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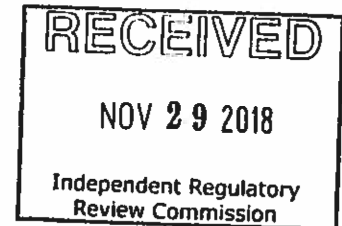
Suzan DeBusk Paiva
Associate General Counsel

verizon

900 Race Street, 6th Floor
Philadelphia, PA 19107

Tel: (267) 768-6184
Suzan.D.Paiva@Verizon.com

November 28, 2018



VIA ELECTRONIC FILING
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

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

Dear Secretary Chiavetta:

Enclosed please find Verizon's Reply Comments Regarding the July 12, 2018 Notice of Proposed Rulemaking, in the above captioned matter.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

Suzan D. Paiva/sau

Suzan D. Paiva

SDP/sau

Enclosure

cc: Shaun Sparks, Law Bureau
Colin W. Scott, Law Bureau

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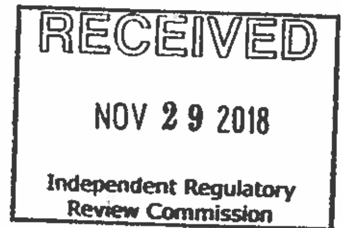

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY COMMENTS OF THE VERIZON COMPANIES

Suzan D. Paiva (Atty No. 53853)
Verizon
900 Race St., 6th Floor
Philadelphia, PA 19107
(267) 768-6184
Suzan.d.paiva@verizon.com

Attorney for the Verizon Companies

Dated: November 28, 2018

TABLE OF CONTENTS

I. Introduction 1

II. Comments 3

A. Uniformity With Federal Rules Is Of Paramount Importance 3

1. The Commission Should Adopt The FCC Rules And Future Changes 3

2. The Commission Has Authority To Adopt Future Updates Automatically. 7

B. The Commission Should Reject Arguments To Deviate From The FCC Rules. ... 9

1. The FCC Specifically Considered The EDCs' Safety Arguments And Adjusted Its Rules To Account For Them. 10

2. The Commission Should Reject EDC Attempts To Abrogate The FCC's Rate Reforms For ILECs And Make Pennsylvania More Expensive For Investment. 13

3. CWA's Arguments Advance Its Own Interests, Not The Public Interest, And Were Already Considered By The FCC. 14

C. Additional Issues 16

1. The Commission Should Not Require A Pole Registry 16

2. The Commission Should Not Require Standardized Agreements Or Tariffs 17

3. Working Groups Should Not Be Used As A Delay Tactic 18

4. Dispute Resolution Should Not Be Made More Difficult For Attachers.. 18

III. Conclusion 20

I. Introduction

Comments on this Commission's proposal to "reverse preempt" the Federal Communications Commission ("FCC") and assume state regulation of communication facility pole attachments under 47 U.S.C. § 224 fall into two general categories. Verizon,[1] along with the other communications industry members that are actually investing in Pennsylvania's broadband future, stressed the crucial importance of maintaining uniformity and regulatory certainty by adopting the FCC rules in their entirety, along with future changes, as the Commission proposed. This framework is essential to maintain a stable regulatory environment and avoid creating entry barriers that would deter broadband investment in the Commonwealth. Many communications providers affirmatively supported reverse preemption,[2] while others more cautiously preferred leaving it to the FCC to continue to regulate pole attachments, [3] but most agreed that if the Commission does reverse preempt it is vital to maintain parity with the FCC's regulations now and in the future with automatic adoption of FCC amendments, to ensure uniform rules and regulatory stability.

Some parties – primarily the electric distribution companies ("EDCs") and the Communications Workers of America ("CWA") – are trying to use this rulemaking to obtain a second bite at the apple, seeking a different result on issues that were thoroughly considered by the FCC, even though that agency already made changes to its rules to address their concerns.

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[1] These Reply Comments are filed on behalf of Verizon Pennsylvania LLC, Verizon North LLC, MCImetro Access Transmission Services Corp., XO Communications Services, LLC, and Cellco Partnership, d/b/a Verizon Wireless (together "Verizon").

