

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on March 14, 2019

COMMISSIONERS PRESENT:

John B. Rhodes, Chair
Gregg C. Sayre
Diane X. Burman
James S. Alesi

CASE 16-M-0330 - Petition of CTIA - The Wireless Association to
Initiate a Proceeding to Update and Clarify
Wireless Pole Attachment Protections.

ORDER APPROVING PETITION IN PART AND CONTINUING PROCEEDING

(Issued and Effective March 14, 2019)

BY THE COMMISSION:

INTRODUCTION

On May 20, 2016, CTIA - The Wireless Association (CTIA) filed a Petition¹ pursuant to Public Service Law (PSL) §119-a requesting that the Commission: (1) grant wireless carriers non-discriminatory access to utility poles; (2) establish and enforce timelines for entering into access agreements, completing the permitting and make-ready review processes, and granting final approval to wireless attachers; (3) extend its expedited dispute resolution process to wireless attachers; (4) adopt a rate methodology for wireless attachers; and, (5) adopt other pro-competitive policies, if necessary.

¹ Case 16-C-0330, Petition of CTIA - The Wireless Association to Update and Clarify Wireless Pole Attachment Protections (filed May 20, 2016) (Petition).

Under 47 U.S.C. §224(c), States are permitted to exercise authority to regulate pole attachments in place of the Federal Communications Commission (FCC); and New York has in fact exercised its jurisdiction over pole attachment issues through the reverse-preemption mechanism allowed under that federal statute.² The Commission, therefore, takes steps here to provide wireless providers with reasonable and equitable access to utility pole infrastructure located in the public rights-of-way (ROW).

Through this Order the Commission grants, CTIA's Petition, in part, by: (1) establishing an interim pole attachment rate for wireless attachments; (2) establishing timelines with respect to the processing of pole attachment applications and make-ready work; and, (3) extending the Commission's existing dispute resolution process to wireless attachment applications.

The Commission also directs that this proceeding be continued so that further consideration can be given to enhancements to both wireline and wireless pole attachment policies including: (1) improvements to streamline the make-ready application, survey and construction processes; (2) the feasibility and implementation of a "one touch make-ready" (OTMR) process; (3) revisions to attachment terms for large-scale projects; and, (4) any other revisions to pole attachment rates and terms, as necessary.

BACKGROUND

Over the last twenty years, the Commission has taken several actions to remove barriers to entry in the

² Id., p. 2.

telecommunications market, including actions to promote standard rates and processes for wireline attachments to utility poles.

In a June 1997 Order, the Commission established a specific rate methodology for wireline attachers by adopting the FCC's approach at that time for the calculation of rates applicable to "horizontal" cable and wireline attachments (the FCC Cable formula).³ That methodology applied a space factor to the cost of the pole to determine an annual rental rate for each one-foot segment of usable pole space. The formula uses a presumptive 37.5-foot pole with 13.5 feet of "usable" space, and thus, yields a space factor of 1 ft./13.5 ft., or 7.4%. Thus, for each one-foot segment of usable pole space, the annual rental rate is calculated as 7.4% of the cost of the pole. The cost of the pole is determined as the net cost of a bare pole multiplied by a fully allocated carrying charge. This methodology is the common approach utilized by states that assert jurisdiction over pole attachments rates for wireline attachment, and, in many jurisdictions, forms the basis for determining wireless attachment rates as well. As for wireless attachments, the Commission determined at that time that "the price and terms for such attachments should be determined through private negotiations."⁴

In an August 2004 Order, the Commission adopted a policy statement on pole attachments, that, among other things, established a timeline for the processing of wireline pole

³ Case 95-C-0341, In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095, Opinion and Order Setting Pole Attachment Rates (issued June 17, 1997).

⁴ Id., pp. 22-23.

attachment applications (the 2004 Pole Order).⁵ The timeline consists of the following segments:

- (1) Pre-construction surveys shall be completed within 45 days after a complete application is received by the pole owner;
- (2) Make-ready estimates of the costs of any required changes to the pole to accommodate the attacher shall be provided within 14 days of completion of the survey;
- (3) Make-ready charges shall be paid to the pole owner within 14 days of receiving the estimate; and,
- (4) Make-ready work shall be completed within 45 days of the date payment is received by the pole owner.

Collectively, the 1997 and 2004 Commission Orders established a framework by which wireline providers could, under normal operating conditions, attach to utility poles across the State in a consistent and transparent way with reasonable expectations regarding timeliness and costs.

There was, however, no such framework in place in New York for the attachment of wireless facilities to utility poles until an April 2004 Order adopted a rate methodology for wireless attachments to Niagara Mohawk Power Corporation d/b/a National Grid's (National Grid) distribution poles.⁶ By that Order, attachments in areas of the pole previously considered "unusable space" were allowed, and the wireline formula was modified to reflect this by increasing the pole's total usable space to 18.5 feet. Additionally, the formula was premised on a wireless attachment requiring space of seven feet, yielding a

⁵ Case 03-M-0432, Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues, Order Adopting Policy Statement on Pole Attachments (issued August 6, 2004).

⁶ Case 03-E-1578, Joint Petition of Niagara Mohawk Power Corp. and National Grid Comm. Inc., Order Approving Petition with Modifications (issued April 7, 2004).

space factor of 37.8% (7 ft./18.5 ft.). This space factor is applied to the cost of the pole, which, as in the wireline formula, is determined as the net cost of a bare pole multiplied by a fully allocated carrying charge. National Grid also established a rate for attachment to poles between 50 and 100 feet for installations requiring "excess height." Unlike the rates and timelines for wireline attachments, which applied to all pole owners, the Commission did not extend the wireless attachment rate methodology adopted for National Grid to other utility pole owners, nor did it establish any timeline for wireless attachment applications.

