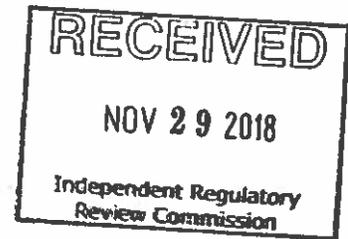




3214

Crown Castle  
2000 Corporate Drive  
Canonsburg, PA 15317

November 28, 2018



**VIA ELECTRONIC FILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
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 the Reply Comments of Crown Castle Fiber LLC, Crown Castle NG East LLC, Fiber Technologies Networks, L.L.C., PA – CLEC LLC d/b/a Pennsylvania – CLEC LLC, and Sunesys, LLC (jointly “Crown Castle”) in the above-referenced matter.

If you have any questions, please feel free to contact me.

Sincerely,

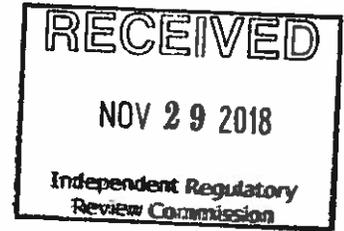
A handwritten signature in black ink, appearing to read 'Robert Millar'.

Robert Millar  
Associate General Counsel

Enclosure

cc: Shaun Sparks, Law Bureau (via email: [shsparks@pa.gov](mailto:shsparks@pa.gov))  
Colin W. Scott, Law Bureau (via email: [colinScott@pa.gov](mailto:colinScott@pa.gov))

3214



BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
HARRISBURG, PA 17120

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

REPLY COMMENTS OF CROWN CASTLE

Pursuant to the Commission’s July 12, 2018 Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding, Crown Castle Fiber LLC, Crown Castle NG East LLC, Fiber Technologies Networks, L.L.C., PA – CLEC LLC d/b/a Pennsylvania – CLEC LLC, and Sunesys, LLC (jointly “Crown Castle”)<sup>1</sup> submit these reply comments addressing the issues raised by other commenters regarding whether the Commission should “reverse preempt” the Federal Communications Commission’s (“FCC”) jurisdiction over pole attachments. As explained below, the record in this proceeding supports maintaining the status quo of allowing the FCC to continue to govern pole attachments in Pennsylvania. If, however, the Commission decides to assume jurisdiction over pole attachments from the FCC, the record supports adopting all of the FCC’s rules and cases, including any subsequent revisions.

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<sup>1</sup> As the result of several mergers, Crown Castle Fiber LLC, Crown Castle NG East LLC, Fiber Technologies Networks, L.L.C., PA – CLEC LLC d/b/a Pennsylvania – CLEC LLC, and Sunesys, LLC are all wholly-owned subsidiaries of a common parent. On Sept. 19, 2018, the aforementioned companies submitted a Joint Application before the Commission to consolidate the multiple affiliates with common ownership. See *Amended Joint Application for Approval of a General Rule Transaction and Abandonment of Competitive Access Services by Crown Castle NG East LLC, Fiber Technologies Networks, L.L.C., PA – CLEC LLC, and Sunesys, LLC*, Dkt. Nos. A-2018-3004131, A-2018-3004133, A-2018-3004135, A-2018-3004136, A-2018-3004771 (Sept. 19, 2018).

**I. COMMENTERS SUPPORT MAINTAINING THE STATUS QUO OF FCC JURISDICTION OVER POLE ATTACHMENT RULES AND DISPUTES**

Crown Castle agrees with commenters that point out that attaching communications facilities to poles in an efficient, cost effective manner is key to broadband deployment.<sup>2</sup> Like Crown Castle, commenters recognize that any delay in access to poles at a reasonable cost can be an unreasonable barrier to broadband deployment.<sup>3</sup> Moreover, the Commonwealth continues to prioritize the deployment of broadband facilities and services to its citizens. As the Commission pointed out, Governor Tom Wolf announced the creation of the Pennsylvania Office of Broadband Initiatives earlier this year, which will develop recommendations and secure funding to further promote broadband deployment.<sup>4</sup> As such, any Commission policy to promote access to utility poles at a reasonable cost and without delay will help satisfy the Commonwealth's broader broadband deployment goals.