[2] Along with Verizon, other parties supporting reverse preemption with automatic adoption of future FCC rule changes include: CTIA – The Wireless Association, which represents the U.S. wireless communications industry; the Pennsylvania Telephone Association, which represents a large number of incumbent local exchange carriers; CenturyLink, a combined company with ILEC and CLEC operations; and DQE Communications LLC, a company investing in broadband infrastructure.

[3] These commenters include Crown Castle Fiber LLC, etc., and the Broadband Cable Association.

Speeding broadband deployment does not seem to be the primary motivation for these parties. Their comments instead focus on rearguing their own parochial positions rather than in improving broadband access for Pennsylvanians. Their attempts to circumvent the FCC rules vary in degree, but they share the common thread of promoting an uncertain regulatory climate and creating state-specific barriers to deployment that would make Pennsylvania less attractive to broadband investment – the exact opposite of the result the Commission seeks to achieve with this rulemaking.

The position advocated by the communications providers better serves the public interest. As the Broadband Cable Association pointed out, even where its members "have not always supported each and every aspect of the federal regime," they do not seek to rehash these arguments before this Commission in an attempt to get a better result for themselves because "on balance . . . 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."[4] In the words of the Central Bradford Progress Authority, "the interests of rigorous competition should prevail over the provincial concerns of any single infrastructure owner" and issues that were resolved by the FCC should not be reargued here because "attempting to find a common ground among providers would regrettably delay broadband development, to the detriment of consumers and attachers."[5]

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[4] Broadband Cable Association Comments at 4

[5] Central Bradford Progress Authority Comments at 2-3.

If the Commission chooses to reverse preempt, then it is imperative that it adopt the FCC rules in their entirety, including immediate adoption of the most recent changes from the *FCC 2018 Poles Order*[6] as soon as they become effective at the federal level and automatic incorporation of any future FCC changes, without the expense and delay of litigation. The *FCC 2018 Poles Order's* key reforms are vital to promoting broadband and 5G deployment and favorably positioning Pennsylvania in the national and global internet economy. Ignoring the *FCC 2018 Poles Order* entirely (as CWA proposes) or chipping away at its reforms (as the EDCs propose) would undermine the Commission's goal of attracting speedy broadband deployment and make Pennsylvania less attractive than other states that will clearly be governed by the FCC rules. If the Commission is not willing or able to adopt the FCC rules, together with the recent changes and automatic future updates, then it should seriously consider whether the public interest would be better served by following the advice of those parties advocating that pole attachment regulation be left to the FCC.

II. Comments

A. Uniformity With Federal Rules Is Of Paramount Importance.

1. The Commission Should Adopt The FCC Rules And Future Changes.

Verizon already explained in its initial comments the crucial importance of adopting the FCC rules and automatically incorporating future changes, because the delay and regulatory uncertainty that would result from any other course of action would undermine the entire purpose of the Commission involving itself in this issue and would harm Pennsylvania's interests in the race for broadband investment and 5G technology.[7] Commenting parties that are actually

[6] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (FCC, Rel. August 3, 2018) ("*FCC 2018 Poles Order*").

[7] Verizon Comments at 9.

investing in the Commonwealth's broadband infrastructure by deploying wireline and wireless broadband technology generally agree.

According to the wireless industry trade association CTIA, "continuity and uniformity are vital to this transition of jurisdiction" and "divergence from the FCC regulations or the precedent associated with those regulations could create inefficiency in wireless deployment."[8] The Pennsylvania Telephone Association (trade organization for rural ILECs) states that "Pennsylvania regulations should be automatically linked with changes at the federal level."[9] Crown Castle pointed out that "regulatory certainty and uniformity of pole attachment rules and adjudication is important and useful for supporting deployment of advanced telecommunications" and "[i]nconsistency would undermine the uniformity of regulation and process needed to allow the telecommunications industry to deploy the networks that consumers demand and deserve."[10] The Broadband Cable Association (trade association for Pennsylvania's cable providers) notes that "on balance" "regulatory predictability and uniformity" are more important than rearguing issues the FCC already addressed.[11]

Verizon strongly opposes the Office of Consumer Advocate's ("OCA") suggestion that the Commission "consider in the future adoption of Pennsylvania-specific rates, terms and

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[8] CTIA Comments at 2 and 4 (CTIA prefers automatic adoption).

[9] PTA Comments at 4.

[10] Crown Castle Comments at 3, 7-8.