Similar steps were taken at the federal level. In 2011, the FCC confirmed that "wireless providers are entitled to the same rate under the statute as other telecommunications carriers."⁷ In 2015, the FCC sought to "harmonize" regulatory treatment for pole attachments.⁸ Despite those attempts to reform pole attachment rates, the current FCC construct uses two calculations to determine the rate: one based on the fully allocated telecommunications formula (which includes certain capital costs, but apportions cost based on allocators determined by the number of attachers in a serving area); and, the other based on "cost causation", i.e., the attachers pay a rate that covers the costs for which it is "causally responsible" (which recovers administrative and maintenance costs, but not capital costs). The FCC approach allows pole owners to charge a rate based on the formula yielding the higher rate.

⁷ FCC Numbers WC 07-245 and GN 09-51, In the Matter of Implementation of Section 224 of the Act, A National Broadband Plan for Our Future, Report and Order and Order on Reconsideration (adopted April 7, 2011)(FCC 2011 Order).

⁸ FCC WC Docket No. 07-245, GN Docket No. 09-51, Order on Reconsideration (adopted November 24, 2015)(FCC 2015 Order).

PETITION

CTIA is an international non-profit membership organization that has represented the wireless communications industry since 1984. Membership in the association includes wireless carriers and their suppliers, as well as providers and manufacturers of wireless data services and products. In its Petition, CTIA requests that the Commission initiate a proceeding to clarify and update its pole attachment policies to ensure that: (1) its regulation of pole attachments applies with equal force, in a non-discriminatory manner, to wireless facilities attached to utility poles; (2) detailed timelines for entering into access agreements, completing the permitting and make-ready review processes, and granting final approval to attachers will be established and enforced; (3) disputes regarding the rates, terms, and conditions of pole attachments will be resolved on an expedited basis; (4) rate principles for wireless attachments track those in place at other regulatory agencies, including the FCC; and, (5) other pro-competitive, pro-deployment measures supported by the record are adopted.

Regarding the Commission's regulation of pole attachments, CTIA states that federal law guarantees non-discriminatory access to public utility poles for both wireless and wireline attachers alike, and in order to ensure that the Commission provides the same protections and economic incentives to wireless attachers as it does to wireline attachers, the Commission should treat both consistently. CTIA adds that for wireline attachments, the Commission has adopted procedures that align pole attachment procedures with those of the FCC, and that those same policies can be applied to wireless attachments without the need to make special accommodations or changing the Commission's overarching policies.

CTIA states that wireless providers frequently face delays in access to utility poles in New York, and that timelines should be adopted in New York that mirror those established by the FCC. CTIA continues, that at a minimum, the Commission should adopt timelines aligned with those of the FCC for the following tasks to ensure that carriers can accurately predict construction timelines in New York and plan accordingly:

- (1) Survey - the FCC provides a 45-day window;
- (2) Estimate - the FCC provides a 14-day window;
- (3) Acceptance - the FCC provides a 14-day window;
- (4) Make-Ready Process (including engineering survey, the provision of estimated make-ready costs to wireless carrier, provision of notice to existing attachers, preparation of pole, as necessary, to accommodate new attacher) - FCC provides 60-day window, and permits 30 additional days for pole-top attachments installed above the communications space on the pole; and
- (5) Optional extension of make-ready period - FCC provides for a 15-day grace period before the attacher is permitted to bring in its own contractors to complete the make-ready process.

CTIA further requests that the Commission resolve disputes between an attacher and a pole owner when a utility fails to comply with Commission rules on attachment rates, timelines or procedures, and that a pole attachment complaint process be adopted for all attachers, with specific deadlines for resolution of cases. CTIA continues that the process should include defined, reasonable deadlines to ensure prompt resolution of issues, including timelines for the Commission to issue decisions, and timelines governing action by DPS Staff members where required. CTIA suggests that disputes regarding physical access to a structure should be resolved within 45 days

of the filing of the complaint and proposes that a shorter timeframe be mandated where the dispute involves responsibility for the correction of pre-existing safety violations.

CTIA states that there is no good policy or other reason to create an entirely different rate methodology for wireless attachments when a functional, effective one already exists, and argues that the Commission should apply the FCC's telecommunications rate methodology to wireless technologies. CTIA asserts that in any methodology, the guiding principle should be that "usable space" component include only uses which exclude use of that space by others. And although CTIA believes that the presumptive minimum amount of space used by a wireless attachment should be one foot, it also believes that the attacher should accept responsibility for any additional space its attachment uses to the exclusion of others' attachments. CTIA argues however, that incremental rent should not be charged for non-exclusionary usage by facilities located between point of attachments, such as risers, which do not prevent other attachments.

CTIA adds that the Commission should consider any additional pro-competitive proposals offered by other parties as the record of this proceeding develops.

CTIA states that the rapid proliferation of smartphones and the development of wireless-broadband dependent applications are causing increasing demands for wireless services, which in turn, is increasing the demand for pole attachments. To illustrate this point, CTIA asserts that the number of connected wireless devices in New York State (i.e., smartphones, smart watches and other wearable technology, wireless medical devices, smart meters, etc.) is projected to

hit 28 million by 2021. CTIA also points out that 70% of all 911 calls are made with smartphones.⁹

According to CTIA, this intensifying demand on mobile networks has pushed the wireless industry to develop advanced wireless technology, 4G, which will lead to the development of next generation wireless technology, or 5G. A key characteristic of these advanced and next generation wireless technologies is the reliance on small cells and Distributed Antenna Systems (DAS), both of which need to be installed closer together and closer to consumers in order for the wireless service to work.¹⁰ This, according to CTIA, places additional pressure on the wireless providers to attach more equipment to other infrastructure, including utility poles.

CTIA asserts that there is no rational basis to continue treating wireless attachments different than wireline attachments. As described by CTIA, both wired and wireless technologies require access to utility poles to deliver services and both networks are capable of being safely and securely attached to utility poles, thus, regulations should apply with equal force to wireless pole attachments.

PUBLIC NOTICE

On June 30, 2016, the Commission issued a Notice Inviting Comments on the Petition as well as other topics unique to wireless pole attachment rates and terms. Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking was also published in the State Register on July 29, 2016.¹¹

⁹ Petition, p. 7.

¹⁰ Id., p. 5.

¹¹ SAPA I.D No. PSC-25-16-00024-P.