However, it is clear that the existing situation, where pole attachment rules are crafted and disputes are resolved by the FCC, *is working*. Commenters recognize that the FCC continues to take steps to promote wireless and wireline deployment, including actions taken just weeks ago to further refine the FCC's rules and procedures to spur deployment.<sup>5</sup> Governor Wolf has also made it a top priority of his administration to eliminate or avoid unnecessary regulation.<sup>6</sup>

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<sup>2</sup> See Comments of Verizon ("Verizon Comments") at 7-8.

<sup>3</sup> See Verizon Comments at 3; Comments of Velocity.net Communications, Inc. ("VCNI Comments") at 2-6, Comments of ExteNet Systems, Inc. ("ExteNet Comments") at 8.

<sup>4</sup> GOVERNOR TOM WOLF, "Governor Wolf Announces New Initiative to Expand Broadband Access," Press Release (Mar. 19, 2018), <https://www.governor.pa.gov/governor-wolf-announces-new-initiative-expand-broadband-access/>; see also NPRM at 7.

<sup>5</sup> See Verizon Comments at 5-7.

<sup>6</sup> GOVERNOR TOM WOLF, "Governor Tom Wolf Rescinds 46 Executive Orders," Press Release (Dec. 6, 2016), <https://www.governor.pa.gov/governor-tom-wolf-rescinds-46-executive-orders/>

To that end, the Commission should avoid adopting new regulations or assuming jurisdiction where the existing process is working. Moreover, preempting the FCC's jurisdiction may prevent Pennsylvania from capitalizing on the latest communications technologies because its regulations may lag behind the FCC's, which are updated regularly to address changes in technology. Consequently, the Commission can simultaneously promote broadband deployment and eliminate unnecessary regulation by taking no action in this proceeding and maintaining the regulatory status quo for pole attachment rules.

Furthermore, the current dispute resolution process available to attachers at the FCC *is working* and is not resource-intensive. Some commenters suggested that having hearings at the Commission would save Pennsylvania companies from having to go to Washington D.C.<sup>7</sup> Those comments appear to misunderstand the FCC's process. Unlike the Commission's process, which involves live hearings and ALJs, the dispute resolution process overseen by the FCC is a "paper" filing process—one where filings can be submitted electronically and that has no live hearings.<sup>8</sup> Thus, it does not require trips to Washington, D.C. or create any special burdens that would be remedied by the Commission's assumption of jurisdiction over pole attachment disputes in Pennsylvania. As noted above, the FCC has also taken recent action to further speed and simplify its dispute resolution process.<sup>9</sup>

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("My administration is prioritizing cleaning up state government and eliminating waste, outdated policies and duplicative bureaucracy . . .").

<sup>7</sup> See Comments of DQE Communications LLC ("DQE Comments") at 3; VCNI Comments at 7.

<sup>8</sup> See 47 C.F.R. §§ 1.1408-1.1410. The FCC "may" order evidentiary hearings, 47 C.F.R. § 1.1411, but has done so extremely rarely.

<sup>9</sup> See, e.g., Comments of the Broadband Cable Association of Pennsylvania ("BCAP Comments") at 2; Verizon Comments at 5-7.

Indeed, several commenters describe the Commission’s existing dispute resolution process as “lengthy”<sup>10</sup> and “resource draining.”<sup>11</sup> Commenters also recognize that a cumbersome dispute resolution process will ultimately harm consumers, who will be unable to access new products and services if deployment of networks is delayed.<sup>12</sup> Consequently, the Commission should refrain from assuming jurisdiction over pole attachment disputes and should allow the FCC to continue resolving disputes based on its years of experience and using its efficient process.

Should the Commission exercise jurisdiction over pole attachment rules and disputes, it would inevitably lead to further questions regarding application and interpretation, as commenters point out. For instance, the Commission would need to resolve key issues related to the conflict or overlap between federal and state definitions relating to pole attachments.<sup>13</sup> Commenters also point out that it remains unclear from the Commission’s proposal whether federal or state rules would apply regarding the preparation of complaints for Commission-led disputes.<sup>14</sup> The Commission can resolve these issues very simply—by maintaining the status quo and refraining from exercising jurisdiction over attachment rules and disputes.

## **II. IF THE COMMISSION MOVES FORWARD WITH ITS PLAN TO ASSERT JURISDICTION OVER ATTACHMENTS AND DISPUTES, IT SHOULD ADOPT THE FCC’S RULES AND ANY UPDATES THERETO**

As outlined in Section I above, Crown Castle believes that the Commission should allow the FCC to continue to exercise regulatory control over pole attachments for the reasons set forth

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<sup>10</sup> Comments of FirstEnergy Companies (“FirstEnergy Comments”) at 12.

