



CASE 22-M-0101 - Proceeding to Review Certain Pole Attachment Rules.

DEPARTMENT OF PUBLIC SERVICE STAFF WHITE PAPER
ON REVIEW OF CERTAIN POLE ATTACHMENT RULES

Dated: December 18, 2023

Table of Contents

EXECUTIVE SUMMARY 1

INTRODUCTION AND BACKGROUND 3

CHAPTER AMENDMENT CONSIDERATIONS..... 8

 I. Dispute Resolution..... 8

 Initial Comments 9

 Staff Recommendation 13

 II. Pole Replacement and Reconfiguration Costs 14

 Initial Comments 15

 Staff Recommendation 31

 III. Pole Attachment Methods and Timelines 35

 Initial Comments 35

 Staff Recommendation 44

CONCLUSION..... 47

EXECUTIVE SUMMARY

Closing the digital divide and ensuring that high-speed broadband service is available to all New Yorkers is a crucial goal for the State of New York. The Public Service Commission (Commission) shares that goal. To promote the fair, orderly, and expeditious deployment of networks capable of providing high-speed broadband, the Commission has already taken important steps to streamline the process by which attachments to utility-owned poles are made. In this White Paper, the Department of Public Service Staff (Department or DPS Staff) provides additional recommendations to modify the Commission's existing pole attachment rules to help further facilitate the deployment of high-speed broadband and wireless cellular services.¹

Pursuant to legislation,² the Commission, through a March 1, 2022 Notice Seeking Comments,³ initiated this proceeding to consider changes to its existing pole attachment rules. In response to its March Notice, comments were received from various stakeholders, including the Joint Utilities,⁴ Frontier,⁵ Verizon New York Inc. (Verizon), Altice USA, Inc. (Altice), the Communication Workers of America (CWA), the Lumen Companies,⁶ CTIA – The

¹ Although the Legislation specifically addresses high-speed broadband, it should be noted that deployment of wireless cellular service, which also requires attachments to utility poles, is also a critical policy goal of the State.

² PSL §119-a (4); L.2021, ch.723, L.2022, C.68.

³ Case 22-M-0101, Proceeding to Review Certain Pole Attachment Rules, Notice Seeking Comments (issued March 1, 2022) (March Notice).

⁴ Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., PSEG Long Island LLC, Rochester Gas and Electric Corporation, and New York State Electric & Gas Corporation (collectively referred to herein as the Joint Utilities).

⁵ Frontier Telephone of Rochester, Inc., Citizens Telecommunications Company 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 referred to herein as Frontier).

⁶ CenturyLink Communications, LLC, Broadwing Communications, LLC, Global Crossing Local Services, Inc., Global Crossing Telecommunications, Inc., Level 3 Communications, LLC, Level 3 Telecom of New York, LP, TelCove Operations, LLC, and WilTel Communications, LLC (collectively referred to herein as the Lumen Companies).

Wireless Association (CTIA), ExteNet Systems, LLC (Extenet), OTTC,⁷ Comcast of New York LLC (Comcast), SLIC Networks, Inc. (SLIC), Mid-Hudson Cablevision (Mid-Hudson), the NYS Telecommunications Association (NYSTA), Crown Castle Fiber LLC (Crown Castle), FirstLight Fiber (FirstLight), Empire Telephone Corporation (Empire), Charter Communications, Inc., on behalf of its affiliates Spectrum Northeast, LLC, and Spectrum New York Metro, LLC (Charter), and Greenlight Networks, Inc. (Greenlight).

On September 28, 2022, additional comments were sought on alternative approaches to cost allocation methodologies for the replacement of utility poles.⁸ The September Notice was based on comments responsive to the March Notice regarding pole replacement cost allocations and analysis by DPS Staff. Additional comments were received from INCOMPAS, USTelecom – The Broadband Association (USTelecom), Senator Dan Stec, Assemblymember Carrie Woerner, Frontier, ExteNet, Greenlight, OTTC, Altice, Verizon, Charter, SLIC, and the Joint Utilities.

Based on a review and analysis of all the comments received to date, DPS Staff makes the following recommendations as described in more detail below on what, if any, modifications to the Commission’s existing rules on pole attachments should be considered.⁹ In summary, DPS Staff recommends:

- **Dispute resolution** - More concrete time frames to facilitate resolution of disputes after existing requirements for inter-company discussion and company Ombudsman activities are exhausted. Any complaint should be served to the pole owner on the day it is filed with the Commission, the pole owner should be given 10 business days to respond to the complaint and the complainant should have 5 business days to reply to the response. The Commission should endeavor to resolve any such disputes within 90 days.
- **Collaboration** - Establish a working group of all interested stakeholders, including pole owners, attachers, Department Staff,

⁷ Finger Lakes Communication Group, Inc. dba Upstate Fiber Networks, NetSpeed Management Inc., Ontario Telephone Company, Inc., Trumansburg Telephone Company, Inc. (collectively referred to herein as OTTC).

⁸ Notice Seeking Further Comments on Cost Allocations (issued September 28, 2022) (September Notice).

⁹ The recommendations set forth in this White Paper are also being submitted for comment through a Notice of Proposed Rulemaking pursuant to SAPA §202.

and other interested persons or companies operating in New York State, to meet regularly (e.g., monthly) and facilitate the discussion and resolution of issues relating to pole attachments, including, but not limited to make-ready¹⁰ estimates, surveys, self-help remedies, and scheduling.

- **Pole replacement costs** - No modification to the requirement that the attacher necessitating a pole replacement bear the cost of pole replacements not otherwise needed by the utility.
- **Pole Replacement Reporting** - Require pole owners to file annual reports detailing third-party attachments. The report would include, at minimum: the number of third-party pole attachment requests, and for each third-party attachment request completed in the reporting year: the number of poles sought for attachment, the number of new attachments licensed, and the total number of poles in need of replacement associated with those licenses. The total number of poles replaced should be further differentiated by the number funded by the utility and the number funded by third-party attachers.
- **Pole attachment methods** - Adopt a new pole attachment process that includes, but does not require, “One Touch Make Ready” (OTMR), in which the new attacher performs all make-ready work on “simple” attachments within the communications space provided it does not conflict with existing collective bargaining agreements.

INTRODUCTION AND BACKGROUND

The Commission continues to take steps to ensure additional high-speed broadband throughout New York State is deployed in unserved and underserved areas.¹¹ The Commission has also taken steps to make it easier for telecommunication and cable systems to

¹⁰ Make-ready generally refers to the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the pole.

¹¹ See e.g., Case 15-M-0388, Joint Petition of Charter Communications, Inc., Order Granting Joint Petition Subject to Conditions (issued January 8, 2016); 22-M-0698, Joint Petition of Altice N.V., Order Granting Joint Petition Subject to Conditions (issued June 15, 2016); Joint Petition of Archtop Fiber LLC., Order Granting Joint Petition Subject to Conditions (issued July 21, 2023); and Case 23-M-0042, Joint Petition of Archtop Fiber LLC, Order Granting Joint Petition Subject to Conditions (issued September 15, 2023).

co-locate on utility-owned poles.¹² The existing pole attachment rules were primarily set forth in the Commission’s Order Adopting Policy Statement on Pole Attachments, issued on August 6, 2004,¹³ and subsequently extended, in part, to include wireless attachments through the Commission’s March 2019 Order.¹⁴ In the March 2019 Order the Commission, approved, in part, a petition filed by the CTIA, that: (1) established an interim pole attachment rate for wireless attachments; (2) established timelines with respect to the processing of wireless pole attachment applications and make-ready work; and (3) extended the Commission’s existing dispute resolution processes to wireless attachment applications. The interim pole attachment rate was subsequently made permanent.¹⁵

The wireless pole attachment rate methodology is consistent with the established horizontal cable attachment rate and is beyond the scope of the new law. The attachment rate adopted by the Commission uses the Federal Communications Commission’s (FCC) cable formula and is based on a 7.4 percent space factor¹⁶ applied to pole costs to produce a per-foot attachment rental rate.¹⁷ The annual rental rate is calculated as 7.4 percent of the cost of the pole for each one-foot segment of usable pole space. The cost of the pole is determined as the net cost of a bare pole multiplied by a fully allocated carrying charge.

The 2004 Pole Order also established a timeline for the processing of wireline pole attachment applications including, an allocation of costs for subsequent attachers, authority

¹² Under 47 U.S.C. §224(c), states are permitted to exercise authority to regulate pole attachments in place of the FCC; and New York has in fact exercised its jurisdiction over pole attachment issues through this reverse-preemption mechanism allowed under federal law.

¹³ 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) (the 2004 Pole Order).

¹⁴ Case 16-M-0330, Petition of CTIA - The Wireless Association to Update and Clarify Wireless Pole Attachment Protections, Order Approving Petition in Part and Continuing Proceeding (issued March 14, 2019) (March 2019 Order).

¹⁵ Id., Order Establishing Updated Pole Attachment Rates with Modifications (issued November 18, 2019).

¹⁶ The 7.4 percent is based on the assumption that a 37.5-foot pole has 13.5 feet of “usable” space, and thus, yields a space factor of 1 ft./13.5 ft., or 7.4 percent.

¹⁷ See, March 2019 Order, pp. 29-30; Id., Order Establishing Updated Pole Attachment Rates with Modifications (issued November 18, 2019).

for attachers to use temporary attachments and overlashing¹⁸ under certain conditions, and requirements related to audits, periodic inspections, post construction inspections, standard pole attachment agreements, and dispute resolution. The 2004 Pole Order established a framework by which wireline telecommunication and cable 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.

As it relates to timelines, the 2004 Pole Order requires that preconstruction surveys must be done 45 days after a complete application has been filed with a pole owner. After conducting a survey of the poles, the pole owner must send a make-ready work estimate to the attacher within 14 days of completing the survey. Attachers have 14 days from receipt of the estimate to accept and pay for the make-ready work. Owners must perform the make-ready work within 45 days of receiving payment from the attacher, and notify the attacher that make-ready is complete within three business days of completion.¹⁹ If a pole owner is unable to meet these deadlines, the attacher may hire an outside contractor to do the survey or perform make-ready work, if the contractor is approved by the pole owner.²⁰ The Commission reasoned that “[s]ince time is the critical factor in allowing Attachers to serve new customers, it is reasonable to require the utilities either to have an adequate number of their own workers available to do the requested work, to hire outside contractors themselves to do the work, or to allow Attachers to hire approved outside contractors.”²¹

For drop poles, which are used between the distribution pole line and a customer’s building,²² the attacher should ascertain who owns the drop pole and notify the owner within 10 business days of the attachment. Owners may bill attachers a pole attachment fee as with other pole attachments and require a license but only after the attachment has been made.²³

¹⁸ Overlashing is the process of physically tying a wire/cable to a previously installed cable that is attached to utility poles.