COMMENTS AND REPLY COMMENTS

Comments were received from numerous industry groups, telephone providers, electric utilities, municipalities and others.¹² They are summarized below.

CTIA

CTIA reiterates the arguments made in its Petition. It also provides details about the type of equipment the wireless industry seeks to attach to utility poles, including pictures of wireless installations that are currently in use. CTIA states that, while these attachments differ from one another, they "without exception - can be accommodated under existing safety standards and permitting processes."¹³ CTIA asserts that many of these wireless installations, which are currently in use elsewhere, have been, or are, inappropriately rejected by utility pole owners in New York for what CTIA claims are generically described safety or engineering reasons.

CTIA also details the difficulties the wireless industry faces in attaching facilities to utility poles in New York State. For example, CITA states that, while many wireless providers are deploying the facilities needed for next generation wireless networks elsewhere in the country, when it comes to New York, "wireless providers' attempts to expand their networks on New York utility poles have frequently been made difficult or impossible due to unreasonable obstruction by

¹² Comments were submitted by: the New York State Wireless Association, the Wireless Infrastructure Association, SQF, the Joint Utilities, Frontier Communications, CTIA - The Wireless Association, Verizon New York Inc., Lightower Fiber Networks I, LLC, the Town of North Hempstead, the City of New York, and the Town of Wheatland. Reply comments were submitted by the Wireless Infrastructure Association, Joint Utilities, Lightower Fiber Networks I, LLC, and CTIA.

¹³ Case 16-M-0330, Comments of CTIA, dated August 1, 2016, p. 8.

utility pole owners."¹⁴ CTIA claims that they have encountered severe delays at every stage of the attachment process - from receiving and negotiating pole attachment agreements - to the permit application and make ready processes.

CTIA also describes how utilities use blanket prohibitions to reject wireless attachment requests. For example, CTIA claims that its members have encountered blanket rejections of any wireless attachment that include pole top antennas or "risers," which effectively prohibits the wireless attachment. CTIA states that it is possible for this type of equipment to be attached to utility poles in compliance with existing safety standards, however, utilities in New York routinely reject them.

The Joint Utilities

The Joint Utilities¹⁵ recommend that the Commission reject CTIA's Petition, in total.

The Joint Utilities' opposition to the CTIA Petition is based, in part, on procedural grounds. The Joint Utilities claim that the Petition does not contain "demonstrable evidence" that wireless telecommunications providers are experiencing delays with their infrastructure build-outs under the Commission's current policies and that the rapid adoption of today's wireless technology is evidence that the current processes are working well. They similarly claim that CTIA has the burden of demonstrating that the current Commission policy for wireless attachments, which includes privately negotiated rates, is not just and reasonable and that CTIA has not met this

¹⁴ Id., p. 10.

¹⁵ Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas (NYSEG), National Grid, Orange & Rockland (O&R) and Rochester Gas & Electric Corporation (RG&E), filed comments as the Joint Utilities.

burden; nor has CTIA demonstrated that all available remedies have been pursued or exhausted. The Joint Utilities assert that CTIA has not shown any error of law or fact, nor shown any change in circumstance in the past thirteen to twenty years since the Commission decided these issues that would warrant reconsideration of the Commission's earlier decisions.

With respect to the substance of CTIA's Petition, the Joint Utilities assert that there are myriad wireless facility designs, many of which consist of several components, and that this precludes standard treatment for pole attachment purposes. For example, the Joint Utilities state that wireless equipment continues to change with regard to equipment footprints and radio frequency power emissions. For these reasons, the Joint Utilities argue that standard timelines cannot reasonably be applied and privately negotiated terms and conditions should remain in place.

In response to CTIA's request for Commission enforcement of an expedited dispute resolution process, the Joint Utilities assert that dispute resolution is not necessary, and that they and the wireless providers have successfully resolved issues amongst themselves. The Joint Utilities point out that four of the six utilities have their own, privately negotiated, dispute resolution processes that include "enforceable timelines, escalation processes, and redress by the Commission if warranted."¹⁶

The Joint Utilities also object to the Petition claiming it lacks evidence of delays in accessing utility poles, and also to the claim that utility poles are largely

¹⁶ Case 16-M-0330, Comments of the Joint Utilities (dated August 1, 2016), p. 13. The Joint Utilities identify Con Edison, Central Hudson, O&R and Niagara Mohawk as having privately negotiated dispute resolution processes in their contracts with attachers.

inaccessible to wireless providers. The Joint Utilities contend that the opposite is true, that thousands of wireless attachments have been made without disputes and within reasonable time frames using negotiated agreements.

On the issue of establishing a rate methodology for wireless attachments, the Joint Utilities claim that there are several good policy reasons to continue using private negotiations rather than a standard rate methodology. They claim that wireless facilities vary significantly from wireline facilities and from each other which renders standardized rates problematic. They also assert that because wireless providers may attach their equipment to alternative forms of infrastructure at competitive rates, i.e., city buildings, streetlights, and utility-owned towers, a standard rate methodology would create an artificially low rate that would deprive utilities, and thus, their electric customers, of the benefit of revenues achieved through market-based rates.

The Joint Utilities maintain that "there are no modifications or accommodations that can be made to the existing rules, without a full review of the impacts to the safety and reliability to the various distinct electric distribution systems throughout the State."¹⁷ As a result, they believe that the record demonstrates that any application of the Commission's pole policies to the wireless industry would be against the public interest because it could deprive utilities of revenues that could ultimately reduce electric rates, harm the competitive market for attachment space, and impose significant burdens on the utilities.

¹⁷ Id., p. 20.

Frontier

Frontier Telephone of Rochester, Inc., Citizens Telecommunications Company of New York, Inc., Frontier Communications of New York, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Communications of AuSable Valley, Inc., Frontier Communications of Seneca-Gorham, Inc. and Ogden Telephone Company (collectively Frontier) submitted comments in opposition to the Petition.