<sup>11</sup> Comments of Full Service Network, LP (“FSN Comments”) at 3.

<sup>12</sup> See FSN Comments at 5.

<sup>13</sup> See Comments of the Office of Consumer Advocate (“OCA Comments”) at 4-6.

<sup>14</sup> See Comments of Duquesne Light Company (“DLC Comments”) at 5.

in Crown Castle's opening comments. As Crown Castle and other commenters point out, the FCC's rules have been significantly updated since the Commission initially released this NPRM. Consequently, at a minimum, the Commission may wish to consider temporarily postponing its decision over whether to reverse preempt the FCC's jurisdiction over pole attachments until these new rules have gone into effect and any pending petitions for reconsideration or court challenges have been resolved.<sup>15</sup> If, however, the Commission decides to assume jurisdiction over pole attachments from the FCC, it should move forward with its proposed plan to adopt all of the FCC's rules by reference, including any updates thereto. A review of the record finds broad support for the Commission to adopt the FCC's pole attachment rules wholesale, including any subsequent updates or rule revisions.<sup>16</sup> The Commission's proposal will allow it to take advantage of the FCC's "fully vetted" regulations,<sup>17</sup> minimizing disruption to providers and providing predictability and uniformity to promote investment in broadband facilities.<sup>18</sup> This proposed approach would also conserve Commission resources by removing the need to develop pole attachment rules from scratch.<sup>19</sup> Moreover, the Commission will promote efficiency by

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<sup>15</sup> See BCAP Comments at 3.

<sup>16</sup> See, e.g., BCAP Comments at 4; DQE Comments at 2; Comments of Pennsylvania Telephone Association ("PTA Comments") at 2, 4; Comments of PECO Energy Company ("PECO Comments") at 11; Comments of CTIA ("CTIA Comments") at 2; Verizon Comments at 4; Comments of CenturyLink ("CenturyLink Comments") at 2. Other commenters support the Commission's wholesale adoption of the FCC's rules as an interim step. See Comments of PPL Electric Utilities Corporation ("PPL Comments") at 2; Comments of Central Bradford Progress Authority and RuralNet ("CBPA Comments") at 4; Comments of MAW Communications Inc. ("MAW Comments") at 1.

<sup>17</sup> CenturyLink Comments at 2.

<sup>18</sup> See BCAP Comments at 4.

<sup>19</sup> See BCAP Comments at 5.

allowing providers and pole owners that do business in more than one state to resolve disputes under a single set of rules.<sup>20</sup>

**A. The Commission Can And Should Adopt By Reference Any Future FCC Regulation**

The Commission's proposal to automatically follow any updates or revisions to the FCC's pole attachment rules is within the Commission's authority.<sup>21</sup> As commenters point out, the practice of allowing state regulations to track corresponding federal regulations, including updates thereto, is pervasive among Pennsylvania agencies and has been utilized in many different industries.<sup>22</sup> Regulating by reference to federal regulations is a structure that the Commission itself has employed in the past.<sup>23</sup> Moreover, the practice of permitting state regulations to track federal regulations has been recognized by both Pennsylvania and federal courts.<sup>24</sup>

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<sup>20</sup> CTIA Comments at 3.

<sup>21</sup> See Verizon Comments at 11; PECO Comments at 1.

<sup>22</sup> See CTIA Comments at 5; Verizon Comments at 11 (citing examples such as regulation of healthcare, transportation, and the environment by such agencies as the Pennsylvania Department of Environmental Protection, Department of Transportation, as well as the Commission).

<sup>23</sup> See, e.g., 52 PA. CODE § 37.204 (adopting federal transportation regulations by reference).

<sup>24</sup> See, e.g., *United States v. EME Homer City Generation L.P.*, 823 F. Supp. 2d 274, 295 (W.D. Pa. 2011), *aff'd*, 727 F.3d 274 (3d Cir. 2013) ("Pennsylvania did not promulgate its own PSD regulations. Instead, the federal regulations at 40 C.F.R. Chapter 52 have been adopted in their entirety and incorporated into the Pennsylvania SIP."); *Pennsylvania Pub. Util. Comm'n, Bureau of Transportation & Safety*, C-2009-2052175, 2011 WL 2530202, at \*1 (May 19, 2011) ("The Commission has adopted portions of Title 49 of the Code of Federal Regulations by reference, which is relevant to this proceeding."). Communications Workers of America did not cite, and Crown Castle was unable to find, any precedent interpreting the Commonwealth Documents Law, the Regulatory Review Act, or the Commonwealth Attorneys Act to invalidate this practice. See Comments of Communications Workers of America ("CWA Comments") at 4.