¹⁹ 2004 Pole Order, pp. 3-4.

²⁰ Id., p. 3.

²¹ Id.

²² Drop poles are installed when the service drop cables/wires to serve this building require additional support.

²³ 2004 Pole Order, pp. 4-5.

For temporary attachments, boxing of poles and extension arms, the 2004 Pole Order states that temporary attachments to poles may be used if they meet all safety requirements and if a utility is unable to meet the make-ready work timeline. The attacher is required to pay for all make-ready work and replace the temporary attachment with a standard attachment within 30 days of the completion of all make-ready work. Boxing of facilities, which involves attaching wires on opposite sides of the pole in order to meet required distances between attachments, is allowed in cases where the cost of a conventional attachment would be exorbitant; so long as the boxing complies with safety codes and the utility practices allow boxing. Further, extension arm brackets may be used for a permanent attachment if all safety requirements are met, if their use is consistent with utility practices, and if make-ready costs are exorbitant. Extension arms may also be used on a temporary basis if a utility is unable to meet the make-ready timelines.²⁴ With regard to overlashing, if no additional space on the pole is used, the Commission determined there should be no additional rental charges.²⁵

For dispute resolution, the 2004 Pole Order states that “[t]he process requires some resolution at the company level before a formal complaint is filed with the Secretary to the Commission. Parties may request expedited dispute resolution in their complaint.”²⁶

Finally, the 2004 Pole Order established that an attacher already attached to a utility pole shall not pay rearrangement or pole replacement costs required for subsequent attachers. In other words, if an attachment is legal when made, subsequent rearrangements or replacements should be paid for by the attacher that requires the rearrangement or replacement and not previous attachers. This determination replaced the prior “but for” rule. Under the prior “but for” rule, the attachers remained liable for subsequent relocation, modification, and replacement costs that would not be incurred “but for” their presence on the pole, but were not subject to any such additional charges during the two-year period following the initial attachment.²⁷ The Commission determined in its 2004 Pole Order, that “in fairness to all

²⁴ Id., pp. 5-6.

²⁵ Id., p. 6.

²⁶ Id., p. 9.

²⁷ Case 95-C-0341, In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095, Opinion No. 97-10 (issued June 17, 1997), p. 4, f.n. 1.

Attachers, if an attachment is legal when made, subsequent rearrangements should be paid for by the Attacher that requires the rearrangement and not previous Attachers.”²⁸

In December 2021, an amendment²⁹ to PSL §119-a³⁰ was signed into law that generally prohibited pole owners from avoiding responsibility for pole replacement costs by unreasonably postponing replacement until receiving a new attachment request. That amendment was set to take effect on March 22, 2022, however, on February 24, 2022, the Governor adopted a chapter amendment³¹ that instead required that the Commission, in conjunction with the New York State Broadband Program Office (now the ConnectALL Office), initiate a proceeding to examine a process for streamlining actions related to utility pole attachments, including consideration of:

- dispute resolution models related to utility pole attachments;
- cost sharing models related to utility pole attachments;
- impacts on the expansion of broadband into unserved and underserved areas associated with alternative cost allocation scenarios;
- requiring new, less expensive pole attachment methods; and,
- modifying existing rules regarding the cost obligations associated with new pole attachments and an assessment of the utility ratepayer and broadband subscriber impacts associated with alternative cost allocation scenarios, including, but not limited to, if a pole replacement is necessitated because of insufficient vertical space or clearance to accommodate an attachment request, or the attachment will exceed loading, making the requesting attacher liable for the following costs in connection with the replacement: (a) the remaining net book value (NBV) of the

²⁸ 2004 Pole Order, p. 4.

²⁹ L.2021, C.723.

³⁰ PSL §119-a previously read as follows: “The commission shall prescribe just and reasonable rates, terms and conditions for attachments to utility poles and the use of utility ducts, trenches and conduits. A just and reasonable rate shall assure the utility of the recovery of not less than the additional cost of providing a pole attachment or of using a trench, duct or conduit nor more than the actual operating expenses and return on capital of the utility attributed to that portion of the pole, duct, trench or conduit 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.”

³¹ L.2022 C.68.

pole being replaced that, but for the new attachment, could have remained in service until such time as it was fully depreciated and/or reached the end of its service life or used and useful life to the pole owner, whichever would come first; and (b) the incremental costs associated with the pole owner installing a pole beyond what said owner would have installed in its normal course of pole replacement, if applicable to the request.

In accordance with PSL §119-a, as amended, the Commission issued the March Notice to comply with the legislation's directives, and also specifically requested that electric corporations that own utility poles provide comments regarding the potential impacts to ratepayers from adoption of a rule change that would require electric corporations to pay: (1) the entire cost associated with utility poles having to be replaced as a result of new pole attachments; or, (2) half the costs associated with utility poles having to be replaced as a result of new pole attachments. The Subsequent September Notice was also issued to solicit additional cost allocation proposals.

CHAPTER AMENDMENT CONSIDERATIONS

I. Dispute Resolution

Under the legislation, the Commission is required to consider modifications to its 2004 Pole Order with regard to dispute resolution. The existing dispute resolution process requires some resolution at the company level before a formal complaint is filed with the Secretary to the Commission. Parties may request expedited dispute resolution (EDR) in their formal complaint.³² Specifically, a dispute shall be discussed at the intermediate level in a company for 10 days before going to the company Ombudsman. The dispute shall remain with the Ombudsman for 12 days before being taken to the Commission for dispute resolution. An initial filing for dispute resolution shall be sent to the Secretary of the Commission. During the pendency of the dispute resolution, disputed work shall continue to the extent possible. Where the dispute is over cost, the work shall continue as long as the attacher pays 50% of the total amount of the disputed invoice(s). Payment of the disputed invoices shall note that they are being paid under protest and subject to reconciliation following resolution of the dispute. If the

³² 2004 Pole Order, p. 9.

dispute is over the form or location of the attachment or the use of a temporary attachment, it is not expected that the disputed work will continue.³³

Comments

Altice

Altice submits that the Commission should expeditiously process pole attachment complaints covering unserved areas. Altice states that it “prefers to resolve pole disputes informally, but to the extent that Commission action is needed, expedited processing of complaints related to unreasonably high make-ready charges is appropriate.” According to Altice, since “prompt resolution of disputes can affect the timing of broadband deployment in unserved areas, it is appropriate for the Commission to process complaints swiftly where there is an allegation that a pole owner has unreasonably shifted a disproportionate amount of make-ready costs to attachers.”³⁴

Comcast

Comcast recommends that the Commission further develop its guidance to provide aggrieved pole attachment stakeholders with an avenue to seek prompt resolution of their claims in order to accelerate deployment. Comcast recommends that the Commission consider adopting a framework for resolution providing an established timeline. For example, Comcast notes that Maine's Rapid Dispute Resolution Process results in a decision in seven business days, or Vermont's Complaint Procedures, which sets a thirty (30) day process to provide accelerated relief. With regard to dispute resolution involving pole rental rates, Comcast states that the Commission should require that pole owners promptly provide requested accounting and plant record information where it is relevant to the calculation of pole rates so that disputes can be appropriately resolved and in a timely manner.³⁵

Crown Castle

Crown Castle asserts that the Commission should adopt a reasonable timeline for resolving disputes related to pole attachment applications and associated make-ready work. If disputes are not resolved quickly, according to Crown Castle, the resulting delays can be costly

³³ Id., Appendix A, p. 14.

³⁴ Altice comments, p. 4.

³⁵ Comcast comments, pp. 7-8.

and impede the deployment of broadband. Crown Castle suggests that the Commission adopt a 60-day timeline for resolving pole attachment complaints regarding any issue other than annual rental rates, including disputes related to pole attachment applications and make-ready work. Moreover, disputes that are not resolved within 60 days should be deemed resolved in favor of the new attacher.³⁶ Crown Castle also asserts that the Commission should amend the 2004 Pole Order to eliminate the provisions requiring that a dispute be discussed company-to-company for 10 days and then “remain with the [Company] Ombudsman for 12 days” before it can be filed with the Commission.³⁷

CTIA

The CTIA states that the Commission should strengthen the mechanism to speed resolution of disagreements, thus accelerating the attachment process as the 2022 Legislation envisioned. CTIA recommends that the Commission adopt a more complete process for resolving pole attachment complaints, claiming that the current dispute resolution process only governs parties’ negotiations before invoking Commission assistance. CTIA also states that the Commission should go further to expand its procedures to address complaints and other disputes after its assistance is sought.³⁸

ExteNet

ExteNet claims that “[i]n the event a dispute requires Commission involvement, the Commission should establish a specific time frame for the case. For example, the Commission should require the Complaint be hand delivered to the Utility on the day it is filed with the Commission, the Utility shall have five (5) business days to respond to the Complaint and the Complainant shall have five (5) business days to reply to the response. Such expedited dates will ensure that the Commission can process and adjudicate the complaint within the 180 days required by federal law.”³⁹

³⁶ Crown Castle comments, p. 6.

³⁷ Id., p. 7.

³⁸ CTIA comments, p. 9.

³⁹ ExteNet comments, p. 8.