In general, Frontier's comments reflect those of the Joint Utilities. For example, Frontier asserts that wireline and wireless facilities are inherently different and that wireless facilities vary significantly from one deployment to the next. Frontier states that any "one size fits all methodology" must be reconciled with the obligation to ensure safe and reliable attachments to utility poles and that, while such a reconciliation is possible in the wireline context, it is not possible in the wireless context. Frontier also makes similar arguments to the Joint Utilities against establishing a standardized rate methodology for wireless attachments, primarily because wireless attachments differ from wireline facilities and from one another.

Frontier suggests that the current frameworks for pole attachments are already non-discriminatory because they allow for wireless attachments to be treated the same as wireline attachments if the wireless attachments "conform to the traditional use of the utility pole structure."¹⁸ However, Frontier readily admits that wireless facilities are "inherently non-standard" or non-traditional.

Finally, Frontier claims that modifying the Commission's pole policies is not in the public interest because

¹⁸ Case 16-M-0330, Comments of Frontier (filed August 2, 2016), p. 2.

doing so would tip the regulatory framework even more heavily in favor of wireless providers. Frontier notes that the Commission more heavily regulates traditional voice services on things like service quality and basic rates, leaving the wireless industry less encumbered. Frontier asserts that the dominance of wireless services proves that existing policies are working sufficiently.

SQF

SQF, LLC (SQF) is a facilities-based competitive provider of radio frequency transport and backhaul services to commercial mobile radio service providers. SQF and its affiliate, Tilson Technology Management, Inc, submitted comments in support of the Petition. In its comments, SQF notes that the Petition presents an opportunity for State regulation to support the industry by ensuring predictability of planning and investment of wireless infrastructure. SQF states, it is "[t]hrough predictability and certainty in the regulations, broadband providers—wireline and wireless alike—can more easily attract investment and plan for future infrastructure enhancements[.]"¹⁹

SQF agrees with CTIA that the pole owners are, at best, inconsistent when it comes to enabling wireless access to poles and that the lack of uniform pole attachment standards for wireless attachments in New York has led to pole attachment agreements that range "from some of the most reasonable and aligned with code, to the most restrictive in the country." SQF also echoes CTIA's arguments with respect to the benefits and reasonableness of using standard rate methodologies for wireless attachments akin to those used by the FCC.

¹⁹ Case 16-M-0330, Comments of SQF (filed August 2, 2016), p. 5.

SQF agrees with CTIA's statements that the pole owners are inconsistent in their treatment of wireless installations. For example, SQF points out that in New York, National Grid's make ready design standards allow for pole top attachments, while "other pole owners prohibit it outright, citing vague safety and engineering codes without specific reference code, engineering best practices, or other objective criteria."²⁰ Finally, SQF points out that while the FCC has prohibited utilities from using blanket prohibitions on attachment techniques such as boxing and extension arms, particularly where the utilities use these attachment designs themselves, wireless providers are experiencing such prohibitions.

Wireless Infrastructure Association (WIA)

The WIA represents a large group of companies that build and operate wireless communications facilities throughout the world. The WIA submitted comments in support of the Petition. The WIA states that its members have deployed or plan to deploy more than 3,200 DAS nodes and approximately 9,000 miles of fiber in New York's networks. It echoes the Petition's arguments that there are barriers to overcome in New York, and that chief among these are obstacles and delays to add capacity and broaden coverage, and that an important step to removing these barriers is to revise the State's wireline pole attachment rules. The WIA explains that its networks rely on existing utility poles in public rights-of-way to support fiber and node attachments that provide DAS and agrees with CTIA that "utility poles remain largely inaccessible to wireless providers."²¹ Therefore, WIA states that the Commission should issue

²⁰ Id., p. 4.

²¹ Case 16-M-0330, Comments of Wireless Infrastructure Association (filed August 2, 2016), p. 4.

guidelines similar to those applicable to attachments for wireline services.

LightTower Fiber Networks I, LLC (Lighttower)

Lighttower provides high-performance fiber optic network solutions to customers in the State. It currently has 7,267 route miles of fiber in New York. In its comments, Lighttower writes that "the use of wireless attachments on existing utility poles has ever increasingly become a critical part of modern deployments" ²² for both densification deployment as well as wireless backhaul.

As such, it argues that the current mix of regulated rates, such as those that resulted from the 2003 National Grid Petition and privately negotiated rates, creates substantial cost variations within New York State that make it difficult to reliably predict costs and make investments necessary to deploy mobile services. As an example, Lighttower points out the inconsistent treatment by pole owners about the installation of pole top antennas. According to Lighttower some pole owners allow pole top antennas on primary and secondary distribution poles, while others only allow pole top antennas to be located on non-primary distribution poles."

In summary, Lighttower agrees with CTIA that the Commission should apply the 2004 Pole Order equally to wireless attachments to ensure a level playing field between wireline and wireless providers. Lighttower states that such a clarification would also eliminate concerns that wireless attachments can be unduly laborious and difficult to obtain, that often squelches wireless deployment.

²² Case 16-M-0330, Comments of Lighttower (filed August 2, 2016) p. 16.

New York State Wireless Association (NYSWA)

The NYSWA provides "an official forum for the cultivation of relationships and exchange of ideas between wireless telecommunications professionals."²³ NYSWA members cite two primary obstacles to the deployment of wireless services in New York State: (1) continued delay of pole attachment agreements by pole owners despite years of unresolved negotiations and (2) pole attachment fees well in excess of those used for wireline attachments, which are not economically feasible. The NYSWA advises that failure to adopt standards consistent with wireline attachment rules will continue to negatively impact wireless deployment, stating that the "lack of wireless pole attachment requirements for pole owners in New York is already having a detrimental impact and threatens the provision of reliable mobile broadband in various parts of the State."

Verizon New York Inc. (Verizon)

Verizon filed comments in support of the main objective of CTIA's Petition that just and reasonable terms should apply to wireless carriers on a non-discriminatory basis when attaching wireless facilities to utility poles. Verizon, however, opposes the use of the FCC's timeframes for survey and other make ready work because, according to Verizon, there is an increase in demand for pole attachments as illustrated by the demands placed on New York by the New York Broadband Programs

²³ Case 16-M-0330, Comments of New York State Wireless Association (filed August 2, 2016), p. 1.

and the merger between Time Warner Cable and Charter Communications, Inc (Charter).²⁴

Accordingly, Verizon suggests that the Commission enforce unspecified longer time frames until more experience is gained. Verizon also states that the Commission should develop policies that include responsibilities of the attachers to review poles in areas of interest in order to identify potential problems in advance, and to provide pole owners with advance notice of attachment demand.

