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October 29, 2018

**VIA ELECTRONIC FILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, PA 17120

Re: Rulemaking to Assert the Assumption of Commission Jurisdiction Over Pole  
Attachments from the Federal Communications Commission  
Docket No. L-2018-3002672

Dear Secretary Chiavetta:

Enclosed please find Verizon's Comments Regarding the July 12, 2018 Notice of  
Proposed Rulemaking, in the above captioned matter.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

A handwritten signature in blue ink that reads "Suzan D. Paiva".

Suzan D. Paiva

SDP/sau

Enclosure

cc: Shaun Sparks, Law Bureau  
Colin W. Scott, Law Bureau

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

L-2018-3002672

**COMMENTS OF THE VERIZON COMPANIES**

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Attorney for the Verizon Companies

Dated: October 29, 2018

**TABLE OF CONTENTS**

I. Introduction..... 2

II. Comments ..... 5

    A. Recent FCC Developments..... 5

    B. The Importance Of Access To Poles, Ducts, Conduits And Rights-of-Way..... 7

    C. The Commission Should Only Reverse Preempt If It Quickly Adopts The FCC’s Rules, Including Future Changes And Interpretations..... 9

    D. The Commission Should Adopt The FCC’s Dispute Resolution Shot Clocks, And It Should Consider Other Dispute Resolution Options It Could Offer..... 12

    E. Answers To Additional Commissioner Questions..... 15

III. Conclusion ..... 18

## **I. Introduction**

Pennsylvania’s broadband future depends on policies that allow providers to quickly and efficiently place facilities out in the field by attaching to poles, accessing rights-of-way and buildings, and deploying backhaul. Removing obstacles that delay or discourage deployment is essential to attract investment, promote job growth and provide the foundation for innovative services that will improve lives.

Attachment to utility poles is key to this deployment. As the FCC has stated, “[n]ow more than ever, access to this vital infrastructure [utility poles] must be swift, predictable, safe and affordable, so that broadband providers can continue to enter new markets and deploy facilities that support high-speed broadband. Pole access also is essential to the race for 5G because mobile and fixed wireless providers are increasingly deploying innovative small cells on poles and because these wireless services depend on wireline backhaul.”<sup>1</sup>

Verizon<sup>2</sup> appreciates the Commission’s willingness to take an active role in making sure that the process of attaching communication facilities to utility poles does not hold back Pennsylvania’s network of the future. Verizon stands ready to work with the Commission to achieve that goal.

As one of the few providers with experience both as a pole owner and as a wireline and wireless attacher in Pennsylvania, Verizon brings a unique perspective to this important issue. Within its incumbent local exchange carrier (LEC) territory, Verizon both owns poles and attaches its wireline facilities to other parties’ utility poles. Verizon’s competitive LEC

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<sup>1</sup> *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (FCC, Rel. August 3, 2018) (“*FCC 2018 Poles Order*”), ¶ 1.

<sup>2</sup> These Comments are filed on behalf of the Verizon affiliated companies that could be affected by this proposal as pole owners or attachers, including Verizon Pennsylvania LLC, Verizon North LLC, MCImetro Access Transmission Services Corp., XO Communications Services, LLC, and Cellco Partnership, d/b/a Verizon Wireless.

operations also seek to attach to utility poles inside and outside Verizon territory. And Verizon Wireless is a nationwide wireless provider that attaches to poles owned by both Verizon and by other entities throughout the Commonwealth, as well as using wireline backhaul as a fundamental backbone of its network. Since 2015 Verizon has invested more than \$3.3 billion in Pennsylvania to meet and exceed our customers’ growing needs and also build for the future.<sup>3</sup> Without a doubt, the communications industry as a whole is making a huge investment in Pennsylvania’s infrastructure and is one of the key engines of the state’s economy.<sup>4</sup>

The FCC regulates pole attachments for wireless and wireline facilities in the majority of states, including Pennsylvania at this time.<sup>5</sup> Verizon is one of the “[s]takeholders” that has “long advocated for pole attachment reform before the FCC.”<sup>6</sup> The FCC has responded by taking steps over the years to improve its pole attachment rules, speed up its dispute-resolution process, and eliminate inefficiencies. Historically, Verizon—and others—have faced delays in obtaining access to poles at reasonable cost. When it can take six months to a year and piles of paperwork to get an attachment approved and on the pole (and even then, frequently at a rate far higher than what competitors are paying), broadband deployment is unreasonably delayed. The FCC has recently taken steps to address these problems.

