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November 28, 2018

**VIA ELECTRONIC FILING**Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120**Re: Assumption of Commission Jurisdiction Over Pole Attachments from the  
Federal Communications Commission; Docket No. L-2018-3002672**

Dear Secretary Chiavetta:

Enclosed for filing at the above-captioned docket please find the Reply Comments of the FirstEnergy Companies.

Copies of the Reply Comments are also served electronically upon the persons listed below as requested in the Commission's Rulemaking Order.

Very truly yours,

  
John L. Munsch  
Attorney

JLM:dml

Enclosures

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**L-2018-3002672**

**REPLY COMMENTS OF THE FIRSTENERGY COMPANIES**

**I. Introduction**

Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company (the “Companies”) provide Reply Comments in response to the Notice of Proposed Rulemaking of the Pennsylvania Public Utility Commission (“Commission”) at the above-captioned docket as published in the Pennsylvania Bulletin on Saturday, September 29, 2018.<sup>1</sup> The Commission’s Notice of Proposed Rulemaking solicited comments and reply comments about the Commission’s proposal to assert Pennsylvania jurisdiction over utility pole attachments pursuant to the Telecommunications Act of 1996 (“TA96”).<sup>2</sup> The Notice requested comments of interested parties within 30 days of the publication and reply comments 15 days thereafter. The Companies submitted Comments to the Commission on October 29, 2018, and hereby submit Reply Comments.

As explained in their Comments, and reiterated in these Reply Comments, the Companies cautiously support the Commission’s proposal to assert reverse preemption from the Federal Communications Commission (“FCC”) over utility pole attachments.

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<sup>1</sup> 48 Pa.B. 6273.

<sup>2</sup> The Pole Attachment Act section of TA96 is found at 47 U.S.C. § 224.

## II. Background

Pole attachments in Pennsylvania are subject to federal jurisdiction by the FCC pursuant to TA96. The FCC has extensive regulations governing access to utility poles by cable and telecommunications carriers covering a wide range of pole attachment issues, including rates, timelines for attachment, and complaint procedures.<sup>3</sup> TA96 provides that a state may assert jurisdiction over pole attachments by notifying the FCC that the state is asserting reverse preemption and assuming state jurisdiction over pole attachments.<sup>4</sup> To date, 20 states and the District of Columbia have opted to regulate pole attachments through reverse preemption.

The Companies are subsidiaries of FirstEnergy Corp. (“FirstEnergy”), which owns 10 electric distribution companies (“EDCs”) providing electric distribution service to more than 6 million customers in 6 states. The EDCs own, in whole or in part, over 4 million above-ground electric distribution poles. In Pennsylvania, the Companies provide service to more than 2 million customers and own, in whole or in part, more than 1.5 million electric distribution poles.

## III. Reply Comments

The Companies’ primary observation about commenters’ positions is that there is nearly unanimous support for reverse preemption.<sup>5</sup> The primary division among commenters appears to be whether the Commission should adopt the FCC regulations, or whether the Commission should specifically allow room for the Commission’s promulgation of Pennsylvania regulations. Some commenters want the Commission immediately to adopt the FCC regulations, including the new

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<sup>3</sup> FCC regulations regulating pole attachments are found at 47 C.F.R. §§ 1.1401-1.1418.

<sup>4</sup> 47 U.S.C § 224 (c).

<sup>5</sup> Crown Castle Fiber LLC and affiliates directly oppose reverse preemption, though their opposition appears conditional in that they stated that, should the Commission assert reverse preemption, the Commission should adopt the FCC’s existing attachment rules and recent and future changes. (Crown Castle Comments, pp. 1-2.)

revisions to the FCC rules, as well as future, yet unseen FCC changes to its rules. Other commenters support reverse preemption but oppose such a “turn-key” adoption of new FCC rules and suggest that new rules be vetted through a Pennsylvania rulemaking process, presumably with opportunity for comments and reply comments, and with the opportunity for the Commission to modify proposed FCC rules.

