PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission	**Public Meeting held August 29, 2019** **3002672-LAW** **Docket No. L-2018-3002672**

STATEMENT OF VICE CHAIRMAN DAVID W. SWEET

Thirteen months ago we opened a notice of proposed rulemaking to consider reverse preemption of jurisdiction over pole attachment disputes by adopting the Federal Communications Commission (FCC) substantive rules and using our procedural rules except where they are silent on an issue. The objective was to make available our presumably more efficient, lower cost dispute resolution process to facilitate broadband deployment.

I supported moving expeditiously because, where our jurisdiction allows, I have consistently engaged in Commission initiatives to facilitate deployment, especially in rural areas lacking modern speeds. However, I also made clear the need to address the impact of this undertaking on our resources, which for telecommunications are already strained. I questioned "the additional caseload and demands on this Commission's resources" assuming federal jurisdiction may impose, particularly "when the impact on our resources had not been quantified" and we had not "identified new revenue sources . . . that will provide this Commission the revenues necessary to address these new responsibilities." I concluded "[t]hese questions need to be fully explored and answered in this process."[1]

I am compelled to dissent from today's action because these concerns are not addressed, and the impact on our resources must be explored *before* we assume this substantial federal obligation not *after*.

I. Fiscal Analysis

Our action today entirely avoids the fundamental issue of the fiscal impact on our own agency.

In the regulatory analysis that accompanied our proposed rulemaking, we identified that approximately 1,000 entities could avail themselves of our resources. Some of those entities are public utilities under the Public Utility Code and, as such, contribute to the costs of operations utilizing our resources through the Section 510 assessment process. However, some are subject only to the regulatory jurisdiction of the FCC. These include Internet Service Providers, various wireless entities, and cable television systems, many of which qualify as telecommunications carriers under relevant federal regulations and may avail themselves of the FCC's existing process. These entities will benefit from use of our resources but will not contribute to those resources. That burden will

[1] July 12, 2019 Statement at this docket. Any suggestion that addressing this issue now raises it for the first time in a final rulemaking ignores the fact that many issues not in our proposed regulations directly were raised in Commissioner statements and subject to comments, like the impact on our resources and the working group.

fall unevenly, and discriminatorily, only on providers, and their customers, defined as public utilities under the Public Utility Code.

The regulatory analysis form also requested an estimate of the costs and/or savings to state government associated with implementation of this regulation. We responded that "[r]ailroads, cooperatives, federal entities, and entities owned by the state are not subject to pole attachment regulation [thus those entities should] not experience any compliance costs." Assumption of this federal obligation most impacts this Commission, yet on this point our analysis and proposed final regulations are silent.

There are other states that have reverse preempted pole attachment jurisdiction, but this submission fails to analyze those commissions' resources or means of funding. The New York dispute process for pole attachments is mentioned, but not the fact that New York proceeded cautiously, taking over 20 years to fully expand its process to include wireless carriers.[2] And we rely on our adoption of the federal Pipeline and Hazardous Materials Safety Administration regulations to support this proposal, but ignore the fact that annually the Commission receives millions of dollars in federal funding from the U.S. Department of Transportation in exchange for our assuming that obligation. We could and should do better.

II. Stakeholder Comments

Most commenting parties support use of the Commission's local dispute resolution resources as a more efficient, lower cost forum than the FCC. Despite four decades' experience at the FCC, however, few provided information about past experiences to aide in our review. While this Commission regularly uses past experience to inform predictive judgment, these parties instead profess their inability to predict the future.[3]

Some, however, did acknowledge that an even-handed approach to addressing this concern now is both feasible and appropriate. MAW Communications recognizes that since "both the pole owners and attachers have a responsibility to [their] customers to resolve disputes in a mutually beneficial [manner] that ensures accelerated deployment of necessary infrastructure to service Pennsylvanians[,] the expenses [should be] shared equally by both disputing parties," allowing for a normalized expense level to be determined annually by the Commission.[4]

Central Bradford Progress Authority states that it is "widely understood" that resolution of pole attachment disputes at the FCC requires substantial time and money, thus the known level of disputes may be depressed. Given the shared objective of expanding broadband deployment while also recognizing the impact on our resources, however, Central Bradford concludes "it would be appropriate to impose a modest fee" on parties, such as a flat filing fee of $500 plus a $1.00 for each

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[2] CTIA Comments at 7 (the New York commission declined to promulgate rules that reflect the wireless carriers' right to attach to utility poles); *But cf. Petition of CTIA – The Wireless Association to Initiate a Proceeding to Update and Clarify Wireless Pole Attachment Protections*, Case 16-M-0330 (Order Issued March 14, 2019) (taking steps to provide wireless providers access to utility pole infrastructure).

