



**Broadband
Cable Association
of Pennsylvania**

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October 29, 2018

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



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

Dear Secretary Chiavetta:

Enclosed for filing please find Comments of the Broadband Cable Association in the above captioned proceeding. Our document is also being filed electronically for your convenience.

Sincerely,

Daniel R. Tunnell
President

Enclosure

cc: Shaun A. Sparks, Law Bureau
Colin W. Scott, Bureau of Technical Utility Services
(via email)

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**Before the
Pennsylvania Public Utility Commission**

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

L-2018-3002672

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Independent Regulatory
Review Commission

Comments of the Broadband Cable Association of Pennsylvania, Inc.

The Broadband Cable Association of Pennsylvania, Inc. ("BCAP")¹ submits these comments on behalf of its members in response to the Commission's Notice of Proposed Rulemaking issued in the above-captioned proceeding ("Notice"),² concerning proposals to reverse preempt Federal Communication Commission ("FCC") jurisdiction over pole attachments in the Commonwealth pursuant to Section 224(c) of the Communications Act of 1934, as amended. BCAP and its members applaud the Commission's goals of ensuring a prompt and fair process for adjudicating pole attachment complaints and facilitating increased broadband deployment in Pennsylvania. Utility poles and conduits are essential physical infrastructure necessary for the delivery of broadband services to end users, and BCAP's members rely on the existence of predictable and enforceable rules and procedures to ensure that they do not face unreasonable impediments in accessing or using this infrastructure to serve Pennsylvania customers.

While BCAP therefore concurs in the Commission's desire to provide for prompt resolution of disputes and to facilitate access to poles, recent developments at the federal level

¹ BCAP is an association representing more than a dozen cable providers offering broadband, video, and voice services to consumers and businesses in Pennsylvania. Our members serve over 3 million customers utilizing more than 85,000 miles of fiber and coaxial cable throughout the Commonwealth.

² See *Assumption of Commission Jurisdiction over Pole Attachments from the Federal Communications Commission*, Pa. Pub. Util. Comm'n, No. L-2018-3002672, Notice of Proposed Rulemaking (rel. Jul. 16, 2018) ("Notice").

militate against moving forward at this time with proposals to reverse preempt the federal pole attachment regime and to establish an entirely new set of rules in Pennsylvania. Specifically, after the Commission commenced this proceeding in June, the FCC released two orders that address the issues raised in the Notice, by providing for accelerated resolution of pole attachment complaints filed with the FCC and by making significant changes to the process for attaching broadband facilities to poles in states such as Pennsylvania.

First, the FCC issued an order in July 2018 that significantly strengthened and consolidated its procedural rules governing formal complaints regarding pole attachments.³ That order, among other things, established a 60-day accelerated complaint procedure, “shot clocks” governing FCC resolution of pole attachment complaints, and enhanced discovery rights for complainants and respondents alike.⁴ BCAP and its members believe that this order will help ensure that all stakeholders have more efficient and prompt means of resolving disputes before the FCC—thus addressing one of the major concerns that led to the Commission’s Notice.

Second, the FCC issued an order in August 2018 that “fundamentally shift[s] the [FCC’s] framework” governing access to utility poles for new attachments.⁵ This order, among other things, adopts a one-touch make-ready (“OTMR”) approach for “simple” make-ready work performed to accommodate new attachments, shortens the time frames for “complex” make-ready work, and refines and codifies longstanding precedent endorsing overlapping as an efficient means of maximizing usable space on the pole.⁶ The order is the subject of a Petition

³ See *Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, EB Docket No. 17-245, Report and Order, FCC 18-96 (rel. Jul. 18, 2018).

⁴ See *id.* ¶¶ 9, 19, 21; see also *id.*, App’x (setting forth the text of the new rules).

⁵ See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, FCC 18-111, ¶ 2 (rel. Aug. 3, 2018).

⁶ See *id.*

for Reconsideration recently filed by a coalition of seven utilities,⁷ which include the parent companies of several Pennsylvania utilities.⁸ The new rules could go into effect and be enforced by the FCC while the Petition is pending, but ultimately may be revised in ways that could further alter the pole attachment process at the federal level.