New York City (NYC)

In its comments, NYC expresses a desire that no additional poles of any type be erected within NYC and that antennas are not placed on historical structures or landmarks. NYC asserts that there are sufficient available sites for wireless antennae, i.e., light poles, public and private buildings, etc., as well as plenty of routes available for fiber optic cabling underground. NYC also states that it wants to retain the right of permitting for facilities within its ROW.

Town of North Hempstead

The Town of North Hempstead states that it does not allow pole top antennas due to its concerns about increasing the height of utility poles. The Town of North Hempstead states that it does not object to extension arms, however, it is concerned that granting the Petition would create situations where several carriers are on the same pole, resulting in more wires and longer and more complicated recovery from storms.

²⁴ Case 16-M-0330, Comments of Verizon New York Inc. (filed August 2, 2016), p. 2. Verizon also challenges the timeframes established in the 2004 Pole Order, asserting that they are not binding because a standard pole attachment agreement was never approved by the Commission.

Town of Wheatland

Mr. Terry Rech, Building Inspector for the Town of Wheatland, states that thirty days is not enough time to research and prepare an adequate comment on these issues, however, he suggests that the proposed one-foot occupancy of the pole is unrealistic, and that granting the Petition could be interpreted as preempting local zoning authority.

Reply Comments

Reply comments were submitted by the Wireless Infrastructure Association, Joint Utilities, Lightower Fiber Networks I, LLC, and CTIA. These reply comments reiterated or otherwise restated the arguments made in the parties Initial Comments or in the Petition.

LEGAL AUTHORITY

Federal law permits states to regulate pole attachments in place of the FCC.²⁵ If a state opts to assert its jurisdiction to regulate pole attachments in lieu of the FCC, it is obligated to certify that in regulating the rates, terms and conditions of pole attachments the state considers the interests of the subscribers to the services offered through such attachments, as well as the interests of the consumers of the utility services.²⁶

New York has exercised its regulatory authority over pole attachments, as permitted by federal law, through section 119-a of the PSL, which states in relevant part that:

"[t]he commission shall prescribe just and reasonable rates, terms and conditions for attachments to utility poles... A just and reasonable rate shall assure the utility of the recovery of not less than the additional cost of providing a pole attachment...nor

²⁵ 47 U.S.C. §224(c).

²⁶ 47 U.S.C. §224(c)(2)(B).

more than the actual operating expenses and return on capital of the utility attributed to that portion of the pole...used. With respect to cable television attachments and use, such portion shall be the percentage of total usable space on a pole or the total capacity of the duct or conduit that is occupied by the facilities of the user. Usable space shall be the space on a utility pole above the minimum grade level which can be used for the attachment of wires and cables."

The Commission requires that such rates be filed as tariffs pursuant to 16 NYCRR Part 720.

Through this Order, the Commission exercises only this express authority to regulate attachments to utility poles, including the rates, terms and conditions thereof, and does not seek to, nor in fact impose, any regulation on the services offered by wireless carriers at this time, nor does it seek to override any local permitting or other authorizations otherwise required by State and local laws.

DISCUSSION

It is in the public interest to enhance the availability and affordability of advanced services to consumers and to facilitate competition for mass market services wherever practicable. The Commission's regulatory responsibility in these matters, which impacts various intermodal competitors and different industry segments, is first and foremost to establish policies and regulations that benefit all consumers. This is established through implementing just and reasonable rates and terms that facilitate and enhance access to facilities, poles and conduit placed in the public ROW by utilities and ensuring safe and reliable service.

Since the Commission's April 2004 Order, wireless technology has continued to rapidly advance and be deployed ubiquitously in New York. In the ten years from 2004 to 2014,

the number of traditional (switch-based) wireline telephone lines declined from about approximately 11 million to four million. In contrast, the number of wireless phones in use in New York State grew from approximately 10 million to more than 20 million over the same ten years. Cellular technology has advanced rapidly over the years, transforming from a mobile voice and text medium to a platform capable of download speeds that rival wired broadband Internet services, and has become the first choice of industry sectors, such as energy, public safety, healthcare, transportation, education, etc., as efficient and effective communication and service deployment platforms. In fact, investor-owned electric companies in New York have described in their Distributed System Implementation Plans how deployment of Advanced Metering Infrastructure and/or Distribution Automation is dependent, in large part, upon wireless technology.

Unlike previous cellular network architecture, the equipment that delivers advanced 4G services and which will enable future 5G service have smaller footprints, and therefore must be installed closer to users and consumers. To accomplish this, advanced wireless networks carriers (and others) must deploy small cells and DAS. Existing infrastructure, such as utility poles, are ideal for such deployment. Timely and affordable access to ubiquitous utility poles will be necessary to facilitate investment and expansion in 5G networks in New York and will keep New York from lagging behind other states that have taken steps to improve the pole attachment process for wireless providers.

As an initial matter, many pole owners, including the Joint Utilities claim that the Petition does not contain "demonstrable evidence" that wireless telecommunications providers are experiencing delays with their infrastructure

build-outs under the Commission's current policies and that the rapid adoption of today's wireless technology is evidence that the current processes are working well. They similarly claim that CTIA has the burden of demonstrating that the current Commission policy for wireless attachments, which includes only privately negotiated rates and terms, is not just and reasonable and that CTIA has not met this burden; nor has CTIA demonstrated that all available remedies have been pursued or exhausted. The Joint Utilities assert that CTIA has not shown any error of law or fact, nor shown any change in circumstance since the Commission decided these issues that would warrant reconsideration of the Commission's earlier decisions.