[3] For example, commentators could have provided information on their number of disputed attachment applications, the extent of their and the FCC resources implicated including time and staff, the ensuing resolution, and the fiscal support they provide at the FCC, including regulatory or other fees paid to the FCC that contribute to that agency's costs of operations.

[4] MAW Communications Comments at 4.

affected, sufficing initially if even with "a short-term potential for incomplete dollar-for-dollar cost coverage by the Commission."[5]

Other parties are less sanguine. Crown Castle comments that the FCC draws on forty years "of experience dealing with the complexities surrounding pole attachments[, which] continue[] to change at a rapid pace. ... Adjudication [at the Commission] will require the Commission to take on and train additional staff on an ongoing basis to manage the increased caseload and ensure disputes are resolved in a timely fashion."[6] Similarly, the Broadband Cable Association of Pennsylvania comments that the Commission's caseload can increase dramatically.[7]

Commentators raise other issues that substantiate my concerns. The FirstEnergy Companies comment that some pole attachment applications "have recently increased dramatically," and "the sheer volume of new requests" led to an affiliated electric utility's having to outsource part of the application review process. Because costs related to the pole attachment process are passed on to the regulated electric utility's electric customers, inadequate cost recovery "would force electric customers to subsidize telecommunication providers."[8] Duquesne Light Company, as a regulated electric distribution company and pole owner, questioned the Commission's entry into dispute resolution when it may have jurisdiction over only one party to the fray and suggested that distinction be considered in its proposed regulations.[9] And though not addressing *existing* resources, Verizon offers that the Commission "can monitor its caseload" but not act now because the Commission's caseload for retail, wireline-related issues has declined, and "there may not be a material *net* increase in caseload[.]"[10]

On the other side of this challenge, CTIA – the Wireless Association, avers that a fact-based response would be speculation, and we must satisfy ourselves with collecting our regulatory costs of operations from our regulated public utilities.[11] Eager to access the Commission's dispute resolution process, CTIA asserts that we should not "get[] into the minutiae of jurisdiction and procedure,"[12]

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[5] Central Bradford Comments at 5. The suggested $500/$1 filing fee finds analogous support in the FCC's recent determination that a nonrecurring $500 application fee with up to an additional nonrecurring $1,000 fee for a new pole attachment (plus additional annual recurring fees) is reasonable and not likely to run afoul of Sections 253 and 332 of the Telecommunications Act of 1996 prohibiting barriers to entry. *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Dockets 17-79, 17-85 (Declaratory Ruling and Third Report and Order released September 27, 2018) at ¶¶ 11, 78-80.

[6] Crown Castle Comments at 4, 6.

[7] BCAP Comments at 3 ("assumption of jurisdiction would cause significant administrative upheaval and substantially increase the demands on the Commission's resources"). *See also* CenturyLink Comments at 5 ("Commissioner [Sweet] raises a very fair question regarding Commission resources."); Duquesne Light Company Comments at 6 (while impossible to estimate with certainty how many parties will access the Commission's process, "[w]ith the opportunity to file a formal complaint before the Commission utilizing in-house counsel, more companies may be inclined to seek redress."); DQE Communications Comments at 3-4 (while current FCC process is complex and costly, with access to the PUC's process, the Company "would certainly avail itself of the process if necessary."); Pennsylvania Telephone Association Comments at 3 (While difficult to forecast the number of disputes, "the Companies recognize that there exists the potential for an increased burden on PUC personnel if it assumes jurisdiction[.]"); PECO Comments at 16 ("PECO understands [Commissioner Sweet's] concerns about regulatory burdens.").

[8] FirstEnergy Companies' Replies to Comments at 10.

[9] Duquesne Light Company Comments at 3.

[10] Verizon Comments at 17 (emphasis added).

[11] CTIA Comments at 6, 9.

[12] CTIA Replies to Comments at 7-8.

and welcomes any process, even New York's. This is despite, as CTIA admits, "[l]acking access to utility poles in New York, CTIA's members have no experience with the New York process[,]" the "effectiveness of which in resolving issues pertaining to wireless attachments is entirely unknown."[13]

III. Fiscal Concerns

A. Subsidization by Existing Customers of Regulated Public Utilities

The FirstEnergy Companies' concern that without adequate cost recovery their customers subsidize telecommunications carriers and customers is the same discriminatory impact we place on those customers if we open our process to nonjurisdictional entities without receiving any contribution to our costs of operations. In the regulated ratemaking process, utilities pay our Section 510 assessment, and those regulatory costs are recovered from their customers as a legitimate expense recovered through the regulated utilities' customers' rates. Cable companies and wireless carriers currently contribute to the FCC's fiscal resources through regulatory fees.[14] In addition, the FCC imposes equally on all affected entities an application processing fee for pole attachment complaints.[15] Assumption of pole attachment jurisdiction does not have to come without any financial consideration on nonjurisdictional entities. While we cannot assess nonjurisdictional entities, we can adopt the FCC's regulation addressing its pole attachment fee structure. Otherwise we assume this jurisdiction at the expense of our regulated service customers.

