

February 3, 2020

Via Electronic Filing

Rosemary Chiavetta, Esquire
Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: Docket No. C-2019-3015187
MAW Communications, Inc. v. PPL Electric Utilities Corporation
Reply to New Matter of PPL Electric Utilities Corporation**

Dear Secretary Chiavetta:

Attached for filing, is MAW's (Complainant) Answer to the Preliminary Objections of PPL Electric Utilities Corporation (Respondent) in the above-captioned proceeding.

A copy of the Answer to the Preliminary Objections has been forwarded to the parties in the manner indicated on the attached Certificate of Service.

If there are any questions, please do not hesitate to contact me.

Very truly yours,

Reger Rizzo & Darnall LLP


Margaret A. Morris

MAM
Attachment

cc: Service List [w/enc.]

**Re: Docket No. C-2019-3015187
MAW Communications, Inc. v. PPL Electric Utilities Corporation
Reply to New Matter of PPL Electric Utilities Corporation**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the following persons on the attached service list, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Dated: February 3, 2020



Margaret A. Morris, Esquire

**Re: Docket No. C-2019-3015187
MAW Communications, Inc. v. PPL Electric Utilities Corporation
Answer to Preliminary Objections of PPL Electric Utilities Corporation**

Via Electronic and UPS Ground

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Utilities Corporation, formerly known as
Pennsylvania Power & Light Co.*

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

MAW COMMUNICATIONS, INC.,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2019-3015187
	:	
PPL ELECTRIC UTILITIES	:	
CORPORATION, FORMERLY KNOWN	:	
AS PENNSYLVANIA POWER & LIGHT	:	
CO.,	:	
	:	
Respondent.	:	
	:	

**MAW COMMUNICATIONS, INC.’S ANSWER TO THE PRELIMINARY
OBJECTIONS OF PPL ELECTRIC UTILITIES CORPORATION**

AND NOW, comes MAW Communications, Inc. (“MAW” or Complainant), by and through its counsel, Reger, Rizzo & Darnall, LLP, and pursuant to 52 Pa. Code § 5.101(f), and files the within Answer to the Preliminary Objections filed by PPL Electric Utilities Corporation (“PPL” or Respondent).

All three of PPL’s Preliminary Objections are meritless and should be rejected. Moreover, PPL’s Preliminary Objections are flawed because they rely on documents and testimony far beyond the four corners of MAW’s Formal Complaint, and it is well-settled that such material is not considered when ruling on a preliminary objection. Factual averments by PPL are not to be considered. See County of Allegheny v. Commonwealth of Pennsylvania, 490 A.2d 402, 408 (Pa. 1985). In resolving PPL’s Preliminary Objections, only the facts pled in MAW’s Formal Complaint may be considered, and such facts must be accepted as true and viewed in the light most favorable to MAW, along with any reasonable inferences from those facts. Id.

Pennsylvania Public Utility Commission (the “Commission”) procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. See e.g. Pa. R.C.P. 1028(a); see also Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. See Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental Resources, 406 A.2d 1020 (Pa. 1979). The Commission follows this standard. Montague v. Philadelphia Gas Company, 66 Pa. PUC 24 (1998). Accordingly, the Commission must view MAW’s Formal Complaint in the light most favorable to MAW and should dismiss the Complaint only if it appears that MAW would not be entitled to relief under any circumstances as a matter of law.

As set forth above, PPL’s Preliminary Objections seek to insert discussion of facts and testimony beyond those stated in MAW’s Formal Complaint. PPL has submitted an appendix with twenty-six (26) exhibits in support of its Preliminary Objections while MAW has submitted five (5) exhibits in support of its Formal Complaint. In this respect, PPL’s Preliminary Objections are analogous to a premature motion for summary judgment. Such a motion is clearly improper when the pleadings are not yet closed (MAW’s Reply to PPL’s New Matter is due on or before February 13, 2020). MAW believes that the totality of the evidence, once elicited, will clearly demonstrate that MAW’s Formal Complaint should be sustained. However, at the Preliminary Objection stage of the proceeding, the focus is not on the totality of the evidence; rather, the focus is on the four corners of MAW’s Formal Complaint, and whether the Complaint can be dismissed for one of the permitted reasons set forth in 52 Pa. Code § 5.101(a)(1-7). PPL clearly has not met the necessary burden to prevail on its Preliminary Objections.

The gravamen of PPL's Preliminary Objections is that the Commission lacks subject matter jurisdiction to entertain and resolve the instant pole attachment dispute PPL and MAW. As set forth in MAW's Formal Complaint, the Commission has elected to regulate pole attachments. See Final Rulemaking Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published by the Pennsylvania Bulletin on January 18, 2020 at 50 Pa. B 469). Accordingly, the Commission has primary jurisdiction over the pole attachment dispute between PPL and MAW, effectively staying the civil action currently pending in the Lehigh Court of Common Pleas (Civil Action No. 2017-C-3755) ("Civil Case") and bifurcating all liability issues to be determined by the Commission. See Elkin v. Bell Tel. Co., 420 A.2d 371, 377 (Pa. 1980); see also Optimum Image, Inc. v. Philadelphia Electric Co., 600 A.2d 553, 555 (Pa. Super. 1991). MAW contends that the Commission is the appropriate regulatory body interpret the specific terms of the 2003 Pole Attachment Agreement (the "Agreement") at issue and address PPL and MAW's performance under the Agreement pursuant to existing statutory and regulatory constraints. Ultimately, PPL's requested relief in the Civil Case could be disruptive of Pennsylvania's attempts to create a coherent and consistent policy with regard to pole attachments.

