Hawke McKeon & Sniscak LLP
ATTORNEYS AT LAW

Todd S. Stewart
Office: 717 236-1300 x242
Direct: 717 703-0806
tsstewart@hmslegal.com

100 North Tenth Street, Harrisburg, PA 17101 Phone: 717.236.1300 Fax: 717.236.4841 www.hmslegal.com

October 29, 2018

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Filing Room
Harrisburg, PA 17120

RE: Reverse Pre-Emption for Pole Attachments; Docket No. L-2018-3002672;
COMMENTS OF CTIA ON NOTICE OF PROPOSED RULEMAKING

Dear Secretary Chiavetta:

Enclosed for electronic filing with the Commission is the Comments of CTIA to the Notice of Proposed Rulemaking in the above-captioned docket.

Thank you for your attention to this matter. If you have any questions related to this filing, please do not hesitate to contact my office.

Very truly yours,

Todd S. Stewart
Counsel for the CTIA

TSS/jld
Enclosure
cc: Shaun A. Sparks, Commission Law Bureau Assistant Counsel (shsparks@pa.gov)
Colin W. Scott (colinscott@pa.gov)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Reverse Pre-Emption for Pole Attachments	:	Docket No. L-2018-3002672

COMMENTS OF CTIA ON NOTICE OF PROPOSED RULEMAKING

I. INTRODUCTION AND SUMMARY

At its June 14, 2018 Public Meeting, the Pennsylvania Public Utility Commission ("Commission") unanimously approved the Motion of Commissioner Norman J. Kennard ("Motion") to initiate a rulemaking that would have the Commission assert jurisdiction over utility pole attachments as provided in the Telecommunications Act of 1996. The Commission's assertion of jurisdiction will divest the Federal Communications Commission ("FCC") of enforcement authority and vest the authority to resolve disputes over utility pole attachments with the Commission. The Motion also proposed that the Commission would simultaneously adopt the FCC's pole attachment regulations and adopt the FCC and court precedent associated with the FCC regulations as persuasive authority, to provide continuity and regulatory certainty to the industry.

CTIA[1] supports the Commission's proposal to assert jurisdiction over pole attachments. The Commission has been a useful forum for resolving complex and technical issues in a fair and balanced manner, and CTIA expects it will be the same in the pole attachment space as well.

CTIA believes that continuity and uniformity are vital to this transition of jurisdiction, and so also supports the Commission's simultaneous adoption of the FCC's pole attachment regulations and associated precedent. Having a consistent framework from state to state for pole attachments facilitates broadband deployment – a goal Pennsylvania and the wireless industry certainly share. CTIA submits that divergence from the FCC regulations or the precedent associated with those regulations could create inefficiency in wireless deployment, and believes that sustaining the FCC's rules, which are the rules currently applicable in Pennsylvania, will produce the best result for all.

II. INDIVIDUAL COMMISSIONER QUESTIONS

A. Chairperson Brown

Chairperson Brown suggested that interested parties doing business in Pennsylvania may not agree on all the issues that have presented themselves since the FCC's 2011 Pole Attachment Order and requested commenters to address what impact this circumstance might have relative to the adoption of the FCC Regulations in Pennsylvania.

By way of background, since 2011 wireless networks have increasingly relied on smaller antennas. Tomorrow's 5G wireless networks, which are on the cusp of deployment, will require

[1] CTIA – The Wireless Association ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, and suppliers as well as app and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

hundreds, or even thousands, of densely deployed small cells. Complementing the existing macro-cell sites, these small cells can be the size of a backpack and discreetly deployed nearly anywhere – from street lamps and utility poles to the sides of buildings.[2] Accenture projects that small cell deployments will escalate rapidly from a nationwide cumulative deployment of roughly 52,000 in 2017 to over 800,000 nationwide by 2026.[3] Accenture also projects that this investment will lead to $500 billion in national GDP growth ($16.2 billion in Pennsylvania), three million jobs created (over 102,000 in Pennsylvania), and over $275 billion invested in 5G wireless infrastructure nationwide, but only if wireless infrastructure can be deployed efficiently.[4]

The proposal before the Commission is to adopt the FCC's attachment regulations, as is, and all future modifications as they may be promulgated. To the extent parties have had and will have differences of opinion over pole attachments, it is most efficient to resolve them under a single set of rules, the FCC's rules, and not under multiple regimes (and, potentially, with varying conclusions) in the various states. The Commission's proposal to adopt the FCC regulations therefore 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.