First Light

First Light suggests that an effective way to minimizing the number of disputes would be for the Commission to require a “virtual ride-out” when differences of opinion arise on pole attachment matters. This, according to First Light, would consist of the pole owner, attacher, and contractor/vendor participating in a videoconference in which there is video of the pole attachment and the parties discuss the issue while looking at the video. If after the virtual ride-out a dispute remains, it should be taken to the Department and the Broadband Program Office (now ConnectALL) and resolved as quickly as possible.⁴⁰

Greenlight

Greenlight notes that the Commission’s current rules do not provide clear timeframes for dispute resolution to be reached. According to Greenlight, this removes the important remedy of temporary pole attachment as recourse for missed deadlines in the pole application process, further extending the timeframe to bring broadband service to residents across the state and should be revised.⁴¹

Joint Utilities

The Joint Utilities support the continuation of the EDR procedures set forth in the 2004 Pole Order. According to them, these procedures encourage pole owners and attachers to work collaboratively and in good faith to resolve disputes related to, among other things, costs, application processing or timing before escalating the matter to Department Staff or filing a formal complaint with the Commission. The Joint Utilities believe the Commission’s recent statement concerning another matter is pertinent to disputes between pole owners and attachers wherein the Commission reaffirmed that attachers should never resort to installation of unauthorized “self-help” pole attachments as a remedy to disputes with pole owners or perceived application processing delays.⁴²

Lumen Companies

According to the Lumen Companies, while the Commission’s 2004 Pole Order contains a provision for addressing EDR there are no time frames or processes once it reaches

⁴⁰ First Light comments, p. 7.

⁴¹ Greenlight comments, p. 3.

⁴² Joint Utilities comments, p. 18.

the Commission. The Commission should, therefore, consider rule revisions to its EDR to facilitate timely resolution of fact-specific scenarios that may arise as providers work to deploy broadband, and attach to poles in the process, to support unserved areas.⁴³

NYSTA

The New York State Telecommunications Association states that it represents pole owners, as well as pole attachers. Being keenly aware of the way things stand today as it relates to broadband deployment in served, underserved and unserved areas throughout the State, NYSTA submits that with billions in federal funding being earmarked for broadband it is essential that policies are put into place that make sure these dollars are used in a cost-effective way. NYSTA firmly believes that pole attachment policies must facilitate, rather than impede, broadband buildout, and there are continuing challenges related to pole attachment issues that continue to stymie deployment of broadband. Delays, costs, and disputes related to pole attachments and replacements have been consistent barriers to connecting new households and businesses to high-speed broadband internet service in a timely and cost-effective manner. NYSTA urges the Commission to begin a series of collaborative conferences amongst all the parties to further address such issues, stating that such conferences will help in identifying not only the continuing challenges but common ground all parties share and could play a significant role in expediting remedies to the current issues impacting the deployment of broadband.⁴⁴

OTTC

OTTC states that the 2004 Pole Order contains timeframes for completion of the various steps in the pole attachment process, but it lacks a definitive remedy other than bringing a complaint to the Commission. Absent such remedies, according to OTTC, attachers are left with uncertainty. Therefore, OTTC suggests that the Commission set a definitive standard for completion of make-ready work to inject certainty into the process, thereby attracting investment.⁴⁵

⁴³ Lumen Companies comments, pp. 6-7.

⁴⁴ NYSTA comments, pp. 1-4.

⁴⁵ OTTC comments, p. 14.

Staff Recommendation

Based on the foregoing, with the exception of a few commenters, there is a universal demand that the Commission further develop its guidance to provide aggrieved pole attachment stakeholders with an avenue to seek prompt resolution of their claims in order to accelerate broadband deployment. DPS Staff agrees that more specific timeframes for dispute resolution would help facilitate attachments, and therefore recommends that the Commission establish timeframes for record development in pole attachment disputes. DPS Staff also believes a collaborative working group of interested stakeholders meeting regularly is imperative to resolve issues expeditiously and facilitate broadband deployment.

Revised Dispute Resolution Timelines

DPS Staff agrees that a complaint for dispute resolution, should the dispute remain unresolved following the existing requirements for a 10-day company-to-company discussion period and the 12-day Ombudsman review period, should be served to the pole owner on the day it is filed with the Commission, the pole owner should be given 10 business days to respond to the complaint and the complainant should have 5 business days to reply to the response. Pole owners should also provide requested accounting and plant record information where it is relevant to the calculation of pole rates. Finally, DPS Staff recommends that the Commission endeavor to resolve any such disputes within 90 days. DPS Staff does not recommend a mandatory timeframe for resolution since some disputes may involve numerous pole applications and complexed engineering issues.

DPS Staff further does not recommend that the Commission modify its dispute resolution rules to require that disputes that are not resolved within 60 days be deemed resolved in favor of the new attacher as recourse for missed deadlines in the pole application processes. These measures could result in unsafe or non-compliant National Electric Safety Code (NESC) conditions on the utility poles. DPS Staff also declines to recommend the elimination of the provisions requiring that a dispute be discussed company-to-company for 10 days and then “remain with the [company] Ombudsman for 12 days” before it can be filed with the Commission. This is an important first step to dispute resolution that we expect will resolve the majority of complaints before they require DPS Staff / Commission intervention.

Establish a Monthly Collaborative Working Group

Department Staff recommends establishing a collaborative working group of all interested stakeholders, including pole owners, pole attachers, DPS Staff, and other interested persons or companies operating in New York State, to meet regularly (e.g., monthly) to discuss issues relating to pole attachment concerns, including, but not limited to: make-ready estimates, surveys, pole replacements, alternative attachment methods, self-help remedies, scheduling, etc.

The purpose of this collaborative is to provide pole owners and pole attachers in New York with a prompt venue to address and resolve issues and to coordinate with each other in a timely manner. The collaborative will seek to encourage consistency in pole attachment methods and identify areas that may require additional resources and timelines, especially for anticipated large, complex projects. To be clear, the collaborative would serve as an additional initiative designed to facilitate large scale pole attachment projects in a timely manner akin to Department Staff's efforts throughout Charter's 145,000 address build-out commitment. The dispute resolution process is separate and distinct from the collaborative process.

II. Pole Replacement and Reconfiguration Costs

The Commission is required to consider whether it should limit a requesting attacher's liability when a pole owner must replace a pole to accommodate the vertical space or clearance of an attachment request, or if the attachment will exceed loading limitations of the pole. In its February 1977 Order, the Commission determined that "a cable operator is entitled to little, if any, permanent right to his attachment, and that it is reasonable to charge him for any make-ready cost later incurred by the telephone company. In order, however, to ensure that utilities make reasonable and careful projections of future needs when planning the initial make-ready work, they will be prohibited from charging for additional make-ready work when it occurs within the first two years of the performance of initial work."⁴⁶ The February 1977 Order required cable operators to "pay the cost of rearranging utility facilities plus the installed cost of the new pole and any removal costs reduced by the percentage depreciation applicable to the old

⁴⁶ Case 26494, New York State Cable Television Association – Investigation of Pole Attachment and Related Agreements Between Utilities and CATV systems, Opinion and Order Promulgating Standards for Utility Pole Attachment Agreements (issued February 28, 1977) (February 1977 Order) pp. 13-14.

pole, less any salvage value of the old pole.”⁴⁷ This requirement was reiterated in the Commission’s 1997 Order Setting Pole Attachment Rates.⁴⁸ However, the make-ready requirements established in the February 1977 Order were modified in the 2004 Pole Order. As previously discussed, attachers that require rearrangement of previous attachers’ facilities are currently required to pay the entire cost associated with such rearrangements.

The chapter amendment requires the Commission to consider modifying existing rules regarding the cost obligations associated with attachments that require a new pole. The Commission is to consider, at minimum, making the requesting attacher liable for the following costs in connection with the replacement: “(a) the remaining net book value of the pole being replaced; and (b) the incremental costs associated with the pole owner installing a pole beyond what said pole owner would have installed in its normal course of pole replacement” as an alternative to the current practice. The chapter amendment also requires the Commission to consider the impacts on the expansion of broadband into unserved and underserved areas associated with alternative cost allocation scenarios.

Comments

Altice

Altice argues that the Commission should clarify that pole owners must share the cost of pole replacements in unserved and underserved areas and agrees with the goals of the PSL §119-a amendment. According to Altice, it has faced high make-ready fees for pole replacement that add costs ultimately borne by broadband customers, and while the Commission has well-developed rules around pole access, there are some rural areas of the State where providing broadband access remains difficult due to the very high pole access costs, driven in particular by pole replacements. As a condition of Altice attaching its equipment, the company states that it is required to pay the full cost of replacing poles, many of which are old and/or already crowded.⁴⁹ Altice states that pole owners would, as a matter of course, bear the cost of removing the old pole, purchasing a new pole, installing the new pole and transferring their

⁴⁷ Id., pp. 14-15.

⁴⁸ 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).

⁴⁹ Altice Comments. p. 2.

facilities from the old pole to the new pole, and the fact that these costs may be incurred sooner to accommodate an attachment does not justify shifting the entire cost to the attacher.

Altice suggests that the Commission could consider adoption of the FCC’s pole attachment rate formula to assign a presumptive value to the old pole. According to Altice, “the FCC’s cable attachment rate formula is a relatively simple and efficient way to assign costs to attaching entities. It relies primarily upon publicly available pole owner actual cost data to derive the average net investment per pole. This average reflects the cost of brand new, undepreciated poles as well as older, depreciated poles, and therefore more likely than not actually produces a cost (born by the attacher) that is greater than the cost of the typically older poles being replaced. A pole owner’s ability to rebut this presumption and demonstrate that a pole is actually newer and more valuable than the average pole adequately protects pole owners against under recovery.”⁵⁰

Altice also submitted comments in response to the request for alternative approaches to cost allocation methodologies for the replacement of utility poles. In those comments Altice opines that pole replacement cost disputes are delaying broadband deployment. Altice states the Commission must eliminate the incentive for pole owners to unreasonably delay necessary pole replacements and adopt a reasonable cost-sharing model. Altice thinks pole owners obtain substantial benefits from poles that are replaced at the expenses of third party-attachers. Altice states that, consistent with Commission policy, and the amendments to PSL §119-a, pole owners should contribute to the benefits they receive when poles are replaced, even when the replacement is caused by a new attachment. Altice proposes a cost-sharing mechanism that would require new attachers to pay only the cost of advancing the retirement of the existing pole unless specific incremental costs caused by the new attachment (such as non-standard height or strength) can be demonstrated by the pole owner. Altice advocates that average net-book value provides a fair proxy if the precise value of a pole to be retired is not available. Altice states that it and other parties currently have proposals under consideration by the FCC so another option for the Commission, which several parties have suggested, would be to defer adoption of a cost sharing mechanism until the FCC concludes its rulemaking.

⁵⁰ Id., p. 4.

