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October 29, 2018

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd 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 Comments of ExteNet Systems, Inc. in the above-referenced matter.

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

Best Regards,

STEVENS & LEE



Michael A. Gruin

Enclosure

cc: Shaun Sparks, Law Bureau (via email: shsparks@pa.gov)
Colin W. Scott, Law Bureau (via email: colin.scott@pa.gov)

**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PUBLIC UTILITY COMMISSION**

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

**INITIAL COMMENTS OF
EXTENET SYSTEMS, INC.**

ExteNet Systems, Inc. (“ExteNet”), pursuant to the Pennsylvania Public Utility Commission’s (“Commission”) July 12, 2018 Notice of Proposed Rulemaking (“Notice”) as published in the September 28, 2018 Pennsylvania Bulletin,¹ and the schedule established therein, hereby respectfully submits the following comments and suggestions regarding the Assumption of Commission Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission (“FCC”).

I. INTRODUCTION

In the Telecommunications Act of 1996 (the “Act”), Congress granted the FCC the obligation to “regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.”² However, “in any case where such matters are regulated by a State,” Congress stated that FCC jurisdiction shall not apply.³ States that sought to exercise jurisdiction over pole attachments in

¹ 48 Pa.B. 6273.

² 47 U.S.C. §224(b)(1).

³ 47 U.S.C. §224(c)(1).

their states were required to certify⁴ to the FCC that they have promulgated “rules and regulations implementing the State’s regulatory authority over pole attachments” and have a procedure in place to resolve complaints within 180 days (unless the State’s rules and regulations for such complaints allow additional time, but not more than 360 days).⁵ To date, twenty states and the District of Columbia have opted out of Commission regulation of pole attachments in their jurisdictions.⁶ These states are commonly referred to as “non-FCC states”

In the remaining states, including Pennsylvania, where the FCC has jurisdiction over pole attachments, the FCC has developed a series of procedures through FCC Orders⁷ and generally codified in Code of Federal Regulations.⁸

Through the instant proceeding, the Pennsylvania Public Utility Commission proposes, through reverse preemption, to assert its statutory right to regulate pole attachments within its geographic jurisdiction. ExteNet recognizes that local control over pole attachments is generally more responsive than the FCC and allows responses to any unique geographic needs within that

⁴ 47 U.S.C. §224(c)(2).

⁵ 47 U.S.C. §224(c)(3).

⁶ The following jurisdictions have certified that they regulate pole attachments: Alaska, Arkansas, California, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Utah, Vermont, and, Washington. WC Docket No. 10-101, Public Notice, 25 FCC Rcd 5541, 5541-42 (WCB 2010).

⁷ See primarily: In The Matter of Implementation of Section 224 of the Act, WC Docket No. 07-245; A National Broadband Plan for Our Future, GN Docket No. 09-51 (April 7, 2011) (“2011 FCC Pole Order”), aff’d, *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013); In The Matter of Implementation of Section 224 of the Act, WC Docket No. 07-245; A National Broadband Plan for Our Future, GN Docket No. 09-51; FCC 15-151 (Nov. 17, 2015) (“2015 FCC Pole Order”); and, In the Matter of: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC 17-84; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT 17-79; FCC 18-11, Aug. 2, 2018 (“2018 FCC Pole Order”).

⁸ 47 C.F.R. §§ 1.1401 - 1.1425.

state. ExteNet supports the Commission's rulemaking proceeding to assert such authority over utility poles and provides the following comments and suggestions.

II. ABOUT EXTENET SYSTEMS, INC.

ExteNet has a vital interest in whether this Commission or the FCC regulates the terms and conditions upon which ExteNet attaches to utility poles within the Commonwealth of Pennsylvania.

ExteNet designs, builds, owns, manages, and operates "neutral-host" distributed telecommunications networks that are in turn used by Wireless Service Providers ("WSPs") in conjunction with the WSPs' 3G, 4G LTE, and eventually 5G, wireless voice and data services in both outdoor and indoor settings. ExteNet's networks provide point-to-point transport and backhaul services to WSPs over fiber optic cables and other transport media that connect remote communication nodes to hub facilities and other signal traffic aggregation points. The networks are designed to support multiple carriers within a defined area through the use of shared infrastructure that enhances service and minimizes the expense of expanding existing carrier networks. Distributed networks are an important component of national and statewide efforts to expand broadband and wireless services to all Americans, including in many markets in Pennsylvania.