Chairperson Brown also requested comment on the Broadband Deployment Advisory Committee's ("BDAC's") deliberations and any impact those might have on pole attachments in Pennsylvania. CTIA appreciates the hard work conducted by the BDAC and appreciated the opportunity to collaborate with industry and various stakeholders from state and local governments

---

[2] *See* accenturestrategy, "Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities" (February 2017) at 11, *available at* https://api.ctia.org/wp-content/uploads/2017/02/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf ("*Smart Cities Report*").

[3] *See* accenturestrategy, "Impact of Federal Regulatory Review on Small Cell Deployment" (March 12, 2018) at 3, *available at* https://api.ctia.org/docs/default-source/default-document-library/small-cell-deployment-regulatory-review-costs_3-12-2018.pdf.

[4] *See Smart Cities Report;* for more, *see* https://www.ctia.org/positions/infrastructure.

on two of the BDAC's working groups. As an FCC advisory committee, the BDAC's work consists of making recommendations to the FCC that the FCC can consider and act upon at its discretion—in other words, the BDAC's recommendations, standing alone, are not binding on the FCC. The FCC took into account the BDAC's pole attachment recommendations just this summer when it updated its policies regarding "one-touch" make-ready and other pole attachment issues. As such, the BDAC's recommendations, as adopted by the FCC, have already been addressed.

B. Vice Chairperson Place

Vice Chairperson Place asked parties to address the legal and technical ramifications of future Pennsylvania statutes that may address pole attachments interacting with FCC regulations the Commission proposes to adopt. If Pennsylvania were to enact a statute that creates requirements that conflict with the FCC's pole attachment rules proposed for adoption, the means of resolving such conflict would be nearly identical to the means of resolving a conflict between a future Pennsylvania statute and any set of rules the Commission adopts. However, CTIA suggests that any such conversation is premature, and the results would be speculation, at best.

Vice Chairperson Place asked Commenters to address the ramifications of Pennsylvania adopting the FCC regulations and the impact of future changes of the FCC regulations on Pennsylvania, and particularly whether the Commission would be obliged to institute a rulemaking every time the FCC regulations change. The short answer is that the proposed regulations state that the Commission would be adopting the FCC regulations and any future changes thereto. CTIA prefers this approach because it eliminates the potential uncertainty that a rulemaking at the state level might cause. Automatic adoption means each party gets one "bite of the apple" to contest a rule at the FCC, and not another chance at the state level.

The automatic adoption of federal regulations is not new to the Commission. For example, 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. CTIA also notes that the impact of future changes to the FCC's regulations are matters that can be addressed through rulemakings, whether initiated by the Commission or an interested party. Accordingly, both the Commission and interested parties have options to address any such future changes.

Vice Chairperson Place also asked parties to address whether the interplay of Commission ratemaking requirements with the FCC's pole attachment regulations might prove problematic. CTIA does not believe so. The rate methodology for pole attachments is codified in FCC regulations today, and has withstood judicial review.[5] CTIA is not aware that any utility that establishes and collects or pays these rates has had any conflict in Commission rate proceedings regarding those items, and those rate proceedings produce a number of the inputs that flow into the FCC rate methodology already in use in Pennsylvania today. The proposed rules should not change the status quo. While it is true that the Commission would be enforcing the FCC rate methodology for pole attachments, it seems unlikely to overlap with Pennsylvania rate proceedings either in process or result, as the underlying requirements for determining rates and rate elements will not change.

C. Commissioner Kennard

[5] *See In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, Report and Order and Order on Reconsideration (April 7, 2011) at ¶ 183 & n.569 (listing cases in which federal courts found the cable rate to be "fully compensatory" to pole owners and concluding that "in virtually all cases the new telecom rate will recover at least an equivalent amount of costs").

Commissioner Kennard's first question seeks an estimate of the number of disputes that might be brought before the Commission in the event the enforcement power were to vest with the Commission. CTIA has no data that would allow it to provide a fact-based response to this question; that is, any attempt at quantification would be mere speculation. However, CTIA asks the Commission to consider that as proposed, it would be adopting the same regulatory regimen that already is operative in Pennsylvania. Only the forum would change. Consequently, the Commission's adoption of the FCC's rules, in and of itself, does not seem likely to generate any more complaints than would otherwise arise. However, as already stated, CTIA has no data regarding complaint volume. To the extent that the Commission believes that any increase in the workload of its ALJ staff would be problematic, CTIA suggests that one solution would be to create an expedited, possibly informal, dispute resolution process using knowledgeable Commission staff as a way to divert disputes from the litigation process where possible.

