

**BEFORE THE
NEW YORK PUBLIC SERVICE COMMISSION**

Comments of

CTIA – THE WIRELESS ASSOCIATION[®]

Case No. 16-M-0330

In re Proceeding to Update and Clarify
Wireless Pole Attachment Protections

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION[®]

CTIA¹ respectfully submits these comments in response to the New York Public Service Commission’s (“Commission’s”) November 12, 2019 Notice in the above-referenced proceeding.²

I. INTRODUCTION AND SUMMARY

CTIA commends the Commission for being proactive in its pursuit of a “new approach” to pole attachments.³ Timely and reliable pole access, for wireless and wireline attachers alike, is essential to broadband deployment. As the wireless industry continues to augment its robust 4G networks and deploys 5G networks, policymakers must adapt their pole attachment policies to accommodate the new deployment patterns that characterize 5G networks, which the Commission keenly recognized in its March Order granting portions of CTIA’s petition to

¹ CTIA – The Wireless Association[®] (“CTIA”) (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association’s members include wireless carriers, device manufacturers, suppliers as well as apps 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.

² Notice Seeking Comments, Case No. 16-M-0330 (Nov. 12, 2019) (“Notice”).

³ Notice at 2.

update and clarify pole attachment protections.⁴ That relief established a predictable framework for wireless attachments and marked an important step toward modernizing New York’s pole attachment rules by more closely aligning them to the realities of 5G deployment.

CTIA applauds the Commission for not stopping there and instead building on the foundation created in its March Order by continuing this proceeding in a systematic and inclusive manner, in order to identify additional areas for reform that will further accelerate broadband deployment in the state. As it embarks on the “second phase” of this proceeding,⁵ the Commission should continue to adhere to a forward-looking, nondiscriminatory pole attachment policy, consistent with its distinguished record of ensuring that its regulations eliminate obstacles to facilities deployment (particularly in the pole attachment context).⁶

Fortunately, the Commission need not write on an entirely blank slate in addressing most of the issues identified in the Notice.⁷ On several issues, the Commission can simply take the next steps that logically follow from its March Order. On others, the Commission can adopt or adapt solutions put in place by the Federal Communications Commission (“FCC”), which have been well-vetted and proven to address several of the deployment challenges identified in the

⁴ See Order Approving in Part and Continuing Proceeding, Case No. 16-M-0330, at 23-24 (Mar. 14, 2019) (“March Order”) (noting that 5G networks have “different deployment patterns” than 4G, such as “placement in more densely populated areas”).

⁵ March Order at 35.

⁶ See generally Petition of CTIA – The Wireless Association to Initiate a Proceeding to Update and Clarify Wireless Pole Attachment Protections, 16-M-0300, at 3-5 (describing the Commission’s previous efforts to facilitate pole access and broadband deployment) (filed May 20, 2016) (“CTIA NY Pet.”); March Order at 2-5 (same).

⁷ See Notice Attachment at 1.

Notice. The Commission can import or modify these approaches without relinquishing its authority to regulate pole attachments.⁸

Specifically, CTIA recommends that the Commission take the following specific, concrete actions:

- Reiterate that wireless attachments “will be installed” in other sections of the pole beyond the communications space, including pole tops and unusable space, and clarify that the rate applicable to pole-top attachments is the same as for any other part of the pole;
- Adopt an additional 30-day time interval beyond the New York-specific interim timeline for wireless attachments set forth in the March Order for make-ready work above the communications space;
- Affirm that wireless attachers may attach to light poles just as they do other poles;
- Account for safety and engineering concerns by requiring pole owners to design poles prudently and consistent with industry standards and seek comment on alternate proposed designs, encouraging sound engineering practices, and considering attachment solutions that present minimal risk;
- Strengthen its dispute resolution process by adopting (i) a specific, accelerated timeline to govern its adjudication of pole attachment complaints, (ii) more stringent notice requirements for when a utility denies a pole attachment application, and (iii) a statement that attachers are allowed to replace a pole with one that can accommodate its proposed attachment;
- Prohibit utilities from citing their voluntary “hardening” measures as the basis for a denial of pole access;
- Improve its rate-setting methodology by adopting a presumption that the amount of space used by a wireless attachment is one foot, and making clear that wireless attachers will pay rent only for the additional space an attachment uses to the exclusion of others’ attachments;
- Require utilities to deliver power to poles in a timely manner as part of the make-ready process, or other Commission-defined interval, and to obtain an attacher’s consent to non-tariffed billing methods;
- Adopt the FCC’s framework for large-scale deployment projects;

⁸ March Order at 20-21.