The doctrine of *res judicata* does not bar MAW's Formal Complaint. The doctrine of *res judicata* encompasses two related, yet distinct principles: technical *res judicata* and collateral estoppel. See Maranc v. Workers' Compensation Appeal Board (Bienenfeld), 751 A.2d 1196, 1199 (Pa. Cmwlth. Ct. 2000). Technical *res judicata*, raised by PPL in its Preliminary Objections, provides that when a final judgment on the merits exists, a future suit between the parties on the same cause of action is precluded. Id. Collateral estoppel (or issue preclusion) forecloses litigation of specific issues of law or fact that have been litigated and were necessary to a previous final judgment. Id. Simply put, there has been no final, valid

judgment on the merits by a court of competent jurisdiction on the same causes of action that precludes MAW's Formal Complaint.

I. PPL'S FACTUAL BACKGROUND

1. MAW admits that in 1998, MAW was granted a Certificate of Public Convenience by the Commission to provide telecommunications service as a Competitive Access Provider ("CAP") and competitive local exchange carrier ("CLEC") at Docket Nos. A-310623 and A-310623F0002, respectively.

2. MAW admits that it is a regulated public utility and that, consistent with federal regulations, MAW has a right to obtain a license from other regulated utilities, such as PPL, to attach MAW its facilities and apparatus to PPL's poles and other infrastructure.

3. Admitted. The Agreement is attached to MAW's Formal Complaint as Attachment "A".

4. Denied as stated. The Agreement, being a writing, speaks for itself. Any characterization thereof by PPL is denied. At all times relevant, MAW acted in a manner which was proper, reasonable, and lawful.

5. Admitted. On or about December 23, 2014, MAW and the City of Lancaster entered into a Municipal Carrier Agreement (the "MCA"), whereby MAW agreed to utilize the City of Lancaster and the Lancaster City Safety Coalition's ("LCSC") existing attachments on PPL owned poles to rebuild the network that supports the City's traffic controllers and camera network and to deploy a community Internet and broadband network referred to as "Lan-City Connect." The overarching goal of the MCA was to promote the deployment of a competitive telecommunications network in the City of Lancaster.

6. Denied. It is specifically denied that MAW failed to obtain authorization from PPL before attaching its facilities to PPL poles in the City of Lancaster. To the contrary, in

2015, MAW worked directly with William Klokis, a Project Manager for PPL. The remaining averments of Paragraph 6 constitute conclusions of law to which no response is required. The Agreement, being a writing, speaks for itself. The MCA, being a writing, speaks for itself. Any characterizations thereof by PPL are denied. At all times relevant, MAW acted in a manner which was proper, reasonable and lawful.

7. Denied. MAW denies that any of its attachments in the City of Lancaster involve safety violations. MAW has a vested interest in the safety and integrity of the PPL poles to which it attaches. Furthermore, MAW is obligated to indemnify PPL for any damages from its attachments. MAW is completely dependent upon access to PPL's poles to provide service to its end users customers and any pole-related network outages impact MAW's end user customers. After PPL filed a 2-Count Complaint against MAW in the Civil Case, the Commission, by and through Bradley R. Gorter, Esquire, Deputy Chief Prosecutor of the Commission's Bureau of Investigation and Enforcement ("BIE"), agreed to act as a neutral, third-party ombudsman and provide feedback on the alleged safety concerns. BIE's investigation did not identify any exigent safety concerns. By way of further response, the Agreement, being a writing, speaks for itself. Any characterizations thereof by PPL are denied. At all times relevant, MAW acted in a manner which was proper, reasonable and lawful.

8. Denied. See Paragraph 7 set forth above.

9. Admitted.

10. Admitted.

11. Admitted.

12. Paragraph 12 contains factual averments which cannot be considered in evaluating PPL's Preliminary Objections. In response to PPL's new factual averments, MAW

admits that on or about December 18, 2017, MAW filed Preliminary Objections to PPL's Complaint in the Civil Case.

13. – 14. Paragraphs 13 and 14 contain factual averments which cannot be considered in evaluating PPL's Preliminary Objections. In response to PPL's new factual averments, MAW admits that it filed Preliminary Objections to PPL's Complaint in the Civil Case. MAW's Preliminary Objections, being a writing, speak for themselves. Any characterization thereof by PPL is denied. MAW further admits that on or about January 30, 2018, the Honorable Judge Edward D. Reibman, presiding over the Civil Case, issued an Order which overruled MAW's Preliminary Objections as to jurisdiction.

