

August 26, 2024

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

**RE: Adoption of Federal Communications Commission Regulations Pursuant to
52 Pa. Code § 77.4
Docket No. L-2018-3002672**

Dear Secretary Chiavetta:

On July 29, 2024, the Pennsylvania Public Utility Commission (the “Commission”) issued a Secretarial Letter in the above-captioned docket seeking comments from all interested parties on the adoption of two new Federal Communications Commission (“FCC”) pole attachment rules that became effective as of July 25, 2024. Specifically, the Commission is requesting comment concerning whether the Commission should allow the FCC’s additions of new subsection (c)(4) to existing regulation 47 C.F.R. § 1.1411 and new Section 1.1415 to become effective in Pennsylvania by operation of law sixty (60) days from publication of notice in the Pennsylvania bulletin, or whether the Commission should determine otherwise for good cause shown.

FirstEnergy Pennsylvania Electric Company (“FE PA” or the “Company”) appreciates the opportunity to provide comments on this topic and respectfully submits these comments in response to the July 29, 2024 Secretarial Letter. FE PA fully supports the Commission’s goals of rapid broadband deployment – particularly to those in unserved and underserved areas. FE PA serves much of rural Pennsylvania and recognizes the advantages and benefits to its customers and communities of the availability of fast, reliable broadband service. In support of this effort, FE PA has, over the past several years: 1) worked to streamline and standardize its attachment processes and procedures to handle high volumes of requests; 2) onboarded qualified personnel and contractors to perform make-ready; 3) investigated creative and innovative solutions in cooperation with attaching entities to increase efficiencies; and 4) restructured its organization to centralize the joint use administrative and engineering functions to best facilitate the safe, efficient, and cost-effective deployment of broadband in our communities.

This effort has been undertaken despite significant external challenges. The regulatory paradigm that governs pole attachments in most FirstEnergy territories is informed by FCC regulations which change regularly and continue to impose more and more obligations on pole

owners while containing virtually no guardrails for attacher behavior. The FCC's most recent mandate to pole owners, new subsection (c)(4) to existing regulation 47 C.F.R. § 1.1411 requiring the provision of pole inspection reports related to poles in an attacher's application, is particularly problematic. As explained more fully below, this rule requires the provision of information that is useless, confusing and outdated to attachers at the expense of critical internal pole owner resources. The rule also risks changing FE PA's risk assessment relative to the voluntary replacement of poles to accommodate new attachers. The adoption of this provision of 47 C.F.R. § 1.1411 would greatly hinder, rather than accelerate, broadband deployment in Pennsylvania.

These comments shall respond to the Commission's questions in the above-referenced Secretarial Letter.

- 1. Pursuant to 52 Pa. Code § 77.4(e), should the Commission allow the FCC's addition of new subsection (c)(4) to existing regulation 47 C.F.R. § 1.1411 to become effective in Pennsylvania by operation of law on the date that is sixty (60) days from publication of this notice in the Pennsylvania Bulletin, or should the Commission determine otherwise for good cause shown?**

FE PA Answer: The Commission should not allow the rule to become effective and should determine otherwise for good cause shown.

In *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment* (WC Docket No. 17-84), Fourth Report and Order, Declaratory Ruling, and Third Further Notice of Proposed Rulemaking, FCC 23-109 (rel. Dec. 15, 2023) at ¶¶ 7-38 ("*Fourth Report and Order*") the Federal Communications Commission ("FCC") amended its pole attachment make-ready rules to require utility pole owners:

to provide to potential attachers, upon request, the information contained in their most recent cyclical pole inspection reports, or any intervening, periodic reports created before the next cyclical inspection, for the poles covered by a submitted attachment application, including whether any of the affected poles have been "red tagged" by the utility for replacement, and the scheduled replacement date or timeframe (if any).¹

Importantly, the FCC had not solicited comment on whether or not it would be useful to provide pole inspection reports to requesting attachers and did not provide sufficient opportunity for the affected industry members to do so.² Many electric utilities have moved for reconsideration of this ruling, and that reconsideration is still pending.

¹ *Fourth Report and Order* at ¶23.

² The *Fourth Report and Order* indicates this ruling followed the request in paragraph 35 of the *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Second Further Notice of Proposed Rulemaking, 37 FCC Rcd 4144 (2022) ("*Second Further Notice*") to provide comment "on requiring utilities to provide more information about their poles to prospective attachers, in order to reduce disputes." Paragraph 35 of the *Second Further Notice* states:

In addition to the questions above, we seek comment on additional measures that the Commission could adopt that would enable attachers and utilities to avoid pole replacement disputes and/or quickly resolve them when they occur. For instance, ExteNet argues that the Commission should require utilities to provide potential attachers with information concerning the condition of, and

Pole owners would not have understood the FCC's *Second Further Notice* to contemplate the provision of pole inspection reports as the data contained therein is largely divorced from considerations affecting an attacher. For instance, the FE PA rate districts conduct pole inspections on 10-12-year cycles in Pennsylvania. The reports generated contain limited information such as pole height, class, age, location and status. They do not contain information regarding capacity, loading or attachment space. Further, depending on the age of the report, many poles may have been replaced or experienced a change in circumstance in the time between the reports' creation and an attachment request. As these reports are geared toward pole plant asset assessment, and not the considerations of potential attachers, the information contained therein, while also stale, is largely useless and uninterpretable to attachers.

The FCC rule entitles attachers to make these requests regarding poles for which an attacher has already submitted a proposal. A diligent attacher, however, would have already made a general assessment of the poles on its proposed route prior to making its proposal. Then, in the initial stages of the attachment process after the proposals are submitted, pole surveys are performed, and later, make-ready engineering, to determine how and where an attacher might safely attach to a pole. During this process, an attacher would learn whether a pole was designated for replacement due to deterioration, or if it needed to be replaced with a taller pole for their use due to lack of capacity. There is no substitute for the data collection and engineering that takes place during this stage of the process. This information is complete, up-to-date, and available within roughly the same timeframe that the inspection reports mandated by (c)(4) could be provided and evaluated.

Pole inspection reports would not assist an attacher in determining whether a particular pole line was already congested, nor would it assist the attacher in determining whether a particular pole line would require replacement due to additional height requirements. If the concern driving the rule is related to helping an attacher determine whether they would have to replace deteriorated poles in order to attach, the pole inspection reports are similarly irrelevant. First, attachers are not charged for poles that are on the schedule to be replaced due to deterioration. Second, the pole

replacement plans for, their poles. Would disputes concerning the need for pole replacements and associated costs be avoided if attachers had access to such information when planning their deployments? What specific data points would utilities need to provide potential attachers for such disputes to be avoided? What mechanism could utilities use to provide such information to attachers if required to do so (e.g., an internal utility database) and what costs would be associated with establishing the mechanism(s)? Does the Commission have jurisdiction to require utilities to provide potential attachers with information concerning the status of their poles? Are there any other revisions or additions that the Commission can make to its rules that would enable parties to avoid disputes concerning pole replacements or facilitate the private resolution of those disputes? Beyond the topic of pole replacements, are there other recurring issues with the pole attachment process that hinder the ability of broadband providers to deploy new facilities? Are there other infrastructure-related barriers that broadband providers are facing in their efforts to quickly deploy broadband? What steps should the Commission take to address these and other problems that may arise, and to accelerate their resolution?

The first indication that the Commission was considering a requirement to provide pole inspection reports was in the Commission's November 22, 2023, draft of the *Fourth Report and Order*, released just two weeks before the December 6, 2023, start of the Sunshine Period which prohibited further comment.

inspection reports are likely to inaccurately identify poles requiring imminent replacement due to the timing consideration mentioned above. Finally, the age and relative state of a pole is rarely determinative of whether an additional attachment can be made.

It is FE PA's hope that attachers would largely decline to take advantage of the opportunity to make these requests given the lack of value of cyclical pole inspection reports to their business plans. If attachers were to make these requests, however, the impacts to both parties could be negative in the following respects:

1. These reports could easily be misconstrued by attaching entities who lack understanding of utility asset management programs and prioritizations and have limited knowledge of complex utility pole maintenance issues. Sharing such information with communications attachers could expose both parties to time-consuming inquiries or challenges and potential disputes.
2. The collection of these reports will take resources away from the core application processing functions of already taxed joint use departments, particularly since the data will have to be pulled from the inspection reports and matched with the poles requested in proposals. It will also create increased costs for attachers who will have to reimburse pole owners for the time and resources spent collecting the reports.
3. The collection and disbursement of these reports will put pole owners' confidential and proprietary pole plant data at risk. Even if obtaining such information about poles throughout the system were useful, socializing such utility asset health information and making it publicly available raises security concerns. Confidentiality agreements do not sufficiently address such concerns, as the proliferation of such agreements and the ensuing volume of production would soon render them meaningless. A pole owner would not be able to track breaches.

A more cynical, but likely, result of the mandate to provide pole inspection reports is that they will be used by attaching entities to argue about how much they should pay for make-ready work. Attaching entities might question why any number of poles passed inspection, question the criteria employed for any given line of poles, question why the utility at issue does not follow the same process as some other utility, or "second-guess" regulated expenses, processes and procedures related to the utility's maintenance of its pole plant. Such disputes would be time consuming and resource consuming and thus, sharing this pole inspection information could disrupt utility resource planning and scheduling.

Such inquiries could also form the basis of post-attachment litigation, particularly with respect to pole replacements. Currently, it is FE PA's practice to replace poles to accommodate attacher capacity and height needs wherever it is possible to do so. Under the Federal Pole Attachment Act, pole owners are under no obligation to replace poles to accommodate attachment requests. FE PA performs these replacements, despite the significant time and resources required, because it shares the goal of promoting the ubiquitous deployment of broadband for its customers. Given the lengthy proceedings before the FCC that attachers have initiated to investigate the equity

of charging attachers for pole replacements necessitated by their attachment requests, there is reason to suspect that these reports may give attachers hope that they will have a second opportunity to litigate their payment obligations *after* pole owners have voluntarily done the work to replace poles.³ FE PA intends to seriously consider the litigation risks that may arise in the context of voluntary pole replacements in the event this rule is promulgated in Pennsylvania.

Some attaching entities are good partners who understand the importance of cooperation and proper engineering to ensure the safety of electric and communication workers and the public. These companies provide notice of significant deployment plans; meet with FE PA staff and contractors regularly to discuss issues, route priorities and challenges; follow the make-ready processes as currently outlined, and promptly pay for the work done on their behalf.

Other attaching entities attach to poles without application or prior to make-ready being complete; create dangerous conditions on poles for workers and the public; apply to attach to poles, but neglect to attach; waste countless hours arguing over contractor invoices, or just do not pay. These are the types of entities that would benefit from this rule, as it would waste pole owner resources that could hinder the processing of their competition's applications.

FE PA and other pole owners have many rule suggestions that could improve the speed and efficiency of broadband deployment in Pennsylvania, but the mandate of 47 C.F.R § 1.1411(c)(4) is not one of them. Nor does it provide any benefit to attachers attempting to plan fiber routes. Unnecessary busywork and disputes between attachers and pole owners inhibit the speed of attachment application processing and make-ready for *all* attachers. Both attachers and pole owners are working within highly compressed time periods with extremely limited resources to accomplish the goals of the federal and state broadband deployment plans. 47 C.F.R § 1.1411(c)(4) is antithetical to those goals and should not be adopted in Pennsylvania.

2. Pursuant to 52 Pa. Code § 77.4(e), should the Commission allow the FCC's new Section 1.1415 to become effective in Pennsylvania by operation of law on the date that is sixty (60) days from publication of this notice in the Pennsylvania Bulletin, or should the Commission determine otherwise for good cause shown?

FE PA Answer: The Commission should not allow the rule to become effective and should determine otherwise for good cause shown.

The addition of 47 C.F.R. § 1.1415 to the FCC's pole attachment regulations created: 1) a new set of dispute resolution procedures that appear to be specifically for deployment delay disputes, and 2) a "Rapid Broadband Assessment Team" ("RBAT") to handle and prioritize such disputes. The RBAT, as envisioned by the FCC would perform a swift review of the information provided by the complaining attacher, meet with the parties to discuss further, and then recommend a voluntary mediation process, placement on the Accelerated Docket, or other options within its discretion.

³ In the *Fourth Report Order*, the FCC declined to entertain attachers' ideas around the development of a methodology that would result in partial or contributory payments by the pole owner for pole replacements necessitated by an attachment request.

There are several reasons why the Commission should not allow the RBAT rules to become effective. First, the RBAT rules would require additional steps to occur and resources to be allocated at the Commission before creation of its own RBAT, making the RBAT rules unsuitable for 'auto-adoption.' Second, the complaint procedures in place in Pennsylvania already incorporate the Commission's mediation and formal complaint processes, the latter of which is governed by a requirement that an order will issue within 180 days of a complaint filing unless good cause is shown for extension of the timeline. The Commission's current procedures should therefore be sufficient to accomplish results within the amounts of time envisioned by the new FCC rules.

The Commission's current processes and procedures may already be superior to the new FCC rules, inasmuch as Parties desire to bring deployment-related complaints. Historically, attachers and pole owners have resolved deployment-related disputes among themselves because the circumstances are complex, and the fastest and best strategy for accomplishing one's purpose tends to be open communication and cooperation. The RBAT process requires several informal steps prior to the issuance of a recommendation as to the type of process the parties shall utilize to pursue resolution. On the other hand, the process seeks to limit the timeframes involved in judicially resolving a dispute. Consequently, the RBAT process may significantly disadvantage a defending party, but ultimately produce a longer course for a dispute than the Pennsylvania rules. In any case, due process must be preserved.

For the reasons stated above, FirstEnergy Pennsylvania Electric Company respectfully requests that the Commission decline to allow these new FCC rules to become effective in Pennsylvania.

Very truly yours,



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Company*

JWR/dml

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