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PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
http://www.irrc.state.pa.us

INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

December 24, 2018

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Keystone Building, 400 North Street
2nd Floor, North Wing
Harrisburg, PA 17120

RECEIVED
2018 DEC 27 AM 9:55
PA PUC
SECRETARY'S BUREAU

Re: Regulation #57-323 (IRRC #3214) (L-2018-3002672)
Pennsylvania Public Utility Commission
Assumption of Commission Jurisdiction Over Pole Attachments from the Federal
Communications Commission

Dear Secretary Chiavetta:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Very truly yours,

David Sumner
Executive Director
sfh

Enclosure

cc: Amy Elliott, Esq., Office of Attorney General

Comments of the Independent Regulatory Review Commission

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PA PUC
SECRETARY'S BUREAU

Pennsylvania Public Utility Commission Regulation #57-323 (IRRC #3214)

**Assumption of Commission Jurisdiction Over Pole Attachments from the
Federal Communications Commission**

December 24, 2018

We submit for your consideration the following comments on the proposed rulemaking published in the September 29, 2018 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Pennsylvania Public Utility Commission (PUC) to respond to all comments received from us or any other source.

1. Whether the regulation is in the public interest; Fiscal impact; Need.

This proposal adopts Federal Communications Commission (FCC) regulations regarding pole attachments as those regulations have been promulgated and as may be amended. The exercise of this reverse-preemption is permitted under Section 224(c) of the Telecommunications Act of 1996. 47 U.S.C. § 224(c). The PUC explains that the regulation of pole attachments at the state level instead of the federal level “will assist policymakers in efforts to expand access to both wireline and wireless broadband services” and will “dovetail with executive and legislative branch efforts to enhance high-speed internet access.”

In addition to seeking comment on the new language proposed as Chapter 77, relating to pole attachments, the PUC is seeking comment from the regulated community on numerous, specific issues affecting pole attachments. As noted in the PUC’s Executive Summary of this proposal, the issues include:

... the coordination of the FCC’s development of its regulations with [PUC] enforcement, the character and potential number of pole attachment adjudications before the [PUC], the development of streamlined dispute resolution procedures, and the creation of a pole attachment registry with the [PUC].

Given the number of issues identified by the PUC and the diverse responses provided by the regulated community, we question the need for the rulemaking at this time. Commentators have provided valuable input on the pros and cons of incorporating the FCC regulations by reference as they currently stand and as they may be amended. A particular concern noted by commentators is the fact that the FCC has significantly amended its regulations twice since the

PUC began this proceeding on June 14, 2018. If the PUC decides that major amendments to this rulemaking are needed to effectively expand broadband in the Commonwealth, we believe it would be in the public interest to start with a new proposed rulemaking. This would allow the regulated community an opportunity to provide input on their experiences working under the revised FCC regulations and the major amendments being considered by the PUC.

If the PUC decides to move forward with this proposal, we suggest that an Advance Notice of Final Rulemaking be issued before it delivers a final-form rulemaking. We also ask that it review and consider the recent changes to the FCC pole attachment regulations and provide a detailed explanation of why it believes the recent changes are appropriate for the Commonwealth and in the public interest.

2. Section 77.1. Statement of purpose and preemption. – Possible conflict with or duplication of statutes or existing regulations; Clarity.

This section includes a reference to 47 CFR 1.1401 – 1.1425. Since the publication of this proposal, it is our understanding the reference has changed to 47 CFR 1.1401 – 1.1415. We ask the PUC to ensure that the final-form rulemaking includes the correct reference to FCC regulations. We note that § 77.2, relating to applicability, § 77.4, relating to adoption of FCC regulations, and § 77.5, relating to resolution of disputes, also include that reference.

3. Section 77.4. Adoption of Federal Communications Commission regulations. – Statutory authority; Implementation procedures; Reasonableness.