The Commission's adoption of federal natural gas and hazardous liquids safety standards for public utilities in its regulations is illustrative of this approach. Title 52 Section 59.33(b) of the Commission's regulations adopts existing regulations and future amendments to 49 CFR Parts 191-193, 195 and 199 by reference and without publishing the text of those federal regulations.<sup>25</sup> This Section also indicates that future amendments of these federal regulations will take effect in Pennsylvania sixty (60) days after the effective date of the federal amendment, unless the Commission publishes a Notice in the Pennsylvania Bulletin stating the amendment may not take effect. The CWA's assertion that the Commission must publish verbatim the FCC's pole attachment regulations in order to adopt them and that future amendment of those regulations must be the subject of a further Pennsylvania rulemaking process is therefore incorrect and contrary to Commission practice.<sup>26</sup>

Contrary to some suggestions in the record, this practice would not deprive interested parties a forum to comment on proposed rule modifications. Prior to adopting new rules or changes to its rules, the FCC gives interested parties notice and an opportunity to comment on its proposals. As a result, any interested parties would have an opportunity to file comments before the FCC regarding any changes to its pole attachment rules, which would then be adopted automatically in Pennsylvania.<sup>27</sup> Indeed, some commenters describe actively participating in the FCC's recent pole attachment rulemaking.<sup>28</sup> Accordingly, it would be duplicative for the

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<sup>25</sup> See 52 Pa. Code § 59.33(b).

<sup>26</sup> CWA Comments at 4-5, 11-12.

<sup>27</sup> See CTIA Comments at 4 (noting that parties can contest a proposed rule at the FCC). *But see* PPL Comments at 3-4 (claiming Pennsylvania stakeholders would not have a direct forum to voice concerns over rule changes at the FCC).

<sup>28</sup> See, e.g., FirstEnergy Comments at 6 (“[FirstEnergy] submitted extensive Comments and Reply Comments during the FCC rulemaking . . . and . . . requested reconsideration of the FCC’s August 3, 2018 Order. . .”).

Commission to provide an additional notice and comment period before adopting future FCC rules.<sup>29</sup> Instead, the Commission should adopt its proposal to allow its own rules to automatically update by reference to the FCC's rules.

If, however, the Commission's exercise of jurisdiction over attachments leads to a lengthy rulemaking process or creates an opportunity for pole owners to second-guess or piecemeal the FCC's rules, the subsequent regulatory uncertainty will make Pennsylvania a less attractive environment for investment in next-generation services and technologies.<sup>30</sup> The Commission itself recognizes that the process to craft Pennsylvania-specific rules would take "many years to develop and implement," yet may only provide "incremental improvement" over existing practices, at best.<sup>31</sup> The delay and uncertainty involved in developing rules from scratch would harm Pennsylvania's vital interest in facilitating broadband access for its citizens and businesses.<sup>32</sup> Moreover, if the Commission adopted a regulatory patchwork, it could cause providers' scarce investment dollars to flow to states that follow the FCC's predictable rules. As Verizon predicts, some commenters would use the venue of a Commission rulemaking to object to rules the FCC has adopted and for which those parties have already had an opportunity to express their views.<sup>33</sup> Indeed, some parties may even seek to eliminate or reverse rules that have been through judicial review and in force for years. Because burdensome local rulemaking processes will harm investment without a concomitant benefit, the Commission should adopt its proposal to follow the FCC's rules with any updates.

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<sup>29</sup> See Verizon Comments at 9.

<sup>30</sup> See Verizon Comments at 4, 9-10.

<sup>31</sup> NPRM at 11.

<sup>32</sup> See Verizon Comments at 9.