15. Paragraph 15 contains factual averments which cannot be considered in evaluating PPL's Preliminary Objections. In response to PPL's new factual averments, MAW admits that on or about January 30, 2018, the Honorable Judge Edward D. Reibman, presiding over the Civil Case, issued an Order which overruled MAW's Preliminary Objections as to jurisdiction. MAW contests jurisdiction in the Civil Case because a challenge to subject matter jurisdiction is never waived; this jurisdictional question may be raised at any stage of the judicial process. See Commonwealth v. Atlantic & Gulf Coast Stevedores, Inc., 221 A.2d 128, 130 (Pa. 1966). The Commission has elected to regulate pole attachments and therefore, it has primary jurisdiction over the instant pole attachment dispute between PPL and MAW. See Final Rulemaking Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published by the Pennsylvania Bulletin at 50 Pa. B 469).

16. Paragraph 16 contains factual averments which cannot be considered in evaluating PPL's Preliminary Objections, namely, testimony in the Civil Case. In response to PPL's new factual averments, MAW admits that on or about April 13, 2018, the Honorable Judge Edward D. Reibman, presiding over the Civil Case, issued an Order granting PPL's

preliminary injunction. There has been no permanent injunction – or final judgment – entered in the Civil Case.

17. Paragraph 17 contains factual averments which cannot be considered in evaluating PPL’s Preliminary Objections. In response to PPL’s new factual averments, MAW admits that on or about January 30, 2018, the Honorable Judge Edward D. Reibman, presiding over the Civil Case, issued an Order which overruled MAW’s Preliminary Objections as to jurisdiction. MAW further admits that on or about April 13, 2018, the Honorable Judge Edward D. Reibman, presiding over the Civil Case, issued an Order granting PPL’s preliminary injunction. MAW contests jurisdiction in the Civil Case because a challenge to subject matter jurisdiction is never waived; this jurisdictional question may be raised at any stage of the judicial process. See Commonwealth v. Atlantic & Gulf Coast Stevedores, Inc., 221 A.2d 128, 130 (Pa. 1966). The Commission has elected to regulate pole attachments and therefore, it has primary jurisdiction over the instant pole attachment dispute between PPL and MAW. See Final Rulemaking Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published by the Pennsylvania Bulletin on January 18, 2020 at 50 Pa. B 469).

18. Paragraph 18 contains factual averments which cannot be considered in evaluating PPL’s Preliminary Objections. In response to PPL’s new factual averments, MAW admits that on or about March 5, 2018, MAW filed its Answer with New Matter to PPL’s Complaint in the Civil Case.

19. Admitted. The FCC Memorandum Opinion and Order is attached to MAW’s Formal Complaint as Attachment “D”.

20. Admitted.

21. Admitted.

22. Admitted in part; denied in part. MAW admits that the FCC Memorandum Opinion and Order was issued on August 12, 2019. MAW specifically denies that its Formal Complaint revives any prior claims which were actually litigated by FCC. See FCC Memorandum Opinion and Order, FCC Docket No. 19-29 (Order entered August 29, 2019). To the contrary, MAW's Pole Attachment Complaint filed with the FCC on February 8, 2019, set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief.

23. Admitted in part; denied in part. MAW admits that the FCC Memorandum Opinion and Order directed PPL to process MAW's rebuild applications where PPL's only basis for denying the applications was failure to pay a prior debt. See FCC Memorandum Opinion and Order, FCC Docket No. 19-29 (Order entered August 29, 2019) ("[d]ebt collection is not permissible grounds for denial of access"). MAW specifically denies that the FCC Memorandum Opinion and Order identified any violations of standards by MAW or any failure by MAW to adhere to its contractual obligations.

24. Admitted in part; denied in part. MAW admits that the FCC Memorandum Opinion and Order directed PPL to process MAW's rebuild applications where PPL's only basis for denying the applications was failure to pay a prior debt. See FCC Memorandum Opinion and Order, FCC Docket No. 19-29 (Order entered August 29, 2019) ("[d]ebt collection is not permissible grounds for denial of access"). MAW further admits that the FCC Memorandum Opinion and Order did not disturb the April 13, 2018 Order issued in the Civil Case. MAW specifically denies that any other requests for relief were actually litigated by the FCC. To the contrary, MAW's Pole Attachment Complaint filed with the FCC on February 8, 2019, set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief.

25. Denied as stated. MAW denies that PPL has processed and reprocessed dozens of MAW applications to attach. To the contrary, PPL continually refuses to process MAW's applications to attach, conditioning the review of applications on the payment of "Make Ready" work charges and rejecting MAW's applications on the basis that the application is either: 1) incomplete, without providing any explanation; 2) must be resubmitted with additional information and corrections; or, 3) raises questions as to whether MAW has established any right to attach. MAW contends that PPL is using its control of the poles to shift unreasonable maintenance, data collection, analysis, and compliance costs to MAW and to identify poles that may need to be replaced, which would only benefit PPL. By way of further response, while MAW did receive written notices on October 22, 2019 and November 22, 2019 that PPL intends to remove certain attachments in the City of Lancaster, MAW denies that the attachments identified therein are unauthorized.