This section adopts the federal regulations noted above and includes the phrase “. . . inclusive of future changes as those regulations may be amended.” This provision has generated significant interest from the regulated community. Most commentators agree with the PUC that adoption of the federal rules would be beneficial to the Commonwealth, but disagree on how that adoption should take place. Some believe that automatic adoption of future amendments, as proposed, is appropriate. They cite to examples of other Commonwealth agency and PUC regulations that use a similar approach to incorporating federal regulations. Others believe that the automatic adoption is not consistent with the Pennsylvania statutes that govern the rulemaking process. Finally, some believe that automatic adoption of unknown amendments would not be in the public interest of the Commonwealth. These commentators believe Pennsylvania businesses and individuals affected by future amendments should have the opportunity to participate in the rulemaking process for regulations that directly and uniquely affect them. They would be in favor of the PUC initiating its own rulemaking proceeding to adopt future FCC amendments of its pole attachment regulations.

We have two concerns. First, while the PUC may impose requirements already mandated by the federal government, the automatic adoption of all future, and consequently unknown, requirements may be an improper delegation of the agency’s statutory authority. Further, new obligations may be imposed without members of the regulated community and other parties having the opportunity for public comment as provided in the Commonwealth Documents Law (45 P.S. §§ 1102 – 1208) and the RRA.

Second, the Preamble to this rulemaking explains the rationale for its “turn-key” approach to adopting existing FCC pole attachment regulations, but does not explain the rationale associated with automatically adopting future amendments to FCC pole attachment regulations. In the Preamble to the final-form rulemaking, we ask the PUC to explain its rationale for including language that automatically adopts future changes to FCC pole attachment regulations without being vetted through the regulatory review process of the Commonwealth.

4. Section 77.5. Resolution of disputes. – Implementation procedures; Need; Clarity.

This section provides direction on how mediation and formal complaints will be adjudicated under Chapter 77. We have two concerns. First, Subsection (a) permits parties subject to this Chapter to utilize PUC complaint and adjudicative procedures found in its existing regulations to resolve disputes or terminate controversies. Subsection (b) states that parties before the PUC shall employ the procedural requirements of the FCC pole attachment regulations “except where silent or in cases of conflict” where the PUC regulations will control. A commentator has stated that it will be difficult for parties to determine the sections that are silent or do not control. We ask the PUC to explain how it will implement Subsection (b) in the Preamble to the final-form regulation.

Second, Subsection (c) reads as follows:

When exercising authority under this Chapter the [PUC] 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 CFR 1.1401—1.1425.

We do not have a particular concern with this subsection, but ask for clarification of the intent of it compared to the following sentence from the PUC’s response to Question #10 of the RAF. The sentence reads as follows: “If adopted, Chapter 77 will provide stakeholders with the opportunity to access the [PUC’s] adjudicatory resources *and to develop precedent relevant to the challenges of broadband development in Pennsylvania.*” (Emphasis added.) If the rulemaking is adopted and implemented, will the adjudicatory functions and processes of the PUC look to Federal decisions and precedent to resolve disputes as required by Subsection (c), or will the PUC look to precedent it develops over the years as it adjudicates these matters? We ask the PUC to explain its intent in the Preamble to the final-form regulation.

5. Compliance with the provisions of the Regulatory Review Act or the regulations of the Commission in promulgating the regulation; Fiscal impact.

When this Commission is reviewing a rulemaking to determine if it is in the public interest, we look at the proposed language in the Annex, the promulgating agency’s description of the rulemaking in the Preamble, and the information provided by the promulgating agency in the RAF. The information requested in the RAF is required by the RRA and this Commission’s regulations. We acknowledge that the PUC is seeking input on the potential number of pole

attachment adjudications and potential workload increase for PUC staff. However, a quantification of the potential fiscal impact of a proposed rulemaking is required to be provided in RAF Questions #19, 20, 21 and 23. If and when the PUC returns this rulemaking in final-form, we ask that the RAF identify the number of pole attachment adjudications it expects, the costs associated with adjudicating a dispute for both parties of a dispute, and the costs to adjudicate a dispute for the PUC.

In addition, we ask the PUC to provide additional information related to how this rulemaking compares to other states as required by Question #12 of the RAF. What other states have exercised “reverse-preemption” under the Telecommunication Act of 1996? For states that have exercised this power, have they taken a “turn-key” approach or have they modified the federal rules in some manner? For the states that adopted the federal rules, how many of them automatically adopt future FCC rule changes automatically?

Finally, we ask the PUC to identify the type and number of small businesses that will be affected by the regulation as required by Question #15 of the RAF.