note 43, at ¶ 17.

⁴⁶ 47 C.F.R. § 1.733; *2018 Formal Complaint Rules Order*, *supra* note 43, at ¶ 18.

⁴⁷ 47 C.F.R. § 1.740; *2018 Formal Complaint Rules Order*, *supra* note 43, at ¶¶ 20-23.

⁴⁸ *2018 Formal Complaint Rules Order*, *supra* note 43, at ¶¶ 16, 18.

disputes knowing the FCC substantive and procedural rules will apply in the event the dispute is not resolved consensually.”⁴⁹ The PSC can and must adopt all such rules.

Additionally, the FCC rules adopt a uniform approach to discovery, thereby giving parties greater certainty regarding the discovery process and available discovery mechanisms.⁵⁰ In contrast, in West Virginia, discovery is not specifically provided for in the context of formal complaint proceedings, and “[t]he Commission will not resolve discovery disputes unless a motion is filed seeking Commission action.”⁵¹ The FCC’s rules seek to avoid engaging in such costly discovery motions.⁵² As with the FCC procedures regarding pleadings, the FCC’s enhanced discovery mechanisms create a streamlined, predictable process that facilitates narrowing the facts and issues in dispute.⁵³ Section 31G-4-4 mandates that the PSC adopt the procedures and rules in the FCC’s Rules.

III. ADOPTION OF THE FCC’S “DAMAGES” RULE WOULD NOT CONFLICT WITH WEST VIRGINIA LAW

The PSC’s Order expressed concern regarding “the apparent conflict between Section 31G-4-4 and 24-4-7 and cases decided thereunder,” and in particular, how this conflict affects their ability to implement damages awards under Rule 1.723.⁵⁴ Crown Castle explained in its initial Comments that the Legislature granted the PSC authority to award refunds and damages through its passage of Section 31G-4-4, which mandates that the PSC adopt the provisions and

⁴⁹ West Virginia Broadband Enhancement Council Cmets. at 2.

⁵⁰ 47 C.F.R. § 1.730; *2018 Formal Complaint Rules Order*, *supra* note 43, at ¶ 9.

⁵¹ West Virginia Commission Procedural Rules § 150-1-13.6.6.

⁵² *See, e.g.*, 47 C.F.R. § 1.730.

⁵³ *2018 Formal Complaint Rules Order*, *supra* note 43, at ¶¶ 1, 9.

⁵⁴ Order at 4.

practices of the PAA and FCC regulations related to pole attachments.⁵⁵ Therefore, under the FCC's Rules as adopted by the PSC, a complainant in a formal FCC complaint proceeding may request damages under Section 1.723, and the Commission may "[o]rder a refund or payment, if appropriate" pursuant to Section 1.1407. The West Virginia Broadband Enhancement Council agrees.⁵⁶

Although prior case law⁵⁷ held that the Commission's authority under the then-existing statutes was limited to prescribing rates and practices, "those cases were decided under a different paradigm," and Section 31G-4-4 "supplanted" that case law and the PSC's complaint procedures.⁵⁸ While enforcement of an award of damages may still ultimately involve the prevailing party seeking enforcement of the PSC's award in court,⁵⁹ in such cases the findings of the PSC should serve as conclusive evidence of the legitimacy of the petitioner's claims such that enforcement by the courts would essentially be automatic.⁶⁰ There is no conflict, as the statute now grants the PSC the same authority as the FCC with respect to "damages" awards.

⁵⁵ Crown Castle Cmts. at § III.

⁵⁶ West Virginia Broadband Enhancement Council Cmts. at 2.

⁵⁷ See *Carter v. Willis*, 145 W. Va. 779, 783 (1960); *Wheeling Steel Corp. v. Pub. Serv. Comm'n*, 110 S.E. 489, 491 (1922).

⁵⁸ Public Systems Cmts. at 13; see also *ExteNet Systems, Inc. Cmts.* at 12 ("This Commission has the legal ability and authority to award damages pursuant to W.VA. Code § 31G-4-4.").