[11] Some smaller communications providers oppose automatic updates because they seem to see the prospect of obtaining rules even more favorable for broadband deployment than the FCC rules. *See, e.g.*, NetSpeed Comments at 2-3; MAW Comments at 1. Verizon disagrees with these comments and agrees with BCAP that "on balance" certainty and uniformity are more important. But, as PTA points out, if the FCC is slow or fails to address an issue in the future, then it might present the Commission with the opportunity to initiate its own remedy and provide the best of both worlds. PTA Comments at 6.

conditions governing pole attachments."[12] As Verizon explained in its initial comments,[13] the harm that could be caused by the delay and uncertainty of such a rulemaking and by imposing different rules that could potentially make Pennsylvania a more burdensome and expensive location to operate would far outweigh the marginal benefit, if any, from reconsidering all of these issues at the state level. This Commission itself noted that "Pennsylvania-specific regulations would likely provide only incremental improvement over what are now well-established installation practices."[14] OCA has not articulated any benefit from Pennsylvania-specific regulations over the already thoroughly litigated and vetted FCC rules.

Other parties argue that the Commission should adopt an older and outdated version of the FCC rules, and then devolve into lengthy rulemakings and re-argument of the issues from that point forward. For example, CWA and some EDCs argue the Commission should only adopt the FCC's rules as they existed on July 12, 2018, and ignore all of the subsequent changes that will likely be effective before the Commission finishes this rulemaking and issues final rules.[15] EDCs also argue that the Commission should adopt portions of the new rules issued with the *FCC's 2018 Poles Order* but not all of them. The Commission should not attempt to draw some arbitrary dividing line, but rather should adopt the federal rules in their entirety as they are effective when this Commission completes this rulemaking. Any other result would put Pennsylvania out of sync with the FCC and risk making the attachment process more expensive and burdensome here than in other states.

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[12] OCA Comments at 6.

[13] Verizon Comments at 9-10.

[14] *NPRM* at 11.

[15] CWA Comments at 5. Some of the EDCs make the same argument less directly. Duquesne Light for example, suggests it is an open question "whether to implement the vastly changed FCC regulation effective in February of 2019." Duquesne Light Comments at 4. First Energy claims it is "unclear" what the Commission intended regarding newly adopted or future changes to the FCC regulations. First Energy Comments at 3.

Some parties suggest that when it issued this NPRM, the Commission was unaware that the FCC was considering the amendments to its rules adopted on August 3, 2018 in the *FCC 2018 Poles Order* and never intended to adopt them.[16] The Commission likely was well aware of the FCC proceeding that culminated in the *FCC 2018 Poles Order* because the FCC issued two notices of proposed rulemaking in 2017 and solicited comments on the exact issues ultimately addressed in that order. As explained in paragraphs 11 and 12 of the *FCC 2018 Poles Order*, on April 20, 2017 the FCC issued a *Notice of Proposed Rulemaking* seeking comment on, among other things, speeding the pole attachment timeline, one-touch-make-ready, a presumption that the incumbent LECs pay the same pole attachment rate as other telecommunications attachers, and whether moratoria on the deployment of telecommunications facilities are inconsistent with section 253(a) of the Act. On November 16, 2017, the FCC issued a *Further Notice of Proposed Rulemaking* seeking comment on the treatment of overlashing by utilities and other issues. This Commission filed comments on other issues raised in by the FCC in the same dockets. The FCC released the draft of its *FCC 2018 Poles Order* on the same day the Commission voted on its NPRM here, July 12, 2018. Surely the reason the Commission stated that it would adopt the FCC regulations "inclusive of future changes as those regulations may be amended" was in part because it knew important reforms to those rules were about to issue.

Some parties note that the rule changes issued with the *FCC 2018 Poles Order* are subject to petitions for reconsideration and appeals, suggesting that the Commission should not adopt them until they are settled and all appeals exhausted.[17] The Commission should reject

[16] CWA Comments at 2-3.

[17] CWA Comments at 4; First Energy Comments at 6.

these arguments and adopt the FCC rules as soon as they are effective, even if petitions for reconsideration or appeals are still pending. The Commission is likely aware that FCC and federal court proceedings can take years to complete, and a very high standard would have to be met for the FCC or a federal court to stay the rules during that period, so most likely they will be effective during these proceedings. Pennsylvania cannot afford to lose time by deviating from the national regulations at this crucial moment in the race to 5G deployment. Even if the Commission ultimately adopted the FCC's rules later, this potentially lengthy disconnect could discourage investment and deployment and set Pennsylvania behind – and for no good reason.[18] If any changes to the FCC rules result from reconsideration or appeal, the automatic adoption provision will ensure that those changes are effective here as well, at the same time that they take effect at the federal level.