Commissioner Kennard next asked commenters to address whether FCC regulations provide a means for pole owners to address unauthorized attachments. As a general matter, CTIA does not believe this is an issue that appears to implicate its members. In its 2011 Order, however, the FCC did address the issue of unauthorized attachments and concluded that providing a methodology for addressing such attachments in contracts is the preferable method of managing the issue.[6]

Commissioner Kennard also asked commenters to suggest ways to streamline or improve the Commission's adjudicatory and/or dispute resolution processes. As noted above, CTIA

[6] *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240; 2011 FCC Lexis 1362; 52 Comm. Reg. (P&F) 1027, (¶ 113-118). While not adopting the requirements as part of its Regulations, the FCC endorsed the unauthorized attachment regimen adopted by the Oregon PUC, stating that it would "consider contract-based penalties for unauthorized attachments to be presumptively reasonable if they do not exceed those implemented by the Oregon PUC." Id. at ¶ 115.

suggests that providing an enhanced, expedited dispute resolution process that involves the expertise of Commission technical staff might be a way to resolve disputes without requiring full litigation. CTIA also suggests that if litigation is unavoidable, Maine has an expedited docket process that could be used as a model.[7]

Commissioner Kennard also queried whether parties believe that the New York dispute resolution process would provide any value. CTIA notes that the New York Public Service Commission has declined to promulgate rules that reflect the right of wireless carriers to attach to utility poles.[8] Lacking access to utility poles in New York, CTIA's members have no experience with the New York process, so its effectiveness for resolving issues pertaining to wireless attachments is entirely unproven. With respect to the actual process, CTIA believes other states, such as Maine, may provide better models. Maine's voluntary process involves the deployment of a Rapid Response Team ("RRT") that is involved in the complaint process from the time before an actual complaint is filed through its resolution. The process provides for the RRT to have initial contact with the parties to a dispute within two business days of being made aware of the issue. The RRT can then mediate or adjudicate the dispute on an expedited basis as the circumstances dictate, and the parties retain the right to appeal any decision to the Commission.[9]

The next question posed by Commissioner Kennard was whether a comprehensive registry of poles and attachments maintained by the pole owner would provide benefits to current and future attachers. CTIA has generally observed that each pole owner has a system for identifying

---

[7] *See Investigation into Practices and Acts Regarding Access to Utility Poles*, State of Maine Public Utilities Commission, Docket No. 2010-371 (Order entered July 12, 2011) (Attached hereto as Appendix A).

[8] *See Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles*, Case 07-M-0741, Order Instituting Proceeding, at p. 6 (N.Y. PSC June 27, 2007) ("... we will not apply the Pole Attachment Order and Policy Statement to wireless attachments."); *See also Petition of CTIA – The Wireless Association®* to Initiate a Proceeding to Update and Clarify Wireless Pole Attachment Protections, New York Public Service Commission ("PSC") Docket No. 16-M-0030 (filed on May 20, 2016, CTIA's Petition has not been acted on though over two years have passed from the time the last comments were filed).

[9] *See n.6, infra.*

poles and attachers, and that any additional layers of regulation on those processes – including creating some form of standardized registry – could be counterproductive. Such a registry presents its own issues, including those of cost, competitive issues, and potential security issues as well.[10]

Commissioner Kennard also raised the issue of whether standardized agreements or tariffs should be developed. In keeping with the theme of adopting the FCC regulations, which do not provide or require tariffs or standardized agreements, CTIA submits that requiring tariffs or standardized agreements is another layer of process that could cause conflict with the FCC requirements, and is otherwise not necessary.

Finally, Commissioner Kennard requested comments on the need for an ongoing working group on pole attachment issues. CTIA does not believe that a general working group is necessary but would not oppose working groups to address discrete issues as necessary.

D. Commissioner Sweet

Commissioner Sweet expressed concern regarding the potential for the proposed reverse preemption to increase the workload of the Commission and likewise its expenses, without providing any new or additional sources of revenue. Commissioner Sweet also queried whether the Commission could institute an assessment under 66 Pa. C.S. § 510 to cover any new expenses. As a threshold matter and as mentioned above, CTIA does not have any reason to expect there to be any dramatic increase in the number of disputes that the Commission might be called upon to address (over what the FCC addresses today) simply due to a change in forum. Any attempt at quantification, however, would be pure speculation because the volume of pole attachment matters arising out of Pennsylvania is not readily discernable from the FCC's records. Moreover, CTIA

[10] For further discussion of such issues, *see, e.g., Order Instituting Investigation into the Creation of a Shared Database or Statewide Census of Utility Poles and Conduit in California and Related Matters,* I.17-06-027, Comments of CTIA on Creation of Shared, Statewide Database of Utility Pole and Conduit Information (California P.U.C., Feb. 8, 2018), at 3-8 (available at http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M211/K794/211794488.PDF).

believes that the Commission can limit any increased workload, to some degree, by implementing dispute resolution pathways that don't involve litigation (and therefore, the expenses associated with litigation).

