

COMMONWEALTH OF PENNSYLVANIA



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October 29, 2018

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



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

Dear Secretary Chiavetta:

Attached for electronic filing are the Comments of the Office of Consumer Advocate in the above-referenced proceeding. The undersigned certifies that this filing contains no averments or denials of fact subject to verification and penalties under 52 Pa. Code Section 1.36.

Copies have been served per the attached Certificate of Service.

Respectfully Submitted,

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Enclosures:

cc: Shaun A. Sparks, Law Bureau
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Certificate of Service
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CERTIFICATE OF SERVICE

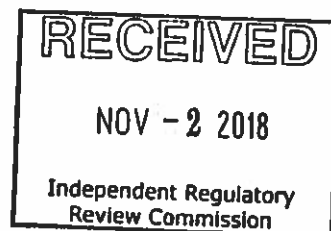
Re: Assumption of Pennsylvania Public Utility
Commission Jurisdiction Over Pole : Docket No. L-2018-3002672
Attachments from the Federal Communications
Commission

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Comments, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 29th day of October 2018.

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**THE OFFICE OF CONSUMER ADVOCATE
COMMENTS**

I. INTRODUCTION

The Office of Consumer Advocate (OCA) offers these Comments in response to the Public Utility Commission’s (PUC or Commission) July 13, 2018 Notice of Proposed Rulemaking (NPRM) regarding jurisdiction over pole attachments pursuant to the federal Telecommunications Act of 1996 (TA96).¹ The OCA supports the Commission’s proposal to assume jurisdiction pursuant to Section 224 of TA96 over the pole attachment process, including state-level mediation or adjudication of complaints related to the pole attachment process. The OCA concurs in the Commission’s proposed “initial turn-key adoption” of the Federal Communications Commission’s (FCC) pole attachment regulations and rates, through adoption of Pennsylvania regulations. See, NPRM at 10-11, Annex A. The OCA offers some further comments and recommendations, as set forth below.

¹ NPRM, citing the Pole Attachment Act (PAA) provisions of the TA96, codified as 47 U.S.C. § 224.

II. COMMENTS

A. The Commission Should Take Needed, Initial Steps to Assume Regulatory Jurisdiction over Pole Attachments, Based Upon A Modified Version of Proposed Chapter 77: Pole Attachments

The OCA supports the Commission's proposal to assume jurisdiction over pole attachments for the benefit of Pennsylvania in general and the numerous Pennsylvania residents, businesses, and community organizations which need access to broadband services at robust speeds, sufficient to meet today's and future needs. The Commission's proposed initial step is to adopt regulations, proposed Title 52, Part 1, Subpart C., Chapter 77: Pole Attachments.

1. Commission Jurisdiction

The OCA supports the proposed regulations as a sufficient statement, once adopted, of the Commission's intent and authority to assume jurisdiction over the scope of pole attachment regulation which would otherwise lie with the FCC.² See, NPRM at 10-11; 47 U.S.C. § 224(c). The OCA agrees with the Commission that it has authority to act to adopt the proposed regulations and assume authority over pole attachments, pursuant to Sections 313, 314, 501, 701, 1301, and 1501. NPRM at 9-10, fn. 28; 66 Pa.C.S. §§ 313 (authority concurrent with United States), 314 (enforcement of federal rates and service), 501 (enforce the full intent of Public Utility Code), 701 (complaints), 1301 (rates), and 1501 (service).

The NPRM notes that the Pole Attachment Act "exempts cooperative utilities, railroads, and federal or state-owned utilities from the definition of a 'utility,' and thus from the reach of the PPA. NPRM at 9. Based upon the limits on the Commission's jurisdiction under the Public Utility Code, the Commission notes that "even with reverse

² See 47 U.S.C. § 224(c).

preemption, Commission jurisdiction may not reach all facilities subject to attachment in the Commonwealth.” *Id.* Despite these limitations, the OCA supports the Commission’s proposal to assume jurisdiction over pole attachments from the FCC.

The OCA notes that upon assumption of such jurisdiction, the Commission may be called upon to consider the interplay of the Pennsylvania Wireless Broadband Collocation Act of 2012 (WCBA), 53 P.S. § 11702.1, et seq. and the federal framework which the Commission proposes to adopt, through proposed Chapter 77: Pole Attachments. The WCBA applies to municipal governments and is intended to streamline the process for placement of wireless communications facilities on water towers, electric towers and other structures which may be subject to municipal permitting and/or zoning. Pursuant to the WCBA, persons aggrieved by any final order or failure to act by the municipality may proceed to the court of common pleas. 53 P.S. § 11702.5. Since the Commission entered the NPRM Order, the FCC has taken steps to limit local authority over the attachment and siting of wireless facilities, as necessary to expand the availability of wireless broadband service. See, Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-184, WT Docket No. 17-79, Declaratory Ruling and Third Report and Order, (rel. Sept. 27, 2018), 83 F.R. 46218 (Sept. 14, 2018) (Amending 47 C.F.R. §§ 1.1402, 1.1403, 1.1411, 1.1412, 1.1413, and 1.1415 effective Oct. 15, 2018. Other amendments to be effective in the future.) The course of action proposed by the Commission may not be easy, but the end goal of providing a state forum for more uniform resolution of pole attachment issues is worthy of pursuit.