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<sup>3</sup> “Verizon is building the future for our customers in Pennsylvania, investing more than \$3.3 billion since 2015.” <https://www.verizon.com/about/news/verizon-building-future-our-customers-pennsylvania-investing-more-33-billion-2015>.

<sup>4</sup> Accenture estimates that the wireless industry contributes \$475 billion to the nation’s economy (\$16 billion in Pennsylvania alone), supports 4.7 million US jobs and generates \$1 trillion in economic output. “How the Wireless Industry Powers the US Economy, Accenture Strategies (available at [https://www.accenture.com/t20180404T025245Z\\_w\\_us-en/acnmedia/PDF-74/Accenture-Strategy-Wireless-Industry-Powers-US-Economy-2018-POV.pdf](https://www.accenture.com/t20180404T025245Z_w_us-en/acnmedia/PDF-74/Accenture-Strategy-Wireless-Industry-Powers-US-Economy-2018-POV.pdf)).

<sup>5</sup> Pole attachment in this context is not just poles, but the “attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.” 47 U.S.C. § 224(a)(4).

<sup>6</sup> *Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission*, Docket No. L-2018-3002672 (Notice of Proposed Rulemaking Entered July 13, 2018) (“NPRM”) at 2.

Just since this Commission entered its *NPRM* in July, the FCC has issued two key orders (discussed in more detail below) to improve the climate for deploying small cells and other broadband facilities. On utility pole access specifically, the FCC, among other things, adopted “one-touch make-ready” to speed up the attachment process, clarified rules for “overlapping” to maximize usable space on poles, and reduced unnecessary costs and outdated rate disparities.

This Commission seeks comment on its proposal to “reverse preempt” the FCC by assuming state regulation of communication facility pole attachments, as permitted by 47 U.S.C. § 224. If the Commission makes the certification required by that federal statute, then the FCC’s pole attachment regulations would not apply in Pennsylvania and they would be replaced by state rules. But the Commission proposes that the substance of the applicable rules would not change. The Commission would adopt the FCC’s existing pole attachment regulations set forth at 47 C.F.R. §1.1401-1.1425<sup>7</sup> as its own, including future changes as those regulations may be amended. The primary purpose of reverse preemption would be to provide a state forum for dispute resolution that the Commission assures would be faster and more efficient than the existing FCC process, thereby removing obstacles to deployment in Pennsylvania and providing a better environment that will attract broadband investment.

The Commission’s proposal will only succeed if Pennsylvania maintains parity with the FCC rules, now and going forward, which is what the Commission proposes to do. If state regulation results in a lengthy fight over the applicable rules or creates an opening for parties to second-guess the FCC or make an end-run around rules or rates they do not like, then the resulting climate of regulatory uncertainty will make Pennsylvania less attractive for investment

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<sup>7</sup> Portions of these FCC regulations were rearranged and renumbered effective October 4, 2018 as a result of the FCC’s order updating its complaint procedures. *In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, EB Docket No. 17-245 (FCC Rel. July 18, 2018), published in the Federal Register on September 4, 2018 at 83 FR 44831.

and innovation, undermining the very result the Commission seeks to achieve. But if (as it proposes) the Commission can implement a quick and efficient mirroring of the FCC rules (including the most recent changes and any future updates, and consistency with FCC interpretations), then it can build upon this firm foundation to provide a helpful and robust state-specific dispute resolution forum.

## **II. Comments**

### **A. Recent FCC Developments.**

Like this Commission, the FCC is well aware of the crucial importance of removing unnecessary barriers to infrastructure deployment. “America is in the midst of a transition to the next generation of wireless services, known as 5G. These new services can unleash a new wave of entrepreneurship, innovation, and economic opportunity for communities across the country. The FCC is committed to doing our part to help ensure the United States wins the global race to 5G to the benefit of all Americans.”<sup>8</sup> The FCC has pledged to “act in partnership with our state and local leaders that are adopting forward leaning policies.”<sup>9</sup>

To that end, the FCC has issued two important orders in the recent weeks after this Commission entered its *NPRM*.