26. Admitted in part; denied in part. MAW admits that on or about December 19, 2019, MAW filed its Formal Complaint with the Commission. The remainder of the averments in Paragraph 26 are denied. The Civil Case has resulted in the drastic and extraordinary remedy of an injunction. Pursuant to the April 13, 2018 Order issued in the Civil Case, MAW is prohibited from accessing, working on or attaching to any PPL poles in the City of Lancaster without PPL's prior approval. Relying on the April 13, 2018 Order, PPL has refused to provide MAW with the opportunity to adequately address attachment issues identified by PPL. PPL will not grant MAW ubiquitous access to MAW's facilities. If MAW requires access to its facilities, MAW must request specific access from PPL. This process is cumbersome, time-consuming and arbitrary. Without the ability to access its Fiber Optic Network, MAW is unable to serve its end user customer base and continues to lose business. PPL's interminable delays and shifting demands compelled MAW to file its Formal Complaint

with the Commission raising issues as to the reasonableness of service and the terms and conditions of attachment. The Commission has elected to regulate pole attachments and therefore, it has primary jurisdiction over the pole attachment dispute between PPL and MAW. See Final Rulemaking Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published by the Pennsylvania Bulletin on January 18, 2020 at 50 Pa. B 469).

27. Denied as stated. MAW's Formal Complaint, being a writing, speaks for itself. Any characterization thereof by PPL is denied.

28. Denied. The averments of Paragraph 28 constitute conclusions of law to which no response is required. PPL clearly has not met the necessary burden to prevail on its Preliminary Objections.

II. RESPONSE TO PRELIMINARY OBJECTIONS

A. RESPONSE TO PRELIMINARY OBJECTION NO. 1

THE COMMISSION HAS ASSERTED JURISDICTION OVER POLE ATTACHMENT DISPUTES EFFECTIVELY STAYING THE CIVIL CASE

29. Paragraph 29 of PPL's Preliminary Objections is an incorporation paragraph to which no response is required and is therefore denied.

30. Paragraph 30 cites legal authority, and that authority speaks for itself. The Commission has elected to regulate pole attachments. See Final Rulemaking Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published by the Pennsylvania Bulletin on January 18, 2020 at 50 Pa. B 469). Accordingly, the Commission has primary jurisdiction over the pole attachment dispute between PPL and MAW, effectively staying the Civil Case and bifurcating all liability issues to be determined by the Commission. See Elkin v. Bell Tel. Co., 420 A.2d 371, 377 (Pa. 1980); see also Optimum Image, Inc. v. Philadelphia Electric Co., 600 A.2d 553, 555 (Pa. Super. 1991).

31. Paragraph 31 cites legal authority, and that authority speaks for itself. MAW has standing to file its Formal Complaint. See 66 Pa.C.S. § 701; see also, 52 Pa. Code § 5.21(a).

32. MAW admits Paragraph 32 of PPL's Preliminary Objections. By way of further response, MAW's Commission approved Tariff permits MAW to offer intrastate wholesale dedicated access service to the public as a Competitive Access Provider ("CAP"). See Tariff No. 2, effective January 30, 2007. MAW is a competitive local exchange carrier ("CLEC") providing Internet access in the City of Lancaster, over its own facilities and under its Tariff, to end user customers for business, residential and public safety agencies.

33. Denied. MAW possesses valid state authorizations to provide telecommunications services, and it has filed a state Tariff offering such services to the public. MAW holds itself out to the public as providing its services indifferently and indiscriminately, for a fee; and those services involve communications by wire and transmission. Accordingly, MAW is a telecommunications service provider. See 47 U.S.C. § 153(53) (FCC has classified broadband as telecommunications service); see also, 47 U.S.C. § 224(f)(1) ("A utility shall provide...any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.")

34. – 37. Paragraphs 34, 35, 36 and 37 cite various legal authorities, and those authorities speak for themselves. MAW denies that the Commission lacks the authority to abrogate or reform the Agreement. Section 508 of the Public Utility Code ("the Code") gives the Commission the power to vary, reform and revise contracts entered into "between any public utility...and any corporation...which embrace or concern a public right, benefit, privilege, duty, or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well-being of this Commonwealth." See 66 Pa.C.S. § 508; see also PPL Elec. Utils. Corp v. Pa. PUC, 912 A.2d 386, 409 (Pa. Cmwlth. Ct. 2006) (holding

that the Commission has broad and flexible authority to find that a public utility's contract terms are unjust, unreasonable, inequitable or otherwise contrary or adverse to the public interest). MAW provides telecommunications services to end user customers for business, residential and public safety agencies in the City of Lancaster. The residents of the City of Lancaster (i.e. the general public) have a vested interest in sustained, uninterrupted Internet access.

38. Paragraph 38 cites various legal authorities, and those authorities speak for themselves. The issues raised in MAW's Formal Complaint must be heard by the Commission because the core issues deal with the conditions for providing "reasonable and adequate service" as required by the Code. 66 Pa. C.S. § 1501. The terms of attachment are governed by the Agreement. The rate making issues involves a review of the terms of the Agreement, with particular emphasis on the rate setting provisions. The Commission can provide proper guidance on the interpretation of the terms or conditions of attachment set forth in the Agreement, which requires an exercise of administrative expertise and promotes uniformity and consistency within the realm of pole attachment regulations. The Commission is the appropriate regulatory body to determine the pole attachment rates based on the positions of the parties and the evidence.