The Companies fall into the latter category.<sup>6</sup> The Companies support reverse preemption and believe the Commission should not adopt new FCC regulations absent a traditional Pennsylvania process for rulemaking and possible modification. The Companies’ approach is based on their central premise in supporting Commission jurisdiction over pole attachments. That is, the Companies believe the Commission maintains a better understanding of electric distribution pole safety, reliability and cost recovery over and above that of the FCC. The Companies’ suggest that the FCC’s expertise seems to concentrate on communication facilities and communication industry expansion, not on electric distribution safety, reliability and cost recovery. The automatic amendment of Commission regulations to apply future federal changes to corresponding parts of the FCC regulations would contravene fundamental fairness and due process for Pennsylvania stakeholders, including EDCs, telecommunication providers, electrical and communication workers, and electric and telecommunication customers. Pennsylvania stakeholders should have a direct forum to present their issues over federal changes that would immediately affect Pennsylvania. Moreover, affected parties in the Commonwealth may not recognize that FCC rulemakings would apply automatically in Pennsylvania, particularly given Pennsylvania’s apparent assertion of jurisdiction over pole attachments.

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<sup>6</sup> The Companies’ position in this respect is generally parallel with the Comments of PPL Electric Corporations (PPL Comments pp. 3-4,) the Comments of PECO Energy Company (PECO Comments pp. 2-5), and the Comments of the Communications Workers of America (CWA comments, pp. 2-5).

The Companies support Comments that recognize that the Commission retains flexibility and discretion to form Pennsylvania’s own interpretation for the benefit of the Commonwealth. PECO Energy Company (“PECO”) in its Comments<sup>7</sup> proposes specific changes to the Commission’s proposed pole attachment regulation at Chapter 77 to Title 52 of the Pennsylvania Code.

The Companies support such a revision of the Commission’s proposed Section 77.5(c). That section, as proposed in the Commission’s NOPR, would recognize that the Commission will consider FCC rulemakings and federal court decisions as persuasive authority in Pennsylvania pole attachment rulemakings. The Companies suggest that proposed Section 77.5(c) be revised to add a new phrase, as shown in bold as follows:

§ 77.5. Resolution of disputes.

....

(c) 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, **but may deviate from those rulings to make its own determinations of whether rates, terms, and conditions of pole attachments are just and reasonable.**

Similarly, the Companies support an addition to proposed regulation Section 77.3. That section, as proposed in the Commission rulemaking, reflects the federal requirement that any state exercising reverse preemption must recognize the interest of pole attachers as well as consumers of utility services. The Companies recommend that the proposed new regulation be modified to

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<sup>7</sup> PECO Comments, pp. 2-4.

recognize that a primary responsibility of the Commission is to maintain the safety and reliability of utility service. The addition to proposed Section 77.3(b) is shown in bold after the existing proposed Section 77.3(b), as follows:

§ 77.3. Commission oversight.

....

(b) The Commission has the authority to consider, and will consider, the interests of the subscribers of the services offered via pole attachments, as well as the interests of the consumers of the utility services. **In addition, in determining whether rates, terms, and conditions are just and reasonable, the Commission will consider compliance with applicable safety standards and the maintenance and reliability of electric distribution, telecommunication and cable services.**

The foregoing changes to the Commission's proposed regulations will reflect the Commission's ongoing responsibility and expertise over rates, terms and conditions of utility service that are at the heart of the Companies' support for the Commission's exercise of reverse preemption.