On August 3, 2018, the FCC issued a Third Report and Order and Declaratory Ruling that bears directly on the issue of attachments to utility poles that is the subject of this proceeding.<sup>10</sup> The FCC updated its pole attachment regulations (the ones the Commission proposes to adopt here) as follows:

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<sup>8</sup> *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 (FCC Rel. September 27, 2018) (“*FCC Small Cell Order*”) ¶ 1.

<sup>9</sup> *Id.* ¶ 4.

<sup>10</sup> *FCC 2018 Poles Order*.

- It adopted a “one-touch make ready” process for “simple” make-ready in the communications space of poles. This allows one entity (the attacher or its contractor) to do all the work to prepare the pole for the attachment instead of multiple parties working on the pole, an efficiency improvement the FCC estimates “could result in approximately 8.3 million incremental premises passed with fiber and about \$12.6 billion in incremental fiber capital expenditures.”<sup>11</sup>
- It codified and refined existing precedent that allows for “overlapping” attachments on top of existing equipment, with advance notice but no requirement for preapproval, which will considerably speed up getting certain attachments onto poles.
- It reduced potential costs and uncertainty by making clear that new attachers are not responsible for costs of repairing preexisting safety or code violations.
- It eliminated outdated disparities between the pole attachment rates incumbent local exchange carriers must pay compared to other similarly-situated attachers, adopting a rebuttable presumption for newly-renewed and newly negotiated agreements, while also setting a cap on rates.<sup>12</sup>

In addition to these rule changes, the FCC’s *2018 Poles Order* issued a declaratory ruling that 47 U.S.C. § 253, which renders unlawful state or local actions that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service,” forbids state and local moratoria on deployment of telecommunications facilities and also may require the FCC to preempt, on a case-by-case basis, state and local laws that inhibit the rebuilding or restoration of broadband infrastructure after a disaster.

On September 27, 2018, the FCC released another order that, while it does not bear directly on the utility pole attachments that are the subject of this rulemaking, provides relevant background for this Commission to understand the universe of potential barriers to infrastructure

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<sup>11</sup> *Id.* ¶ 2.

<sup>12</sup> The FCC’s revisions to its pole attachment rules could become effective as early as February 3, 2019, but might go into effect at a later date depending on the timing of the Office of Management and Budget’s review process. See *FCC 2018 Poles Order* ¶ 136 (discussing effective date of FCC’s modified pole attachment rules).

deployment.<sup>13</sup> Here, the FCC addressed state and local laws governing right-of-way use and the issuance of permits for small wireless facilities to be placed on existing utility poles, new poles, or government owned poles and other structures within the right-of-way. This FCC order provides a framework for state and local laws to avoid operating as a barrier to infrastructure deployment in violation of 47 U.S.C. §253 and 332, holding that these statutory provisions prohibit state and local government actions that “materially inhibit” the provision of communications service and providing specific guidance on activities relating to small cell deployment that would violate that standard and would be preempted by federal law.

**B. The Importance Of Access To Poles, Ducts, Conduits And Rights-of-Way.**

Attachment to utility poles has become more and more important to the industry with the widespread deployment of 4G wireless and the emergence of 5G wireless broadband service. The FCC estimates that “wireless providers will invest \$275 billion over the next decade in next generation wireless infrastructure deployments, which should generate an expected three million new jobs and boost our nation’s GDP by half a trillion dollars.”<sup>14</sup> But the FCC explains that these new networks will look different from the wireless facilities of the past that focused on the construction of large towers. “Over the last few years, providers have been increasingly looking to densify their networks with new small cell deployments that have antennas often no larger than a small backpack. . . . Indeed, estimates predict that upwards of 80 percent of all new deployments will be small cells going forward. To support advanced 4G or 5G offerings, providers must build out small cells at a faster pace and at a far greater density of deployment than before.”<sup>15</sup>

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<sup>13</sup> *FCC Small Cell Order*.

<sup>14</sup> *FCC Small Cell Order* ¶ 2.

<sup>15</sup> *Id.* ¶ 3.