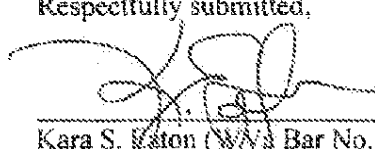
⁵⁹ See *Authority of the district courts to enforce the Communications Act and FCC orders—Enforcement of FCC orders for the payment of money*, 9 Bus. & Com. Litig. Fed. Cts. § 97:48 (4th ed.); 47 U.S.C. § 407 ("If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States . . . or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises.").

⁶⁰ 47 U.S.C. § 407 ("Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suits the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated . . .").

IV. CONCLUSION

Crown Castle respectfully submits these reply comments and recommendations regarding how the FCC's formal complaint rules can be implemented at the state level in West Virginia considering that many provisions are unique to FCC operations, as well as the extent to which the PSC is authorized to implement damages awards pursuant to 47 C.F.R. § 1.723.

Respectfully submitted,



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July 25, 2019

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I, Kara S. Eaton, hereby certify that on July 24, 2019, I caused a copy of the foregoing

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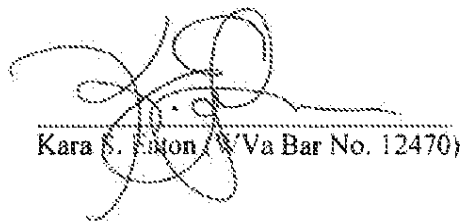
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July 25, 2019

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03:45 PM JUL 25 2019 EXEC SEC DIV

**CASE NO. 19-0551-T-GI
General Investigation into Adopting and
Implementing Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction over Pole Attachments**

Dear Ms. Graley:

Enclosed please find for filing in the above-referenced matter the original and twelve (12) copies of **Reply Comments of the West Virginia Cable Telecommunications Association**.

Thank you for your attention in this matter.

Very truly yours,

Richard L. Gottlieb

RLG/dc

Enc.

cc: All counsel of record

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conditions of access to, and use, of poles, ducts, conduits, and rights-of-way as provided in the FCC regulations.

The WVCTA submits these reply comments in this matter. While the WVCTA is generally supportive of the position taken by Staff in its comments, Staff does appear to propose one change with regard to pole rental rates that would be inconsistent with the statutory provision that “[t]he commission shall adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. § 224 and 47 C.F.R. § 1.1401–1.1415. . . .” See W.Va. Code §31G-4-4(b). Specifically, in its comments to sections 1.1406 (complaint consideration), 1.1408 (imputation of rates; modification of costs), 1.1409 (allocation of unusable space costs), and 1.1410 (space factor presumptions), Staff contends that the Commission must ensure that the pole rate formulas do not result in pole owners’ ratepayers subsidizing the services being provided by the attachers. See Staff Initial Comments, pp 19-20. In these sections, Staff indicates that it wants “some flexibility in the formulas” for calculating rates to ensure that such subsidization does not occur. *Id.*

The FCC’s rate formulas adopted pursuant to 47 U.S.C. § 224 fully compensate pole owners for costs associated with accommodating a pole attachment. The Cable Formula has been well-vetted over the past several decades at both the federal and state levels and repeatedly found by regulatory agencies and by the courts, including the U.S. Supreme Court, to produce rates that are just, reasonable and fully compensatory to the utility.² Moreover, attachers are required to

² See, e.g., *Implementation of Section 224 of the Act*, Report and Order on Reconsideration, 26 FCC Red 5240, ¶¶ 130-131, 181 (2011) (“2011 Pole Order”), aff’d, *American Elect. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013) (“AEP v. FCC”), cert. denied, 134 S. Ct. 118 (2013); 2011 Pole Order ¶ 184 (“We find no evidence in the record that supports the utilities’ assertions that the [FCC rate] results in rates so low that it forces electric ratepayers to subsidize third-party attachment rates. . . The given service (e.g., access to poles) does not subsidize other services (e.g., electric service) if its rate produces revenues that cover the incremental costs of providing the service.”); *In re Amendment of Commission’s Rules and Policies Governing Pole Attachments, Consolidated Partial Order on Reconsideration*, 16 FCC Red. 12103, ¶¶ 15-25 (2001) (“2001 Reconsideration Order”); *FCC v. Florida Power Corp.*, 480 U.S. 245, 253-54 (1987) (finding that it could not be “seriously argued, that a rate