- Continue to evaluate the effectiveness of its rules and commit to revising them as needed to facilitate broadband deployment; and
- Adopt a one-touch make-ready framework for simple attachments and a self-help regime for complex attachments.

Collectively, these measures will go far toward ushering in the 5G revolution and ensuring that New York consumers have access to the most advanced communications services available, while cementing the Commission's leadership in promoting the latest technologies.

II. THE COMMISSION SHOULD ADOPT RULES AND POLICIES THAT PROMOTE NEW TECHNOLOGIES AND ATTACHMENT METHODS

CTIA encourages the Commission to promote pole attachment practices that are innovative, workable, and consistent with its stated goal of promoting broadband deployment.⁹ This means adopting new methods and adapting others in response to changes in technology. The first section of the Notice references various pole attachment methods and other issues that have become increasingly relevant as broadband evolves. Below, CTIA addresses those issues that are of particular relevance and interest to the wireless industry, all of which can be readily and expeditiously addressed by the Commission in this phase of this proceeding.

Pole-top access and rate. Now that the Commission has made clear that wireless attachers are affirmatively entitled to pole-top access, it should proceed to clarify that the rate applicable to such access is the same rate as for any other occupied space. In the March Order, the Commission stated its expectation that wireless attachments “*will be installed*” on pole tops.¹⁰ It also described how its rate formula would apply to such attachments, stating that the length of the antenna above the pole should be excluded from the occupied space.¹¹

⁹ See generally March Order at 21-24.

¹⁰ March Order at 32 (emphasis added).

¹¹ See *id.* at 33 n.33.

Unequivocal as the Commission was in its March Order, it should reaffirm these points and clarify that the rate applicable to pole-top access is the same as for any other part of the pole, and that this rate only applies to space used by one attacher to the exclusion of others. Doing so should finally thwart attempts to deny or restrict access to pole tops out of hand, a practice that has been documented.¹² That outcome is correct as a matter of state law, since nothing in New York’s pole attachment statute, N.Y. Pub. Serv. L. § 119-A, or in the Commission’s other rulings suggests that pole tops are excluded from utilities’ access obligations. Moreover, this conclusion is consistent with federal law. Years ago, in response to pole owners’ imposition of blanket bans on pole-top access, the FCC likewise “clarif[ied] that a wireless carrier’s right to attach to pole tops is the same as it is to attach to any other part of a pole.”¹³ By providing a similar clarification here, the Commission would align New York and federal law, while ensuring that wireless providers are not deprived of an important pole location for deployment purposes.

Although not specified for comment in the Notice, the Commission should issue the same clarifications with respect to the other parts of a pole to which the Commission has ruled attachers must be provided access. Indeed, the Commission did not stop at assuring pole-top access. It also stated that wireless attachments “will be installed in the communications space *and other sections of the pole*,” including but not limited to “unusable or common” space as well as pole tops – in effect, all portions of the pole except the electric space, which it deferred for

¹² See, e.g., March Order at 11, 16, 17, 19; Reply Comments of CTIA, WT Docket No. 19-250, at 34-35 (filed Nov. 21, 2019) (“CTIA FCC Reply Comments”) (citing record evidence).

¹³ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 ¶ 77 (2011) (“*2011 Pole Attachment Order*”).

further consideration in this proceeding.¹⁴ Again, such a clarification would conform to federal law, which has long permitted access to the unusable space on poles.

In terms of timing for access to pole tops or other space above the communications space, the Commission's rules should reflect the fact that such access implicates the safety and reliability concerns that apply to the portion of poles above the communications space. Doing so means affording sufficient time to navigate these challenges in the attachment process. In this respect, the FCC's rules addressing pole access above the communications space provide useful guidance. When the FCC confronted this issue, it adopted a longer timeline to govern attachments above the communications space. In particular, the FCC provided 30 extra days for make-ready work in that space compared to make-ready work within the communications space.¹⁵

The Commission should likewise allow an additional 30-day interval for make-ready work above the communications space. Although the FCC's current rules now include a 60-day time difference between make-ready work in the communications space and work above the communications space (reflecting that typically less time is required for work in the communications space),¹⁶ this Commission has already allowed far more time than is available under the FCC's approach. Adding a 60-day supplemental interval to that baseline would result in an unreasonably long timeframe. For example, the period for make-ready work would become 150 days, which would unduly prolong the attachment process, create opportunities for abuse by pole owners, and inevitably (and unjustifiably) stall broadband deployment.