Altice advocates for the use of a set formula for pole replacement cost allocation. Altice is opposed to the Joint Utilities proposal which would “socialize” pole replacement costs among existing and future attachers through annual rental rates. According to Altice the Joint Utilities proposal ignores the Commission’s policy to use historical costs when setting pole and conduit rates and thinks that a model using forward-looking costs could increase rates.

Altice further argues that pole owners may already be recovering pole replacement costs through recurring rental fees which are set using the fully allocated rate formula.

Assemblymember Carrie Woerner

Assemblymember Carrie Woerner (Woerner) submitted a letter addressing various issues related to pole replacements. First, Woerner questions the accuracy of the utilities data on the number of pole replacements necessitated by third-party attachers. Woerner explains that the number of historical pole replacements, which are used to estimate future pole replacements, does not seem apparent from rate case information. Woerner also questions how the Joint Utilities projected the number of pole attachment requests that will necessitate a pole replacement; and how many of such replacements will be in underserved areas. Additionally, Woerner asserts the utilities delay pole replacements until triggered by third-party attachment requests. Woerner opines that socializing the costs of pole replacements necessitated by third-party attachers among existing and future attachers presents several problems including burdensome impacts. Woerner asserts that third-party attachers are responsible for property taxes associated with poles for which they funded replacements. In addition to these issues Woerner requests verification of the impacts on electric customers if utilities bear the cost of third-party related pole replacements. Finally, Woerner submitted a second letter, urging the Commission to release, without delay, the data used to develop cost estimates such that the data can be used to inform to the public.

Charter

Charter recommends that the Commission focus on two areas, both of which Charter claims would help streamline pole access and reduce the costs of rural broadband deployment. First, Charter avers that the allocation of pole replacement costs should be changed. Additionally, Charter indicates that the rules around pole attachment techniques should be revisited to reduce the frequency of pole replacements, which will be discussed below.

Charter specifies that it recently expanded its network in upstate New York and paid to replace “roughly one out of every eight poles it attached to, at an average cost of nearly \$9,000 per pole.”⁵¹ Charter explains that poles in underserved areas are often several decades old and, due to their age, are more likely in need of replacement due to height or load bearing capabilities. Charter states that the frequency and cost of pole replacements threaten the policy goal of broadband deployment in unserved areas, and unless policymakers take swift action to confront the challenges of pole replacement costs, a large percentage of the funding allocated for rural broadband deployment will be diverted into subsidizing local electric distribution infrastructure, and some broadband expansion projects (due to these excessive costs) may not be built at all. Charter asserts that current pole replacement practices create windfalls to pole owners while placing exorbitant costs on attachers. Charter argues that requiring pole attachers to fully fund pole replacement costs results in the “broadband provider subsidizing the utility’s core regulated operations.”⁵² Charter recommends that attachers be required to compensate the utility for the cost of advancing the replacement to an earlier date, and the incremental cost of any increased pole height or strength, relative to a standard pole, needed to accommodate an attachment.

In its comments filed in response to the request for alternative approaches to cost allocation methodologies, Charter states that the current practice of requiring new attachers to pay the entire cost of replacing a pole to accommodate their attachments is a significant barrier to expanding broadband connectivity and harms consumers. Charter requests that the Commission act promptly to reform pole replacement cost allocation so that broadband providers can maximize the effectiveness of substantial federal funding, soon to become available, as well as private investment to connect the remaining unserved areas in New York.

Like other commenters in this proceeding, Charter suggests that in its consideration of potential pole replacement cost-sharing frameworks, the Commission could benefit from the record being developed in the FCC proceeding. Charter states that, subsequent to the March Notice in this proceeding, pertinent analysis on pole replacement allocation methods has been submitted in the FCC proceeding, including an Economist White Paper.

⁵¹ Charter Comments, p. 2

⁵² *Id.*, p. 18.

Charter offers several principles to guide consideration of alternative pole replacement cost allocation. Charter states that all parties that benefit from pole replacements, including pole owners, should share in such replacement costs. Charter avers that, while pole replacement costs should be borne by the parties who cause them, the allocation of pole replacement costs consider the immediate costs and any offsetting savings or benefits that are projected to occur on a longer-term basis, including costs driven by the pole owner's long-term plant management and maintenance needs. Further, Charter states that the current policy, where new attachers bear the entire cost of a pole replacement, creates no financial incentive for pole owners to consider alternatives to pole replacement, such as extension arms and trussing. Charter states an equitable cost-sharing approach where pole owners bear pole replacement costs proportionate to the benefit they receive, would correct these financial distortions and inefficiencies, minimize pole replacements and encourage safe construction practices.

To better advance these principles, Charter includes three allocation approaches for pole replacement costs necessitated by a prospective attachment that have been proposed by parties in the FCC's proceeding that merit consideration here including reimbursement to pole owners: 1) for the NBV of the pole being replaced; 2) in proportion to the remaining useful life; or, 3) using capital recovery from all customers including attachers.

Citing the Economist White Paper, Charter states that the NBV method adequately compensates the utility for the true incremental cost imposed for a pole replacement to accommodate an attachment request, which is the cost of replacing a pole earlier in time than the utility would have installed in the regular course of business and in cases where a more expensive pole (i.e., a taller pole) is required. In its comments here and in the FCC proceeding, Charter supports the NBV approach as the best alternative to the existing pole replacement cost allocation methodology, however, it urges the Commission to examine all three proposals in this proceeding.

Crown Castle

According to Crown Castle, the Commission should clarify that a pole owner may not charge a new attacher to bring poles, attachments, or third-party equipment into compliance with current published safety, reliability, construction standards and guidelines if such noncompliance is pre-existing. Pre-existing conditions on utility-owned poles must, Crown Castle states, be remedied by existing attachers or the utility in a manner that does not delay

access by new attachers.⁵³ Crown Castle further recommends that the Commission should adopt standards and clarify that a pole owner may not unreasonably withhold its consent if an attacher chooses a contractor that meets the pre-established criteria for performing make-ready work.⁵⁴ According to Crown Castle, the Commission can further support deployment and minimize disputes by promoting transparent tracking mechanisms. Once an application is submitted, Crown Castle asserts that it is important that the attacher is able to follow its progress from the time it is received through the completion of the post-construction inspections.⁵⁵

CTIA

The CTIA recommends a model for wireless providers to share costs based on the following principles. First, pole attachment rates are generally calculated based on the amount of physical space on the pole an attachment occupies; second, vertical conduit between an equipment cabinet and a wireless antenna should not be subject to fees for occupying space on the pole unless the presence of the conduit prevents other attachers from attaching equipment to the pole in the span of the conduit; and third, attachers should not have to pay an additional charge to place equipment in the “unusable space.”⁵⁶

Empire

Empire recommends several modifications to the Commission’s 2004 Pole Order, including requiring the utility company to replace poles when they reach a certain age, for system reliability and safety purposes. According to Empire, a third-party should not pay for a pole replacement if the pole is 25-30 years old. Empire also recommends that poles should be managed with the goal of reserving 5 ft to 6 ft of usable telecom space.

ExteNet

ExteNet states that the Commission should reiterate, that if an existing attachment is in violation of NESC, any make-ready work needed to remediate the violation to accommodate a new attachment should be paid for by the non-compliant attacher and completed within 14-days of notification. According to ExteNet this will greatly reduce costs to new

⁵³ Crown Castle comments, p. 15.

⁵⁴ Id., p. 17.

⁵⁵ Id., p. 18.

⁵⁶ CTIA comments, pp. 13-14.

attachers, eliminate disputes, and expedite new deployments and help to ensure that all pole attachments in New York State are NESC code compliant.⁵⁷ Furthermore, ExteNet states that the cost of pole replacements should be allocated fairly and proportionately between the pole owner and the new attacher to distinguish between the true economic costs associated with the attachment and the costs associated with “betterment,” i.e., improving the utility’s facilities. Specifically, the Commission should declare that because the utility is the chief beneficiary of the pole replacement, it is unjust and unreasonable for the pole owner to capture the windfall benefits of obtaining a new, upgraded pole when that benefit comes at the expense of broadband availability. According to ExeNet, the new attacher should be responsible only for the incremental costs it actually causes. Rather than make the attacher responsible for the full cost of the pole, ExeNet states that the appropriate cost should be the remaining book value of the pole being replaced, allocated between the pole owner and the new attacher.⁵⁸

In its second set of comments, ExteNet urges the Commission to adopt a modification to the current cost methodology for pole replacements that it has submitted to the FCC in a docket similar to this proceeding. ExteNet proposes cost responsibility to attachers for pole replacement be based on the depreciated value of the pole and should consider the additional pole attachment revenue that the replacement pole will generate. Extenet states that “new attachers should be responsible only for the incremental costs it actually causes—i.e., the cost of advancing the retirement of the existing pole that would have been retired by the utility in the normal and routine course, unless the pole owner can demonstrate any other specific incremental costs caused by the attacher.”

ExteNet’s proposal would require that the Commission either standardize the age at which poles should be replaced for the purposes of cost allocation or require pole owners to disclose the age at which they typically replace poles. For relatively new poles, i.e., those that require replacement to accommodate a new attachment within the first half of the pole’s projected lifespan, ExteNet proposes that the attacher should bear the full burden of the pole replacement. However, if a pole is more than half-way through its projected life, the cost of the new replacement pole should be shared between the pole owner and the prospective attacher on

⁵⁷ ExteNet comments, p. 9.

⁵⁸ Id., comment pp. 15-16.

the basis of the number of years of life remaining in the pole; the attacher's portion of costs would be the remaining life of the pole divided by the projected lifespan of the pole.

ExteNet further proposes that, to avoid disputes regarding remaining NBV, pole owners be required to provide the age and planned replacement date for their poles, similar to that of the California Public Utilities Commission's requirements.