<sup>33</sup> See FirstEnergy Comments at 6-8; CWA Comments at 3-4

Importantly, attaching facilities to poles in Pennsylvania does not present special issues that are not present in the other approximately thirty jurisdictions that follow the FCC's rules. Although commenters frequently allude to issues that are supposedly unique to Pennsylvania, they have not identified what those issues are. As such, there is no need for Pennsylvania-specific rules.<sup>34</sup> Developing Pennsylvania-specific rules would involve significant resources with little corresponding benefit, and would create the type of regulatory uncertainty that disincentivizes investment in next-generation facilities.<sup>35</sup> As Crown Castle previously noted, many of the Pennsylvania-based electric utilities that have filed in this proceeding are part of multi-state companies.<sup>36</sup> Thus, for both providers deploying networks with national reach and pole owners with utility facilities in multiple states, regulatory uniformity across state lines creates numerous efficiencies.<sup>37</sup> As a result, should the Commission assume jurisdiction over pole attachments, it would be most efficient to follow all of the FCC's rules and any updates.

Notably, Crown Castle strongly opposes PECO's proposal to add language to proposed Section 77.5(c) to say that the Commission can "deviate from those [FCC] rulings to make its own determinations of whether rates, terms, and conditions of pole attachments are just and reasonable."<sup>38</sup> The FCC's body of case law applying the Pole Attachment Act and the FCC's rules is a critical part of what the Commission should be adopting. PECO's argument represents an attempt to pick and choose from the FCC's orders, and the result of PECO's proposal would

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<sup>34</sup> See CenturyLink Comments at 4; Verizon Comments at 16.

<sup>35</sup> See CenturyLink Comments at 4; Verizon Comments at 10.

<sup>36</sup> See Crown Castle Comments at 7 & n.13; FirstEnergy Comments at 2-3.

<sup>37</sup> See CTIA Comments at 2 ("Having a consistent framework from state to state for pole attachments facilitates broadband deployment. . .").

<sup>38</sup> PECO Comments at 3.

fundamentally undermine the regulatory uniformity and certainty associated with adopting the FCC's rules in their entirety.

Similarly, the Commission should reject PECO's proposal to add language saying that when determining whether rates terms and conditions are just and reasonable the Commission should "consider compliance with applicable safety standards and the maintenance and reliability of electric distribution, telecommunications and cable services."<sup>39</sup> First, there is no merit to PECO's fundamental premise that the FCC does not appropriately consider safety and reliability. Second, there is no merit to PECO's attempt to raise the specter of "safety" to achieve its policy goals. Like other pole owners and attachers, Crown Castle is considerably invested in the safety and reliability of the commonly used pole plant. If a pole fails, Crown Castle's facilities and services will be damaged the same as the electric network. Further, contrary to PECO's view, Crown Castle's and other telecommunications providers' services and networks are as critical to consumers and the public as electric service. Indeed, Crown Castle relies on electric power to run its facilities. The suggestion that the FCC or attaching parties discount the importance of safety and reliability is meritless. The FCC's rules also reflect the importance of safety and reliability.<sup>40</sup> PECO's argument seeks to undermine FCC rules – even on rates, which have nothing to do with safety or reliability – with vague references to "safety." The Commission should not be persuaded by these unfounded references.

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<sup>39</sup> PECO Comments at 3-4.

<sup>40</sup> See, e.g., *Implementation of Section 224 of the Act*, FCC 11-50 ¶ 49 (2011) ("We also seek to ensure that safety and network integrity are preserved at all costs").

## **B. Achieving Expedited Dispute Resolution**

Should the Commission assume jurisdiction over attachment disputes, commenters support expedited dispute resolution because resolving disputes quickly will ensure the rapid rollout of communications facilities.<sup>41</sup> Some commenters support the expedited approach adopted by New York.<sup>42</sup> Other commenters point out that New York has not promulgated rules for wireless attachments and suggest looking to other states for an expedited dispute resolution model, such as Maine.<sup>43</sup> Crown Castle supports Verizon's suggestion that the Commission implement the FCC's new dispute resolution "shot clocks" to create predictable timelines for expedited dispute resolution.<sup>44</sup> Regardless of which approach the Commission chooses, it is clear that adopting an expedited, efficient process will promote swift resolution of disputes and will allow providers to deploy facilities sooner and bring service to consumers faster.

Some commenters also see value in establishing a working group, as the Commission has asked about.<sup>45</sup> However, Crown Castle agrees with the commenters that note any working group must have a clear, specific, and limited mandate.<sup>46</sup> A working group's mission should be limited

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<sup>41</sup> See ExteNet Comments at 9; CTIA Comments at 6.

<sup>42</sup> *E.g.*, MAW Comments at 3-4; CenturyLink Comments at 5; Comments of NetSpeed LLC at 3; PTA at 3.