¹⁴ March Order at 32 (emphasis added).

¹⁵ See *2011 Pole Attachment Order* at ¶ 33.

¹⁶ See 47 C.F.R. § 1.1411(e)(2).

Accordingly, to the extent the Commission determines that some amount of additional time is required for pole access above the communications space, CTIA proposes a 30-day additional interval.

Streetlight attachments. The Commission should affirm that wireless attachers may attach to light poles just as they do other poles. The New York statute refers to “utility poles” but does not define that term or the term “pole.”¹⁷ Accordingly, these terms should be given their “ordinary meaning.”¹⁸ As CTIA has explained elsewhere, a “pole” clearly encompasses a “light pole” and a “utility pole” simply refers to a pole (of whatever type) owned by a utility.¹⁹ Section 119-A was enacted in direct response to the federal pole attachment statute, 47 U.S.C. § 224, so the meaning of “pole” and “utility pole” under the federal statute should bear directly on the meaning of those terms under New York law.²⁰

Moreover, as a policy matter, light poles are an important alternative to other types of utility poles – and in fact, they may be the *only* feasible location for small cells along rights-of-way where electric lines are buried underground. CTIA and others have submitted ample arguments and evidence to the FCC regarding the need for light pole access.²¹

¹⁷ N.Y. Pub. Serv. L. § 119-A.

¹⁸ *See, e.g., People v. Cruz*, 48 N.Y.2d 419, 428 (1979) (citations omitted).

¹⁹ *See generally* CTIA Petition for Declaratory Ruling, WT Docket No. 17-79, at 21-25, (FCC filed Sept. 6, 2019); CTIA FCC Reply Comments at 26-33.

²⁰ *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 108 A.D.2d 266, 271 (N.Y. 1985) (holding that interpretation of 47 U.S.C. § 224 applied to interpretation of Section 119-A, stating that “the authoritative legislative history and judicial and administrative interpretation of a statute upon which New York legislation was modeled is highly persuasive” and that “uniformity in interpretation is desirable”).

²¹ *See generally* CTIA Petition for Declaratory Ruling, WT Docket No. 17-79, at 21-25, (FCC filed Sept. 6, 2019); CTIA FCC Reply Comments at 26-33.

Safety and engineering concerns. A pole attachment framework must account for and address safety and reliability concerns. Pole owners and attachers alike must not compromise the safety of pole infrastructure. But too often, utilities broadly invoke these concepts and general safety protocols to block access to poles without demonstrating that a particular pole attachment would actually implicate these concerns or degrade safety. Accordingly, the Commission should ensure that safety and engineering concerns are accounted for, but not exploited.

The Commission should require pole owners to design poles prudently and consistent with industry standards. If alternative designs are being considered, the Commission should issue a public notice and provide an opportunity for interested parties to comment on those alternate designs before the Commission acts on the application(s) related to construction of those poles. The Commission should ensure that pole designs do not intentionally or unintentionally hinder or prevent wireless deployments.

Dispute resolution. In its March Order, the Commission appropriately extended its existing dispute resolution process to wireless attachment applications. It should now strengthen that mechanism to ensure that disagreements can be processed in a more predictable way. In particular, the dispute resolution process adopted in 2004 only governs the parties' negotiations before invoking Commission assistance. The Commission should go further and adopt an accelerated process for its own consideration of pole attachment complaints, comparable to the process already adopted by the FCC.²²

²² See 47 C.F.R. § 1.736(a); *Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, Report and Order, 33 FCC Rcd 7178 para. 19 (2018).

Relatedly, the Commission should adopt more stringent notice requirements by which a utility must inform an attacher of the specific reasons why a particular application cannot be accommodated on the particular pole. The Commission should make clear that, if a pole owner rejects an attachment based on pole-specific structural concerns, the attacher may choose to replace the pole with one that can accommodate the proposed attachment. This approach is consistent with the FCC's rules as well.²³ In addition, CTIA urges the Commission to encourage sound engineering practices and to consider solutions that present minimal risk – for instance, a well-engineered “temporary attachment” may well be properly permitted on a pole.