The Commission should adopt the federal rules in their entirety as they are effective when this Commission completes this rulemaking, which will include some recent changes that are already effective and may also include the entire *FCC 2018 Poles Order* depending on when it becomes effective. And any future changes that become effective at the FCC after that point should be automatically adopted. The Commission has the authority to implement such a mechanism, as discussed below.

2. The Commission Has Authority To Adopt Future Updates Automatically.

A key aspect of the Commission's reverse preemption proposal is the automatic adoption of future changes to the FCC rules upon effectiveness at the FCC level. The Commission's

[18] If the pending petitions for reconsideration or appeals are a concern to the Commission, then, rather than reverse preempting with outdated rules, the better solution would be to hold off on reverse preemption for now and leave Pennsylvania under the FCC's authority until the rules are sorted out, when this Commission could again consider reverse preemption. *See* Broadband Cable Association Comments at 3.

proposed regulation states that adoption of the FCC regulations is "inclusive of future changes as those regulations may be amended."[19] CWA claims that it is contrary to the statutes governing promulgation of regulations to adopt a provision that automatically updates to include future changes to the FCC's rules.[20] That argument cannot be correct because many regulations promulgated by this Commission and other agencies contain automatic update provisions to comport with federal changes.[21] In fact, the Commonwealth Documents Law permits the Commission's regulations to be altered without a rulemaking if "[t]he agency for good cause" finds that the full rulemaking procedures are "impracticable, unnecessary, or contrary to the public interest." 45 P.S. § 1204(3). This Commission's finding that automatic adoption of the future FCC changes is in the public interest satisfies that standard.

Other parties do not question the authority for an automatic adoption provision. For example, OCA agrees that the Commission has the authority to adopt the FCC's regulations.[22] But some nevertheless suggest the Commission should eliminate the automatic adoption aspect

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[19] The Commission was absolutely clear that it intended to adopt future changes automatically. Some of the EDCs attempt to create an issue that does not exist. Duquesne Light questions whether the Commission proposes to "adopt each change promulgated by the FCC as quickly as it is adopted." Duquesne Light Comments at 4. First Energy questions whether "yet-to-be-effective" FCC regulations would apply automatically. First Energy Comments at 4. The Commission's proposed regulation is clear on its face that it is "inclusive of future changes as those regulations may be amended."

[20] CWA Comments at 4.

[21] *See, e.g.*, 25 Pa. Code § 145.204 ("Except as otherwise specified in this subchapter, the provisions of the CAIR NOx Ozone Season Trading Program, found in 40 CFR Part 96, including all appendices, future amendments and supplements thereto, are incorporated by reference."); 25 Pa. Code § 260a.3 ("The incorporation by reference includes any subsequent modifications and additions to the CFR incorporated in this article."); 52 Pa. Code § 59.33 ("Future Federal amendments to 49 CFR Parts 191 -- 193, 195 and 199, as amended or modified by the Federal government, shall have the effect of amending or modifying the Commission's regulations with regard to the minimum safety standards for all natural gas and hazardous liquid public utilities. The amendment or modification shall take effect 60 days after the effective date of the Federal amendment or modification, unless the Commission publishes a notice in the *Pennsylvania Bulletin* stating that the amendment or modification may not take effect."); 55 Pa. Code § 1141.54a (teaching physician reimbursement shall follow "42 CFR 415.170 -- 415.184, including any subsequent amendments thereto.")

[22] OCA Comments at 2.

of its proposal and hold a full rulemaking before adopting any future FCC changes.[23] Such a cumbersome process would keep Pennsylvania far behind the FCC, which, as discussed above, risks deterring broadband deployment and making Pennsylvania an unattractive climate for investment.