2. Federal and State Regulatory Definitions

To accomplish the reverse preemption of the FCC's jurisdiction over pole attachments under the Pole Attachment Act (PPA), the Commission must commit to regulate the rates, terms and conditions of access to and use of poles, ducts, conduits, and right-of-ways owned or controlled by public utilities. 47 U.S.C. § 224(c). Since the Commission does not have a ready set body of regulations and established rates for pole attachments, the Commission proposes through draft regulation Section 77.4 to incorporate by reference the FCC's rates, terms and conditions for pole attachments. Proposed Chapter 77: Pole Attachments is appropriately brief and direct, as a means to accomplish the Commission's near-term goal of assumption of jurisdiction, without excessive disruption, burden and uncertainty for public utilities which own the pole and related facilities and potential attachers.

However, the OCA recommends that the Commission amend proposed Chapter 77 to include the federal definition of "pole attachments," as set forth in Section 224(c) of the PPA and Section 1.1402 of the FCC's regulations, to provide notice of the breadth of above ground and below ground facilities encompassed by the "pole attachments" concept.

Second, the OCA recommends that the Commission clarify which federal definitions and/or Public Utility Code definitions are applicable. The Commission's clarification may be provided in the Final Rulemaking Order, and/or the final version of Chapter 77: Pole Attachments. The OCA submits such clarification will assist the Commission and parties in the mediation or adjudication of any complaints regarding pole attachments.

For example, the OCA submits that the Pennsylvania statutory definition of “public utility” is important as it describes the entities and services which are subject to the Commission’s traditional jurisdiction and regulations. See, 66 Pa.C.S. § 102. Section 1.1402 of the FCC’s regulations defines “utility” as used in the context of the regulation of rates, terms and conditions of pole attachments. See, 47 C.F.R. § 1.1402(a). The state definition of “public utility” and federal definition of “utility” overlap in part, but each definition may assist the Commission in exercise of state jurisdiction over pole attachments.

Similarly, the Section 3012 definitions of “telecommunications carrier” and the FCC’s Section 1.1402(h) definition of “telecommunications carrier” are different. The Commission may want to clarify which applies in the context of state regulation of pole attachment issues, pursuant to the proposed Chapter 77 regulations. The Public Utility Code, Chapter 30 definition states that “[a]n entity that provides telecommunications services subject to the jurisdiction of the commission” is a “telecommunications carrier.” 66 Pa.C.S. § 3012. The federal definition, for the purpose of pole attachment regulation, defines “telecommunications carrier” as “any provider of telecommunications services, except that 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)).” 47 C.F.R. § 1.1402(h).

The OCA submits that other Public Utility Code definitions, “corporation,” “facilities,” “person,” “rate,” “service,” and “tariff,” set forth in Section 102, and “electric distribution company, as set forth in Section 2803 are important as they describe what entities are subject to the Commission’s jurisdiction and the breadth of what constitutes

services, rates and facilities. See, 66 Pa.C.S. §§ 102, 2803. These Pennsylvania statutory definitions should apply in the Commission's administration of assumed jurisdiction over pole attachments.

The OCA would also note that "advanced services" and "broadband" as defined in Chapter 30 of the Public Utility Code has not been amended since 2004 and do not reflect current state or federal concepts of what download and upload speeds constitute "broadband" service needed to meet the needs of consumers today and in the future. See, 66 Pa.C.S. § 3012. For example, the Pennsylvania Broadband Investment Incentive Program established by Governor Tom Wolf has offered state funding to supplement federal Connect America Fund Phase II support, linking Pennsylvania's policy goals with the FCC's current definition of broadband service with a speed of at least 25 megabits/second (Mbps) download and at least 3 Mbps upload.³

The OCA supports the Commission's adoption of framework of draft Chapter 77: Pole Attachments, subject to the amendment and clarifications of which statutory definitions control or may inform the Commission's exercise of its authority, upon assumption of jurisdiction over pole attachments.

B. The Commission Should Consider Other Steps to Assure Public Benefits from the Commission's Assumption of Jurisdiction over Pole Attachments

The OCA recommends that the Commission consider in the future adoption of Pennsylvania specific rates, terms and conditions governing pole attachments, which would replace the federal framework initially adopted by proposed Chapter 77: Pole Attachments. For example, the Commission should consider whether to continue to use

³ See, Pennsylvania Broadband Investment Incentive Program. "What is Broadband," <https://www.governor.pa.gov/broadband/#what-broadband>.

the pole attachment rates established by the FCC or adopt an alternative approach to setting Pennsylvania specific rates.

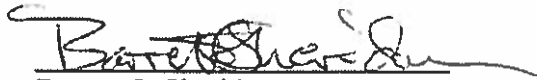
To assist the Commission in its initial and future exercise of jurisdiction over pole attachments, the Commission should consider the merits of creating its own data base of pole and conduit investment information. The Commission should consider collection and compilation of key information from facilities owners, such as information regarding the rates charged by facilities owners including information required by the FCC's Section 1.1401(g) and (h) regulations, along with supporting documents; information from facilities owners as to how they track and manage investment in poles and conduits as well as specific details regarding the individual facilities (height, location, installation year, last inspection date, etc); and any utility's photographic inventory of poles and manhole access to conduits.

These are examples of information which may assist the Commission in meeting its Section 224(c) commitment to "consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.

III. CONCLUSION

WHEREFORE, the Office of Consumer Advocate supports the Commission's Notice of Proposed Rulemaking and proposed assumption of jurisdiction over pole attachments, subject to certain amendments and clarifications.

Respectfully Submitted,



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Dated: October 29, 2018
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