It is already well-known that poles are vital to the placement of wireless small cells in the field. But wireline fiber deployment is also crucial. Access to poles, ducts, conduits and rights-of-way is required for fiber backhaul, which is an “integral component of a wireless service provider’s network” because it “link[s] a mobile wireless service provider’s cell sites to the mobile switching centers that provide connections to the provider’s core network, the public switched telephone network, or the Internet, carrying wireless voice and data traffic for routing and onward transmission.”<sup>16</sup> “Backhaul services are generally provided by incumbent local exchange carriers (ILECs), competitive local exchange carriers (CLECs), competitive fiber and microwave wholesalers, cable providers, and independent backhaul operators” and the cost of backhaul is a “significant percentage” of the cost of deploying a modern broadband network.<sup>17</sup> “As wireless service providers increase their effort to deploy their small cells in the coming years, backhaul operators, cable companies, fiber providers, and tower operators are building out fiber networks to provide backhaul connectivity.”<sup>18</sup> And of course wireline fiber facilities also provide broadband service themselves, particularly the ultra-high bandwidth now required by commercial enterprises, universities, hospitals and the like. All of this deployment depends on reasonably quick access to utility poles at competitive rates, terms and conditions.

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<sup>16</sup> *Annual Report And Analysis Of Competitive Market Conditions With Respect To Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 16-137, Nineteenth Report (FCC, Rel. September 23, 2016), ¶ 75.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

**C. The Commission Should Only Reverse Preempt If It Quickly Adopts The FCC’s Rules, Including Future Changes And Interpretations.**

According to this Commission’s *NPRM*, “[t]he initial step in this process is to establish which pole attachment rules the Commission will apply and how it will apply them,” and it asks for comment on the Commission’s “proposal to adopt the FCC pole attachment regulatory regime without modification at this time.”<sup>19</sup> The proposed regulations state that:

- “This chapter adopts the rates, terms and conditions of access to and use of poles, ducts, conduits and rights-of-way to the full extent provided for in 47 U.S.C. § 224 and 47 C.F.R. 1.1401 – 1.1425, inclusive of future changes as those regulations may be amended.”
- “When exercising authority under this chapter the Commission will consider Federal Communications Commission orders promulgating and interpreting federal pole attachment rules and federal court decisions reviewing those rules and interpretations as persuasive authority in construing the provisions of 47 U.S.C. § 224 and 47 C.F.R. 1.1401 – 1.1425.”

Verizon supports these provisions as the Commission has proposed them. This is a key issue. If the Commission does not or cannot adopt the FCC rules quickly and in total, including automatic updates for future changes, then it should not reverse preempt the FCC at all.

The simple truth is that the delay and regulatory uncertainty that would result from any course of action *other* than a straight adoption of the FCC rules would undermine the entire purpose of the Commission involving itself in this issue and would harm Pennsylvania’s interests in the race for broadband investment and 5G technology. As the Commission itself recognized, one of the benefits of its proposal is that “it preserves the status quo in that it does not represent a substantive change in law. As such, it does not impose any unexpected burdens on pole owners or attaching entities. Stakeholders will operate under familiar rules and rates such that Commission jurisdiction will not disrupt existing business practices or regulatory

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<sup>19</sup> *NPRM* at 2.

expectations.”<sup>20</sup> The Commission correctly noted that, given all of the work that the FCC and the industry have put into the FCC’s rules and interpretations, “Pennsylvania-specific regulations would likely provide only incremental improvement over what are now well-established installation practices.”<sup>21</sup>

The Commission should make clear that it is adopting the FCC regulations in total, including automatic adoption of future changes and relying on FCC interpretations, and that it will not entertain arguments for different rules. It is very important that the Commission not turn this rulemaking into an opportunity for parties dissatisfied with the outcome of particular issues at the FCC to seek another bite at the apple. That would be the worst thing the Commission could do for Pennsylvania because it would create a climate of regulatory uncertainty.

When it comes to the Commission’s goal of creating a stable and certain Pennsylvania regulatory environment attractive for investment, speed matters. As the FCC recognized, “[m]oving quickly to enable this transition is important, as a new report forecasts that speeding 5G infrastructure deployment by even one year would unleash an additional \$100 billion to the U.S. economy.”<sup>22</sup> A lengthy open proceeding pending before this Commission, where the rules and costs for attaching to utility poles and resolving disputes are thrown into uncertainty, could itself constitute a barrier to entry, or at least become a discouraging factor. An uncertain and unattractive regulatory climate could deter investment and possibly drive early waves of deployment to other states. Implementing the FCC’s pole attachment rules quickly and without regulatory uncertainty is particularly important for rural communities. As the FCC noted, “[r]emoving barriers can also ensure that every community gets a fair shot at these deployments

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<sup>20</sup> *NPRM* at 11.