ExteNet owns and operates multi-carrier -- often referred to as "neutral-host" -- and multi-technology distributed network systems to ensure multiple wireless service providers can provide their services in the most effective and efficient manner. ExteNet creates a scalable network design utilizing its high-bandwidth fiber network to ensure that wireless network densification needs of users and wireless service providers are met and can evolve over time as user demands dictate.

Typically, ExteNet installs its distributed network system equipment and fiber on existing utility poles, street lights, conduit and other existing facilities located in the public right-of-way. . These utility poles and conduit are often owned by public utility companies under the regulatory jurisdiction of the Commission. Non-discriminatory and equitable access to these public utility company- owned utility poles and conduit is essential not only to ExteNet, but to all telecommunications providers offering service to the people of Pennsylvania who are clamoring for additional broadband access and bandwidth.

A. ExteNet’s Authority to Operate in Pennsylvania

This honorable Commission granted ExteNet’s predecessor-in-interest, ClearLinx Network Corporation, a Certificate of Public Convenience to operate as a Competitive Access Provider (“CAP”) on January 27, 2006 (“Order”). The Order describes ExteNet’s service as the offering of:

Non-switched dedicated point-to-point circuits carried on fiber optic facilities. These point-to-point circuits will carry Radio Frequency (“RF”) traffic of Wireless Service Providers between the company’s newly developed shared distributed antenna system networks and WSPs’ existing facilities or through collocation facilities leased to WSPs by the Company. These fiber-fed shared distributed antenna system networks will extend wireless networks, improving quality, coverage and capacity, with community-friendly solutions.

Based on the authority granted in the Order, ExteNet has been able to negotiate pole attachment agreements with Duquesne Light Company, Metropolitan Edison Company, PECO Energy Company, Pennsylvania Electric Company, PPL Electric Utilities Corporation, Verizon Pennsylvania, and West Penn Power – each of which are public utilities under the jurisdiction of

this Commission.⁹ These agreements permit the placement of fiber and DAS equipment on utility-owned poles within the public rights-of-way. In addition, ExteNet has agreements in place with numerous Pennsylvania municipalities for both access to the public rights-of-way and attachment to municipal-owned poles and other structures. Through these and other agreements, ExteNet has installed networks throughout the Commonwealth of Pennsylvania.

ExteNet currently has installations in the following Pennsylvania municipalities: Aliquippa, Avalon, Baldwin, Beaver Falls, Bellevue, Bethel Park, Big Beaver, Canonsburg, Carnegie, Carnot-Moon, Castle Shannon, Crafton, DuBois, East York, Ellwood City, Enlow, Green Tree, Grove City, Hermitage, Homestead, Homewood, Houston, Imperial, Ingram, Irwin, King of Prussia, Koppel, Latrobe, Monaca, Munhall, New Brighton, New Castle, New Stanton, North Charleroi, Oakwood, Pittsburgh, Pleasant Hills, Plum, Rochester, Sharon, Stonybrook, Upper St. Clair, Washington, Whitehall, and Wolfdale. ExteNet anticipates installation of additional networks and facilities in Pennsylvania as the need for broadband capacity continues to grow.

III. COMMISSION JURISDICTION

ExteNet agrees that the Commission has authority to promulgate its own rules for the regulation of pole attachments under existing Pennsylvania law.¹⁰ Section 501 of the Public Utility Code gives broad authority to the Commission, even when not “expressly enumerated” in the Public Utility Code.¹¹

⁹ It is ExteNet’s understanding that rural electric cooperatives are not regulated by the Commission. 66 Pa.C.S. §102. Unfortunately, regardless of the outcome of the instant proceeding, the FCC’s jurisdiction over such cooperatives is limited. 47 U.S.C. § 224(a)(1). While not the subject of the instant proceeding, ExteNet submits that it would be beneficial for the Pennsylvania General Assembly to grant such jurisdiction to the Commission.

¹⁰ 66 Pa.C.S. §§ 102, 501, 1301, and 1501.