39. Denied. The Commission has the authority under the Code to vary, reform and revise the Agreement. 66 Pa.C.S. § 508. PPL knew at the time the Agreement was executed in 2003 that there were limitations on the charges that could be levied under the Agreement and that federal law allowed attaching entities to file complaints with the FCC to resolve issues. The Commission has elected to regulate pole attachments and therefore, it has primary jurisdiction over the pole attachment dispute between PPL and MAW. See Final Rulemaking

Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published by the Pennsylvania Bulletin on January 18, 2020 at 50 Pa. B 469).

40. Denied as stated. At no time since the Agreement was executed in 2003 have pole attachments been unregulated. MAW denies that its voluntary negotiation of the Agreement with PPL in any way waives its right to challenge PPL's unreasonable and arbitrary terms and conditions of attachment. Based solely on what PPL would unilaterally consider an "unauthorized" attachment, with no regulatory determination, PPL intends to remove certain MAW attachments in the City of Lancaster, which will impact MAW's end user customers who routinely access its Fiber Optic Network. Pennsylvania courts have held "when a utility's failure to maintain reasonable and adequate service is alleged, regardless of the form of the pleading in which the allegations are couched, it is for the Commission initially to determine whether the service provided by the utility has fallen short of the statutory standard required of it." Di Santo v. Dauphin Consolidated Water Supply Company, 436 A.2d 197, 199 (Pa. Super. 1981).

41. Denied. MAW provides telecommunications services to end user customers for business, residential and public safety agencies in the City of Lancaster. The residents of the City of Lancaster (i.e. the general public) have a vested interest in sustained, uninterrupted Internet access.

42. Denied as stated. MAW submits that primary jurisdiction rests with the Commission. The Commission has elected to regulate pole attachments. See Final Rulemaking Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published by the Pennsylvania Bulletin on January 18, 2020 at 50 Pa. B 469). Accordingly, the Commission has primary jurisdiction over the pole attachment dispute between PPL and MAW, effectively staying the Civil Case and bifurcating all liability issues to be determined by

the Commission. See Elkin v. Bell Tel. Co., 420 A.2d 371, 377 (Pa. 1980); see also Optimum Image, Inc. v. Philadelphia Electric Co., 600 A.2d 553, 555 (Pa. Super. 1991). There has been no final judgment entered in the Civil Case. Moreover, a challenge to subject matter jurisdiction is never waived; this jurisdictional question may be raised at any stage of the judicial process. See Commonwealth v. Atlantic & Gulf Coast Stevedores, Inc., 221 A.2d 128, 130 (Pa. 1966).

43. Admitted in part; denied in part. MAW admits that the FCC Memorandum Opinion and Order did not disturb the April 13, 2018 Order issued in the Civil Case. MAW specifically denies its other requests for relief were actually litigated by the FCC. To the contrary, MAW's Pole Attachment Complaint filed with the FCC on February 8, 2019, set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief.

44. MAW admits Paragraph 44 of PPL's Preliminary Objections. By way of further response, the Commission has elected to regulate pole attachments. See Final Rulemaking Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published in the Pennsylvania Bulletin on January 18, 2020 at 50 Pa. B. 469). Accordingly, the Commission has primary jurisdiction over the pole attachment dispute between PPL and MAW, effectively staying the Civil Case and bifurcating all liability issues to be determined by the Commission. See Elkin v. Bell Tel. Co., 420 A.2d 371, 377 (Pa. 1980); see also Optimum Image, Inc. v. Philadelphia Electric Co., 600 A.2d 553, 555 (Pa. Super. 1991).

45. Denied. MAW's Formal Complaint does not revive any prior claims which were actually litigated by FCC. See FCC Memorandum Opinion and Order, FCC Docket No. 19-29 (Order entered August 29, 2019). To the contrary, MAW's Pole Attachment Complaint

filed with the FCC on February 8, 2019, set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief.

46. Paragraph 46 contains factual averments which cannot be considered in evaluating PPL's Preliminary Objections. In response to PPL's new factual averments, the email that comprises PPL App. Ex. 26, being a writing, speaks for itself. Any characterization thereof by PPL is denied. Moreover, an email from Bradley R. Gorter, Esquire, Deputy Chief Prosecutor of the Commission's BIE, has no bearing on jurisdiction. The Commission has elected to regulate pole attachments and therefore, it has primary jurisdiction over the pole attachment dispute between PPL and MAW. See Final Rulemaking Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published in the Pennsylvania Bulletin on January 18, 2020 at 50 Pa. B. 469).

B. RESPONSE TO PRELIMINARY OBJECTION NO. 2

**THIS IS A CASE OF FIRST IMPRESSION AND
THEREFORE MAW'S FORMAL COMPLAINT
CANNOT BE DEEMED LEGALLY INSUFFICIENT**

47. Paragraph 47 of PPL's Preliminary Objections is an incorporation paragraph to which no response is required and is therefore denied.