<sup>21</sup> *Id.*

<sup>22</sup> *FCC Small Cell Order* ¶ 2.

and the opportunities they enable.”<sup>23</sup> A stable, pro-competitive framework for pole attachments will enable Pennsylvania’s rural areas to compete for investment dollars with similar areas in other states.

The Commission has the authority to adopt these FCC rules along with future changes and interpretations. Where a federal agency has already invested the time and administrative resources to establish a comprehensive set of regulations, there is precedent for Pennsylvania agencies to adopt those regulations, by reference, as their own,<sup>24</sup> including future modifications.<sup>25</sup> The Pennsylvania Legislature also has enacted provisions automatically adopting FCC regulations, including future changes.<sup>26</sup> The Commission has already determined that state and federal statutes provide it the authority to do the same here.<sup>27</sup>

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<sup>23</sup> *FCC Small Cell Order* ¶ 2.

<sup>24</sup> *See e.g.*, 25 Pa. Code § 127.83 (“The Prevention of Significant Deterioration requirements promulgated in 40 CFR 52 by the Administrator of the EPA under section 161 of the Clean Air Act (42 U.S.C.A. § 7471) are adopted in their entirety by the Department and incorporated herein by reference”); 25 Pa. Code § 215.1 (“Title 10 Chapter I (Nuclear Regulatory Commission) Parts 19, 20, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 70, 71 and §§ 150.1, 150.2, 150.3, 150.11 and 150.20 of the CFR are incorporated by reference with the exceptions set forth in paragraphs (1) -- (14)”); 25 Pa. Code § 217.131 (“Except as provided in this subchapter, the requirements of 10 CFR Part 30 (relating to rules of general applicability to domestic licensing of byproduct material) are incorporated by reference”); 28 Pa. Code § 201.2 (“The Department incorporates by reference Subpart B of the Federal requirements for long-term care facilities, 42 CFR 483.1 -- 483.75 (relating to requirements for long-term care facilities) revised as of October 1, 1998, as licensing regulations for long-term care nursing facilities with the exception of the following sections and subsections...”); 52 Pa. Code § 37.204 (“The Commission incorporates by reference the following portions of 49 CFR (relating to transportation), subject to §§ 37.202 and 37.205 (relating to definitions; and additions or modifications to 49 CFR”); 67 Pa. Code § 231.1 (“Much of this chapter incorporates by reference 49 CFR Parts 382, 385 and 390 – 396”).

<sup>25</sup> 25 Pa. Code § 260a.3 (“The effective date for the *Code of Federal Regulations* incorporated by reference in this article is May 1, 1999. The incorporation by reference includes any subsequent modifications and additions to the CFR incorporated in this article.”)

<sup>26</sup> *See, e.g.*, 58 P.S. § 801.302(b)(1) (“The safety standards and regulations for pipeline operators shall be those issued under the Federal pipeline safety laws as implemented in 49 CFR Subtitle B Ch. I Subch. D (relating to pipeline safety)” and “Amendments to Federal pipeline safety laws shall have the effect of amending or modifying the safety standards and regulations for the transportation of gas and hazardous liquids in this Commonwealth”).

<sup>27</sup> *NRPM* at 10 (“Under that state authority the Commission may adopt current FCC regulations and applicable federal precedent to regulate the full scope of pole attachments in Pennsylvania.”)

**D. The Commission Should Adopt The FCC’s Dispute Resolution Shot Clocks, And It Should Consider Other Dispute Resolution Options It Could Offer.**

The Commission concludes that “pole owners and attaching entities seek more timely alternatives to the FCC complaint resolution process,” and “[t]o address this issue, the Commission can make its quasi-judicial function available to stakeholders.”<sup>28</sup> According to the Commission, “adoption of existing FCC pole attachment rules and rates will permit timely stakeholder access to adjudicatory resources unique to our Commonwealth – the administrative hearings before this Commission and the specialized administrative jurisdiction of Commonwealth Court.”<sup>29</sup>

As an initial matter, the federal statute that authorizes reverse preemption requires the Commission to make certain commitments as to the timeliness of its complaint resolution.