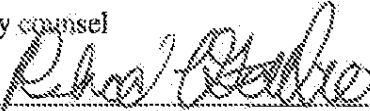
pay “make-ready” costs as a condition to attaching to a pole. Make-ready costs consist of all the pole owners’ costs associated with making space available on a pole, including the cost of changing out the pole if that is necessary. Once the attacher pays make-ready costs, the pole owner is fully compensated for any incremental costs caused by the attachment. The annual pole rent – which provides pole owners a rent representing a proportional share of all its annual costs of ownership - is on top of the make-ready charges. As a result, the pole owner is often better off with attachments and there is absolutely no subsidy.³ Adopting the FCC formulas is critical to incentivize new construction to encourage cable and broadband deployment, particularly in rural areas. They do not, as suggested by the staff, serve as a subsidy for the attachers’ service. The Staff’s concerns about utility ratepayers subsidizing attachers so as to justify flexibility in formula rates are simply unfounded and contradicted by all available evidence.

Implementation of the FCC rules is mandated by W.Va. Code §31G-4-4 and does not allow any flexibility for the rate formulas, as sought by Staff. Adoption of the FCC’s rules by the Commission, in fact, will promote the kind of regulatory predictability and uniformity that encourage providers’ investment in and deployment of broadband networks.

providing for the recovery of fully allocated cost, including the cost of capital, is confiscatory.”); *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1363, 1370; (11th Cir. 2002); *Detroit Edison Co. v. Michigan Public Serv. Comm’n*, Nos. 203421, 203480, slip op., at 3-4 (Mich. Ct. App. Nov. 24, 1998), affirming *Consumers Power Co., Detroit Edison Co., Setting Just and Reasonable Rates for Attachments to Utility Poles, Ducts and Conduits*, Case Nos. U-010741, U-010816, U-010831, Opinion and Order (Mich. Pub. Serv. Comm’n Feb. 11, 1997), appeal denied, 461 Mich. 853, 602 N.W.2d 386, 1999 Mich. LEXIS 3252, 1999 WL 711854 (Mich.); *In the Matter of Trenton Cable TV, Inc. v. Missouri Public Serv. Co.*, PA-81-0037, ¶ 4 (rel. Jan. 25, 1985) (“Since any rate within the range assures that the utility will receive at least the additional costs which would not be incurred but for the provision of cable attachments, that rate will not subsidize cable subscribers at the expense of the public.”).

³ See *Alabama Cable Telecom Ass’n v. Alabama Power Co.*, 16 FCC Rcd 12209, ¶58 (2001) (“The [FCC]’s cable rate formula, together with payment of make-ready expenses, provides compensation that exceeds just compensation. In instances where attachers pay the costs of a replacement pole, the attacher actually increases the utility’s asset value and defers some of the costs of the physical plant the utility would otherwise be required to construct as part of its core service.”).

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**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 19-0551-T-GI

**General Investigation into Adopting and
Implementing Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction over Pole Attachments**

CERTIFICATE OF SERVICE

I, Richard L. Gottlieb, Counsel for the West Virginia Cable Telecommunications Association (WVCTA), does hereby certify that a copy of the foregoing **Reply Comments of the West Virginia Cable Telecommunications Association** has been served upon the following parties of record by First Class, United States Mail; postage prepaid, this 25th day of July, 2019.

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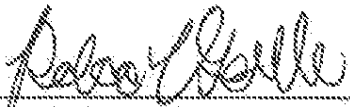
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