48. – 49. Paragraphs 48 and 49 cite various legal authorities, and those authorities speak for themselves. In order to be legally sufficient, a complaint must set forth “an act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission.” 52 Pa. Code §5.22(a)(4). MAW's Formal Complaint alleges a violation of the Code by PPL for failure to provide “reasonable and adequate service.” 66 Pa. C.S. § 1501. The Commission has original jurisdiction over the reasonableness and adequacy of public utility service. Elkin v. Bell Telephone Co., 372 A.2d

1203 (Pa. Super. 1977) aff'd 420 A.2d 371 (Pa. 1977); Behrend v. Bell Telephone Co., 243 A.2d 346 (Pa. 1968). Moreover, the Commission has elected to regulate pole attachments and therefore, it has primary jurisdiction over the pole attachment dispute between PPL and MAW. See Final Rulemaking Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published in the Pennsylvania Bulletin on January 18, 2020 at 50 Pa. B. 469). Since this is a case of first impression before the Commission, it is therefore contrary to reason assert that MAW's Formal Complaint fails for legal insufficiency.

50. – 53. Paragraphs 50, 51, 52 and 53 cite various legal authorities, and those authorities speak for themselves. It is specifically denied that MAW's requests for relief set forth in its Formal Complaint are barred or limited in any way. All allegations pertaining to jurisdiction are denied. MAW's requests for relief are not barred by the doctrines of *res judicata* or collateral estoppel. There has been no final judgment entered in the Civil Case involving PPL and MAW currently pending in the Lehigh Court of Common Pleas (Civil Action No. 2017-C-3755). Moreover, MAW's Formal Complaint does not revive any prior claims which were actually litigated by FCC. See FCC Memorandum Opinion and Order, FCC Docket No. 19-29 (Order entered August 29, 2019). To the contrary, MAW's Pole Attachment Complaint filed with the FCC on February 8, 2019, set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief.

54. Denied. MAW's Formal Complaint does not revive any prior claims which were actually litigated by FCC. See FCC Memorandum Opinion and Order, FCC Docket No. 19-29 (Order entered August 29, 2019). To the contrary, MAW's Pole Attachment Complaint filed with the FCC on February 8, 2019, set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief.

55. Denied. MAW's Formal Complaint does not revive any prior claims which were actually litigated by FCC. See FCC Memorandum Opinion and Order, FCC Docket No. 19-29 (Order entered August 29, 2019). To the contrary, MAW's Pole Attachment Complaint filed with the FCC on February 8, 2019, set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief.

56. – 57. Denied. The Civil Case has resulted in the drastic and extraordinary remedy of an injunction. Pursuant to the April 13, 2018 Order issued in the Civil Case, MAW is prohibited from accessing, working on or connecting to any PPL poles in the City of Lancaster without PPL's prior approval. Relying on the April 13, 2018 Order, PPL has refused to provide MAW with the opportunity to adequately address attachment issues identified by PPL. PPL will not grant MAW ubiquitous access to MAW's facilities. If MAW requires access to its facilities, MAW must request specific access from PPL. This process is cumbersome, time-consuming and arbitrary. Without the ability to access its Fiber Optic Network, MAW is unable to serve its end user customer base and continues to lose business. PPL's interminable delays and shifting demands compelled MAW to file its Formal Complaint with the Commission raising issues as to the reasonableness of service and the terms and conditions of attachment. The Commission has elected to regulate pole attachments and therefore, it has primary jurisdiction over the pole attachment dispute between PPL and MAW. See Final Rulemaking Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published by the Pennsylvania Bulletin on January 18, 2020 at 50 Pa. B 469).

58. – 59. Admitted.

60. Denied. MAW's Formal Complaint does not revive any prior claims which were actually litigated by FCC. See FCC Memorandum Opinion and Order, FCC Docket No. 19-29 (Order entered August 29, 2019). To the contrary, MAW's Pole Attachment Complaint

filed with the FCC on February 8, 2019, set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief.

61. Admitted in part; denied in part. MAW admits that the FCC Memorandum Opinion and Order directed PPL to process MAW's rebuild applications where PPL's only basis for denying the applications was failure to pay a prior debt. See FCC Memorandum Opinion and Order, FCC Docket No. 19-29 (Order entered August 29, 2019) (“[d]ebt collection is not permissible grounds for denial of access”). MAW further admits that the FCC Memorandum Opinion and Order did not disturb the April 13, 2018 Order issued in the Civil Case. MAW specifically denies its other requests for relief were actually litigated by the FCC. To the contrary, MAW's Pole Attachment Complaint filed with the FCC on February 8, 2019, set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief.

62. Paragraph 62 cites legal authority, and that authority speaks for itself. MAW denies that the requests for relief set forth in its Formal Complaint are barred or limited in any way. All allegations pertaining to jurisdiction are denied. MAW's requests for relief are not barred by the doctrines of *res judicata* or collateral estoppel. There has been no final judgment entered in the Civil Case. Moreover, MAW's Formal Complaint does not revive any prior claims which were actually litigated by FCC. See FCC Memorandum Opinion and Order, FCC Docket No. 19-29 (Order entered August 29, 2019). To the contrary, MAW's Pole Attachment Complaint filed with the FCC on February 8, 2019, set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief.