Of course this does not mean the Commission has no recourse if an important issue of concern arises in the future. As the PTA points out, the Commission's proposal provides "the best of both worlds," because "[i]f the FCC makes changes to improve the process, Pennsylvania will automatically follow suit. If the FCC is slow to act or takes no action to remedy any problems which remain, then the PUC could initiate its own remedy."[24] Also if the FCC makes a future change that raises concern for the Commission, then Verizon believes the Commission already has the authority to convene a rulemaking after automatic adoption to examine any of the changes that became automatically effective, if it finds good cause to do so. If the Commission finds it important to address that issue in its regulation (which is not necessary), ExteNet suggests compromise language whereby future changes would automatically be adopted but any party seeking a generally applicable deviation could petition for a rulemaking and the Commission "shall, in its sole discretion, by formal vote of its members, determine whether to initiate such a rulemaking proceeding."[25]

B. The Commission Should Reject Arguments To Deviate From The FCC Rules.

It is perhaps predictable that parties who are not deploying broadband facilities in Pennsylvania do not seem to care if they create regulatory uncertainty and delay. The EDCs pay

[23] First Energy Comments at 10; PECO Comments at 12; PPL Comments at 3-4.

[24] PTA Comments at 6.

[25] ExteNet Comments at 8.

lip service to supporting the FCC's rules, but they want to use this rulemaking as an opportunity to chip away at the parts they do not like. First Energy, for example, "supports aspects" of the FCC rules but has "objections" to other parts.[26] PECO claims to want "modest" changes, all of which open the way to deviate from FCC rules and precedent by allowing the electric utilities to reargue matters decided by the FCC.[27] The EDCs acknowledge that their issues have already been extensively briefed to and considered by the FCC and they have had the opportunity to argue them again to the FCC in a petition for reconsideration.[28] They should not be heard to reargue those issues here.[29]

1. The FCC Specifically Considered The EDCs' Safety Arguments And Adjusted Its Rules To Account For Them.

The EDCs seek to water down the FCC's new rules by claiming that the federal agency did not consider or was not capable of considering their electrical safety and reliability concerns. However, the *FCC 2018 Poles Order* makes clear that the FCC listened to the EDCs' arguments and adjusted its rules to address them. There is no benefit for Pennsylvania to be gained by letting them reargue these matters here or altering the rules to make it more difficult for attachers to operate in Pennsylvania than elsewhere, which is the result they seek.

For example, some of the EDCs and CWA object to the FCC's provisions allowing for the use of contractors to perform one-touch and/or "self-help" make-ready work in certain

[26] First Energy Comments at 6.

[27] PECO Comments at 3-5, 12.

[28] *See, e.g.*, First Energy Comments at 6.

[29] OCA notes that some terms that are used in the FCC's regulations are the same or similar to terms defined in Pennsylvania statutes that may not have identical meanings, and that the Commission should clarify which definition it is using. OCA Comments at 4-6. If the Commission addresses OCA's issue, it should make sure that it does not materially change the meaning or application of the FCC rules to put Pennsylvania out of sync with locations still subject to those rules.

circumstances.[30] But these are not issues of first impression and the FCC did not ignore them. The FCC already considered the same arguments and inserted safeguards into its rules specifically to address electric utilities' concerns about safety and equipment integrity for self-help work 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."[31] 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.[32] The FCC notes that "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 that "utilities may prevent self-help from being invoked by completing make-ready on time."[33] The utilities should not be heard to reargue those issues here.

First Energy objects to the FCC's findings that utilities cannot require prior approval for "overlashing."[34] But the FCC was only "codify[ing] our longstanding policy that utilities may not require an attacher to obtain its approval for overlashing," and its holdings were already "[c]onsistent with [FCC] precedent."[35] To address the EDCs' concerns, however, the FCC

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[30] First Energy Comments at 6; PPL Comments at 5; CWA Comments at 7-8.

[31] *FCC 2018 Poles Order* ¶ 99.

[32] *Id.*

[33] *Id.*

[34] First Energy Comments at 7.

[35] *FCC 2018 Poles Order* ¶ 115.

added a new requirement that "allows utilities to establish reasonable advance notice requirements."[36] The FCC considered and rejected EDC 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 overlash being completed or after completion."[37] First Energy also fails to mention the significant benefits of the FCC's rule on overlashing. The FCC found that "the ability to overlash 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 overlashing."[38] In short, the FCC already reasonably considered and addressed First Energy's arguments on overlashing and there is no reason to deprive Pennsylvania of this important option to accelerate broadband deployment.[39]

[36] *Id.*

[37] *Id.* ¶ 117.