It is significant that the FCC recently issued new and extensive final pole attachment regulations. The final revised FCC regulations were released August 3, 2018 after a lengthy rulemaking process.<sup>8</sup> The FCC directed that its revised regulations become effective the later of: (1) six months after the August 3, 2018 release of the regulations; or (2) 30 days after the FCC publishes a notice in the Federal Register announcing approval of the regulations by the Federal Office of Management and Budget.<sup>9</sup> The FCC's rulemaking makes numerous changes to its

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<sup>8</sup> Third Report and Order and Declaratory Ruling, FCC 18-111, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment. August 3, 2018; WC Docket No 17-84 and WT Docket No. 17-79. ("Third Report and Order"). The Order portion was published in the Federal Register September 14, 2018, 83 Fed. Reg. 46812.

<sup>9</sup> 83 Fed. Reg. 46812 at ¶166.

existing pole attachment regulations governing attachment rates and procedures. The Companies support aspects of the FCC regulations, but also have objections to the FCC's proposed regulations, including issues as summarized below. To that point, the Companies submitted extensive Comments and Reply Comments during the FCC rulemaking as part of the Coalition of Concerned Utilities,<sup>10</sup> and on October 15, 2018 requested reconsideration of the FCC's August 3, 2018 Order as part of the same Coalition. The Companies attached this Petition for Reconsideration as Attachment A to the Companies' Comments submitted October 29, 2018.

The Companies agree in part with Comments of the Communications Workers of America ("CWA")<sup>11</sup> that the new FCC regulations significantly modify procedures for pole attachments, and that portions of the new regulations are inconsistent with the provision of adequate, efficient, safe, and reasonable utility facilities, as required by Section 1501 of the Public Utility Code.<sup>12</sup> The Comments of the CWA strongly explain that work on utility poles presents a dangerous environment, even solely in the communications space, with major ramifications for electric reliability, and must be performed by properly supervised highly skilled, highly trained line workers.

The Companies reiterate their concerns with portions of the FCC regulations, released August 3, 2018.

- The FCC's regulations provide that if an electric utility fails to meet the new make-ready construction deadlines for attachers, the attacher may hire utility-approved contractors to perform make-ready work, not only in the

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<sup>10</sup> The Coalition of Concerned Utilities comprises Arizona Public Service, Consumers Energy, Eversource, Exelon Corporation, FirstEnergy Corp., Hawaiian Electric, Kansas City Power and Light, Northwestern Energy, Portland General Electric, Puget Sound Energy, South Carolina Electric & Gas, and The AES Corporation.

<sup>11</sup> CWA Comments, pp. 6-8.

<sup>12</sup> 66 Pa.C.S. §1501.

communications space (which is the current rule) but also in the electric space, creating significant safety concerns.

- The FCC's regulations provide that if a utility does not maintain a list of utility approved contractors, or if those contractors are too busy, the attacher could hire its own contractor which the utility must accept if the contractor meets criteria specified by the FCC. It is vital that communications attachers not have any authority to conduct activity in the electric space.
- There are critical safety and reliability issues that arise from working on electric facilities that the FCC thus far has simply failed to grasp. For example, even while acknowledging that pole replacements are too complex to allow for "self-help," the FCC seems not to understand that many of the same de-energization, switching, and other coordination also necessarily attends the rearranging of electric facilities. It is imperative that the Commission bring its electric distribution experience and oversight into the process instead of simply adopting such dangerous regulatory decisions.
- Also concerning is the FCC's apparent lack of understanding around the risks of overlashing. The FCC would allow a communication company to overlash an existing communication cable without submitting any engineering analysis nor requiring approval by the pole owner. Even more alarming is the FCC will allow overlashing on poles with pre-existing NESC violations. The Companies, through the Coalition of Concerned Utilities, provided detailed data about the safety and reliability risks that overlashing presents, yet the FCC simply decreed there was no evidence

that overloading presents safety or reliability issues. Indeed, under the FCC's new rule an overloading attacker is not even required to evaluate whether the attachment conditions are simple or complex. The only concession the FCC makes to utilities' very real safety concerns is to allow pole owners to make an after-the-fact evaluation via an engineering study at their own cost. The Companies hope the Commission will recognize that some decisions that favor attackers necessarily disfavor electric utilities and their customers.