<sup>43</sup> *E.g.*, Verizon Comments at 16; CTIA Comments at 7.

<sup>44</sup> Verizon Comments at 13.

<sup>45</sup> See, *e.g.*, PPL Comments at 4; CBPA Comments at 4; Comments of Pennsylvania Rural Electric Association ("PREA Comments") at 3; FirstEnergy Comments at 13; MAW Comments at 2.

<sup>46</sup> See CenturyLink Comments at 6-7; PTA Comments at 4; PECO Comments at 16; CTIA Comments at 8.

in scope and tailored to addressing discrete issues; it should not have expansive power or any involvement in formal dispute resolution, as suggested by some commenters.<sup>47</sup>

In its exercise of jurisdiction, the Commission should not depart from accepted FCC rules and procedures. For instance, commenters support Crown Castle's view that the FCC's existing method to address unauthorized attachments is sufficient, and an additional remedy is not necessary.<sup>48</sup> Other proposals addressing steep monetary fines for unauthorized attachments from certain commenters are discriminatory, unreasonable, and go beyond the FCC's guidelines on unauthorized attachments, which have been developed over many years and based on significant experience.<sup>49</sup> Proposals to radically increase unauthorized attachment penalties reflect attempts to profit from what may simply be record-keeping errors. PECO's suggestion of a \$2,500 penalty for wireless attachments, for example, is particularly meritless. The fact that such attachments may be at the pole top demonstrates how unrealistic it is to think that unauthorized attachments will take place. Companies are not attaching expensive antennas in the space above electric lines clandestinely without approval. Indeed, in almost every case, such attachments will have to be performed by PECO's crews. Instead of being a deterrent to unauthorized attachment, the \$2,500 penalty is more likely to be a "gotcha" used by PECO in the case of a record-keeping error that fails to accurately track otherwise approved work.<sup>50</sup> Excessive penalties are

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<sup>47</sup> See MAW Comments at 2 (suggesting that the working group be involved in dispute resolution).

<sup>48</sup> See, e.g., PPL Comments at 4; PTA Comments at 3; CTIA Comments at 6; Verizon Comments at 16.

<sup>49</sup> See PECO Comments at 14 (proposing a \$200 penalty per unauthorized wireline attachment and \$2,500 per unauthorized wireless attachment).

<sup>50</sup> Indeed, PECO's grounds for opposing a pole registry further demonstrate that the administrative underpinnings of tracking pole attachments is not perfect. See PECO Comments at 15.

unnecessary because the deterrents to unauthorized attachment are inherent in the value of the equipment being installed and the need to be able to access that equipment for upgrades, modifications, or maintenance. Ultimately, even another significant pole owner, PPL, does not support any change to the unauthorized attachment remedies. PPL recognizes that unauthorized attachments have occurred with only a limited number of attachers and that it has been able to cooperatively remedy the situation.<sup>51</sup>

In contrast, PPL's proposal that the Commission eliminate self-help remedies in FCC rules is meritless.<sup>52</sup> PPL rationalizes this departure from FCC rules based on the ability of the Commission to render timely decisions, a point on which commenters disagree.<sup>53</sup> Moreover, by and large, self-help remedies are invoked to assist with deployment in uncontroverted make ready scenarios; thus PPL's rationale for eliminating self-help remedies is misplaced. Even the fastest Commission complaint process would be significantly longer and more burdensome than the "self-help" remedy of allowing attaching parties to hire approved contractors to perform make ready that the pole owner has failed to timely perform.

These examples demonstrate that the Commission should adopt the FCC's rules without modifications that could harm the deployment of broadband.

Finally, it is critical that the Commission recognize that picking and choosing from the FCC's regulations, as suggested by some commenters, will cause a fundamental failure of the regulatory structure. For example, Duquesne Light suggests that the Commission can and should

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<sup>51</sup> PPL Comments at 4.

<sup>52</sup> PPL Comments at 5.