¹¹ 66 Pa.C.S. §501.

Upon asserting such jurisdiction and promulgating the proposed rules, this Commission would then have an obligation to certify to the FCC that it has issued and made effective such rules and regulations implementing its regulatory authority over pole attachments pursuant to Section 224(c) of the Act.

IV. PROPOSED PENNSYLVANIA RULES

In the instant proceeding, the Commission proposes a new chapter of Title 52 of the Commission's regulations, proposed Chapter 77: Pole Attachments. ExteNet hereby suggests the following modifications to that proposed chapter.

A. Applicability

In Section 224 of the Act, the FCC's jurisdiction over pole attachments owned by "any political subdivision, agency, [of a State] or instrumentality thereof" is limited.¹² However, Section 102 of the Pennsylvania Public Utility Code grants this Commission authority over municipally owned facilities, except those owned prior to 1937. The Pennsylvania Public Utility Code provides:

"Facilities." All the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility. Property owned by the Commonwealth or any municipal corporation prior to June 1, 1937, shall not be subject to the commission or to any of the terms of this part, except as elsewhere expressly provided in this part.¹³

Based on this authority, ExteNet urges this honorable Commission to expressly assert its regulation over pole attachments not only to publicly owned utilities, but also to municipally

¹² 47 U.S.C. § 224(a).

¹³ 66 Pa.C.S. §102.

owned utility poles. ExteNet thus recommends the following changes to Proposed Rules §§ 77.2 and 77.3:

§ 77.2. Applicability.

This chapter applies to all persons, entities, poles, ducts, conduits and rights-of-way under this Commission's jurisdiction including those subject to 47 U.S.C. § 224 and 47 C.F.R. 1.1401 – 1.1425 as those regulations may be amended.

§ 77.3. Commission oversight.

(a) This chapter establishes the Commission's regulatory authority over the rates, terms and conditions of access to and use of poles, ducts, conduits and rights-of-way to the full extent of this Commission's jurisdiction and authority and as provided for in 47 U.S.C. § 224 for pole attachments as of sixty days after the effective date of this Chapter.

(b) The Commission has the authority to consider, and will consider, the interests of the subscribers of the services offered via pole attachments, as well as the interests of the consumers of the utility services.

B. Adoption of Federal Communications Commission Regulations

In proposing Rule 77.4, the Commission has chosen to explicitly adopt existing and future FCC interpretations of pole attachment rates, terms, and conditions as codified in the Code of Federal Regulations now and in the future.

§ 77.4. Adoption of Federal Communications Commission Regulations.

This chapter adopts the rates, terms and conditions of access to and use of poles, ducts, conduits and rights-of-way to the full extent provided for in 47 U.S.C. § 224 and 47 C.F.R. 1.1401 – 1.1425, inclusive of future changes as those regulations may be amended.

Recognizing the extensive nature of comments that contribute to an FCC declaratory ruling and report and order, issues that are appropriate for nation-wide implementation may not always fit the needs of Pennsylvanians. Customization of the FCC's rules and regulations should be anticipated. While Proposed Rule 77.5 contemplates that "federal court decisions reviewing

those rules and interpretations [will be] persuasive authority in construing the provisions” of the rules, the Commission should adopt a method to codify any variance from the FCC’s rules and regulations specific to Pennsylvania. ExteNet thus recommends the following changes to Proposed Rule § 77.4:

§ 77.4. Adoption of Federal Communications Commission Regulations.

a) This chapter adopts the rates, terms and conditions of access to and use of poles, ducts, conduits and rights-of-way to the full extent provided for in 47 U.S.C. § 224 and 47 C.F.R. 1.1401 – 1.1425, inclusive of future changes as those regulations may be amended.

b) Any party seeking a generally applicable deviation from those rates, terms and conditions of access to and use of poles, ducts, conduits and rights-of-way to the full extent provided for in 47 U.S.C. § 224 and 47 C.F.R. 1.1401 – 1.1425, may at any time petition the Commission for a rulemaking proceeding for such purpose pursuant to 52 Pa. Code §§1.5, 5.1, 5.11, and 5.211. The Commission shall, in its sole discretion, by formal vote of its members, determine whether to initiate such a rulemaking proceeding.