“Hardening” measures. CTIA recognizes the value of measures that protect communications infrastructure – including poles – against natural disasters. But some utilities have cited their pole hardening efforts as a reason why certain pole attachments cannot be accommodated, claiming such attachments would undermine poles' hardening ratings. While the wireless industry agrees with electric utilities that wireless attachments cannot compromise utility poles, CTIA suggests that the solution cannot be to prohibit wireless attachments.

CTIA proposes a straightforward approach to address this issue. If a utility undertakes hardening measures pursuant to a government mandate, such that it is not optional, then the pole owner may deny access to a pole based on pole-specific evidence that the attachment would defeat the pole's required hardening rating. However, the attacher maintains the right to replace the pole, or take other measures that will maintain the measure of resiliency, at its own cost, to accommodate the attachment while maintaining the required level of structural hardening.

²³ See *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103 ¶ 24 (2001) (“if a utility is required to replace a pole in order to provide space for an attacher, the attacher pays the full cost of the replacement pole”).

Similarly, in instances where hardening is purely voluntary, wireless carriers maintain their fundamental right to attach if they are willing, and it is feasible, to maintain the level of resiliency. However, unlike with government mandated hardening, the Commission must guard against resiliency measures or treatments that have the net effect of making wireless attachment impossible or cost prohibitive, or that are simply unnecessary, unreasonable, or imprudent. For non-mandatory resiliency measures, the Commission's dispute resolution processes may be needed to resolve whether resiliency or hardening demands or levels are necessary, reasonable, and prudent. Again, wireless carriers recognize the importance of resilient infrastructure, but urge the Commission to guard against utilities using claims of resiliency as a tactic to deny access.

Application of rates. The Commission should make certain improvements in the rate applicable to wireless attachments. In particular, as CTIA argued in its 2016 petition,²⁴ the Commission should adopt a presumption that the amount of space used by a wireless attachment is one foot, and make clear that wireless attachers must pay rent only for the additional space their attachments use to the exclusion of others' attachments.²⁵ The same space assumption is used in some landline tariffs (such as Verizon's) for pole-top attachments, which generally take up no more than that amount of space. The Commission's per-foot rate methodology is subject to abuse if wireless pole attachments are presumed to be longer.

This concern is not hypothetical – some pole owners begin with the presumption that wireless attachments require seven feet of usable space, a proposition that defies fact and logic. To the extent a wireless attachment excludes others from attaching to a vertical span that is

²⁴ See CTIA NY Pet. at 10.

²⁵ See March Order at 29.

longer than one foot of space on a pole, the attacher should accept responsibility for any actual additional space the attachment uses to the exclusion of others' attachments.

Power delivery. A reliable and economic source of power is essential to wireless pole attachments. Consistent with the Commission's goal of promoting pole attachments, the Commission should require utilities to deliver power to poles in a timely manner as part of the make-ready process, or within some other Commission-defined interval. In addition, to avoid abuse in the fees charged for electricity, the Commission should require utilities to obtain an attacher's consent to any non-tariffed billing approach.

III. THE COMMISSION SHOULD ADOPT THE FCC'S FRAMEWORK TO ADDRESS LARGE-SCALE DEPLOYMENT PROJECTS

The Notice properly singles out "large-scale projects" for examination. Large-scale deployments present unique practical, operational, and economic challenges due to the volume of poles and attachments involved. But these projects will be increasingly crucial to accelerating the pace of broadband deployment generally, and 5G in particular, given the high number of small cells and densification that 5G deployment requires.

The Commission should adopt the FCC's definitions and processes for large-scale projects and adjust its own timelines by the same intervals.²⁶ The FCC has compiled an extensive record on this subject and put in place milestones and guidelines to ensure that such projects proceed in a manner that is realistic and pro-deployment. Specifically, the FCC established tiers of large-scale projects based on a numerical cap on poles and a cap based upon the percentage of poles owned in a state, and then set up a timeline or process for each.²⁷ As applied in New York, that approach would result in the following:

²⁶ See 47 C.F.R. § 1.1411(g).

²⁷ *Id.*; 2011 Pole Attachment Order ¶¶ 63-67.