63. – 64. Denied. MAW's Formal Complaint does not revive any prior claims which were actually litigated by FCC. See FCC Memorandum Opinion and Order, FCC Docket No. 19-29 (Order entered August 29, 2019). To the contrary, MAW's Pole Attachment Complaint

filed with the FCC on February 8, 2019, set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief.

65. Denied as stated. The Civil Case has resulted in the drastic and extraordinary remedy of an injunction. Pursuant to the April 13, 2018 Order issued in the Civil Case, MAW is prohibited from accessing, working on or connecting to any PPL poles in the City of Lancaster without PPL's prior approval. Relying on the April 13, 2018 Order, PPL has refused to provide MAW with the opportunity to adequately address attachment issues identified by PPL. PPL will not grant MAW ubiquitous access to MAW's facilities. If MAW requires access to its facilities, MAW must request specific access from PPL. This process is cumbersome, time-consuming and arbitrary. Without the ability to access its Fiber Optic Network, MAW is unable to serve its end user customer base and continues to lose business. PPL's interminable delays and shifting demands compelled MAW to file its Formal Complaint with the Commission raising issues as to the reasonableness of service and the terms and conditions of attachment. The Commission has elected to regulate pole attachments and therefore, it has primary jurisdiction over the pole attachment dispute between PPL and MAW. See Final Rulemaking Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published by the Pennsylvania Bulletin on January 18, 2020 at 50 Pa. B 469).

66. Denied. The averments in Paragraph 66 constitute conclusions of law to which no response is required. MAW's Formal Complaint does not revive any prior claims which were actually litigated by FCC. See FCC Memorandum Opinion and Order, FCC Docket No. 19-29 (Order entered August 29, 2019). To the contrary, MAW's Pole Attachment Complaint filed with the FCC on February 8, 2019, set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief. Based solely on what PPL unilaterally considers an "unauthorized" attachment, with no regulatory determination, PPL

intends to remove certain MAW attachments in the City of Lancaster, which will impact MAW's end user customers who routinely access its Fiber Optic Network. Pennsylvania courts have held "when a utility's failure to maintain reasonable and adequate service is alleged, regardless of the form of the pleading in which the allegations are couched, it is for the Commission initially to determine whether the service provided by the utility has fallen short of the statutory standard required of it." Di Santo v. Dauphin Consolidated Water Supply Company, 436 A.2d 197, 199 (Pa. Super. 1981).

67. It is admitted only that the FCC Memorandum Opinion and Order was a final judgment on the merits of MAW's Pole Attachment Complaint filed with the FCC on February 9, 2018, which set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief.

68. Admitted.

69. It is admitted only that the FCC Memorandum Opinion and Order was a final judgment on the merits of MAW's Pole Attachment Complaint filed with the FCC on February 9, 2018, which set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief.

70. Denied. The averments in Paragraph 70 constitute conclusions of law to which no response is required. It is specifically denied that MAW's requests for relief set forth in its Formal Complaint are barred or limited in any way. All allegations pertaining to jurisdiction are denied. MAW's requests for relief are not barred by the doctrines of *res judicata* or collateral estoppel. There has been no final judgment entered in the Civil Case involving PPL and MAW currently pending in the Lehigh Court of Common Pleas (Civil Action No. 2017-C-3755). Moreover, MAW's Formal Complaint does not revive any prior claims which were actually litigated by FCC. See FCC Memorandum Opinion and Order, FCC Docket No. 19-29

(Order entered August 29, 2019). To the contrary, MAW's Pole Attachment Complaint filed with the FCC on February 8, 2019, set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief. By way of further response, the Commission has elected to regulate pole attachments and therefore, it has primary jurisdiction over the pole attachment dispute between PPL and MAW. See Final Rulemaking Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published in the Pennsylvania Bulletin on January 18, 2020 at 50 Pa. B. 469).

71. Admitted in part; denied in part. MAW admits that the FCC Memorandum Opinion and Order directed PPL to process MAW's rebuild applications where PPL's only basis for denying the applications was failure to pay a prior debt. See FCC Memorandum Opinion and Order, FCC Docket No. 19-29 (Order entered August 29, 2019) (“[d]ebt collection is not permissible grounds for denial of access”). MAW further admits that the FCC Memorandum Opinion and Order did not disturb the April 13, 2018 Order issued in the Civil Case. MAW specifically denies its other requests for relief were actually litigated by the FCC. To the contrary, MAW's Pole Attachment Complaint filed with the FCC on February 8, 2019, set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief.

C. RESPONSE TO PRELIMINARY OBJECTION NO. 3

THE COMMISSION HAS PRIMARY JURISDICTION

72. Paragraph 72 of PPL's Preliminary Objections is an incorporation paragraph to which no response is required and is therefore denied.