According to ExteNet, the majority of New York areas that are unserved and underserved by broadband are rural communities. These areas are typically served by Rural Electric Cooperatives and ExteNet states that the Commission has no jurisdiction over Rural Electric Cooperatives. In those areas, ExteNet states that the general recommendation contained in its comments "will by nature encourage deployment of Broadband throughout the State of New York in unserved and underserved areas."⁵⁹

Frontier

Frontier asserts that, the "Commission should maintain the current pole replacement cost allocations set forth in the 2004 Pole Attachment Order" and that "those allocations properly reflect cost-causation principles and are, therefore, just and reasonable."⁶⁰ Frontier explains that the party that benefits from the pole replacement is the party seeking to place a new attachment and that requiring pole owners to "pay for some or all of the capital costs to replace an existing and compliant pole when the new pole is only needed to provide capacity, clearance, or loading for an attaching party's attachment" would violate the Takings Clause of the U.S. Constitution.⁶¹ Frontier claims the FCC "has long recognized the existence of this issue under the Federal Pole Attachment Act" and that the "FCC has noted, such a taking is permissible only so long as the pole owner receives fair compensation."⁶²

Frontier asserts that requiring a pole owning telecommunications company to subsidize another provider's costs violates "the principles of a competitive telecommunications marketplace as embodied in the Telecommunications Act of 1996."⁶³ Frontier explains that

⁵⁹ ExteNet additional comments, p. 10.

⁶⁰ Frontier comments, p. 2.

⁶¹ Id.

⁶² Id. p. 4.

⁶³ Id. p. 2.

limiting its reimbursement for “pole replacements to expand capacity for a competitor’s network would ... divert Frontier’s limited capital dollars away from its own fiber deployment activities.”⁶⁴ Frontier claims that it would be “forced to spend its capital to subsidize its competitors’ own market expansions” which is “completely counter to the idea of a competitive telecommunications marketplace.”⁶⁵

Frontier submitted subsequent comments reiterating their position that the current pole replacement cost allocations set forth in the 2004 Pole Attachment Order should be maintained. Frontier does not believe there is an alternative cost allocation method that would facilitate the Commission’s deployment goals while also respecting a pole owner’s property rights.

Greenlight Networks

Greenlight requests that the Commission issue revised pole attachment rules as soon as possible and that pole replacement cost allocation be moved to a separate phase of this proceeding. Greenlight opines that the record in this proceeding is sufficiently robust to make determinations on most of the non-cost issues under consideration. Greenlight posits that doing so will aid both pole owners and attachers in managing their 2023 broadband buildouts, and the Commission will have more time to consider the challenging issue of pole replacement cost allocations and could potentially benefit from guidance expected to be issued by the FCC which is also examining cost allocation issues. Additionally, Greenlight maintains that the Joint Utilities’ cost projections included in the Notice on Cost Allocation are ambiguous and should be further examined. Greenlight opines that the Joint Utilities’ assumptions, data and workpapers used in its cost projections should be disclosed and submitted into the record for examination and analysis by the parties in a separate phase of this proceeding.

INCOMPAS

INCOMPAS submits that the Commission should adopt a pole replacement mechanism that assigns the costs of pole replacements equitably and that cost assignments should include pole owners. INCOMPAS states that appropriate cost allocation must be based on long run considerations. The current situation where pole owners are reimbursed based on

⁶⁴ Id. p. 5.

⁶⁵ Id. p. 6.

short run incremental costs allows the pole owner to pass on a disproportionate amount of replacement costs to attachers. INCOMPASS asserts that pole owners receive an unjust gain.

Specifically, INCOMPAS recommends that the method proposed by the Brattle Group (Brattle) in the FCC proceeding be used to allocate costs of pole replacements.⁶⁶ In the report, Brattle proposes a formula (below) for the cost to be paid by an attacher for a pole replacement:

$$\begin{aligned} \text{Replacement Fee} &= \text{NBV of the replacement pole} \\ &+ \text{Appropriate share of incremental cost of upgrade (if any)} \\ &+ \text{Cost incurred on time value of money} \\ &- \text{Incremental betterment and cost savings from early replacements.} \end{aligned}$$

INCOMPAS asserts that pole owners benefit from pole replacements and opposes socialization of pole replacements costs through rents to third-party attachers. INCOPAS alleges that some utilities delay pole replacements until triggered by third-party attachment requests and states that their members have experienced such delays and alleges that utilities have required their members to fund replacements of “red-tagged” poles.

Joint Utilities

The Joint Utilities oppose adoption of any rule that would require electric utilities and their customers to bear additional pole replacement costs that solely benefit third-party attachers. They state that such a rule would be inequitable and contrary to the Commission’s longstanding approach for handling pole attachments, which is consistent with the FCC’s methodology and the utilities’ continuing obligation to keep electric rates just and reasonable. They further state that such a rule would also impose additional costs on electric customers, which, in turn, will drive up electric bills during a time of increasing concerns with energy affordability. They urge the Commission to maintain the current cost allocation rules that have been in place for decades.⁶⁷

As requested by the March Notice, the Joint Utilities provided their estimate of the incremental impact to their customers in a single year if the electric corporations were required to subsidize either 100% or 50% of attacher-related pole replacement costs. Each of the

⁶⁶ Filed with the FCC by Crown Castle Fiber in docket 17-84 on November 11, 2020.

⁶⁷ Joint Utilities comments, pp. 2-3.

Joint Utilities reached their projections by multiplying the number of recent historical attacher-related pole replacements on an annual basis by each utility's current average pole replacement cost for a standard utility pole within their respective service territories. The results, which were based on the 100% and 50% utility funding of attacher-related pole replacements, are as follows: RG&E - \$3,161,904 and \$1,580,952, respectively; NYSEG - \$34,087,544 and \$17,043,772, respectively; National Grid - \$38,277,691 and \$19,138,845, respectively; Central Hudson - \$1,877,809 and \$938,905, respectively; Con Edison - \$3,456,000 and \$1,728,000, respectively; and Orange & Rockland - \$733,301 and \$366,651, respectively.⁶⁸ However, the Joint Utilities note that these estimates were based on historical attacher-related pole replacements and that if utilities were required to fund pole replacements the impacts would be much higher as it has the potential to dramatically increase the number of attacher-related pole replacement requests in New York.

According to the Joint Utilities, it is equitable and appropriate for third-party attachers operating in a competitive market to bear the costs for building out their own networks. On the other hand, the Joint Utilities state that there is no rational basis to impose such costs on electric utility customers who derive no direct benefit from the premature replacement of existing and functional utility poles. Indeed, there is tremendous value to electric utility customers in not replacing existing and functional utility poles prior to the end of their useful lives. The remaining undepreciated cost of poles installed 20, 30 or 40 years ago that remain in an electric utility's rate base is, according to the Joint Utilities, dwarfed by the cost of installing a new pole at current prices.⁶⁹ Further, they state that forcing electric customers to pay to prematurely replace existing poles would divert resources away from investments in utility infrastructure that are necessary for system modernization and decarbonization.⁷⁰

Nevertheless, the Joint Utilities state that if the Commission agrees with third-party attachers that replacement costs are an impediment to broadband deployment, then the costs should be socialized among existing and future attachers. They suggest that one method to allocate these costs among third-party attachers is to have electric utilities factor these costs into

⁶⁸ Id., p. 5.

⁶⁹ Id., p. 9.

⁷⁰ Id., p. 10.

the annual pole attachment rental rates charged to all attachers. Under this approach, according to the Joint Utilities, the portion of the annual rental rate related to attacher pole replacements could be forecast using going market rates for labor and materials. Pole owners could work to minimize these rates by ensuring that attachment inventories are periodically updated and that any unauthorized attachments are timely identified and billed. If the Commission seeks to socialize the cost of pole replacements to promote expansion of broadband, then, the Joint Utilities state that it is only fair that the cost be borne by competitive broadband and telecommunications companies, rather than imposing these costs on electric customers, who are already facing increasing challenges with affordability.⁷¹

In its further comments, the Joint Utilities urge the Commission to leverage available State and federal grant programs designated for broadband as the most appropriate source of funding for third-party attachment pole replacements, and objects to any cost allocation approach that require the electric utilities and their customers to subsidize competitive broadband buildout. The Joint Utilities agree with Department Staff's assessment, that socializing pole replacement costs among existing and future attachers would likely cause pole attachment rates to double within three years and would continue to increase so long as pole replacement costs due to new attachments are included in pole attachment rates. Additionally, the Joint Utilities indicate that socializing pole replacement costs among third-party attachers could potentially cause adverse impacts to the safety, reliability, and access to poles by broadband attachers and could potentially motivate some attachers to make unauthorized or non-conforming attachments, as well as increase the auditing and enforcement burden on the pole owners.

According to the Joint Utilities, since electric utility bills already fund a myriad of policy programs and initiatives, it is difficult to understand why electric customers should be expected to also fund the buildout of telecom/broadband networks where the preponderance of the benefits will flow to corporations operating in a competitive market. However, they state that "to the extent the Commission sees fit to change existing cost allocation rules for pole replacements, which the Joint Utilities oppose, any new rule should be narrowly tailored to apply

⁷¹ Id., p. 11.

only to pole replacements in communities that are truly underserved by a lack of available broadband service.”⁷²

Lumen Companies

The Lumen Companies state that since “the Commission has a deadline of September 30, 2022 to adopt rule changes, the Commission should wrap up the work started in Case 16-M-0330, implementing those streamlined approaches, including those already fully vetted and implemented in the FCC’s pole attachment rules, such as OTMR, self-help and use of contractors. After addressing those issues in its pole attachment rules, the Commission should then turn its attention to whether any changes are needed to the long-established cost-causation principles that govern the complex issue associated with replacing/upgrading a pole to make space for new pole attachments.”⁷³

OTTC

OTTC states that pole owners frequently attempt to pass on costs associated with correction of preexisting NESC noncompliance to new applicants. OTTC states that a new attacher should not incur the cost of make-ready work required to bring a pole into compliance with the NESC where the NESC noncompliance cannot have been caused by the new attacher.⁷⁴ Additionally, should a requesting third-party attacher precipitate the need for a pole replacement or electrical upgrade, OTTC recommends that new attacher should be responsible only for (i) the difference, if any, between the cost of the replacement utility pole necessary to accommodate the third-party attacher’s attachment, and the cost for a new utility pole of the type and height the utility would have installed in the same location in the absence of the attachment, plus (ii) a reasonable estimate of the NBV of the pole and supporting equipment, if any, which has been replaced.⁷⁵

In its subsequent comments, OTTC supports Greenlight Networks in urging this Commission to issue revised pole attachment rules as soon as possible.⁷⁶ OTTC avers that the

⁷² Joint Utilities comments, pp. 12-14.