CTIA analogizes the invocation of our dispute resolution process to that of a "consumer complainant" that does not pay expenses generated by its complaint. However, that analogy bears no weight. These are not "consumer complaints." Pole attachments involve commercial negotiations between large sophisticated entities. While disputes may be generically referred to as "complaints," the FCC itself considers them "not ordinary customer complaints" but rather applications to be processed and enforced.[16] Explosive changes in technology have caused the number of entities that provide "telecommunications" services today to expand well beyond the ability of our regulatory resources to keep pace. Through the ratemaking process customers of traditional utilities compensate the Commission for access to our process. Wireless and cable companies and their customers neither currently do, nor will they in the future under the final rulemaking, contribute to the costs of our operations.[17]

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[13] CTIA Comments at 7.

[14] *See, e.g.,* https://docs.fcc.gov/public/attachments/DOC-353886A1.pdf (regulatory fees applicable to cable television systems) and https://docs.fcc.gov/public/attachments/DOC-353888A1.pdf (regulatory fees applicable to commercial wireless services).

[15] https://docs.fcc.gov/public/attachments/DOC-353915A1.pdf (FCC charges an "application processing fee" for complaints involving pole attachments and publishing an application fee of $295 per complaint); https://www.law.cornell.edu/cfr/text/47/1.1106 (application processing fee for pole attachment complaints).

[16] *See https://www.fcc.gov/licensing-databases/fees* (FCC fees applicable to pole attachment disputes "not ordinary complaints"); note 15, *supra*.

[17] Unlike jurisdictional service providers that fund our operations through fees that are passed on to their customers, *nothing* in the pole attachment fee that attachers pay to owners contributes to our resources.

B. Current Restraints on Telecommunications Resources

A concern as important as the proper allocation and recovery of our regulatory costs of operations is consideration of our existing telecommunications resources. Our regulatory assessments are sized generally on the basis of our operations devoted to our regulated utilities.[18] As Verizon noted, our role over wireline services is shrinking. However, our assessments from regulated telecommunications services are also shrinking.[19] Along with fewer financial resources from which to assume this obligation, we also have fewer staff. As traditionally regulated wireline services have decreased, so, too, has the Commission's telecommunications staff, which over time has seen wireline telecommunications staff reassigned and vacancies unfilled. Also because we have no jurisdiction over wireless, cable and other entities that provide "telecommunications services" under federal but not state law, and we have only limited jurisdiction over broadband, we have no staff assigned to these nonwireline issues. Thus *any* increase in telecommunications caseload negatively affects our resources.

In transferring this obligation to the state level, we hold nonjurisdictional entities entirely unaccountable while allowing the burden of our assumption of the FCC's pole attachment dispute process to fall squarely, unreasonably, and discriminatorily on the customers of traditionally regulated public utilities. This is neither appropriate nor necessary.

IV. Timely Remedy to Address Fiscal Impact

There is no reason to ignore this issue *before* we adopt final regulations. The majority vote today implements a discrete, self-contained chapter of state regulations on an entirely new subject. This is precisely the time to address the impact on our resources. The issue was raised and vetted. Resolution at some indeterminate time in some indeterminate manner in the future, if at all, insufficiently addresses the impact on our resources, which will be immediate.[20]

Use of a fee-based application is well supported in the federal jurisdictional practice that we are reverse preempting today. All entities, including those nonjurisdictional to our process, are currently required to support the operations of the FCC through regulatory fees, a fiscal resource unavailable to the Commission as nonregulated entities in Pennsylvania, as well as application filing fees, a fiscal resource that could be made available to the Commission in this rulemaking.

A timely remedy could be accomplished in this rulemaking through minimal modification of existing language in Section 77.5 of our proposed final regulations in one of either two ways: (1) Adopt the FCC regulation at 47 C.F.R. § 1.1106, which imposes an application processing fee on

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[18] In other instances involving our assumption of work not covered through our traditional Section 510 regulatory assessments, additional financial resources have been assigned to contribute to the recovery of our costs of operations. *See, e.g.,* Act 50 of 2017 (Pennsylvania Underground Utility Line Protection Act, also known as "One Call"); Act 127 of 2011 (levy on pipeline operators under the Gas and Hazardous Liquids Pipelines Act to fund the Commission's establishment and ongoing administration of a pipeline operator registry and enforcement of pipeline safety laws).