73. Paragraph 73 cites legal authority, and that authority speaks for itself. The Commission has elected to regulate pole attachments. See Final Rulemaking Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published by the

Pennsylvania Bulletin on January 18, 2020 at 50 Pa. B 469). Accordingly, the Commission has primary jurisdiction over the pole attachment dispute between PPL and MAW, effectively staying the Civil Case and bifurcating all liability issues to be determined by the Commission. See Elkin v. Bell Tel. Co., 420 A.2d 371, 377 (Pa. 1980); see also Optimum Image, Inc. v. Philadelphia Electric Co., 600 A.2d 553, 555 (Pa. Super. 1991). This is a case of first impression before the Commission. There has been no final judgment entered in the Civil Case. MAW's Formal Complaint is timely. Clearly, PPL and MAW are unable to resolve the pole attachment dispute on their own. Since the Commission has elected to regulate pole attachments, MAW is permitted to seek Commission resolution of the issues raised in its Formal Complaint.

74. Paragraph 74 cites various legal authorities, and those authorities speak for themselves. The Commission has elected to regulate pole attachments. See Final Rulemaking Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published by the Pennsylvania Bulletin on January 18, 2020 at 50 Pa. B 469). Accordingly, the Commission has primary jurisdiction over the pole attachment dispute between PPL and MAW, effectively staying the Civil Case and bifurcating all liability issues to be determined by the Commission. See Elkin v. Bell Tel. Co., 420 A.2d 371, 377 (Pa. 1980); see also Optimum Image, Inc. v. Philadelphia Electric Co., 600 A.2d 553, 555 (Pa. Super. 1991).

75. Paragraph 75 cites legal authority, and that authority speaks for itself. It is specifically denied that MAW's requests for relief set forth in its Formal Complaint are barred or limited in any way. All allegations pertaining to jurisdiction are denied. MAW's requests for relief are not barred by the doctrines of *res judicata* or collateral estoppel. There has been no final judgment entered in the Civil Case. Moreover, MAW's Formal Complaint does not revive any prior claims which were actually litigated by FCC. See FCC Memorandum Opinion

and Order, FCC Docket No. 19-29 (Order entered August 29, 2019). To the contrary, MAW's Pole Attachment Complaint filed with the FCC on February 8, 2019, set forth One Count, Ongoing Denial of Access. For this reason, the FCC did not rule on any other requests for relief.

76. Admitted.

77. Denied as stated. The Civil Case has resulted in the drastic and extraordinary remedy of an injunction. There has been no permanent injunction – or final judgment – entered in the Civil Case. Pursuant to the April 13, 2018 Order issued in the Civil Case, MAW is prohibited from accessing, working on or connecting to any PPL poles in the City of Lancaster without PPL's prior approval. Relying on the April 13, 2018 Order, PPL has refused to provide MAW with the opportunity to adequately address attachment issues identified by PPL. PPL will not grant MAW ubiquitous access to MAW's facilities. If MAW requires access to its facilities, MAW must request specific access from PPL. This process is cumbersome, time-consuming and arbitrary. Without the ability to access its Fiber Optic Network, MAW is unable to serve its end user customer base and continues to lose business. PPL's interminable delays and shifting demands compelled MAW to file its Formal Complaint with the Commission raising issues as to the reasonableness of service and the terms and conditions of attachment. The Commission has elected to regulate pole attachments and therefore, it has primary jurisdiction over the pole attachment dispute between PPL and MAW. See Final Rulemaking Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published by the Pennsylvania Bulletin on January 18, 2020 at 50 Pa. B 469).

78. – 79. Denied as stated. PPL narrowly interprets the Civil Case as a mere contract dispute over unpaid amounts for "Make Ready" work charges under the Agreement, which raises no technical issues that would warrant any consideration by the Commission based on its

exclusive subject matter jurisdiction. Despite the fact that there is a contract and that a payment dispute over “Make Ready” work charges exists, the Civil Case ultimately involves the resolution of regulatory issues which are under the Commission’s exclusive jurisdiction. See 66 Pa.C.S. § 501; see also Lansdale v. Philadelphia Elec. Co., 170 A.2d 565, 567 (Pa. 1961); PECO Energy v. Twp. of Upper Dublin, 922 A.2d 996, 1001 (Pa. Cmwlth. Ct. 2007). The Commission has elected to regulate pole attachments. See Final Rulemaking Order, PUC Docket No. L-2018-3002672 (Order entered August 29, 2019 and published by the Pennsylvania Bulletin on January 18, 2020 at 50 Pa. B 469). Accordingly, the Commission has primary jurisdiction over the pole attachment dispute between PPL and MAW, effectively staying the Civil Case and bifurcating all liability issues to be determined by the Commission. See Elkin v. Bell Tel. Co., 420 A.2d 371, 377 (Pa. 1980); see also Optimum Image, Inc. v. Philadelphia Electric Co., 600 A.2d 553, 555 (Pa. Super. 1991). Deferral to the Commission is appropriate where, as here, the Commission’s expertise will provide material aid in resolving the claims in the Civil Case.

III. CONCLUSION

For all of the foregoing reasons, MAW Communications, Inc. respectfully requests that the Commission deny the Preliminary Objections of PPL Electric Utilities Corporation.

Respectfully submitted,



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