[38] *Id.*

[39] *See FCC 2018 Poles Order* ¶¶ 116-19 (addressing commenters' concerns).

2. The Commission Should Reject EDC Attempts To Abrogate The FCC's Rate Reforms For ILECs And Make Pennsylvania More Expensive For Investment.

The EDCs also disagree with FCC's decision to provide lower rates for ILECs.[40] The FCC noted that since 2011 "[i]n the interest of promoting infrastructure deployment," it "adopted a policy . . . that similarly situated attachers should pay similar pole attachment rates for comparable access," but that electric utilities "continue to charge pole attachment rates significantly higher than the rates charged to similarly situated telecommunications attachers, and that these higher rates inhibit broadband deployment."[41] To continue addressing these legacy rate disparities, the *FCC 2018 Poles Order* established a presumption that for "new and newly-renewed" pole attachment agreements, an incumbent LEC should be charged no higher than the current telecom rate.[42] Electric utilities can rebut the presumption by demonstrating with "clear and convincing evidence" that the incumbent LEC receives net benefits that materially advantage the incumbent LEC over other telecommunications attachers.[43] If the presumption is rebutted, the pre-*2011 Poles Order*[44] telecom rate "is the maximum rate that the utility and incumbent LEC may negotiate."[45] For agreements that do not qualify as "new or newly-renewed" pole attachment agreements, the *2011 FCC Poles Order*'s guidance regarding

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[40] First Energy Comments at 7-8; PPL Comments at 2. PECO suggests an unnecessary provision related to "voluntarily negotiated agreements" that may be intended to alter or abrogate the FCC's decision on ILEC rates and should be rejected. PECO Comments at 4-5.

[41] *FCC 2018 Poles Order* ¶ 123.

[42] *Id.* The Order defines a "new or newly-renewed agreement" as "one entered into, renewed, or in evergreen status after the effective date of this Order, and renewal includes agreements that are automatically renewed, extended, or placed in evergreen status." *Id.* ¶ 127 n.475.

[43] *Id.* ¶ 123; *id.* at Appx. A, revised § 1.1413(b).

[44] *Implementation of Section 224 of the Act, et al.*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) ("*FCC 2011 Poles Order*").

[45] *FCC 2018 Poles Order* ¶ 129.

review of incumbent LEC pole attachment complaints will continue to apply.[46] If the Commission reverse preempts the FCC and adopts its rules, it may be called upon to help resolve ongoing disparities in the future, but there is no reason to undo these reforms and make it more expensive for ILECs to deploy broadband facilities in Pennsylvania – including the crucial backhaul facilities deployed by ILECs.

3. CWA's Arguments Advance Its Own Interests, Not The Public Interest, And Were Already Considered By The FCC.

The FCC already specifically considered and rejected CWA's argument that the FCC's one-touch make-ready provisions "would violate existing collective bargaining agreements between CWA and various ILECs,"[47] and there is no reason to allow CWA to revisit that issue here. As the FCC explained, "[w]e decline to adopt a requirement that [one-touch make-ready work] must be performed by union contractors where an existing attacher has entered into a collective bargaining agreement (CBA) that requires the existing attacher to use union workers for pole attachment work," because "[n]ew attachers that are not parties to a CBA have no obligations under such a CBA. It is the new attacher's contractor that will be performing the make-ready work, so the CBA is not implicated."[48] The FCC also found that "requiring a new attacher to hire a union contractor only because one of the existing attachers' CBA mandates the use of union workers to perform its pole attachment work would frustrate the efficiency and utility of [the one-touch make-ready process]," and "would result in a patchwork of rules that

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[46] *Id.* ¶ 127 n.478.

[47] CWA Comments at 10.

[48] *FCC 2018 Poles Order* ¶ 47.

might be subject to change every few years and would be administratively unmanageable for new attachers."[49]

The FCC also specifically considered CWA's safety and reliability arguments about the use of contractors and found that these concerns are already addressed "through the opportunity for existing attachers to be present for surveys and make-ready work and to conduct post-make-ready inspections on the work performed. Both opportunities provide existing attachers with a safeguard against facility damage and harms that could result from contractor mistakes – and nothing in our adoption of an OTMR regime should be construed as preventing an existing attacher from using union employees and/or contractors pursuant to an applicable CBA on pole-related work not subject to OTMR that the existing attacher is entitled to perform."[50]