<sup>53</sup> *See supra* ns. 10 & 11 (pointing out that Commission's existing formal dispute resolution process is lengthy).

simply delete the FCC's "complaint" rules.<sup>54</sup> However, the sections that Duquesne Light proposes to delete are not merely procedural. They contain fundamental elements of the merits of the FCC's substantive rules. For example, 47 C.F.R. § 1.1408 (formerly 1.1409 prior to the FCC's July 18, 2018 Order), although entitled "Commission Consideration of the Complaint," contains substantive provisions setting forth and governing the rental rate calculation formula.<sup>55</sup> Similarly, Section 1.1404(f) of the FCC's rules contains an affirmative requirement that the pole owner provide the attaching party critical information upon request.<sup>56</sup> Sections 1.1404 through 1.1408 of the FCC's rules are not merely procedural or specific to the FCC's process, as Duquesne Light suggests.

If the Commission were to adopt some of the FCC's rules, but fail to adopt others, the substantive meaning of the FCC's rules would be lost.

### **C. Confidentiality And Uniform Agreement Terms**

Crown Castle also wishes to address comments regarding the confidentiality and enforcement of negotiated pole attachment agreements. First, Crown Castle posits that attachers should not be forced to agree to keep the contents of any pole attachment agreement confidential. Otherwise, it would be difficult to determine whether pole owners are treating attachers in a nondiscriminatory fashion.<sup>57</sup> However, Crown Castle disagrees with ExteNet's proposal asking

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<sup>54</sup> See DLC Comments at 4-6. Crown Castle notes that the FCC's July 18, 2018 Order in EB Docket 17-245, not only amended but also re-numbered some of the FCC's rules, and those amendments are in effect as of October 4, 2018. 83 Fed Reg 44831 (Sept. 4, 2018). Crown Castle assumes that Duquesne Light was referring to the current section numbers as amended by the FCC's Order. Even if it is not, the points remain the same. The FCC's rules cannot be taken piecemeal and still retain their substantive meaning.

<sup>55</sup> 47 C.F.R. § 1.1408

<sup>56</sup> 47 C.F.R. § 1.1404(f) (formerly 1.1404(j)).

<sup>57</sup> See ExteNet Comments at 10.

the Commission to mandate publication of all existing and future pole attachment agreements.<sup>58</sup> Compulsory publication of each and every pole attachment agreement is not necessary to ensure compliance with attachment rules and constitutes regulatory overreach. Second, PECO's contention that existing and newly negotiated agreements be "protected" from enforcement of the new rules is meritless and would severely undermine the value of maintaining strong attachment rules.<sup>59</sup> The FCC has repeatedly found that utility pole owners have unbalanced bargaining power relative to attachers. As a result, the FCC for decades has followed a "sign and sue" rule, which allows an attacher to enter into an objectionable agreement, but "sue" after "signing" the agreement if provisions in the agreement violate the FCC's pole attachment rules.<sup>60</sup> This rule recognizes that because utility pole attachments are essential to providing telecommunications services, and because there is typically one set of poles in the right-of-way with one owner in any given area, negotiating power is concentrated with the pole owner and can result in contracts of adhesion.<sup>61</sup> As a result, the rule provides for a level playing field. Should the Commission abrogate this important rule, it would unjustly tip the scales toward the pole owner and could allow for one-sided contracts that will slow deployment and increase costs. It would also force attaching parties to file complaints over every pole attachment agreement if the utility pole owner refuses to eliminate provisions that are unjust and unreasonable, even under

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<sup>58</sup> See ExteNet Comments at 10.

<sup>59</sup> See PECO Comments at 4-5.

<sup>60</sup> See 47 C.F.R. § 1.1404(d).

<sup>61</sup> See *S. Co. Servs. v. F.C.C.*, 313 F.3d 574, 583 (D.C. Cir. 2002) (upholding the FCC's "sign and sue" rule to guard against a scenario where "the utility gives nothing of value in exchange for the attacher's coerced 'agreement' to accept unreasonable or discriminatory access," allowing the attacher to bring suit "to challenge this abuse of the utility's monopoly control over the essential transport facilities"); *In re Implementation of Section 224 of the Act, A Nat'l Broadband Plan for Our Future*, 26 FCC Rcd. 5240, 5292-95 (2011) (affirming the "sign and sue" rule).

well-established case precedent. That would not be efficient and could overwhelm the Commission.

### **III. CONCLUSION**

The record in this proceeding supports the Commission continuing its current course rather than assuming jurisdiction over pole attachment regulation and dispute resolution from the FCC. In the alternative, if the Commission assumes jurisdiction over pole attachments, it should follow its proposal to adopt the FCC's pole attachment rules by reference, including any updates.

Respectfully submitted,

/s/ Monica Gambino

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November 28, 2018