⁷³ Lumen Companies comments, p. 3.

⁷⁴ OTTC comments, pp. 20-24.

⁷⁵ Id., pp. 25-26.

⁷⁶ OTTC additional comments, p. 2.

record on cost allocation is also well developed in other proceedings, including before the FCC,⁷⁷ and thus, are also ripe for a decision. OTTC states that owners benefit (in terms of increased reliability, lower maintenance costs, and additional pole rental revenue opportunities) when third-party attachers pay to replace poles, yet pole owners insist that the entire cost of pole replacement necessitated by attachers be borne the requesting attacher. OTTC asserts that this creates an incentive for an owner to forego pole replacement until a third-party can be found to replace a pole, which ultimately impacts safety and reliability. OTTC advocates for sensible rules that allocate pole replacement costs properly to improve broadband availability and price, and also remove economic incentives to forego replacement of marginal poles.

OTTC references the same report from the Brattle Group as INCOMPAS which, OTTC maintains sets forth well-founded cost allocation principles for pole replacements. OTTC maintains the proposed formula appropriately reimburses the pole owner for the remaining value of the replaced pole, plus any incremental cost of any upgrade.

Senator Dan Stec

Senator Dan Stec (Stec) submitted public comments based on discussions with local, small telephone companies in the 45th Senate District. Stec explains that communications providers must pay for new poles and then pay taxes and rent on those for which they funded replacement but would not own the pole or receive any benefit from this arrangement. Stec claims that NYSEG acknowledges pre-existing conditions on poles and pays for replacements, but National Grid does not have to in New York State. Stec asserts there is no distinction between ratepayers and internet access customers. Stec claims that pole owners receive unjust compensation from attachers that pay for pole replacements. Finally, Stec opines that the current pole attachment policy will inhibit achievement of the state's broadband deployment goals.

SLIC

According to SLIC, the only way to achieve the goals of the State regarding ubiquitous, reliable and usable internet is to lower the obstacles to building the required network. SLIC submits that the make-ready process has become, by far, the most unreliable, unknowable, uncontrollable part of the process for getting networks built and people served. SLIC believes it

⁷⁷ See, f.n. 66, supra.

is fundamental to attracting capital that the make-ready process be safe, predictable and efficient, so that New Yorkers have the opportunity to have among the best networks in the country.⁷⁸

SLIC states that it must be made clear that a subsequent attacher should only be responsible for remediation of any condition that it would cause by attaching, whether resulting in a rearrangement or pole replacement. However, in practice, according to SLIC, they have encountered hundreds of situations where existing attachers do not meet at pole or midspan ground clearance requirements, yet they claim they do not need to address these violations due to “grandfathering.” SLIC requests clarity from the Commission, on identifying violations and is the party responsible for replacement.⁷⁹

SLIC provided subsequent comments and suggestions based on its experience as an attacher on more than 50,000 poles. SLIC contends that pole replacement costs are ultimately borne by the same customer whether funded by the utility or third-party attacher and that minimizing cost and streamlining the process is in the interest of customers. SLIC contends that if a pole has been fully recovered then 100% of the new pole cost should be borne by the pole owner. SLIC explains that pole owners are paid back by ratepayers and get benefits from new replacement poles that are gifted to them. The attacher pays 100% of the cost of the new pole, 100% of the property tax, and still has to pay rent to attach to the pole. SLIC contends that if the pole replacement is funded by a third-party attacher that entity should own the pole and be entitled to rent revenues from the utility. SLIC supports third-party attachers funding the undepreciated investment in utility poles.

US Telecom

US Telecom submitted an economist paper, and accompanying cover letter, that it filed previously with the FCC.⁸⁰ In the cover letter to the FCC US Telecom avers the current cost causation standard, where the entity that needs the additional space for its attachment pays for the new pole, is consistent with sound economics. US Telecom indicates that reversing course would have a negative economic effect. US Telecom claims requiring pole owners to incur replacement cost caused by others would create a subsidy from pole owner to attacher,

⁷⁸ SLIC comments, p. 1.

⁷⁹ SLIC comments, p. 4.

⁸⁰ Filed with the FCC in docket 17-84 on September 9, 2022.

violating the FCC's competitive neutrality objective. Additionally, US Telecom contends that shifting new pole costs to existing pole owners would dilute the incentive for new attachers to use capital efficiently as new attachers may choose to attach devices in locations that cannot accommodate the attachments if they are not required to pay for the replacements rather than pursue options that are less costly. US Telecom criticizes the NBV funding level option stating that the NBV does not account for other non-recurring costs such as transferring attachments to the new pole, removing the old pole and remediating the site, or disposing of old poles. US Telecom explains that fully depreciated poles may have decades of useful life remaining and poses an analogy in that equating a post value to its remaining depreciation is as appropriate as finding that a home's value is equal to its remaining mortgage balance.

Verizon

Verizon submits that the Commission should address the operational issues raised by the legislation based on the record in Case 16-M-0330. With regard to pole replacement costs, Verizon states that cost allocation rules related to pole replacements should be adopted on an interim basis only, subject to review and revision once the FCC addresses similar issues in its pending pole-replacement proceeding. In the interim, Verizon states that the Commission should adhere to the cost-causative approach to cost allocation that it adopted in the 2004 Pole Order — and that the FCC has applied to date. Under that approach, according to Verizon, where a new attachment request cannot be accommodated on an existing pole (whether because of space availability or because of the loading capacity of the pole), and a pole replacement that would not otherwise be required is necessary to accommodate the attachment, the new attacher should bear the entire cost of the pole replacement, including the cost of moving facilities from the old to the new pole.⁸¹

Verizon continues that, if a cable company is engaged in a broadband deployment project that causes large numbers of pole replacements, the cost of such replacements is a legitimate cost of the deployment effort, and should be borne by the provider and recovered, as feasible, through end-user charges and through grants and subsidies available under federal and State law. According to Verizon, passing the costs on to other companies - including pole-owning companies such as Verizon that compete with the attachers in the provision of broadband

⁸¹ Verizon comments pp. 2 and 5.

services - is unfair and anticompetitive. Finally, Verizon disagrees with some proponents of shifting replacement costs to pole owners that argue pole owners benefit from pole replacements because the replacements result in poles that are well into their useful lives being replaced with new, perhaps taller, poles. According to Verizon, this is an “incidental benefit” of a pole replacement that was caused (and requested) by another party and should not create any obligation on the part of the pole owner to bear the cost of a replacement that it neither requested nor desired.⁸²

In its further comments, Verizon reiterates that “where a pole replacement is made necessary by a request for a new attachment that would exceed the available space or loading capacity of an existing pole, the new attacher should be responsible for the installed cost of the replacement pole and for the cost of transferring existing attachers’ facilities to that pole.”⁸³ Verizon states that shifting the costs to pole owners, such as itself, would have an even more severe impact than it would have on electric utility pole owners because of the significant competitive and financial challenges it faces and the inability to recover costs through the rate-case mechanism. Verizon states that companies seeking pole attachments for new broadband facilities have access to governmental funding and can pass on costs their end-user customers.

Department Staff Recommendation

In its initial comments the Joint Utilities proposed that pole replacement costs could be socialized among existing and future attachers through pole rental rates. DPS Staff analyzed the Joint Utilities’ proposal and determined that the rental rates would significantly increase within several years. Subsequently, multiple parties raised concerns regarding the proposal to socialize these costs among current and future attachers. The Joint Utilities confirmed the results of DPS Staff’s analysis that such a mechanism would have a negative impact on pole attachment rates. Since this would serve as a new barrier to broadband deployment in unserved and underserved areas, Department Staff recommends against the Commission’s adoption of such a funding methodology.

Turning to the current pole replacement methodology where the entity causing the need for reconfiguration/replacement is liable for the cost of the new pole, commenters raised

⁸² Id., pp. 9-11.

⁸³ Id., p. 2.

several issues. Some commenters state that attachers are paying property taxes on the poles for which they funded replacement, even though they do not own the poles after transferring them back to the respective utilities. Department Staff reached out to the Office of Real Property Tax Services (ORPTS), which advised that attachers are liable for taxes on poles they replace only if they maintain ownership of the pole. Property taxes on poles that are gifted to the utility are the responsibility of the utility. However, ORPTS further advised DPS Staff that attachers who fund replacement of poles and subsequently gift those poles to utilities need to notify ORPTS that the poles have been gifted and the attacher will no longer be liable for such taxes. Likewise, ORPTS advised DPS Staff that utilities should be reflecting gifted poles in their respective reporting to ORPTS for tax purposes.

Some commenters allege that pole owners delay pole replacements until triggered by third-party attachment requests to avoid replacement costs. Commenters also assert that utilities receive a benefit from third-party funded pole replacements. An evaluation by DPS Staff of the revenue requirements associated with electric utility and attacher funded pole replacements determined that ratepayers do not receive any economic value of poles being replaced to enable third-party attachments even when the attacher entirely funds the replacement. This is because the utilities' ratepayers are ultimately responsible for the one-time state and federal tax associated with the value of the contributed pole, the on-going local property taxes,⁸⁴ and the remaining net book value of the pole being prematurely retired. Further, electric utilities do not have an incentive to require attachers to pay for pole replacements because utilities do not earn a return or depreciation expense on contributed assets such as third-party funded pole replacements.

DPS Staff examined historical pole replacements in the major electric investor-owned service territories of the State. The vast majority of pole replacements are occurring in the service territories of NYSEG and National Grid. In reviewing their respective data, DPS Staff determined that, over the period 2018 through 2021, newly licensed attachments necessitated pole replacements approximately 7 percent of the time for NYSEG and 9 percent for National Grid. During that same period, attachers paid for approximately 45 percent of attacher-related pole replacements in NYSEG's service territory as compared to approximately 92 percent

⁸⁴ Utility property tax obligations are based on the reproduction cost of the asset less depreciation. Therefore, property tax obligations are higher for newer assets.

in National Grid’s territory. This means that attachers paid for pole replacements approximately 3 percent of the time for newly licensed attachments in NYSEG’s territory compared to 8 percent of the time in National Grid’s territory.⁸⁵ These percentages are shown in the chart below.