CWA also suggests that this Commission does not have the same authority as the FCC to require pole owners to allow other parties and their contractors to work on their poles because "utilities control their own property."[51] CWA misreads the court precedent quoted at page 9 of its comments, which simply provides that this Commission cannot micro-manage a public utility's own choice of facilities used in the provision of its public utility service – not that the Commission lacks authority over the attachment of third party facilities to a utility pole. According to CWA, "the Commission cannot adopt the FCC's new regulations if those regulations exceed the scope of the Commission's authority."[52] If the CWA is correct that this Commission's authority over utility poles is so limited, then it would be highly questionable whether the Commission has the authority to reverse preempt and regulate pole attachments at

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[49] *Id.* ¶ 48.

[50] *Id.* ¶ 49.

[51] CWA Comments at 9.

[52] CWA Comments at 1.

all. However, the Commission already rejected this argument in its NPRM when it found that federal and state law provide it with authority "to regulate the full scope of pole attachments in Pennsylvania."[53]

C. Additional Issues.

1. The Commission Should Not Require A Pole Registry.

This is an issue on which most of the communications providers and the EDCs agree. As Duquesne Light explains, creating and maintaining a pole registry "would be a costly endeavor, present a security risk, shows little necessity and would provide limited benefit to ratepayers."[54] "PECO strongly objects to this concept of a comprehensive registry of pole and attachments."[55] PPL and First Energy agree that this would be unduly burdensome and costly with little benefit.[56] According to CTIA, requiring a standardized registry could be counterproductive.[57] CenturyLink views this idea as "very problematic" and PTA agrees.[58] For communications companies that are not rate-of-return regulated, these costs cannot be charged back to ratepayers and would divert funds that might otherwise have been used for broadband deployment. It is notable that the parties who support this requirement do not have to bear the burden and expense of creating and maintaining such a registry.[59] But they do not establish any benefit that would outweigh the considerable costs, burdens and other negative consequences of such a requirement.

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[53] *NPRM* at 10.

[54] Duquesne Light Comments at 6.

[55] PECO Comments at 15.

[56] PPL Comments at 6; First Energy Comments at 13.

[57] CTIA Comments at 8.

[58] CenturyLink Comments at 6; PTA Comments at 4.

[59] *E.g.*, OCA Comments at 7; MAW Comments at 2; CBPA Comments at 6.

2. The Commission Should Not Require Standardized Agreements Or Tariffs.

Most communications providers and EDCs also agree that there is no need to require standardized agreements or tariffs for pole attachments, which are not required by the FCC. As PECO points out, the "current system is not broken and does not require any change."[60] The other EDCs agree that standardized agreements and tariffs are not necessary and "may not be an efficient use of resources."[61] And CTIA points out that standardized agreements and tariffs are "another layer of process that could conflict with the FCC" and are not necessary.[62]

In a related but slightly different proposal, ExteNet suggests that all "utilities" should be required to file publicly their pole attachment agreements and "any pole attachment or conduit rates and the basis therefore."[63] ExteNet claims that "the FCC's formula for setting pole attachment rates is based on complex information known only to the utility setting such rates there is no way for ExteNet, or other attachers, to know if the utility is following the formula short of a time consuming and expensive complaint to the FCC."[64] Extenet may be right for electric utilities. However, for Verizon and other incumbent local exchange carriers, pole cost and other information needed to set rates is publicly available. This data can be plugged into the FCC formula to calculate the rates. Verizon has historically provided detailed pole cost information to the FCC, offering state-by-state details about costs used for the FCC pole attachment formula, and will continue to provide such information even if the Commission

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60 PECO Comments at 15.

61 Duquesne Light Comments at 6. *See also* First Energy Comments at 13; PPL Comments at 6.

62 CTIA Comments at 8. *See also* CenturyLink Comments at 6; NetSpeed Comments at 4; CBPA Comments at 6.

63 ExteNet Comments at 10.

64 *Id.*

reverse preempts the FCC. Verizon and the other incumbent local exchange carriers provide this data annually to the FCC as a remaining part of the ARMIS 43-01 filing.[65]