The Commission disagrees. First, the circumstances have indeed changed in the past fifteen to twenty years and any suggestion to the contrary is misplaced. Wireless technology is expanding at a rapid pace and access to utility poles will facilitate deployment of important technologies like 5G wireless networks that promise high data rates, reduced latency, energy saving, cost reduction, higher system capacity, broader device connectivity and faster Internet speeds. Notwithstanding the Petition, New York is in the midst of rapid and robust deployment of broadband throughout the State, and the need for access to utility poles by wireline providers has increased dramatically. Similarly, the wireless providers are poised to embark on the deployment of 5G networks, which will likely result in different deployment patterns to those of current 4G networks and will necessarily require placement in more densely populated areas where pole attachments will be critical to ensuring full deployment. Relying on individually negotiated contracts could be time consuming and delay these very important advancements in technology for the people of New York State.

Consistent with past Commission actions to promote competition in the telecommunications market, steps are taken here to remove barriers to wireless carriers gaining access to utility poles for the purpose of provisioning advanced telecommunications services. As discussed in detail below, the Commission grants CTIA's petition, in part, by: (1) setting interim timelines for the processing of wireless pole attachment applications and make-ready work, (2) establishing an interim rental rate to be charged for new wireless pole attachments, and (3) extending the existing Commission dispute resolution process to wireless attachment applications. In addition, the Commission will continue this proceeding to explore pole attachments more comprehensively, for both wireline and wireless, to establish more permanent timelines and rates, as well as to more fully examine other pole attachment issues, as discussed in detail below.

Timelines

CTIA requests that the Commission enforce detailed timelines for various stages of the pole attachment application process for wireless attachments including entering into access agreements, completing the permitting and make-ready review processes, and granting final approval to attachers. More specifically, CTIA requests that the Commission enforce the timelines adopted by the FCC in April 2011. In establishing those timelines, the FCC established a robust record favoring the use of timelines in the context of wireless attachments to utility poles, particularly due to the excessive delay and cost associated with private negotiation. The FCC acknowledged, however, that there may be unique circumstances and complexities associated with wireless attachments. To balance these concerns, it determined that timelines for pole owners to accommodate wireless attachments to utility poles were needed,

but established timelines in the FCC 2011 Order that run longer than those used for wireline attachments.

CTIA, SQF, NYSWA and WIA comment that attachment applications are often subject to excessive delays. In response, the Joint Utilities and Frontier argue that standard timelines cannot be applied to wireless attachments because wireless attachment designs can differ significantly from one another. The Joint Utilities and Frontier also argue that wireless infrastructure has enjoyed a rapid deployment, indicating that the current processes work and do not need to be changed. Neither the Joint Utilities nor Frontier, however, acknowledge the more specific assertions made by CTIA and others that these processes are not working in practice today, and will continue to not work, for 4G and 5G technology deployment, both of which require networking with more electronics and physical equipment attachments, to function reliably and efficiently.

Verizon argues that due to the increased demand for utility pole access as a result of New York's broadband expansion efforts, the FCC timeframes are not sufficiently long enough to accommodate escalating requests for pole access. Verizon suggests that the Commission adopt "longer" timeframes until "more experience is gained."

Establishing a uniform timeline for wireless attachers will provide both pole owners and attachers with the requisite information and much needed certainty to make informed decisions about network construction, service deployment, and overall management of facilities located within the ROW. A uniform wireless attachment timeline also provides the basis upon which a dispute resolution process, discussed below, may be effectively used, if necessary.

The FCC's timeline for wireless attachments acknowledges that wireless facility attachment applications may

require longer processing time than applications for wireline attachments. Wireless attachments may involve both horizontal and vertical attachments on a utility pole, which is atypical for wireline attachments. Additionally, the required make-ready and construction work to accommodate wireless attachments is often more complex than that of traditional wireline cable placement.

For these reasons, the Commission agrees that the FCC's determination that additional time may be needed for pole owners to accommodate wireless attachments is reasonable. But, the FCC's timeline, presumably established for normal "business as usual" conditions, may not be long enough. New York is not currently operating in a "business as usual" environment where such timelines may be appropriate. For example, recent experience with wireline pole attachment timelines in the context of New York's broadband expansion efforts has shown that it has been a challenge for both pole owners and attachers to work within the bounds of current wireline attachment timelines previously established by the Commission.

The deployment of 5G wireless networks will bring even more attachment applications to an already overloaded process, and as such, and in recognition of this reality, the Commission will establish interim timelines for wireless attachments based on the timelines approved in the 2004 Pole Order, but provide additional time, in both the survey and make-ready steps of the process. The Commission's focus on these steps is warranted because these are the steps that take the longest amount of time and those that DPS Staff reports have often extended past the Commission's established timeline. The timeline detailed below, therefore, is adopted for wireless attachments:

- (1) Pre-construction survey and engineering shall be completed within 90 days after a complete application is received by the pole owner;
- (2) Make-ready estimates of the costs of any required changes to the pole to accommodate the attacher shall be provided within 14 days of completion of the survey and engineering;
- (3) Make-ready charges must be paid to the pole owner within 21 days of receiving the estimate; and,
- (4) Make-ready work shall be completed within 90 days of the date payment is received by the pole owner.

The timelines adopted here acknowledge the differences in wireline and wireless attachments, as well as the current environment in New York, while providing certainty to wireless carriers. The Commission notes that in instances where a wireless provider seeks to attach only a horizontal cable, the timelines established in the 2004 Pole Order shall continue to apply as those constitute more routine types of attachments.

Rate Methodology for Wireless Attachments

CTIA seeks a transparent and standard methodology to calculate rates for wireless attachments to utility poles, which CTIA claims will allow for better planning, investment, maintenance and operation of enhanced wireless services. The absence of a standard rate methodology will, according to CTIA, continue to frustrate deployment of advanced communications services in New York by, among other things: (1) causing protracted contract negotiations that delay deployment; (2) prolonging exorbitant attachment rates that force providers to direct investments to other, more reasonable jurisdictions; and, (3) undermining planning and investment due to the unpredictability of attachment rates.