- The standard timeline, as described in Commission’s March Order,²⁸ would apply to orders up to the lesser of 0.5 percent of the utility’s total poles within the state or 300 poles within the state during any 30-day period.
- For larger orders – up to the lesser of 5 percent of a utility’s total poles in the state or 3,000 poles within the state – 15 days would be added to the standard timeline’s survey period and 45 days to the make-ready period.
- For in-state orders greater than the lesser of 5 percent of a utility’s poles in the state or 3,000 poles within the state, parties would be required to negotiate in good faith regarding the timeframe for completing the job.
- As with the FCC rules, “[a] utility may treat multiple requests from a single new attacher as one request when the requests are filed within 30 days of one another.”²⁹

This structure is easy to understand and administer. It already works well in jurisdictions that are subject to the FCC’s rules, and thus should be an effective and efficient framework for New York.

IV. THE COMMISSION SHOULD EVALUATE THE EFFECTIVENESS OF ITS RULES AND MAKE SUCH REVISIONS AS MAY BE NECESSARY TO FACILITATE BROADBAND DEPLOYMENT

The Notice asks whether aspects of the pole application and make-ready process can be improved – for instance, by reducing delays or expanding the use of qualified contractors.³⁰ At present, the make-ready rules now in place in New York include longer make-ready timelines than those under the FCC’s rules. The Commission should not increase those timeframes except as suggested in these comments. CTIA encourages the Commission to monitor actual experience in the marketplace and to revisit this issue as appropriate. As the pace of deployment increases and competitive dynamics evolve, it is possible that current make-ready timelines and processes will need to be adjusted.

²⁸ March Order at 27.

²⁹ 47 C.F.R. § 1.1411(g)(5).

³⁰ See Notice Attachment at 1.

The Notice also seeks comment on the use of “advanced ride-out technologies.”³¹

Although the Notice does not define this term, CTIA envisions it to include alternative techniques such as drones that would conduct surveys of deployment sites in place of traditional truck rolls. The Commission should encourage the use of innovative practices that can streamline and reduce the costs of the pole attachment process without undermining its reliability and effectiveness. Specifically, even though advanced technologies may not yet be commercially available or viable, the Commission should also not prohibit them, so that utilities and attachers can remain free to innovate and enhance their approaches. At the same time, the Commission should be prepared to intervene if such practices are being used as unreasonable short-cuts. For instance, a utility should not be permitted to insist on a drone-conducted survey or use of other advanced technology without an attacher’s consent.

V. THE COMMISSION SHOULD ADOPT ONE-TOUCH MAKE-READY FOR SIMPLE ATTACHMENTS AND A SELF-HELP REGIME FOR COMPLEX ATTACHMENTS (INCLUDING WIRELESS ATTACHMENTS)

The Commission should adopt a one-touch make-ready (“OTMR”) framework for simple attachments, and a self-help regime for complex attachments, including wireless attachments. Various states that are certified to regulate pole attachments (or that presumably will soon seek to be certified) already are pursuing their own versions of OTMR with accompanying self-help procedures,³² demonstrating that the approach is feasible. This is in addition to the thirty states subject to FCC regulation, in which OTMR is already implemented.

³¹ Notice Attachment at 1.

³² See, e.g., *Petition of Vermont Department of Public Service for Rulemaking to Amend Public Utility Commission Rule 3.708*, Case No. 19-0252-RULE (Vt. Pub. Serv. Bd.). The Vermont Board submitted a final proposed rule along these lines to the required state authorities on November 27, 2019, pursuant to a statutory requirement to adopt OTMR.

Regardless of whether the Commission adopts an OTMR construct for simple attachments, its pole attachment regime must include a self-help remedy for complex attachments, including wireless attachments. The Commission should ensure that utilities maintain publicly available and updated lists of approved contractors, identifying actual businesses or individuals capable of undertaking such work, to ensure that if timelines are not met, deployment of broadband facilities is not unduly delayed. These lists should be posted on the Commission's website and promptly updated as needed. Moreover, attachers should be permitted to proceed with self-help promptly upon a pole owner's failure to complete necessary make-ready within Commission defined timeframes. Any self-help prerequisite steps involving pole owners who have missed Commission imposed deadlines could effectively nullify the self-help remedy by granting the pole owner exclusive control over when self-help is available.

VI. CONCLUSION

CTIA looks forward to continuing to work with the Commission as it modernizes its pole attachment rules and thereby takes steps towards expanding broadband access for consumers in the state of New York.

Respectfully submitted,

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