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**Broadband
Cable Association
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Independent Regulatory
Review Commission

November 28, 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 Reply Comments of the Broadband Cable Association in the above captioned proceeding. Our document is also being served on parties to the proceeding.

Sincerely,

Daniel R. Tunnell
President

Enclosure

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

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**Before the
Pennsylvania Public Utility Commission**

Assumption of Commission Jurisdiction

Over Pole Attachments from the Federal

L-2018-3002672

Communications Commission

Reply Comments of the Broadband Cable Association of Pennsylvania, Inc.

The Broadband Cable Association of Pennsylvania, Inc. (“BCAP”)¹ submits these reply comments on behalf of its members in connection with the Commission’s Notice of Proposed Rulemaking issued in the above-captioned proceeding (“Notice”).² BCAP continues to support the Commission’s goals of ensuring a prompt and fair process for adjudicating pole attachment complaints and facilitating increased broadband deployment in Pennsylvania. Those objectives understandably led the Commission to initiate this proceeding to explore the possibility of reverse preempting the Federal Communication Commission’s (“FCC’s”) jurisdiction over pole attachments in the Commonwealth. Since the Commission commenced this proceeding in June, however, the FCC released two orders that are directly relevant to the issues raised in the Notice—one that provides for accelerated resolution of pole attachment complaints filed with the FCC,³ and another that makes significant changes to the process for attaching equipment to

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”).

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, ¶¶ 9, 19, 21 (rel. Jul. 18, 2018).

poles.⁴ In light of these developments, BCAP continues to believe, as explained in its opening comments, that the most prudent course at this stage would be to delay any 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 which are scheduled to take effect early next year.⁵ The initial comments filed by pole owners in this proceeding confirm the wisdom of this approach.

To date, the FCC's rules have allowed providers in Pennsylvania to make significant strides in deploying broadband and the FCC's new rules could help further accelerate broadband deployment. Thus, it is no surprise that the majority of commenters, all twelve broadband providers plus OCA, advocate in favor of adopting the FCC rules wholesale⁶ and seven support adoption of the FCC's future rule changes.⁷ Only four commenters - all pole owners - present the Commission with a smorgasbord of conflicting views on how to proceed if it were to reverse preempt—including disagreements over which specific aspects of the FCC's decades-old regime should be retained or discarded. Some commenters would pick and choose among the FCC's complementary set of rules.⁸ Others would use reverse preemption to remove the FCC's rate

⁴ 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).

⁵ See BCAP Comments at 5. See also Crown Castle Comments at 6 (recommending “that the Commission not reverse preempt the FCC’s jurisdiction over pole attachment rulemaking and adjudication” given that “the increased training necessary to familiarize staff with the FCC’s rules as well as the ongoing need for qualified dispute resolution staff may be an undue burden on the Commission’s existing resources”)

⁶ See Comments filed by OCA, BCAP, ExteNet Systems, Crown Castle, CTIA, Verizon, DQE Communications, Full Service Networks, CenturyLink, Inc., NetSpeed, LLC, MAW Communications, Pennsylvania Telephone Association, Central Bradford Progress Authority together with RuralNet, Inc. While certain of these providers complain that the FCC's historic complaint rules were not as effective as they could have been, they do not seem to have been aware of the FCC's recent complaint rule changes which only went into effect in October.

⁷ Of the commenters listed in n. 6, only OCA, NetSpeed, Inc., MAW Communications, and Pennsylvania Telephone Association raised questions about future changes, but they appear unaware of the fact that Pennsylvania agencies, including this Commission, have incorporated federal law future changes in other rules.

⁸ See, e.g., Duquesne Light Comments at 5 (suggesting that “instead of the Commission adopting all of 47 C.F.R. §§1.1401 through 1.1425, it should instead note that it is not adopting §1.1404 through §1.1408 and will utilize 52

formula and accompanying rules, which promote transparency and efficiency in pole attachment rate-making and prompt resolution of rate disputes (including without FCC intervention).⁹ To evaluate these proposals properly, the Commission would need to undertake a careful weighing of the costs and benefits presented by each alternative, and, in some cases, to consider whether sufficient justification exists to eliminate or retain rules that the FCC has enforced for decades or, in other cases, only recently adopted or amended. Even then, if pole owners, consistent with past practices and as evidenced by their opening comments, use the Commission's assertion of jurisdiction as an opportunity to revisit old tactics and make arguments and propose rules previously rejected by the FCC, the Commission's assertion of jurisdiction may have the unintended effect of slowing broadband deployment.

At this stage, without data on the impact of the FCC's recent amendments to its pole attachment rules, it would be premature for the Commission to attempt to resolve these disputes over the effectiveness of the FCC's new regime overall or the benefits and drawbacks of various aspects of that regime. As BCAP noted in its opening comments, pole owners and attachers are still in the process of adjusting their practices and policies to conform to the FCC's rule changes, and the FCC has not yet had the opportunity to adjudicate any complaints under its new

Pa. Code Chapters 1, 3 and 5 to adjudicate any disputes"); First Energy Comments at 6-8 (listing four aspects of the FCC's pole attachment rules that it believes the Commission should refrain from adopting at the state level); PPL Electric Comments at 5 (urging the elimination of "certain 'self-help' remedies under the FCC regulations," while supporting the adoption of the FCC's approach in other respects); PECO Comments at 14 (urging the Commission to adopt stiffer unauthorized attachment penalties than currently imposed by the FCC).