Consistent with the “cautious approach” espoused in the Notice and the Commission’s concern about “mak[ing] any sudden departures from the federal pole attachment standards,”⁹ the most prudent course at this stage would be for the Commission to postpone any decision concerning reverse preemption until after the dust settles surrounding the recent sweeping amendments to the FCC’s pole attachment rules. Pole owners and attachers are currently in the process of adjusting their practices and policies to conform to the rule changes, and the FCC has not yet had the opportunity to adjudicate any complaints under the newly amended substantive pole attachment rules and procedures, which will be informed by its decades of prior experience. Moreover, some of the reforms adopted in the FCC’s August 2018 order could be amended further in the near future based on the pending reconsideration proceeding. As a result, the Commission lacks sufficient data at this stage to make an informed decision as to whether reverse preempting the federal regime—a move that would cause significant administrative upheaval and substantially increase the demands on the Commission’s resources—would best serve the Commonwealth and its citizens. Postponing a decision on reverse preemption would give the Commission and relevant stakeholders the opportunity to determine whether recent

⁷ See Petition for Reconsideration of the Coalition of Concerned Utilities, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment and Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 and WT Docket No. 17-79, filed October 15, 2018 (“Utility Coalition Reconsideration Petition”). The seven utilities that make up the coalition are Arizona Public Service Company, Berkshire Hathaway Energy, Eversource, Exelon Corporation, FirstEnergy, South Carolina Electric & Gas, and The AES Corporation.

⁸ Pennsylvania Electric Company (Penelec) and West Penn Power are both FirstEnergy companies, and PECO Energy Company is an Exelon Corporation company.

⁹ Notice at 12.

federal reforms adequately advance the goals identified in the Notice for broadband providers and consumers in the Commonwealth.

Should the Commission nevertheless choose to reverse preempt at this time, BCAP urges the Commission to adopt the FCC's pole attachment rules wholesale, as proposed in the Notice. Many aspects of the federal regime—including the FCC's time-tested and court-affirmed pole attachment rate formulas, which continue to cap attachment rates at reasonable cost-based levels necessary to incentivize new construction—have proven effective at encouraging cable and broadband deployment throughout the country, including in Pennsylvania. To be sure, BCAP's members have not always supported each and every aspect of the federal regime; for example, in the proceeding that led to the FCC's August 2018 order, some BCAP members supported alternative reforms to the make-ready process that differed from the OTMR framework that the FCC ultimately adopted. But on balance, BCAP believes that Pennsylvania's adoption of the FCC's rules in their entirety would minimize the disruption to broadband providers already faced with conforming to recent changes to the federal regime, and would promote the kind of regulatory predictability and uniformity that have undergirded providers' investment in and deployment of broadband networks in the Commonwealth. Other reverse preemption states, such as New York, have similarly recognized the benefits of using the FCC's federal regime as a model for state regulation.¹⁰ Moreover, such an approach would require far fewer Commission

¹⁰ New York has generally adhered to the FCC's pole attachment rate formula and other aspects of the federal regime despite its status as a reverse preemption state. As the NY PSC has explained, "us[ing] the federal approach as [a] model" for pole attachment regulation in reverse preemption states "make[s] it easier for service providers to do business by eliminating unnecessary variation in regulatory requirements," "make[s] it possible for firms operating nationally to compare favorably [the state's] practices and those followed elsewhere," and accordingly helps "provide consumers the full benefits available from the development of competitive markets." *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n, No. 95-C-0341, 1997 N.Y. PUC LEXIS 364, at **10-11 (rel. June 17, 1997); see also *id.* at **9-10 ("While we retain full jurisdiction over pole attachment matters, our new approach to pole attachments will adhere to the FCC's methods and practices unless we find a compelling reason to depart from them.").

resources than developing rules from scratch, and would enable the Commission to look more readily to FCC precedent as a guide for enforcement at the state level.

Accordingly, BCAP respectfully urges the Commission to delay its decision concerning reverse preemption until after the Commission and relevant stakeholders have had an adequate opportunity to assess the impact of the FCC's recent rule changes, including any future changes that may be made in light of the pending Petition for Reconsideration of the FCC's August 2018 order.

Respectfully submitted,



Daniel R. Tunnell
President

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