[19] In the general utility assessment order we adopt today, reported revenues from regulated telecommunications providers have decreased by over $40 million compared to last year's assessment, resulting in a reduction in assessment revenues we will receive from these utilities, whereas revenues reported from other utilities has increased, which in turn will produce an increased assessment. *See General Assessment Upon Public Utilities*, BP8-3012136.

[20] The FirstEnergy Companies state already have a pending FCC action that would likely come before the Commission. FirstEnergy Comments at 11.

pole attachment "complaints"; or (2) Require the filing of an application for pole attachment permit accompanied by an application fee with the Secretary's Bureau in order to invoke our resources.

A. Modification of Section 77.5(b) of the Proposed Final Regulations

Adoption of the FCC's regulation imposing an application processing fee through adoption of Section 1.1106 is entirely consistent with the concept we adopt today: reverse preemption of an existing federal obligation through adoption of federal pole attachment regulations, including FCC process rules where ours are silent. While our procedural rules are silent on the subject of pole attachment dispute filing fees, the FCC's rules are not and subject all entities to a $295 "application processing fee." No logical or legal impediment precludes our adopting this existing FCC regulation governing pole attachment disputes to recover some contribution towards the cost of our operations. In fact, doing so ensures some measure of fiscal responsibility in our actions today.

This could be readily accomplished as follows:

> Section 77.5 * * *
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> (b) Parties before the Commission under this chapter shall employ the procedural requirements in 52 PA. Code Chapters 1, 3 and 5, Title 66 PA.C.S. (relating to the public utility code), and related Commission precedent except where silent, in which case 47 U.S.C. § 224 or 47 CFR Chapter I, Subchapter A, Part 1, Subpart J, OR SUBPART G, SECTION 1.1106, REGARDING THE APPLICATION PROCESSING FEE APPLICABLE TO POLE ATTACHMENT COMPLAINTS, will control.[21]

B. Modification of Section 77.5(a) of the Proposed Final Regulations

Alternatively, an application enforcement fee is independently supported because the pole attachment process is initiated by an attacher's "filing an application with the pole owner" seeking permission to attach.[22] Upon dispute, it is the application that is subject to dispute resolution. It is entirely consistent with existing state law and the federal practice we are assuming to require the filing of an application for pole attachment permit with our Secretary's Bureau and the imposition of a filing fee under Sections 317 and 501 of the Public Utility Code.

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[21] The argument exists that adoption of a filing fee to process a disputed pole attachment application is already implicit in our action since our regulations are silent on the subject.

[22] Comments of Velocity.Net Communications, Inc. at 3; *See also In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Dockets 17-84, 17-79 (Third Report and Order and Declaratory Ruling released August 3, 2018) at ¶¶ 7, 64.

This, too, could be readily accomplished as follows:

Section 77.5

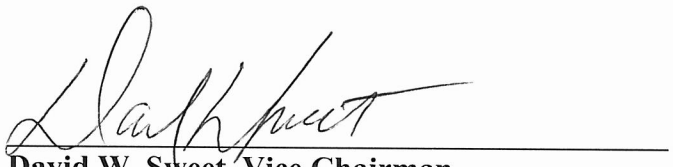
(a) UPON APPLICATION FILED WITH THE SECRETARY'S BUREAU, persons and entities subject to this Chapter may utilize the mediation, formal complaint and adjudicative procedures under 52 Pa. Code Chapters 1, 3 and 5 (relating to rules of administrative practice and procedure; special provisions; and formal proceedings) of the Commission's regulations to resolve disputes or terminate controversies. IF NOT RESOLVED BY MEDIATION, THE COMMISSION'S RESOLUTION OF THE MATTER WILL BE SET FORTH IN AN ADJUDICATION ORDER THAT GRANTS, MODIFIES OR DENIES THE POLE ATTACHMENT PERMIT TERMS AND CONDITIONS REQUESTED OR DISPUTED.

V. Conclusion

Having wholly avoided a fiscal analysis while options are readily available to mitigate the impact on our resources by adopting the FCC's regulatory fee-based process while we assume a substantial, new regulatory responsibility from the FCC is both fiscally unsound and entirely unnecessary. In adopting the FCC's pole attachment regulations, we should also adopt the FCC's regulation for an application fee through either of the two means identified above.[23] This would ensure that the interests of all stakeholders, including those of the Commission specifically and the Commonwealth generally, are properly considered and served.

I am not satisfied that the inchoate regulatory action taken today satisfies the fiscal impact analysis required under the regulatory review process. Assumption of jurisdiction without addressing the impact on our resources is in neither the immediate nor the long-term interests of the Commonwealth.

For these reasons, I respectfully dissent.



Dated: August 29, 2019 **David W. Sweet, Vice Chairman**

[23] Other options, though less attractive from the adoption process approved today, are to apply the suggestion of Central Bradford or refer the level of the fee immediately to the proposed Working Group for consideration, report, and Commission action.