	Attachment Related Poles Replaced as a % of Poles Licensed	Attachment Related Pole Replacements Paid by Third Party	Attacher Paid Poles Replaced as a % of Poles Licensed
	(A)	(B)	(C) = (A) x (B)
NYSEG	7.1%	44.6%	3.2%
NMPC	8.6%	92.3%	7.9%

The difference in attachment related poles paid for by a third-party may be explained in that while National Grid owns about 70 percent more poles than NYSEG, DPS Staff’s analysis found that in the years from 2018 through 2021 National Grid also replaced far more poles outside the attachment process (almost three times as many) as part of its routine maintenance program. Given that the average age of the poles at National Grid and NYSEG are about the same at 40 years and 41 years, respectively, this suggests that National Grid has a more aggressive pole inspection and replacement program, and that the vast majority of poles replaced during the attachment process were not otherwise in need of replacement.

Regarding questions related to how the Joint Utilities estimated the number and cost of pole replacements that will be necessitated on future pole attachment requests, DPS Staff’s analysis found that the Joint Utilities projected the number of future pole replacements based on an historical average of pole replacements necessitated by third-party attachments. The Joint Utilities’ estimates for the cost associated with third-party related pole replacements do not differentiate between location or terrain; the utilities multiplied historical average territory-wide cost of pole replacements by the historical number of pole replacements necessitated by third-party attachments. Based on the foregoing it appears that the Joint Utilities’ estimate of the

⁸⁵ The percentage of poles paid by attachers is calculated as the percentage of poles replaced through the attachment process multiplied by the percentage of those replacements paid for by attachers.

number and replacement cost of third-party attacher related pole replacements is a reasonable proxy for the costs associated with a modification to pole replacement cost responsibility.

Electric utility customers are expected to fund potentially billions of dollars on various traditional and public policy-related projects and programs, for example, vehicle electrification, energy efficiency, Climate Leadership and Community Protection Act, low-income programs, etc. While expanding broadband in New York is critically important, as has been emphasized in other proceedings before the Commission, utility customer funds are not unlimited. DPS Staff estimates that recovering attacher necessitated pole replacement costs through electric rates would result in annual delivery bill increases of about 0.6 percent and 1.0 percent each year for a 600 kWh per month per customer at National Grid and NYSEG, respectively. Department Staff's estimated increases would then remain over the average service life of the poles which is about 60 years. DPS Staff has not estimated the impact of requiring pole owners to fund replacements of poles based on a specified vintage. However, the impact on electric utility customers would likely be close to those presented above as older poles are predominantly the poles in need of replacement due to clearance/loading violations. While Department Staff's estimated ratepayer impact associated with funding attacher-related pole replacements is moderate in comparison to some of the public policy-related programs listed above, DPS Staff declines to recommend such funding here. Department Staff therefore recommends no change, at this time, to the current cost allocation policy. Under the current policy providers necessitating a pole replacement bear the cost unless the pole is identified as being in need of replacement by the utility due to its condition.

Filing of Annual Reports

Notwithstanding the foregoing, PSL §119-a (3) specifies that pole owners may not require attachers to pay pole replacement costs, except where there is insufficient capacity, clearance or loading to accommodate the request. To help ensure that electric utilities are consistently applying PSL §119-a (3), DPS Staff recommends pole replacement disputes be explicitly included as a discussion topic in the monthly collaborative working group recommended above. In this regard, Department Staff recommends that pole owners be required to file annual reports detailing third-party attachments. The report should include, at minimum, the number of third-party pole attachment requests, and for each of those requests completed in the reporting year: the number of poles sought for attachment, the number of new attachments

licensed resulting from the request, and the number of poles replaced associated with each licensed attachment request. The number of poles replaced should be further differentiated by the number funded by the utility and the number funded by third-party attachers. Finally, the report should include, for each request licensed, the time to complete make ready and make-ready charges to respective attachers. This information will help ensure that utilities are complying with their obligations under PSL §119-a (3).

III. Pole Attachment Methods and Timelines

The legislation requires the Commission to consider new, less expensive pole attachment methods. Current industry practice for make-ready usually involves each existing attacher (and possibly the pole owner) sequentially taking turns to move their facilities using their own contractor. OTMR would give the new attacher the option of using a single qualified contractor to perform all (or most) make-ready work to move existing facilities attached to the pole and attach the new facility in a single pole visit. Thus, OTMR has potential cost and timeliness benefits compared to the current make-ready practice. The 2004 Pole Order does not address OTMR.

With regard to alternative attachment methods, the 2004 Pole Order states that boxing of facilities is allowed only in cases where the cost of a conventional attachment would be exorbitant so long as the boxing complies with safety codes and the utility practices allows for boxing. Similarly, extension arm brackets may be used for a permanent attachment if all safety requirements are met, their use is consistent with the pole owner's practices, and if standard attachment costs are exorbitant. They may also be used on a temporary basis if a utility is unable to meet the make-ready timelines. The 2004 Pole Order allows for temporary attachments when make-ready timelines are not met by the pole owner, but requires that when temporary attachments are employed, they must be replaced with a standard attachment within 30 days of the completion of all make- ready work.

Comments

Charter

Charter states that the Commission should make targeted reforms to its pole attachment rules to maximize the use of engineering techniques that can avoid unnecessary pole replacements. Moreover, Charter states the Commission should ensure that when pole

replacements are required, they do not unnecessarily delay a broadband provider's ability to deliver connectivity for customers by expanding the use of temporary attachments that can allow broadband projects to proceed while a pole owner arranges to have a pole replaced.⁸⁶

Specifically, Charter submits that the Commission can require pole owners to approve the use of extension arms that add additional clearance whenever doing so would be safe and compliant with the NESC and prohibit pole owners from refusing such modifications based upon their own internal engineering standards, as the Commission's current rules allow. Charter also asks the Commission to clarify that the requirement under the Commission's rules, which directs pole owners to allow attachers to use temporary attachments until 30 days after make-ready is complete, requires pole owners to allow temporary attachments on poles scheduled for replacement until the pole owner completes the replacement.⁸⁷

Comcast

Comcast supports the adoption of OTMR rules and other self-help remedies for new attachments. According to Comcast, it is essential that the new OTMR rules sufficiently protect existing attachers and the reliability of their communications infrastructure, which is currently providing broadband and other services to users. Therefore, the Commission should, according to Comcast, require that new attachers indemnify existing attachers against damages and third-party claims resulting from OTMR as well as any self-help methods.⁸⁸

Crown Castle

Crown Castle states that the Commission should clarify that utilities are prohibited from limiting the number of applications or the number of poles per application that can be tendered by attachers. According to Crown Castle, the mechanism for addressing a potentially large influx of applications is to create thresholds that allow an increase in the time for utility action - not to limit the number of applications or poles per application. Accordingly, Crown Castle states that the Commission should establish a specific threshold for when additional time is appropriate based on the volume of applications. The Commission should also

⁸⁶ Charter comments, p. 4.

⁸⁷ Id., pp. 4-5.

⁸⁸ Comcast comments, p. 3.

clarify when it is reasonable for pole owners to request more time to review applications, and how much more time is appropriate.⁸⁹

Moreover, Crown Castle states that the Commission should determine that blanket bans on pole top antenna attachments are unlawful, and that any utility denying access to a pole must provide its specific, lawful rationale for denial and permit the attacher to replace the pole if necessary. Categorical blanket restrictions, including prohibitions on the placement of antennas in certain pole sectors and restrictions on the number of antennas that may be attached to a pole, are, according to Crown Castle, unreasonable barriers to deployment because they do not rely on specific, reasonable concerns.⁹⁰

CTIA

According to the CTIA, make-ready timelines for wireless attachments should incent pole owners and attachers to complete installations without unnecessary delay, while reflecting safety and reliability concerns related to access to pole tops and other space on the pole above the communications space. The CTIA states that the timelines that are now in place in New York include longer make-ready timelines than those under the FCC's rules, which govern pole attachments in more than half of all states. The CTIA submits that the Commission should consider shortening those timelines to align them with FCC's rules.⁹¹ The CTIA also recommends that the Commission adopt a OTMR process and require that pole owners maintain publicly available and regularly updated lists of approved contractors and post those lists on the Commission's website, identifying specific businesses and individuals qualified to perform pole attachment work.⁹²

The CTIA also recommends that the Commission adopt the FCC's definitions and processes for large-scale projects and adjust its own timelines by the same intervals. According to the CTIA, the FCC has put in place milestones and guidelines to ensure that such projects proceed in a manner that is realistic while encouraging prompt deployment. The FCC's rules

⁸⁹ Crown Castle comments, p. 10.

⁹⁰ Id., p. 14.

⁹¹ CTIA comments, p. 5.

⁹² Id., pp. 6-7.

establish 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.⁹³

Further, the CTIA states that the Commission should adopt more stringent notice requirements by which a utility must inform an attacher, in writing, of the specific reasons why a particular attachment cannot be accommodated on the particular pole; that the Commission should make clear that, if a pole owner rejects an attachment based on pole-specific structural concerns, the attacher has the right to replace the pole with one that can accommodate the proposed attachment; that the Commission should clarify that a new attacher is not responsible for the costs associated with bringing an existing pole into compliance with safety and construction standards, where the pole was out of compliance prior to the new attachment; and, that the Commission clarify that a utility cannot delay completion of make-ready while the utility attempts to identify or collect from the party who should pay for correcting the preexisting condition(s).⁹⁴

The CTIA states that the Commission should ensure that safety and engineering concerns are addressed, but not exploited. Specifically, it states that the Commission should require pole owners to design poles prudently and consistent with industry standards; provide interested parties an opportunity to comment on alternative pole designs proposed by pole owners; ensure that pole designs do not unnecessarily hinder or prevent wireless attachments; and encourage sound engineering practices and solutions that present minimal risk.⁹⁵

Finally, the CTIA states that commercial power is essential to wireless pole attachments and the Commission should require utilities to deliver power to poles in a timely manner as part of the makeready process, or within some other timely, Commission-defined interval.⁹⁶

CWA

CWA supports the Commission's efforts to increase universal, affordable, and high-quality access to broadband, however, according to CWA, a OTMR pole attachment policy

⁹³ Id., p. 8.

⁹⁴ Id., pp. 10-11.

⁹⁵ Id., p. 13.