The Comments submitted by parties indicate that there is consensus in three areas about which the Commission requested comments. Those three areas are the advisability of standard pole attachment agreements, the advisability of standard pole attachment tariffs for utilities, and the advisability of a central registry of pole attachments. The consensus of the commenters appears to be that none of the three are in the public interest.

With respect to the issue of standardized pole attachment agreements and tariffs, the comments appear consistent with the Companies' Comments opposing standardized agreements and tariffs for pole attachments. The Companies stated that they have negotiated and maintain several hundred pole attachment agreements and private license agreements in Pennsylvania. The agreements are independent of one another and contain provisions specific to individual circumstances and customers not compatible with standardized agreements or tariffs. The Companies agree with commenters that the present practice, without standardized agreements or tariffs, is working properly and should not be changed.

With respect to the suggestion about creation of a comprehensive registry of pole attachments, few commenters suggest a need for a comprehensive registry.<sup>13</sup> The consensus that there is no need for a comprehensive registry is consistent with the Companies' Comments. The Companies stated that a comprehensive data base would jeopardize the security of electric distribution systems as such information is critical energy infrastructure that should not be available in the public domain. Disclosing the location of attachments on utility distribution systems would reveal to competitors proprietary information about where communications companies are deploying their services. Finally, the assembly of a comprehensive database would be prohibitively expensive and would be of little use, as new attachers would still require an analysis of whether a pole can accommodate additional attachments, thus requiring an individual pole-loading analysis.

The Comments expressed varying opinions about the benefits of establishing a working group to discuss issues about pole attachments. A consensus of comments appears that a working group is not required, though commenters expressed a willingness to participate in a working group if established. Likewise, the Companies are amenable to the establishment of a working group to discuss pole attachment issues and ideas, and suggest that the rulemaking raises questions about the Commission's jurisdiction and procedures for consideration. For example, as expressed in the Companies' Comments, it is unclear if the Commission's dispute resolution procedures under Pa. Code Chapters 1, 3, and 5 are mandatory or if the parties would have an option to use FCC dispute procedures. Such issues could be clarified in a working group prior to finalization of the Commission's proposed rulemaking.

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<sup>13</sup> The Office of Consumer Advocate suggests that the Commission should consider creating a data base of pole and conduit investments. OCA Comments, pp. 6-7.

Finally, the Companies are compelled to respond to assertions directed at Pennsylvania Electric Company (“Penelec”), a FirstEnergy Company, in the Comments submitted by Velocity.Net Communications, Inc. (“Velocity”). Though it is unusual for a party to use Rulemaking comments to target negatively a specific entity or company, Velocity has chosen to do so here. Penelec strongly disagrees with Velocity’s suggestion that Penelec is inattentive and overly expensive for make-ready work of pole attachers.

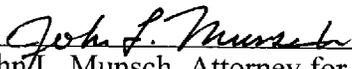
Pole attachment requests to Penelec from parties such as Velocity have recently increased dramatically, often in remote areas of the Commonwealth served by Penelec. The sheer volume of new requests across the state led Penelec to begin outsourcing work for pole attachment requests and Penelec’s outside contract costs are passed through to the party requesting attachment. Yet some telecommunication providers unrealistically expect processing to be both faster *and* cheaper. Charging the telecommunication provider less than the full cost of telecommunication attachments would force electric customers to subsidize telecommunication providers. The Commission should be wary of telecommunication efforts to make telecommunication pole attachments a priority of EDCs over and above the provision of safe and reliable electric service at reasonable prices.

**IV. Conclusion**

The Companies appreciate the Comments submitted by parties to the rulemaking proceeding. The Companies maintain a keen interest in the Commission's proposal to assert jurisdiction over utility pole attachments and are cautiously optimistic and supportive of the Commission's proposal at this point and look forward to continued involvement in the rulemaking process.

Respectfully submitted,

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