3. Working Groups Should Not Be Used As A Delay Tactic.

Most parties agree that there is no need for working groups at this time,[66] or that the mission of any working groups should be strictly limited and defined to ensure efficiency.[67] Some parties try to use working groups to delay and confuse. Whatever the Commission ultimately decides regarding working groups, it should be very careful not to allow the parties, particularly those seeking to abrogate the FCC rules, to use working groups as a delay tactic or as a mechanism to create an environment of regulatory uncertainty in Pennsylvania. For example, the Commission should reject First Energy's suggestion that all of its "issues" of disagreement with the FCC rules should first be "clarified in a working group prior to implementation of the Commission's proposed rulemaking."[68]

4. Dispute Resolution Should Not Be Made More Difficult For Attachers.

Verizon covered the issue of dispute resolution in depth in its initial comments, noting that the Commission should resolve disputes with shot clocks at least as fast as those set forth in the FCC rules, which it would adopt, and that it could endeavor to act faster than the FCC and/or to offer different dispute resolution options.[69] To the extent it attempts to offer creative dispute resolution options, the Commission will have to consider what works based on the nature of the

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[65] *See In the Matter of Petition of Qwest Communications for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c)*, 23 FCC Rcd. 18483 (2008) ("We impose one further condition on our forbearance from the ARMIS Financial Report: each carrier's continued public filings with the Commission of pole attachment cost data currently submitted in ARMIS Report 43-01.")

[66] Duquesne Light Comments at 7; CTIA Comments at 8.

[67] *See, e.g.*, PECO Comments at 16 ("mandate for working group" must be "clear").

[68] First Energy Comments at 13.

[69] Verizon Comments at 12-14.

dispute. For example, something like the Abbreviated Dispute Resolution Process cited by Full Service Network and Verizon might be useful for pole access complaints to speed up attachment to poles, but perhaps not appropriate for complex contractual or rate disputes, but all disputes still should be decided at least as quickly as required by the FCC shot clocks.

The Commission should resist EDC arguments to use the dispute resolution process to make it more difficult for attachers to operate in Pennsylvania. Duquesne Light, for example, suggests that the Commission "may" want to refrain from adjudicating pole attachment disputes involving entities that are not regulated by the Commission.[70] To the extent Duquesne Light is suggesting that the Commission reverse preempt to remove the FCC as a forum for wireless and other unregulated providers to bring complaints, and then refuse to take complaints from these entities at the state level, that proposal is unfair and counterproductive. It is well-established that the deployment of wireless broadband facilities is vital to broadband access, so the Commission should not adopt dispute procedures that make it more difficult for wireless carriers to operate.

First Energy points out (correctly) that this Commission's typical formal complaint procedures can be "quite lengthy" and argues that the Commission should ignore the FCC's shot clocks and use these lengthy complaint adjudication procedures instead, to "allow for development of an ample evidentiary record on which to base decisions."[71] If the Commission reverse preempts, it should adopt the FCC's shot clocks, including the most recent changes from the FCC's July 18, 2018 procedural rules order, and adapt its typical procedures to fit these shot clocks.[72] The EDCs should not be permitted to use this Commission's lengthy formal complaint

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[70] Duquesne Light Comments at 3.

[71] First Energy Comments at 12.

[72] *In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, EB Docket No. 17-245 (FCC Rel. July 18, 2018), published in the Federal Register on September 4, 2018 at 83 FR 44831 and effective October 4, 2018.

procedures to "slow-roll" attachers, particularly smaller companies that do not have the same local contacts and resources to litigate before the Commission as the EDCs do, as this could constitute a barrier to entry and thwart the Commission's objective to provide a better dispute resolution environment.

III. Conclusion

If the Commission determines to reverse preempt the FCC, then Verizon urges the Commission to maintain uniformity by adopting the FCC rules quickly and in total, together with automatic adoption of future changes, and to reject attempts to create an uncertain and unstable regulatory environment in Pennsylvania that will make it less attractive for investment and innovation. For dispute resolution, the Commission should adopt a process at least as fast and efficient as the shot clocks in the FCC rules and consider any other procedures that could reasonably speed up or improve dispute resolution to remove unnecessary barriers to deployment. Verizon thanks the Commission for the opportunity to comment on this matter of great importance to the citizens of Pennsylvania.

Respectfully submitted,

Suzan D. Paiva (Atty No. 53853)
Verizon
900 Race St., 6th Floor
Philadelphia, PA 19107
(267) 768-6184
Suzan.d.paiva@verizon.com

Attorney for the Verizon Companies

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