The Joint Utilities and Frontier oppose using a standard rate because, according to them, standardizing the attachment rate would reduce potential revenue, thereby indirectly increasing electric rates to the detriment of

electric customers. The Joint Utilities also claim that using a standard rate methodology is unnecessary because there is plenty of competition, i.e., other infrastructure, such as buildings and streetlights, to attach wireless equipment. CTIA responds that while street lights and buildings are useable, they are not nearly as ubiquitous as utility poles, particularly in more rural or sparsely populated areas of the State.

CTIA requests the adoption of a rate methodology consistent with the formulas sanctioned by the FCC and in use by other states. The CTIA asserts that there is no good policy reason to develop an entirely new rate methodology for wireless attachments when one already exists. According to the CTIA, "the Commission should simply apply the FCC's telecommunications rate methodology to wireless technologies."²⁷ The CTIA also states that the attachers' "usable space" component should include only uses which exclude use of that space by others, the presumptive minimum amount of space used by a wireless attachment should be one foot, and the attacher should be responsible for any additional space the attachment uses that excludes other attachments.

The Commission agrees in principle with the CTIA that where possible the rates and conditions for existing wireline pole attachments should apply equally and consistently to the attachment of wireless facilities. However, there are two issues that undermine the adoption of the FCC's telecommunications formula at this time. First, the Commission notes that in one of the two calculations for a rental rate, the FCC incorporates a cost allocator system that requires an input for the presumptive average number of attachers in the pole owner's service area, as prescribed in the FCC 2011 Order, and

²⁷ Petition, p.10.

again in the FCC 2015 Order. For utilities in New York, this would require each pole owner to assess its pole attachment counts across multiple service areas, which could be impractical, and would cause further delay in the implementation of a tariffed rental rate. Second, although the FCC modified its telecommunications formula in 2011, and again in 2015 to bring parity to pole attachment rates at the cable rate formula level for one foot of vertical space, it is not clear that parity is achieved for attachments greater than one foot, such as wireless attachments.

The Commission will likewise not adopt the rate it approved for wireless attachments to National Grid's facilities in 2004 on a statewide basis. Although this flat rate was approved in 2004, the current demand for non-discriminatory treatment of wireless providers seeking to attach to utility poles throughout New York has prompted the Commission to reexamine Niagara Mohawk's wireless attachment rate here. Specifically, the method established by the Commission in the Niagara Mohawk case resulted in an annual flat rate per pole that is independent of the actual space occupied by the attachment. This is inconsistent with the current rate methodology for wireline attachments in New York, and with the request by CTIA to establish rates on a per foot basis.

Therefore, in the interest of developing a standard and non-discriminatory approach for calculating wireless attachment rates in New York, a wireless pole attachment methodology consistent with the established rate using the FCC's cable formula for horizontal cable attachments, based on the aforementioned 7.4% space factor applied to pole costs (i.e., net bare pole cost multiplied by a carrying charge), to produce a per-foot attachment rental rate, is adopted on an interim and

Statewide basis.²⁸ The Commission notes that the interim methodology being adopted here has previously been approved and is in use for wireline attachments in New York, and will allow the various pole owners to reflect their respective costs. The net cost of the bare pole is to be calculated by subtracting the accumulated depreciation and accumulated deferred income taxes for poles from the total investment in poles divided by the number of poles. An adjustment to a utility's net pole investment (of 15% for electric utilities and 5% for telephone providers) is necessary to eliminate the investment in cross-arms and other non-pole related items.

Carrying charge factors reflect those costs incurred by the utility in owning and maintaining poles regardless of the presence of pole attachments. Cost elements recovered through carrying charge factors include: administrative, maintenance, depreciation, taxes and cost of capital (rate of return). To calculate the carrying charge rate, the FCC developed a formula that relates each of these elements to a pole owner's net pole investment.

The FCC's Cable Formula uses the FCC's default rate of return, 11.25%, as the rate of return component of the carrying charge factors. The 11.25% return was adopted by the FCC in 1990 and was used to calculate National Grid's wireless pole attachment rates in the Commission's April 2004 Order. Interest rates and the financial markets in general are much different now than they were in 1990. For example, the Joint Proposal embodying the rate plan National Grid is operating under used a pre-tax rate of return of 8.07% to determine National Grid's

²⁸ The methodology set forth in this Order supersedes existing Orders and Rulings related to Niagara Mohawk's wireless attachment rate policy as defined in Case 03-E-1578 and modified in Cases 11-E-0708 and 15-E-0444.

revenue requirement for the 12 months ended March 31, 2019.²⁹ To determine the interim pole attachment rates, the electric utilities are to use the pre-tax rate of return adopted in their most recent rate case. Consistent with the Commission Order that addressed the effects of the federal Tax Cuts and Jobs Act of 2017 (Tax Act) on New York utilities, the pre-tax rate of return of electric utilities with rates set prior to the Tax Act becoming effective is to be estimated to account for the effect of the Tax Act.³⁰

The rates, terms and conditions for attachment in the various areas of a pole, including the use of alternative attachment methods where appropriate, should be explored as part of the next phase of this proceeding. Therefore, the pole owners and wireless attachers should work collectively in the interim to have the actual physical installations to promote worker safety and reliability of both communications and electric service. Costs for "make ready" work should comport to that used for wireline service, with the dispute resolution process available should concerns arise.

Accordingly, pole owners are directed to file tariff amendments reflecting the per-foot wireless attachment rental rate based on the determinations herein within 90 days of issuance of this Order, with an effective date of August 1, 2019. Pole owners are encouraged to work with DPS Staff to determine the appropriate form and content of the tariff amendments.

²⁹ Case 17-E-0238, National Grid Rates, Joint Proposal, Appendix 1, Schedule 1, Page 5 of 37 (filed January 19, 2018),

³⁰ Case 17-M-0815, Proceeding on Motion of the Commission on Changes in Law that May Affect Rates, Order Determining Rate Treatment of Tax Changes, (issued August 9, 2018).

Since the wireless service provider and telecommunications industries are involved in this proceeding, they will be made aware of the rate through the issuance of this Order. Therefore, the newspaper publication requirements of Public Service Law §66(12)(b), §92(2)(a), and 16 NYCRR §720-8.1 are waived.