C. Dispute Resolution

Issues that will arise before the Commission regarding pole attachments generally require expedited and quick resolution. In most cases, a delay that prevents a party from attaching to a pole is a deterrent to construction of much needed broadband service that would otherwise benefit the citizens of Pennsylvania. As noted in the 2018 FCC Pole Order, “a number of commenters allege that pole attachment delays and the high costs of attaching to poles have deterred them from deploying broadband.”¹⁴ Congress also recognized this in only allowing states to exercise jurisdiction over pole attachment rates, terms, and conditions if that state has procedures in place to “take final action on a complaint regarding such matter— (i) within 180

¹⁴ 2018 FCC Pole Order, ¶ 8.

days after the complaint is filed with the State.”¹⁵ Unfortunately, the FCC does not generally hold fast to these timelines and it generally takes months for resolution of disputes with the FCC.

Presumably the Commission recognized this requirement in including Chapter 3 of Title 52 of the Commission’s regulations, which allows for emergency relief in its Proposed Rule § 77.5 on the Resolution of Disputes. However, ExteNet believes more explicit language is required and thus recommends the following changes to Proposed Rule §77.5:

§ 77.5. Resolution of disputes.

(a) Persons and entities subject to this chapter may utilize the mediation, formal complaint and adjudicative procedures under 52 Pa. Code Chapters 1, 3 and 5 (relating to rules of administrative practice and procedure; special provisions; and formal proceedings) of the Commission’s regulations to resolve disputes or terminate controversies.

(b) Parties before the Commission under 47 U.S.C. § 224 or 47 C.F.R. 1.1401 – 1.1425 shall employ the procedural requirements therein except where silent or in cases of conflict where 52 Pa. Code Chapters 1, 3, and 5 will control.

(c) When exercising authority under this chapter the Commission will consider Federal Communications Commission orders promulgating and interpreting federal pole attachment rules and federal court decisions reviewing those rules and interpretations as persuasive authority in construing the provisions of 47 U.S.C. § 224 and 47 C.F.R. 1.1401 – 1.1425.

(d) A final action on any proceeding brought under this chapter shall be issued within 180 days of the filing of a complaint with the Commission. The assigned presiding officer shall have discretion to accordingly adjust responsive timelines provided for under 52 Pa. Code Chapters 1, 3 and 5 to meet this timeframe for resolution.

¹⁵ 47 U.S.C. § 224(e)(3)(b).

D. Transparency and Equity

Currently, entities attaching to poles, such as ExteNet, are forced to assume that utilities are complying with the FCC's regulations. The FCC was required to, and did, issue "such regulations [which] shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments."¹⁶ However, because the FCC's formula for setting pole attachment rates is based on complex information known only to 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. In addition, most if not all pole attachment agreements are not public documents. Therefore, ExteNet and other attachers have no way of knowing if they are being treated in a nondiscriminatory manner, vis-à-vis each other. In promulgating these rules, this Commission has the opportunity to remedy that shortcoming in the FCC's rules. ExteNet proposes an additional rule as follows:

§ 77.6 Transparency

(a) Within 30 days of the effective date of this Chapter, all utilities under the jurisdiction of this Chapter shall file with the Commission, in a docket established for such purpose, any existing pole attachment agreements between that utilities and attachers. Utilities shall file any future pole attachment agreements within 14 days of such agreement's execution.

(b) Within 90 days of the effective date of this Chapter, all utilities under the jurisdiction of this Chapter shall file with the Commission, in a docket established for such purpose, any pole attachment and conduit rates and the basis therefore. If a utility enters into an agreement for a rate not previously provided in said docket, such rate and the basis therefore shall be filed with the Commission within 14 days.

¹⁶ 47 U.S.C. §224(e).

V. CONCLUSION

ExteNet commends this honorable Commission for taking the steps necessary to assert Pennsylvania control and jurisdiction over the regulation of the rates, terms, and conditions for pole attachments and appreciates the opportunity to submit the foregoing comments and suggestions. We look forward to working with the Commission to implement rates, terms, and conditions for pole attachments in the Commonwealth of Pennsylvania.

Respectfully Submitted,

EXTENET SYSTEMS, INC.

/s/ Haran C. Rashes

By: _____

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