- (3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—
  - (A) unless the State has issued and made effective rules and regulations implementing the State’s regulatory authority over pole attachments; and
  - (B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—
    - (i) within 180 days after the complaint is filed with the State, or
    - (ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

47 U.S.C. § 224(c)(3). Consistent with this statute, the FCC’s regulations provide for jurisdiction to revert back to the FCC if the state does not meet the statutory deadline in any individual case.

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<sup>28</sup> *Id.* at 10-11.

<sup>29</sup> *Id.* at 11.

- (f) Notwithstanding any such certification, jurisdiction will revert to this Commission with respect to any individual matter, unless the state takes final action on a complaint regarding such matter:
  - (1) Within 180 days after the complaint is filed with the state, or
  - (2) Within the applicable periods prescribed for such final action in such rules and regulations of the state, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

47 CFR § 1.1405(f).

The FCC has also adopted shot clocks for its own resolution of pole attachment complaints, which are set forth in the regulations the Commission proposes to adopt. In November of 2017 the FCC established a 180-day shot clock to decide complaints alleging denial of access.<sup>30</sup> In July of 2018 it established that a 270-day shot clock applies to pole attachment complaints alleging unjust and unreasonable rates, terms, and conditions. These shot clocks are codified at 47 C.F.R. § 1.1414 and 47 C.F.R. § 1.740.<sup>31</sup> At a minimum, the Commission's handling of pole attachment complaints should comply with these shot clocks, which it would adopt as its own by adopting the FCC regulations. The Commission could also endeavor to handle matters more quickly than the FCC.

In addition to following the FCC shot clocks, the Commission could offer alternatives such as mediation<sup>32</sup> or abbreviated dispute resolution.<sup>33</sup> These processes would be more efficient if the Commission assigns them to a core of subject matter expert staff trained in legal and technical issues relating to pole attachments. It would also be helpful if the Commission could provide assistance and incentive for negotiated settlement of disputes.

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<sup>30</sup> *In the Matter of Accelerating Wireline Broadband Deployment By Removing Barriers To Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd 11128, 11132, para. 9 (2017).

<sup>31</sup> The FCC's Enforcement Bureau has discretion to pause the applicable shot clock if actions beyond its control are responsible for delaying review of the complaint.

<sup>32</sup> See 52 Pa. Code § 41.31.

<sup>33</sup> See *Order Establishing Revised Interim Guidelines for Abbreviated Dispute Resolution Process*, July 13, 2000, Published at 30 Pa. B. 3808.

Verizon is unable to forecast the caseload the Commission might expect. The FCC's website shows two open pole attachment complaint proceedings, both of which involve Pennsylvania utilities.<sup>34</sup> Verizon does not itself have any open FCC pole attachment complaints. The FCC's most recent changes to its pole attachment regulations in August of 2018 added a provision relating to complaints over the rates that utilities can charge incumbent LECs through contracts (joint use/joint ownership).

In complaint proceedings challenging utility pole attachment rates, terms, and conditions for pole attachment contracts entered into or renewed after the effective date of this section, there is a presumption that an incumbent local exchange carrier (or an association of incumbent local exchange carriers) is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system providing telecommunications services for purposes of obtaining comparable rates, terms, or conditions. In such complaint proceedings challenging pole attachment rates, there is a presumption that incumbent local exchange carriers (or an association of incumbent local exchange carriers) may be charged no higher than the rate determined in accordance with § 1.1406(e)(2). A utility can rebut either or both of the two presumptions in this paragraph (b) with clear and convincing evidence that the incumbent local exchange carrier receives benefits under its pole attachment agreement with a utility that materially advantages the incumbent local exchange carrier over other telecommunications carriers or cable television systems providing telecommunications services on the same poles.

47 C.F.R. § 1.1413(b).<sup>35</sup> Verizon is or will be negotiating new or renewal rates with some Pennsylvania utilities under this standard, but is hopeful that matters can be resolved on a business-to-business basis. However, this is an area in which the Commission could be called upon to address complaints if it reverse preempts the FCC. Given the importance of wireline

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<sup>34</sup> See EB - Market Disputes Resolution Division Pending Complaints, <https://www.fcc.gov/general/eb-market-disputes-resolution-division-pending-complaints>. The FCC's rules require that, upon its receipt of a certification of reverse preemption, "the [FCC] shall forward any pending case thereby affected to the state regulatory authority, shall so notify the parties involved and shall give public notice thereof." 47 C.F.R. § 1.1405(d). The Commission might consider expressly excluding pending FCC proceedings from reverse-preemption, so that the FCC could retain jurisdiction over those proceedings and parties would not be forced to undertake the delay and additional expense of separate dispute resolutions that are already underway and in queue to be determined by the FCC.