Application of Rental Rate

In New York, cable attachments are charged the equivalent of one foot of vertical space on a pole in the area conventionally referred to as the "communications space." This one foot of space accommodates the cable and provides for additional space to allow for reasonable access for installation and maintenance activities. Wireless facility attachments subject to the rate methodology established by this Order will be installed in the communications space and other sections of the pole (i.e., "unusable or common" space, and "pole-top"), and will likely include equipment that will occupy more than one foot of vertical pole space.³¹ Excluding conduits, risers, and electrical meters,³² it is reasonable for wireless pole attachers to pay for the total space occupied by their facilities plus additional space to allow for reasonable access for installation and maintenance activities, as do wireline attachers.

³¹ Other than pole-top installations, attachment of wireless facilities in the "electric space" is not contemplated in this Order but will be explored in the continued proceeding.

³² Other equipment necessary for wireless facility operation, such as conduit and cable risers installed vertically on a pole, and electric meters shall not be subject to an attachment rental rate as they typically do not prohibit or hinder attachment by other wireline or wireless attachers, or, in the case of electric meters, because ownership and placement is determined by the electric utility or pole owner.

To accomplish this, the Commission determines that for each piece of equipment attached, the occupied space measurement shall reflect the overall length of the equipment and mounting hardware plus six inches, rounded up to the next whole foot.³³ Thus, equipment with a total length of three feet and six inches would occupy four feet of space for rental purposes, while equipment with a total length of three feet eight inches would occupy five feet of space for rental purposes. This methodology will apply to wireless facility attachments regardless of the equipment installed and the area of the pole the attachment occupies. Overall attachment costs will be determined by multiplying the occupied space measurement by the per-foot attachment rental rate.

Dispute Resolution Process

CTIA requests that the Commission adopt and enforce an expedited dispute resolution process for wireless attachments that mirrors the FCC, requiring disputes between pole owners and wireless attachers to be resolved finally within 45 days of the filing of a complaint. CTIA states that these processes are necessary because "the process for small-cell attachments on utility poles has been abused in the past."³⁴ The WIA generally supports CTIA's position by requesting that the Commission issue guidelines similar to those applicable to attachments for wireline services, which includes dispute resolution.

In response, the Joint Utilities assert that there are no obstacles necessitating dispute resolution. Rather, the Joint Utilities contend that they and the wireless providers can resolve their disputes privately and point to the fact that wireless facilities have managed to get attached notwithstanding

³³ For pole top attachments, the length of the antenna above the height of the pole is excluded from the occupied space.

³⁴ Case 16-M-0330, CTIA Comments, p. 20.

the lack of a Commission-sanctioned dispute resolution process. Moreover, the Joint Utilities assert that some (but not all) utilities have privately negotiated dispute processes implying that the remedy being sought by the CTIA already exists, at least in part.

The record in this proceeding indicates disagreement about whether a dispute resolution process is needed. However, the 2004 Pole Order contains a dispute resolution process for wireline attachments that requires the parties to first attempt to resolve their disputes business-to-business before invoking Commission assistance, and it is clear that this process would also be useful for wireless attachment disputes. The 2004 Pole Order requires that a final resolution be reached within 22 days and there is no indication in the record that this timeframe is insufficient in the wireless context. Accordingly, the dispute resolution process in place for wireline attachments through the 2004 Pole Order will be applied to wireless attachments going forward.

Issues for Continuing this Proceeding

While the actions discussed herein take large first steps toward consistent pole attachment policies, the Commission finds a more comprehensive review of pole attachment policy should be conducted to allow for innovative and new approaches and, where appropriate, further streamline existing processes to improve the efficient and safe deployment of advanced services in New York.

To that end, this Order directs that Department Staff begin a second phase of this proceeding to create a record necessary to adopt policies applicable to both wireline and wireless attachments. The process shall be designed as a collaborative process that involves all stakeholders. The Commission further directs Department Staff to organize one or

more technical conferences or working group meetings with interested stakeholders within 180 days of the issuance of this Order designed to elicit discussion of the following issues: 1) the terms and conditions for attachment in the various areas of a pole; 2) the use of alternative attachment methods where appropriate; 3) reasonable safety and construction requirements, including those that may exceed National Electric Safety Code requirements; 4) further improvements to streamline the make-ready process (application, survey and construction process) for all attachers; 5) reasonable attachment terms and timelines appropriate for large-scale projects; 6) the feasibility and implementation of a one-touch-make-ready process; 7) and, other issues to update pole attachment rates, conditions and timelines that may arise through this process.

The results of this collaborative process should be brought to the Commission for appropriate action at a later date.

CONCLUSION

Consistent with the foregoing discussion, the Commission grants, in part, the Petition of CTIA, and will begin a second phase of this proceeding to review additional pole attachment issues.

The Commission orders:

1. Electric and telephone utilities subject to the jurisdiction of the Commission shall file, within 90 days new or amended tariff amendments and associated Short Form Environmental Assessment Forms, setting rates for new wireless pole attachments, consistent with the discussion in this Order, to become effective on August 1, 2019.

2. Consistent with the discussion in this Order, timelines for the processing of pole attachment applications for wireless attachments are hereby established.

3. Consistent with the discussion in this Order, the Commission's existing dispute resolution process, as established in the 2004 Pole Order, will apply for disputes related to wireless attachments on a going forward basis.

4. Consistent with the discussion in this Order, Department of Public Service Staff shall organize one or more technical conferences or working group meetings with interested stakeholders within 180 days of the issuance of this Order designed to elicit discussion on the issues to be examined during the second phase of this proceeding.

5. The requirements of Public Service Law §66(12)(b), §92(2)(a), and 16 NYCRR §720-8.1 as to newspaper publication for the proposed tariff changes directed in Clause 1 are waived.

6. The Secretary in her sole discretion may extend the deadlines set forth in this Order. Any request for an extension must be in writing, must include justification for the extension, and must be filed at least one day prior to the affected deadline.

7. This proceeding is continued consistent with the discussion in this Order.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary