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July 15, 2019

**VIA HAND DELIVERY**

Connie Graley  
Executive Secretary  
Public Service Commission  
201 Brooks Street  
Charleston, WV 25301

04:08 PM JUL 15 2019 EXEC SEC DIV

Re: Case No. 19-0551-T-GI  
General Investigation into Adopting and  
Implementing Rules Governing Pole Attachments  
and Assumption of Commission Jurisdiction  
Over Pole Attachments.

Dear Ms. Graley:

On behalf of CTIA, please accept this letter as the **Initial Comments of CTIA** in response to the Commission Order issued June 4, 2019. An original and twelve (12) copies of this letter are provided.

Sincerely,

David B. Hanna  
WV State Bar # 8813  
dhanna@hannalawpllc.com

DBH/dh

Enclosures

cc: C. Howard, Esq.  
L. Bouvette, Esq.  
J. Roberts, Esq.

**Before the  
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA**

General Investigation into Adopting and	)	
Implementing Rules Governing Pole	)	Case No. 19-0551-T-GI
Attachments and Assumption of Commission	)	
Jurisdiction over Pole Attachments	)	
	)	04:08 PM JUL 15 2019 EXEC SEC DIV

**COMMENTS OF CTIA**

CTIA<sup>1</sup> respectfully submits its comments in response to the Public Service Commission of West Virginia’s (“Commission’s”) Commission Order (“Order”) entered June 4<sup>th</sup>, 2019 in the above-captioned docket.

As noted in the Order, the Commission has been instructed by recently-passed Senate Bill 3 (“SB3”) to reverse-preempt the Federal Communications Commission’s (“FCC’s”) jurisdiction over pole attachments and adopt the provisions of the Pole Attachment Act (47 U.S.C. §224) and attendant FCC regulations (47 C.F.R. §§ 1.1401 – 1.1415, inclusive, as well as the complaint rules in 47 C.F.R. §§ 1.720 – 1.740).<sup>2</sup> CTIA asks that the Commission adopt those rules and associated FCC interpretations, as well as future FCC amendments to those rules, to the extent they do not conflict with existing West Virginia statute, and use its discretion as the expert agency to resolve any conflicts.

As the wireless industry is presently engaged in deploying advanced 4G and 5G networks to benefit West Virginians, it is important for the Commission to streamline and facilitate

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<sup>1</sup> CTIA – The Wireless Association (“CTIA”) ([www.ctia.org](http://www.ctia.org)) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21<sup>st</sup> century connected life. The association’s members include wireless carriers, device manufacturers, and suppliers as well as app and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry’s voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

<sup>2</sup> As codified at W.Va. Code § 31G-4-4.

infrastructure deployment. Small cells are being deployed across the nation today to support these networks, and access to infrastructure, such as utility poles, is essential to such deployments. Wireless carriers' overall site deployments increased by 25,000 in 2018,<sup>3</sup> and Accenture projects that small cell deployments will escalate rapidly from a nationwide cumulative deployment of roughly 52,000 in 2017 to over 800,000 nationwide by 2026.<sup>4</sup> Accenture also projects that this investment will lead to \$500 billion in national GDP growth, three million jobs created, and over \$275 billion invested in 5G wireless infrastructure nationwide,<sup>5</sup> but only if wireless infrastructure can be deployed efficiently. Wireless providers' capital expenditures in 2018 totaled \$27.4 billion, and total over \$253 billion since 2010.<sup>6</sup>

The wireless industry is a driver of West Virginia's economy, and deployment of 5G networks will only enhance the wireless industry's contributions to West Virginia's economy. There are already over 9,000 wireless-related jobs in West Virginia, and the wireless industry is responsible for a \$669 million contribution to West Virginia's GDP.<sup>7</sup> Going forward, Accenture estimates that in Charleston, 5G deployment will lead to an estimated 447 new jobs and \$73 million in new GDP; in Huntington, 5G deployment will lead to an estimated 439 new jobs and \$42 million in new GDP; and in Morgantown, 5G deployment will lead to an estimated 285 new jobs and \$25 million in new GDP.<sup>8</sup>

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<sup>3</sup> See CTIA.org, "2019 Annual Survey Highlights" (June 20, 2019), available at <https://www.ctia.org/news/2019-annual-survey-highlights> ("CTIA Annual Survey for 2019") (last accessed July 12, 2019).

<sup>4</sup> See accenturestrategy, "Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities" (February 2017) at 11, available at <https://api.ctia.org/wp-content/uploads/2017/02/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf> ("Smart Cities Report") (last accessed July 12, 2019).

<sup>5</sup> See accenturestrategy, "Impact of Federal Regulatory Review on Small Cell Deployment" (March 12, 2018) at 3, available at [https://api.ctia.org/docs/default-source/default-document-library/small-cell-deployment-regulatory-review-costs\\_3-12-2018.pdf](https://api.ctia.org/docs/default-source/default-document-library/small-cell-deployment-regulatory-review-costs_3-12-2018.pdf) (last accessed July 12, 2019).

<sup>6</sup> See CTIA Annual Survey for 2019.

<sup>7</sup> See Smart Cities Report; see also CTIA.org, "Positions: Infrastructure," available at <https://www.ctia.org/positions/infrastructure> (last accessed July 12, 2019).

<sup>8</sup> See *id.*

To that end, the FCC’s pole attachment rules and regulations have proven successful to promote deployment in the thirty states subject to federal jurisdiction over utility pole attachments, and adopting them will promote deployment in West Virginia. The FCC’s pole rate methodologies have proven fair and effective, and courts have held that they result in rates that are just and reasonable for owners and attachers.<sup>9</sup> The FCC’s “shot-clock” timelines for make-ready, which the FCC recently streamlined,<sup>10</sup> help to remove unnecessary delay in the attachment process. Further, West Virginia’s adoption of the FCC’s pole attachment regulations will help to create a consistent framework from state to state, which in turn will help facilitate broadband deployment. Neighboring Pennsylvania, for example, is also considering reverse-preempting the FCC’s pole attachment jurisdiction in a similar proceeding to this, and has proposed wholesale adoption of the FCC’s regulations and associated precedent.<sup>11</sup>

However, the Commission is correct to note that there are some provisions of the rules that conflict with existing West Virginia statute. For example, the Order notes the conflict between venues for damages, suits for which may only be brought in circuit court according to statute, rather than the Commission.<sup>12</sup> Other examples include a requirement to file complaints via the FCC’s online complaint portal and a requirement that the FCC’s Market Disputes Resolution Division handle primary jurisdiction referrals.

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<sup>9</sup> See Fed. Comms. Comm’n, *In the Matter of Implementation of Section 224 of the Act: A National Broadband Plan for Our Future*, WC Docket No. 07-245, Report and Order and Order on Reconsideration (April 7, 2011) at ¶ 183 & n.569 (listing cases in which federal courts found the cable rate to be fully compensatory” to pole owners and concluding that “in virtually all cases the new telecom rate will recover at least an equivalent amount of costs”).

<sup>10</sup> See Fed. Comms. Comm’n, *In the Matter of Accelerating Wireline Broadband Deployment to Infrastructure Investment*, Third Report and Order, WC Docket No. 17-84 (released August 3, 2018), and Fed. Comms. Comm’n, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79 (released September 27, 2018).

<sup>11</sup> See, e.g., Comments of CTIA on Notice of Proposed Rulemaking before the Pennsylvania Public Utility Commission, Docket No. L-2018-3002672 (October 29, 2018).

<sup>12</sup> See Order at 3.

Although the Order notes that SB3 “does not authorize the Commission to adopt its own rules... or to adopt only those sections of the FCC formal complaint rules that are consistent with State law,”<sup>13</sup> the inherent conflicts demand some sort of resolution, as suggested by the request for comment in the Order. It is a well-established tenet of statutory interpretation that statutes should be read to harmonize, when possible.<sup>14</sup> Additionally, where the plain language creates conflicts, as it does here, courts look to legislative intent in order to determine the meaning of the statute.<sup>15</sup>

In this case, the Legislature could not have intended for the Commission to adopt rules that are in conflict with West Virginia statute, or contain provisions that make no sense. Instead, CTIA contends the Legislature intended for the Commission, as the state’s expert agency on the subject matter, to have discretion to adopt the FCC rules in a manner that harmonizes with the existing rule and statute. For example, as the Order points out, the FCC formal complaint rules require use of the FCC’s electronic filing system.<sup>16</sup> To infer that this was the intent of the Legislature would create absurd (and impossible) results, as West Virginia pole complaints cannot be submitted via the FCC’s online portal. Similarly, as the state’s expert agency, the Commission is empowered to determine a reasonable resolution of the issue regarding damage awards, and it would be reasonable to decide in favor of the long-standing exclusive jurisdiction of the circuit courts over damage awards.

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<sup>13</sup> *Id.*

<sup>14</sup> *See, e.g., State ex rel. Pinson v. Varney*, 142 W.Va. 105, 109, 96 S.E.2d 72, 74 (1956) (holding that “where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions.”)

<sup>15</sup> *See, e.g., Ohio County Comm’n v. Manchin*, 171 W.Va. 552, 301 S.E.2d 183 (1983) (holding “the initial step in such interpretative inquiry [of a statute] is to ascertain legislative intent”); *State ex rel. McGraw v. Scott Runyon Pontiac-Buick, Inc.*, 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (1995).

<sup>16</sup> *See* Order at 4.

Accordingly, the Commission should adopt the FCC's pole attachment rules and use its discretion as the expert agency to resolve any conflicts. CTIA also urges the Commission to adopt the FCC's interpretations of its rules as precedent, as well as any future changes to the FCC's pole attachment rules, or future interpretations thereof, on an automatic basis. CTIA supports this approach because it eliminates the potential uncertainty that a rulemaking at the state level might cause. Automatic adoption means each party gets one "bite of the apple" to contest a rule at the FCC, and not another chance at the state level. Keeping West Virginia regulations consistent with the FCC regulations will also lessen the likelihood that there will be redundant litigation over pole attachment regulations and the interpretation thereof, creating efficiency and ensuring fair application of a consistent set of rules, which will encourage deployment. If the Commission reaches the conclusion that it cannot automatically adopt future changes to the FCC rules due to conflict with West Virginia statute, the Commission could alternately promulgate a rule requiring it to open a rulemaking to adopt new FCC rules within a time certain. If there are no objections, the proposed changes could become effective, and if there are objections, the ordinary rulemaking process could apply. It cannot be emphasized enough, however, that consistency with the FCC regulations is important to promote regulatory certainty and the efficiency that it creates.

CTIA looks forward to continuing to working with the Commission to achieve the goal of making infrastructure deployment more efficient in West Virginia.

**CTIA**  
By Counsel

A handwritten signature in black ink, appearing to read 'DHanna', is positioned above a horizontal line.

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[dhanna@hannalawpllc.com](mailto:dhanna@hannalawpllc.com)

July 15, 2019

**CERTIFICATE OF SERVICE**

I, David B. Hanna, counsel for CTIA hereby certify that copies of the foregoing **Comments of CTIA**, have been served upon the following, by first class United States mail, postage prepaid, this 15<sup>th</sup> day of July 2019:

Jacqueline Lake Roberts, Director  
Consumer Advocate Division  
700 Union Building  
723 Kanawha Boulevard, East  
Charleston, WV 25301

**VIA HAND DELIVERY**

Chris Howard, Esq.  
Linda Bouvette, Esq.  
Legal Division  
Public Service Commission  
201 Brooks Street  
Charleston, WV 25301



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DAVID B. HANNA