<sup>35</sup> This is one of the sections that will take effect on or after February of 2019.

fiber backhaul and wireline broadband facilities generally, it would be important to handle any such cases expeditiously and consistent with FCC precedent.

**E. Answers To Additional Commissioner Questions.**

In Statements issued along with the *NPRM* some of the Commissioners asked additional questions. To the extent those questions were not already addressed in the discussion above, Verizon provides the following brief responses.

- ***Update Recent FCC Activity (Chairman Brown)***. This information is provided in the discussion above.
- ***Impact of Broadband Deployment Advisory Committee (Chairman Brown)***. BDAC's purpose is to make recommendations to the FCC, but FCC action is required to carry out any of those recommendations. Some BDAC recommendations are reflected in the FCC's recent orders discussed above. So long as this Commission keeps its rules in parity with those of the FCC it will benefit from any BDAC recommendations the FCC chooses to adopt.
- ***Impact of Future Pennsylvania Statutes (Vice-Chairman Place)***. At this time Verizon is not aware of any Pennsylvania statute that would be inconsistent with the Commission's adoption of the FCC's rules on pole attachments. There is a pending bill regarding access to government rights-of-way and property for small cell deployment, but it does not address utility pole attachments and does not present any risk of inconsistency.<sup>36</sup> If such an issue were to arise in the future the Commission can address it at that time.
- ***Process for Updating Pennsylvania Rules for Future FCC Changes (Vice-Chairman Place)***. This is an important question that is addressed in some detail above. The Commission's purpose in reverse preempting the FCC on utility pole attachments is to encourage and enable speedy and efficient facility deployment in Pennsylvania. This goal would be undermined if updating the Commission's rules requires time-consuming additional rulemakings with duplicative litigation of issues already being addressed before the FCC. Successful achievement of the Commission's streamlining goals requires a process by which future changes to the FCC rules are automatically included in Pennsylvania without unnecessary litigation and process. *See, e.g.*, 25 Pa. Code § 260a.3 ("The incorporation by reference includes any subsequent modifications and additions to the CFR incorporated in this article.")

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<sup>36</sup> HB 2564.

- ***Will Pennsylvania-Specific Changes To The FCC Rules Be Needed (Vice-Chairman Place).*** Verizon is not aware of any Pennsylvania-specific issues that need to be addressed at this time. As discussed above, opening the regulations to changes from the FCC rules could increase costs and litigation and create a climate of regulatory uncertainty that would be counterproductive to the Commission’s goal of improving the pole attachment process in Pennsylvania.<sup>37</sup>
- ***Forecast of Disputes (Commissioner Kennard).*** This issue was discussed in the comments above.
- ***Unauthorized Attachments (Commissioner Kennard).*** In its *2011 Poles Order* the FCC determined that unauthorized attachments should be addressed contractually where possible and declined to adopt rules on this issue. Existing contracts should contain terms for handling unauthorized attachments and parties should enter into contracts to resolve claims of unauthorized attachments and provide rates. “If an attacher who has made unauthorized attachments without any contract with the utility refuses to enter into a pole attachment agreement, the utility may seek other remedies including, for example, an action in state court for trespass.”<sup>38</sup> The Commission observes that “many pole attachments involve jurisdictional utility property subject to the full provisions of the Public Utility Code,”<sup>39</sup> which may provide the Commission authority to handle disputes that cannot be handled contractually as well. No other action is needed at this time.
- ***Streamlining Adjudicatory and Dispute Resolution Process (Commissioner Kennard).*** This information is provided in the discussion above. At a minimum the Commission must provide a process that complies with the deadlines in 47 U.S.C. § 224 and, by adopting the FCC’s rules, it would be adopting the FCC’s shot clocks. The Commission could also endeavor to resolve complaints faster than the FCC and provide alternative dispute resolution options.
- ***Adopting New York Process (Commissioner Kennard).*** This Commission’s own rules and processes provide sufficient flexibility to address this issue as discussed in more detail above, and it is not necessary to look to other states’ processes.
- ***Comprehensive Registry of Poles (Commissioner Kennard).*** The FCC considered and rejected this proposal in 2011 and there is no need to reconsider that decision. The FCC found that the burdens of such an undertaking far outweigh any potential benefits because it “would take years and hundreds of millions dollars to create, then would require annual

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<sup>37</sup> One possible Pennsylvania-specific change would be if the Commission were able to regulate pole attachments for owners that are exempt from the FCC’s jurisdiction today. As the *NPRM* noted, “[t]he PAA expressly exempts cooperative utilities, railroads, and federal or state-owned utilities from the definition of a ‘utility,’ and thus, from the reach of the PAA,” and under the Public Utility Code the Commission also “does not regulate some of the entities exempted by the PAA.” *NPRM* at 9. If the scope of the Commission’s jurisdiction were to expand, it could improve upon the federal regime by extending the rules to additional categories of pole owners.

<sup>38</sup> *In re Implementation of Section 224 of the Act*, WC Docket No. 07-245, 26 FCC Rcd 5240, 5280-5281 (F. C.C. April 7, 2011) (“*FCC 2011 Poles Order*”) ¶¶ 113-117.

<sup>39</sup> *NPRM* at 10.

maintenance. Such a data collection would necessarily take significant time for the millions of poles that a single utility can own, and it is not likely that such data for all utilities would be kept sufficiently up-to-date for a prospective attacher to rely on for access and network planning. Major events like storms can compromise the integrity of data, as can the activities of unauthorized attachers. Moreover, legitimate concerns exist about making critical infrastructure information and proprietary information available to the public, and about whether a database would be susceptible to abuse by unauthorized attachers. Meanwhile, the record reflects significant doubt--from both utilities and telecommunications providers--that improving the collection and availability of data would have much value to attachers. . . . After considering the record, we find that the burdens associated with an information collection requirement likely outweigh the benefits, and therefore, we decline to adopt such a proposal at this time.”<sup>40</sup> In Verizon’s experience, the pole owners (both Verizon and the electric utilities) already have in place workable methods of communicating with joint users/owners and attachers, usually electronically, and there is no need to incur the cost and complexity of forcing providers to adopt a state-mandated registry or database.

- ***Standardized Agreements or Tariffs (Commissioner Kennard)***. The FCC does not require pole owners to maintain standardized agreements or tariffs for pole attachments and Verizon does not see a need for such a state-specific requirement in Pennsylvania. Tariffs in particular are a cumbersome relic of regulation that should not be used in this context. Pole owners are free to publish template agreements if they wish, but there should be no requirement to do so.
- ***Ongoing Working Groups (Commissioner Kennard)***. The time and expense of ongoing working groups does not appear necessary at this time. This issue could be considered at a later date if specific issues arise that would be efficiently resolved through such discussions.
- ***Additional Caseload (Commissioner Sweet)***. The Commission can monitor its caseload for pole attachment issues but there is no need for specific action at this time. Given that regulated telephone line counts have declined dramatically over the years,<sup>41</sup> the caseload for retail telecommunications complaints and other issues generally continues to decrease and is only a small fraction of what it used to be. Thus, there may not be a material net increase in caseload relating to communications providers with the addition of pole attachment disputes.

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<sup>40</sup> *FCC 2011 Poles Order* ¶ 89.

<sup>41</sup> The vast majority (at least 85%) of voice connections in Pennsylvania are from providers and technologies that are not regulated by this Commission, and regulated line counts have declined from almost 9 million in 1999 to 2.7 million and shrinking as of 2016. FCC Wireline Competition Bureau, *Voice Telephone Subscriptions as of 12/31/16* (Rel. 2/18) (available at <https://www.fcc.gov/voice-telephone-services-report>).

### **III. Conclusion**

Verizon appreciates the opportunity to comment on the Commission's reverse preemption proposal. Verizon supports the Commission's proposal if the result would improve the regulatory climate in Pennsylvania for pole attachments and thereby encourage investment and deployment in the state. To do so, the Commission must maintain regulatory certainty by adopting the FCC rules quickly and in total, without allowing parties to disrupt certainty by seeking a second bite at the apple on issues the FCC has already decided. Under those terms, the Commission can build upon the shot clocks already existing in the FCC rules to employ creative dispute resolution procedures and remove unnecessary barriers to deployment.

Respectfully submitted,



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Dated: October 29, 2018