⁹ Duquesne Light proposes that the Commission "note that it is not adopting §1.1404 through §1.1408" of the FCC's rules. These rules contain critical provisions setting out the rate formulas and supporting cost information needed to adjudicate pole attachment rate disputes. For instance, the revised Section 1.1406, effective as of October 4, 2018, sets forth in detail the "formulas for determining a maximum just and reasonable rate" for pole attachments. 47 C.F.R. § 1.1406(d). The revised Section 1.1404, also effective as of October 4, 2018, specifies that the "[d]ata and information" used in calculating these formulas "should be based upon historical or original cost methodology . . . derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies;" require that the data be provided to an attaching entity within 30 days of a request to promote transparency and resolution of disagreements without the need for a complaint; and contains other provisions guiding the substantive assessment of pole attachment rates. *Id.* § 1.1404(e), (f), (g).

procedural and substantive rules.¹⁰ After industry stakeholders and regulators have adjusted to and gained experience with the amended federal regime, the Commission would be better positioned to develop the record it needs to decide whether to undergo the administrative challenge of reverse preemption—but it is premature to undertake that analysis now. Moreover, the prospect that the federal rules could be amended in response to a pending Petition for Reconsideration filed last month by a coalition of several utilities¹¹ or that a reviewing court might provide additional insight in response to a recent appeal¹²—further support letting the dust settle at the federal level rather than short-circuiting those processes and continuing on the path to reverse preemption in Pennsylvania.

If, however, the Commission decides to move forward with reverse preemption on the current record, BCAP continues to support the Commission’s proposal to adopt the FCC’s pole attachment regime in its entirety, including future changes to the federal rules. Several other commenters agree with BCAP that doing so would help minimize confusion and disruption and would provide stakeholders with the certainty they need to support ongoing efforts to expand and enhance broadband networks in the Commonwealth.¹³ Opponents, meanwhile, are misguided in

¹⁰ See BCAP Comments at 3. See also Crown Castle Comments at 3-8.

¹¹ See Petition for Reconsideration of the Coalition of Concerned Utilities, *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, WT Docket No. 17-79 (filed Oct. 15, 2018).

¹² *American Electric Power Service, et al v. FCC, et al*, No. 18-14408 (11th Cir.).

¹³ See, e.g., Verizon Comments at 9 (“The simple truth is that the delay and regulatory uncertainty that would result from any course of action other than a straight adoption of the FCC rules 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.”); CTIA Comments at 3 (“The Commission’s proposal to adopt the FCC regulations [wholesale] . . . lessens the likelihood that there will be redundant litigation over pole attachment regulations and the interpretation thereof, creating efficiency and ensuring fair application of a consistent set of rules, which will encourage deployment.”); Crown Castle Comments at 8-9 (explaining that, “by adopting the FCC’s rules by reference, as the Commission has proposed, Pennsylvania will allow providers the certainty of knowing that attaching broadband infrastructure to poles in the Commonwealth will follow the same rules and procedure as in a majority of other states, creating efficiencies for nationwide providers.”).

arguing that it would somehow violate Pennsylvania law for the Commission to adopt the FCC's rules along with future amendments.¹⁴ As Verizon correctly points out, "Where a federal agency has already invested the time and administrative resources to establish a comprehensive set of regulations," ample precedent exists "for Pennsylvania agencies to adopt those regulations, by reference, as their own, including future modifications."¹⁵ Indeed, the PUC's rules governing federal minimum safety standards for the Commonwealth's natural gas and hazardous liquid public utilities incorporate the federal pipeline safety laws, including the federal rules set forth in 49 CFR Parts 191—193, 195 and 199, "*including all subsequent amendments thereto.*" 52 Pa. Code 59.33(b) (emphasis added). Future amendments are automatically incorporated, without publication, and take effect in Pennsylvania sixty 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.¹⁶ Pennsylvania courts presented with such statutes have not found them to be unlawful.¹⁷ Nor would such an approach present due process issues; interested

¹⁴ See, e.g., Communications Workers of America Comments at 4-5; PPL Electric Comments at 3-4.

¹⁵ Verizon Comments at 11.

¹⁶ See also Verizon Comments at 11 nn. 24, 25, 26 (citing, inter alia, 25 Pa. Code § 260.a(1) (incorporating 40 CFR Part 260 and its appendices relating to hazardous waste management system: general) and § 260a.3(e) ("The incorporation by reference includes *any subsequent modifications and additions to the CFR incorporated in this article.*") (emphasis added); 25 Pa. Code § 127.83 ("The Prevention of Significant Deterioration requirements promulgated in 40 CFR 52 by the Administrator of the EPA under section 161 of the Clean Air Act (42 U.S.C.A. § 7471) are *adopted in their entirety* by the Department and incorporated herein by reference") (emphasis added); and 67 Pa. Code § 231.1 ("Much of this chapter incorporates by reference 49 CFR Parts 382, 385 and 390 – 396")); and CTIA Comments at 5 ("58 P.S. §801.302(b)(1), also known as Act 127, contains an automatic adoption clause similar to that proposed here, and provides that any change in the federal regulations shall take effect in Pennsylvania sixty (60) days after the effective date, which seems to be a reasonable amount of time to provide notice to affected entities."); and 52 Pa. Code § 37.204 ("The [Public Utility] Commission incorporates by reference the following portions of 49 CFR (relating to transportation), subject to §§ 37.202 and 37.205 (relating to definitions; and additions or modifications to 49 CFR)").

¹⁷ See *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.").

parties would have every opportunity to participate in future FCC rulemaking proceedings on proposed reforms to the federal pole attachment regime that might affect the substantive law applicable in Pennsylvania, even if the Commission were to reverse preempt.¹⁸ Indeed, utilities that are not directly subject to the FCC's jurisdiction file comments in FCC pole attachment proceedings all the time.¹⁹ The Commission thus would not face any significant legal impediments if it were to move forward with such an approach.

By contrast, the Commission may well encounter a notice problem if it were to replace certain aspects of the FCC's regime with Pennsylvania-specific requirements, as some commenters invite the Commission to do, without issuing a new notice of proposed rulemaking.²⁰ While the Commission's Notice squarely tees up "an initial turn-key adoption of FCC pole attachment regulations and rates,"²¹ which would be "inclusive of future changes,"²² the Notice does not seek comment on adopting any particular *subset* of the federal rules, nor does it identify any specific FCC rules as candidates for retaining or eliminating. Therefore, at a minimum, the Commission would have to issue a new notice of proposed rulemaking before undertaking any serious consideration of proposals to forgo some aspects of the FCC regime in favor of new and different state-level requirements.²³

¹⁸ The FCC does not limit the entities that may file comments in their rulemaking proceedings.

¹⁹ See, e.g., Comments filed by Puget Sound Energy, Inc. in FCC Docket WC 17-84, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Deployment, dated June 15, 2017, despite the fact that PSE is located in a certified state and thus is not subject to the FCC's jurisdiction. Similarly, the National Electric Rural Cooperatives Association and numerous electric cooperatives filed comments in the FCC's 2011 pole attachment rulemaking proceeding despite the fact that cooperative pole owners are excluded from the federal Pole Attachments Act and thus, the FCC's jurisdiction.

²⁰ See, e.g., *supra* note 7.

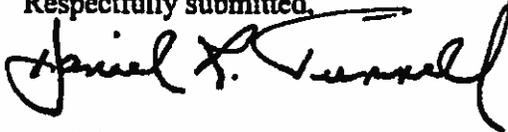
²¹ Notice at 11.

²² *Id.*, Annex, § 77.4.

²³ The better approach is to adopt the rules in their entirety, as proposed in the Notice, and avoid the perils of the piecemeal approaches proposed in the record, such as those proposed by Duquesne Light, PECO and First Energy, which would eliminate core *substantive* features of the federal regime—giving rise to far-reaching consequences that the commenters appear not to have considered. The Commission's proposal to adopt the federal regime in its

The better approach is to adopt the rules in their entirety, as proposed in the Notice, and avoid the perils of the piecemeal approaches proposed in the record, such as those proposed by Duquesne Light, PECO and First Energy, which would eliminate core *substantive* features of the federal regime—giving rise to far-reaching consequences that the commenters appear not to have considered. The Commission’s proposal to adopt the federal regime in its entirety would avoid creating these sorts of unintended but significant gaps in the regulatory framework, and would provide stakeholders with the certainty and predictability they need to continue advancing broadband deployment in the Commonwealth.

In considering how best to proceed, the Commission should remain mindful of the important observation made in its Notice: That as the Commission seeks to “promote and encourage the provision of advanced telecommunications services and broadband deployment in the Commonwealth,” it must avoid unduly “disrupt[ing] existing business practices or regulatory expectations” in the process.²⁴ BCAP agrees with this guiding principle—which, at this stage, supports taking a wait-and-see approach with respect to developments at the federal level before committing to reverse preemption or adopting Pennsylvania-specific requirements.

Respectfully submitted,


Daniel R. Tunnell
President

November 28, 2018

entirety would avoid creating these sorts of unintended but significant gaps in the regulatory framework, and would provide stakeholders with the certainty and predictability they need to continue advancing broadband deployment in the Commonwealth.

²⁴ Notice at 8, 11.

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing reply comments to be served on the following individuals/organizations (service method indicated):

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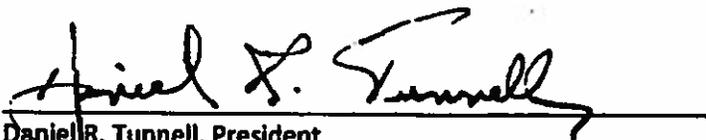
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