It is likely, however, that the Commission will not have jurisdiction over many attachers in Pennsylvania, which impacts the means available to the Commission to raise any additional revenue it may feel is necessary. The Commission's jurisdiction extends to jurisdictional utilities as that term is defined under Pennsylvania law, but not necessarily to the attachers – which can be cooperatives, municipal governments, wireless carriers, or other such entities. As such, when these non-jurisdictional attachers participate in matters regarding pole attachments before the Commission, they would be in a position similar to that of a customer filing a formal complaint before the Commission; *i.e.,* consumer complainants do not pay the expenses generated by their complaints.

Directly to Commissioner Sweet's suggestion regarding assessments – Section 510 of the Public Utility Code[11] does not authorize the Commission to assess entities that are not public utilities.[12] Moreover, neither the Federal Pole Act[13] nor any other federal law, rule, or regulation, including the FCC pole attachment regulations, authorizes any such of assessment. Accordingly, if the Commission expects that it will need to raise additional revenue, it would need to do so from those entities subject to its jurisdiction.

III. CONCLUSION

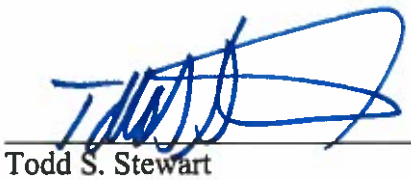
CTIA wishes to thank the Commission for taking up this important issue and for its willingness to serve as a forum to resolve pole attachment issues in a fair and expedient manner.

---

[11] *See* 66 Pa. C.S. § 510.
[12] *See Delmarva Power & Light Co. v. Com.*, 870 A. 2d 901 (Pa. 2005).
[13] 47 U.S.C. § 224.

We look forward to working with the Commission as this process progresses and offer our assistance if the Commission so desires.

Respectfully submitted,



Todd S. Stewart
PA Attorney I.D. #75556
Hawke McKeon & Sniscak LLP
100 North Tenth Street
Harrisburg, PA 17101
E-mail: tsstewart@hmslegal.com
Telephone: (717) 236-1300
Facsimile: (717) 236-4841

Counsel for CTIA

DATED: October 29, 2018

APPENDIX A

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2010-371

July 12, 2011

MAINE PUBLIC UTILITIES COMMISSION
Investigation into Practices and Acts
Regarding Access to Utility Poles

ORDER

WELCH, Chairman;[1] VAFIADES and LITTELL, Commissioners

I. SUMMARY

In this Order we close our investigation into the practices and acts regarding access to utility poles. We find that any dispute arising out of such practices can be addressed on a case-by-case basis pursuant to 35-A M.R.S.A. § 711 and Chapter 880 of the Commission's Rules. We also establish and expedite our dispute resolution process to provide a rapid means to resolve disputes regarding the terms and conditions of pole attachment terms.

II. BACKGROUND

The Commission opened this Investigation by Notice issued on December 15, 2010. The Notice was sent to all facilities-based local exchange and interexchange telephone utilities doing business in Maine, all transmission and distribution utilities in Maine, and all cable television companies in Maine. The purpose of this investigation was to examine the administration of the communications space on utility poles by incumbent local exchange carriers (ILECs). This included the reasonableness of attachment methods and the effect of these methods upon ILECs and other transmission and distribution utilities. Similar issues recently arose in the context of a dispute between Biddeford Internet Corporation (GWI) and FairPoint – a dispute which resulted in the opening of Docket No. 2010-206, *Commission Investigation into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation*. However, that docket was closed upon receipt by the Commission of a letter from GWI by which it withdrew the letter that had formed the initial basis for that investigation. *Id.*, Order (Nov. 30, 2010).

Petitions to intervene in this proceeding were received from the Office of the Public Advocate (OPA), FairPoint, GWI, OTT Communications (OTT), Kennebunk Light and Power District (KLPD), Central Maine Power Company (CMP), Bangor Hydro Electric Company (BHE), Lincolnville Telephone Company (Lincolnville), Van Buren Light and Power District (Van Buren), Maine Public Service Company (MPS), Cornerstone Communications, LLC (Cornerstone), the New England Telephone and Cable Association (NETCA), and the Telephone Association of Maine (TAM). All of the petitions were granted at a case conference held on January 11, 2011.

[1] Chairman Welch did not participate in this decision.

In an Order issued on October 26, 2006 in *Oxford Networks F/K/A Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles*, Docket No. 2005-486 (the Oxford Order), the Commission determined that certain requirements imposed by Verizon in connection with requests by Oxford Networks to attach its facilities to Verizon's poles were unjust and unreasonable insofar as the imposition of such requirements discriminated against a third party attacher that was seeking to compete in the marketplace with Verizon. Included among the requirements addressed was the prohibition by Verizon of the "boxing" of telephone poles by attachers.[2]

By Procedural Order issued January 12, 2011, the Hearing Examiner instructed interested parties to submit briefs addressing the effect of the Oxford Order upon the legal and evidentiary issues presented in this proceeding. Parties filed briefs on February 1, 2011 and reply briefs on March 2, 1011. The Hearing Examiner issued a report on May 6, 2011 and GWI, FairPoint, OTT, and TAM filed comments and exceptions on May 20, 2011.

III. POSITIONS OF THE PARTIES

The Procedural Order issued January 12, 2011 asked parties to address whether the holding and findings of the *Oxford Order* would preclude re-litigation in any subsequent dispute regarding the acts and practices of pole administrators in respect to third party attachers. FairPoint argues that the facts and circumstances of pole attachments since the issuance of *Oxford Order* have changed to such a great extent that reliance upon either its record or decision would be unfair. Specifically, FairPoint points to new pole attachment rules promulgated by the FCC. These rules, FairPoint argues, are part of a shift in the larger landscape of pole attachments which the Commission should consider in its determination of industry requirements.[3] Additionally, FairPoint argues that the *Oxford Order* did not "meaningfully address the additional costs" for pole owners associated with allowing boxing and the expanded use of extension arms. Finally, FairPoint argues that determinations by the Commission that set requirements for the attachments of third party facilities to utility poles are laws of general applicability adopted by an administrative agency and therefore must be created through an agency rulemaking process.

KLPD also argues for the development of industry standards associated with pole attachments to be drafted through a rulemaking process. Additionally, KLPD argues that issue preclusion has little applicability in a Commission investigation, as

---

[2] "Boxing" is the industry term for stringing cables on opposite sides of a utility pole. In the *Oxford* case, the Commission found that Verizon's practice of requiring attachers to pay for moving existing cables on the pole, rather than allowing the attacher to "box" Verizon's poles, was unreasonable.

[3] See generally, *Order and Further Notice of Proposed Rulemaking*, FCC 10-84, (May 20, 2010).

opposed to a Commission proceeding regarding two specific parties. KLPD also joins FairPoint in arguing that circumstances regarding pole attachments have changed markedly in the intervening years since the *Oxford Order* and that these considerations, taken together, should preclude the use of the rule of the *Oxford Order* for general application.

TAM argues that the proceeding in *Oxford* did not include within its scope any of TAM's members, although TAM sought and received intervention as a party to the proceeding, and argues therefore, that the requirements of the *Oxford Order* cannot be applied to these entities on the basis of the record on *Oxford* and there is no indication in the order that the Commission intended such a result.

BHE did not take a position on the legal effect of the *Oxford Order* on future proceedings regarding pole attachments but indicated that it did not object to the extension of its requirements throughout the state provided BHE was reimbursed for any significant increase in costs caused by third party attachment practices.

OTT, in contrast to the arguments raised by FairPoint, TAM and KLPD, argued that the issues in the *Oxford Order* were exhaustively litigated by Verizon and that FairPoint, as Verizon's successor in interest, meets the criteria for issue preclusion and should be prohibited from further litigating the reasonableness of the practices that were the subject of *Oxford.*

GWI argues that the proceeding in *Oxford* was both a general investigation into Verizon's practices throughout the state and the resolution of a discreet dispute between Verizon and Oxford and therefore the *Oxford Order* was clearly intended to govern Verizon's, and thus FairPoint's, prospective dealings with its competitors as regards pole attachments. Additionally, GWI argues that FairPoint agreed to abide by the requirements of the *Oxford Order* as a condition of the transfer and merger of property from Verizon to FairPoint in *Verizon New England, Inc. D/B/A Verizon Maine, Et Al & FairPoint Maine Telephone Companies, Request for Approval of Affiliated Interest Transaction and Transfer of Assets of Verizon's Property and Customer Relations to be Merged with and into FairPoint Communications, Inc.,* Docket No. 2007-67 (Feb. 1, 2008) (Merger Order).[4] As a result, GWI argues that the Commission should simply enforce its prior order by directing FairPoint to cease any and all practices that were found to be unreasonable therein.[5]

The OPA joins the arguments of GWI but further argues that the scope of investigation in *Oxford*, as indicated Notice of Investigation issued in that docket, was general in nature and included not only FairPoint's prospective practices in regards to pole attachments but every situation where one utility administers the attachment of

[4] GWI notes that it also adopts the arguments of OTT.

[5] The Merger Order states, "FairPoint states that it will provide access to poles as required by state and federal law and that it will abide the Commission's decision in Docket No. 2005-486." Merger Order at 37.

third party facilities to utility poles. Additionally, the OPA argues that FairPoint lacks the ability to claim that application of the requirements of the *Oxford Order* violate its right to due process given that FairPoint is in privity to Verizon. Finally, the OPA argues that the policy reasoning behind the Commission's decision in *Oxford* is still valid and, in the interest of administrative economy, FairPoint should be precluded from additional litigation of the issues that were the subject of *Oxford*.

IV. ANALYSIS AND DECISION

A. Commission Authority and the Effect of Federal Regulation

Federal authority to regulate the terms and conditions by which third parties attach facilities to poles owned or controlled by a utility is derived from 47 USC § 224. Pursuant to Section 224, the Federal Communications Commission (FCC) is granted authority 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." 47 USC § 224(b). The FCC's authority to regulate pole attachments, however, only extends to States that do not themselves regulate pole attachments. A State that certifies to the FCC that it: (1) regulates the rates, terms, and conditions of attachment to utility owned poles; (2) has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services; and (3) has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments, is considered to regulate pole attachments within the meaning of section 224. *Id.* at § 224(c). A certifying State retains such authority over the rates, terms, and conditions of pole attachments as it would have in the absence of any federal authority under Section 224. Maine regulates the rates, terms, and conditions of pole attachments in Chapter 880 of the Commission's rules, is authorized to adopt such rules in 35-A M.R.S.A. §711(4), and made its initial certification to the FCC in 1984.

Notwithstanding the Commission's jurisdiction over pole attachment rates and policies in Maine, utilities that administer the communications space of utility poles are also obligated to conform to other provisions of federal law which impact the administration of poles. For instance, pursuant to 47 U.S.C. §251(b)(4), a local exchange carrier is required to "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224." In order to meet the interconnection requirements of Section 251, a LEC administrating utility pole space must comply with Section 224 and, therefore with the regulation of any state wherein the utility poles are located that has certified itself as regulating the terms, rates, and conditions of pole attachments. The FCC has recognized this congruence of state and federal policies regarding pole attachments, stating that "when a state has exercised its preemptive authority under section 224(c)(1), a LEC satisfies its duty under section 251(b)(4) to afford access by complying with the state's regulations." *In the Matter of*

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, 11 FCC Rcd 15499, 16106-16107 (FCC 1996) (Local Implementation Order).

The only limitation to a certifying state's authority provided in Section 224 pertains to discrete disputes between parties attempting to attach facilities to utility owned or controlled poles. Section 224(c)(3)(B) requires a state that regulates the rates, terms, and conditions of pole attachments to resolve disputes within 180 days of the filing of the complaint or whatever time period is prescribed in the State's rule's provided, in any event, that the period is no greater than 360 days.[6] With the exception of this timing consideration, Section 224 places no requirements upon the particulars of how a State exercises its authority over the rates, terms and conditions of pole attachments. The FCC identified the absence of Federal authority to regulate in these areas stating, "Congress' clear grant of authority to the states to preempt federal regulation in these cases undercuts the suggestion that Congress sought to establish federal access regulations of universal applicability." *Id.* at 16106.

Title 35-A M.R.S.A. § 711 governs joint use of utility equipment in Maine, including utility poles, and grants to the Commission the authority to adopt implementing rules. Section 711 reflects the legislative judgment that federal standards are useful as persuasive guides in setting standards in Maine, but that primary authority rests with the Commission.[7] Chapter 880 of the Commission's rules, enacted in response to legislative direction in Section 711(4), sets forth rules governing the allocation of common space on utility poles, the recovery of the costs associated with joint use, and the process for filing complaints and resolving disputes under Section 711.

The primary purpose of Chapter 880 is to establish the methods for calculating the rates to be charged for the joint use of utility facilities. The rule also explicitly permits pole owners to charge attachers for "make ready" work. Chapter 880 §7(A). As we explained in adopting Chapter 880, "our authority under this Rule to ensure that ratepayers are not harmed, as result of inadequate revenues from other attachers for the use of a utility's valuable joint-use poles" is based on the Commission's statutory duty under 35-A M.R.S.A. §301 to require just and reasonable utility rates. Docket No. 1993-87, *Proposed Amendments to Chapter 88, Attachments to Joint-Use Utility Poles; Determination and Allocation of Costs; Procedure (Chapter 880), Order Adopting Rule and Statement of Factual and Policy Basis* at 6 (Oct. 18, 1993).

---

[6] Chapter 880 does not extend the time period for resolution of disputes arising under Section 711 to 360 days.

[7] 35-A M.R.S.A. §711(4) states that the Commission in developing its rules can consider pricing formulas contained in the Federal rules. See 47 CFR 1.1409, 1416-1418.

B. Proceedings Arising Under Section 711

Section 711 provides the mechanism through which a public utility or cable television company can request, or the Commission can take up on its own motion, the resolution of disputes regarding the rates, terms and conditions of pole attachments. Section 711 also authorizes the Commission to prescribe reasonable compensation and reasonable terms and conditions for the joint use of utility property when, after a hearing, the Commission finds that 1) joint use is required by public convenience and necessity; 2) that such use will not cause irreparable injury to the utility owner or other users; and 3) that the public utilities or cable television system have failed to agree upon the terms and conditions of use of utility property. 35-A M.R.S.A. §711(1)(A-C). Thus, on its face, Section 711 requires that the Commission make discrete findings based upon the dispute before it before it makes any order regarding the terms of joint use of the facilities in question.

We note that with respect to pole attachment disputes arising in states that do not assert jurisdiction in the area, the FCC also takes a "case-by-case" approach. Indeed, in rejecting a uniform rule, the FCC observed that "no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment," and that as the factors "may vary from region to region, necessitating different operating procedures particularly with respect to attachments" including "extreme temperatures, ice and snow accumulation, wind, and other weather conditions [that] affect a utility's safety and engineering practices" and therefore "the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis." *Local Implementation Order* at 1143, 1145.

We agree with this general proposition and adopt it for our processing of pole attachment disputes. Disagreements arising about charges or practices associated with pole attachments may be brought to the Commission for resolution pursuant to Section 711 and Chapter 880 § 14. While our rules and Title 35-A allow for intervention in a proceeding by other parties, a complaint will trigger an adjudicatory proceeding for the purpose of resolving the disputes between a party attempting to attach facilities and a party that administers the terms and conditions of attachment tailored to the facts presented, and will be binding on those two parties.

C. The Effect of the *Oxford Order*

Notwithstanding our case-by-case approach to the adjudication of pole attachment disputes pursuant to Section 711, the findings in any one proceeding may establish precedent that may be relied upon in subsequent cases where the material facts are sufficiently similar to warrant such reliance. Moreover, general observations made by the Commission in the course of a particular proceeding may provide useful guidance to pole administrators and attachers regarding future transactions. Likewise, articulations by the FCC regarding general approaches that it will take with respect to disputes regarding particular pole attachment practices may prove persuasive before this Commission. Indeed, it would be an undesirably inefficient process if the general

principles underlying the benefits of a policy that facilitates the timely attachment, at just and reasonable rates, of wires on utility poles administered by competitors (including an appreciation of the potential for non-competitive misuse of pole attachment policies imposed by pole owners) needed to be developed, from scratch, with each new complaint brought to the Commission. Thus, while our conclusion is that the *Oxford Order* resolved the issues presented by the parties in that case, the mode of analysis employed in the *Oxford Order*, and portions of the extensive record developed in that case, will be useful to the Commission to resolve a similar dispute in the future between a pole owner/administrator and attacher. In accordance with our decision in Oxford and the FCC's conclusion in its order implementing the National Broadband Act, we find that for a pole administrator to prohibit attachment practices that it employs itself is unreasonable. *In re Implementation of Section 224 of the Act et al.*, 25 FCC Rcd 11864, 11869 (F.C.C. 2010). The policy underlying our decision in Oxford, specifically the prevention of discriminatory practices and the encouragement of broadband expansion, remains unchanged.

D. Conclusion

We agree with FairPoint and TAM that the *Oxford Order* was decided as a case between two distinct parties in the context of a specific dispute. We also recognize that the *Oxford Order* will have substantial precedential weight in the consideration of future disputes, but we do not find that the *Oxford Order* precludes consideration of relevant legal and factual issues on a case by case basis.

While we decline at this time to adopt definitive administrative rules of general applicability to pole attachment practices, finding instead that our enforcement of reasonable pole attachment rates, terms and conditions should continue on a case-by-case basis, we recognize that the cost and delay associated with a proceedings brought under Section 711 could discourage a party experiencing discriminatory or unreasonable attachment conditions from bringing a valid complaint to the Commission. In the interest of eliminating this barrier, preventing discrimination in the administration of utility poles, and allowing for the rapid deployment of telecommunications infrastructure, we establish an expedited dispute resolution process, attached to this order, for issues regarding the terms and conditions of attachment of third party facilities to utility poles. The use of this process is not mandatory but it is highly encouraged. It does not supplant a proceeding pursuant to Section 711. Parties may appeal a decision issued through the expedited dispute resolution process by bringing a complaint under Section 711. However, when a party chooses to avail itself of the expedited process, the party complained of must also participate in the expedited process in good faith.

The resolution of disputes through the expedited process will be delegated to our Director of Telecommunications and Water Industries pursuant to 35-A M.R.S.A. § 107(4). The decision of the Director of Telecommunications and Water Industries must be complied with pending any appeal to the Commission. Complaints brought to the commission for resolution using the expedited process will be resolved within 7 business days, unless the parties and our staff agree that additional time is necessary.

Accordingly, we decline to investigate this matter further and close our proceeding in this docket.

Dated at Hallowell, Maine, this 12th day of July, 2011.

BY ORDER OF THE COMMISSION

Karen Geraghty
Administrative Director

COMMISSIONERS VOTING FOR: Vafiades
Littell

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within **20** days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.

Expedited Complaint Resolution Process for Disputes Regarding Utility Pole Attachments

1. **Activities Prior to Filing a Complaint**
   a. Complainant shall call the contact for the party with whom there is a dispute and give notice that they are planning to file a complaint with the Commission Rapid Response Team the next business day.

2. **Filing Complaints**
   a. Complainant files Complaint electronically to the RRPT (rapidresponse.PUC@maine.gov) and the responding party contact. The filing shall contain the appropriate caption for the Complaint (name of company and date of filing), and the actual Complaint shall be a document attached to the email.

   b. A Complaint shall contain sufficient information to indicate:
      i. (1) the facts underlying the Complaint;
      ii. (2) the harm which is resulting or could result to the Complainant due to the situation;
      iii. (4) a description of the steps which the parties have taken to resolve the situation prior to the filing of the Complaint; and
      iv. (5) whether or not Complainant is requesting a preliminary finding. The Complainant shall also indicate the times both parties will be available for a conference call on the 2nd business day after the Complaint is filed.

3. **Response to Complaint**
   a. Respondent acknowledges the by email. The acknowledgement and any response shall be emailed to the RRPT and the Complainant. The Respondent *may:*

      i. respond to the factual issues in the Complaint;

      ii. argue the Complaint should be dismissed or is otherwise not ripe for review; or

   b. The RRT will schedule a time for the Preliminary Conference Call within 2 business days of the date when the Complaint is filed.

4. **Preliminary Conference Call and Intermediate Dispute Resolution Process.**
   a. Preliminary Conference Call: The following may occur:
      i. Respondent may provide oral response to Complaint;
      ii. Deadline established for written response, if appropriate;
      iii. RRPT may request additional information from each party and set a schedule for its production;
      iv. RRPT may schedule follow-up telephone conference among the parties;

v. RRPT may issue a Preliminary Finding or dismiss the complaint; either party may appeal to the Commission an adverse Preliminary Finding or dismissal;
vi. The issue may be resolved to the satisfaction of both parties.

b. Follow-up conference calls will be held at a time determined by RRPT and the following may occur:
   i. Parties will update RRPT on progress since last call;
   ii. Parties will discuss information provided in response to any RRPT requests;
   iii. RRPT may issue a Preliminary Finding or dismiss the Complaint; either party may appeal to the Commission an adverse Preliminary Finding or dismissal;
   iv. The issue may be resolved to the satisfaction of both parties; or
   v. RRPT may request written comments and/or schedule a Notice of Decision Call.

5. **Notice of Decision and Final Order**
   a. If required by RRPT, a final conference call is held and the following may occur:
      i. RRPT hears closing argument from parties and issues oral decision.
      ii. RRPT hears closing argument from parties and schedules time for written decision.
   b. Within 7 business days of the filing of the Complaint, the RRPT will issue a final written decision (Final Order). Unless stayed by RRPT, the Final Order remains in effect pending appeal.
   c. Within 5 business days after written decision is issued, a party may:
      i. Appeal the Final Order to full Commission.
      ii. Request a stay of the Final Order by the Commission pending appeal.