⁹⁶ Id., p. 15.

does not achieve that goal. To the contrary, CWA states that OTMR presents serious risks to worker and public safety and threatens existing good jobs in New York. CWA submits that the Commission's responsibility is to protect the public's interest by safeguarding its right to safe, adequate, and reliable utility service. Therefore, the CWA suggests that the Commission not adopt any new pole attachment policies before studying the safety implications of such a regime on New York workers, communities, and public rights of way, and before defining "simple make-ready work"⁹⁷ in a manner that provides the maximum protection of public and worker safety. Moreover, the CWA states that the Commission should similarly reject any proposal that transfers responsibility for make-ready work from those who are best qualified to do the work -- the skilled workforces of communications service providers -- to third-party attachers and their contractors, because it jeopardizes public and worker safety and threatens good jobs in the State.⁹⁸

Empire

Empire states that it is time to start adhering to the Commission's 2004 Pole Order timeframes for pole attachments. According to Empire, the 2004 Pole Order stipulates a process that takes about 120 days, but today, due almost primarily to the pole owner, the pole application processing can take over one year. Finally, Empire asserts application process and make-ready costs are excessive. Adopting a OTMR process, according to Empire, would be less costly. Moreover, Empire states that requiring electric companies to open up their certification process, with the goal of approving more qualified local contractors, should drive down costs.

ExteNet

ExteNet states that it has encountered substantial delays when attempting to deploy facilities to support voice, broadband, 5G and 911 emergency services. According to ExteNet, these delays are often caused by the need to move third-party facilities and perform other make-ready work on existing utility poles. ExteNet states that these delays can be greatly reduced through adoption of a OTMR process in New York. ExteNet believes that OTMR can

⁹⁷ "Simple" make-ready involves facility moves or attachment construction within the communications space of a pole and which do not involve splicing of any existing cables or relocation of an existing wireless attachment.

⁹⁸ CWA comments, p. 1.

greatly increase timely access to utility poles in New York, which is essential for future wireless and wireless broadband deployment in the state.⁹⁹

First Light

First Light also submits that adoption of the OTMR process in New York would serve the dual purpose of streamlining pole attachment timeframes and reducing the expense associated with the cumbersome process that currently exists. According to First Light, it will reduce costs to New York consumers, municipalities and businesses, improve safety, and speed deployment of broadband, wireless, and wireline networks to unserved and underserved areas.¹⁰⁰

First Light also suggests that allowing boxing statewide as a matter of policy would be less expensive than the current system because it would significantly reduce the number of new poles required for additional attachments, thus eliminating the significant cost and resource requirements of new pole placement. First Light also advocates for the use of temporary attachments and extension arm brackets when safety requirements are met. First Light does not believe there should be a time limit placed upon their use.¹⁰¹

Greenlight

Greenlight recommends that the Commission adopt a OTMR process to expedite broadband deployment. Greenlight also suggests that the Commission prohibit pole attachment agreements that conflict with Commission rules. Greenlight further recommends that the Commission adopt a universal survey process using a platform to collect, process, and deliver accurate data. Greenlight urges the adoption of the FCC's pole attachment rate formula to assign a presumptive value to the old pole. According to Greenlight, the FCC's cable attachment rate formula is an efficient way to assign costs to attaching entities. It relies primarily upon publicly available pole owner actual cost data to derive the average net investment per pole.¹⁰²

Joint Utilities

The Joint Utilities state that construction standards are based on the NESC and that the 2004 Pole Order authorizes on a limited, case-by-case basis, the use of "temporary

⁹⁹ ExteNet comments, p. 10.

¹⁰⁰ First Light comments, p. 3.

¹⁰¹ Id., pp 4-5.

¹⁰² Greenlight comments, pp 1-3.

attachments” as a means of relieving a delay in pole application processing, and only where such attachments may be made in compliance with the NESC. According to them, the current process requires that the methods for temporary attachments be cognizant of all relevant safety requirements and that the equipment used is manufactured and intended for the application. Further, if temporary attachments are used, survey and make-ready design must be completed in advance and attachers are still required to pay for all make-ready work necessary to convert to a permanent attachment. The Joint Utilities note that attachers are also required to complete make-ready work on poles with temporary attachments within a reasonable time - and when make-ready work is completed, to make the temporary attachments permanent. These requirements, they state, have been successfully utilized on a case-by-case basis, as necessary to conform with the Commission’s policy statement and there is no justification to modify these practices, which are essential to preserving system reliability and worker and public safety.¹⁰³

The use of boxing, according to the Joint Utilities, could make the pole unclimbable by electric utility workers, frequently making maintenance and restoring service when outages occur difficult or impossible. Similarly, they state that the use of extension arms to reduce vertical clearances between attachments requires the drilling of additional holes in the pole, which can weaken the pole. They further state that expanding the use of alternative or substandard attachment practices, such as extension arms, boxing, j-bolt hardware, etc. could degrade construction safety standards and the resiliency of New York’s distribution pole infrastructure. Finally, according to the Joint Utilities, using alternative attachment methods as a purported means to reduce third-party attacher costs or expedite construction schedules could likely lead to more frequent outages, increased storm restoration times, increased costs of electric system operation and a reduction in worker and public safety.¹⁰⁴

With regard to OTMR, while the Joint Utilities support adopting OTMR for simple make-ready in the communications space, they strongly oppose OTMR for complex make-ready work, especially for work above the communication space. They submit that OTMR

¹⁰³ Joint Utilities comments, p. 14.

¹⁰⁴ Id., pp 14-15.

for complex work should never be available for “self-help” or any other reason – and the use of OTMR anywhere on the pole other than the communication zone presents safety issues.¹⁰⁵

Lumen Companies

The Lumen Companies submit that the Commission’s pole attachment rules “should include not only OTMR as discussed above, but also clarifications on the use of temporary attachments and self-help provisions allowing new attachers to hire and use contractors to conduct surveys and complete make-ready work. These rules should also incorporate the best practices that have been developed to speed broadband deployment, including self-help options to allow new attachers to perform work themselves in the communications space of the pole when the deadlines are not met.”¹⁰⁶

OTTC

OTTC states that the 2004 Pole Order provides a useful framework for processing pole applications, including timeframes, cost allocation rules, and suggests remedies for delays in application processing. OTTC further states that, unfortunately, utility pole owners continue to miss deadlines, improperly shift costs, and impose other improper barriers to deployment of new network necessary to expand availability of broadband services to New York consumers and businesses. OTTC submits that the rules set forth in the 2004 Pole Order “need sensible reform to create a fair system that will serve all parties: pole owners, attachers, and, importantly, broadband customers.”¹⁰⁷ According to OTTC, excessive make-ready costs and delayed deployment have an undeniable adverse impact on expansion of broadband and make a market less attractive to private investment and diminish the impact of public funding.¹⁰⁸

OTTC recommends allowing the use of several other methods of attachment which are permitted by the NESC and are commonly used in the industry. These alternative methods, according to OTTC, may eliminate the need to perform make-ready work, including work necessary to eliminate existing NESC-noncompliance. OTTC states that by “boxing” a pole, or using extension arms, or permitting attachment below the existing Incumbent Local

¹⁰⁵ Id., p. 16.

¹⁰⁶ Lumen Companies comments, p. 3.

¹⁰⁷ OTTC comments, pp. 5-6.

¹⁰⁸ Id., p. 6.

Exchange Carrier attachment where NESC-compliant space is available, the make-ready costs of attaching to poles is dramatically reduced.¹⁰⁹ OTTC states that the use of these alternative attachment techniques saves make-ready costs and the Commission should adopt a rule giving attachers a presumptive right to employ boxing and extension arms, absent clear and convincing evidence, particular to a given utility pole, that the alternative attachment technique is not appropriate for that pole.¹¹⁰ Finally, OTTC favors the use of temporary attachments and other self-help remedies to allow attachers to complete make-ready work themselves if the work has not been completed within the allotted timeframe.¹¹¹

Mid-Hudson

According to Mid-Hudson, the main problem among utilities is the lack of uniformity in their processes and requirements for both pole applications and make-ready. Mid-Hudson states that uniform processes and uniform pricing are what is needed to streamline the process for broadband companies to be able to accurately quote the much-needed buildout of broadband. With the costs varying so immeasurably between utility companies, it is, according to Mid-Hudson, very difficult to accurately quote projects for expansion. Furthermore, Mid-Hudson states that the use and requirement of third-party contractors among utilities not only pushes timelines but also drives costs in the broadband expansion initiative.¹¹²

SLIC

As a result of the inequity in the make-ready process, SLIC recommends that the Commission adopt rules with punitive measures if pole owners fail to meet established timeframes. SLIC further recommends amending the process by which contractors can be approved so that a broader pool of qualified providers, meeting State established licensing requirements, is created and available to attachers to efficiently and cost effectively complete this make-ready work according to NESC standards.¹¹³

¹⁰⁹ Id., p. 8.

¹¹⁰ Id., p. 13.

¹¹¹ Id., pp. 14-18.

¹¹² Mid-Hudson comments, pp. 1-2.

¹¹³ SLIC comments, p. 3.

Staff Recommendation

Even with the interest in expanding and ensuring access to high-speed broadband services with the deployment of advanced telecommunications capabilities, DPS Staff believes that utilities and attachers must maintain their focus on the safety, reliability, and resiliency of the electric/telephone systems for all New York State customers. In recent years, there has been increased awareness and need for the electric system to be able to withstand increasingly severe storm conditions associated with climate change being experienced across the country and in New York State. On February 24, 2022, the Governor passed a new law (Chapter 45) focusing on how the State's electric utilities address climate change vulnerability and increase their storm hardening and system resiliency efforts. Therefore, it is imperative that any make-ready work associated with pole attachments be completed in a manner that not only follows all industry standards and complies with the NESC at a minimum, but also meets the increased resiliency needs of these other State initiatives. Even though these increased efforts are targeted at the electric utilities and the electric service they provide, telecommunications infrastructure needs to be equally resilient. High-speed broadband expansion and the speed of that deployment should not negatively impact or take precedence over the reliability and resiliency of all services provided on utility poles. The overall goal should be to improve the resiliency of electric and telecommunications systems when performing these expansion efforts.

The methodology discussed here does not intend to create a barrier to high-speed broadband expansion. Individual pole attachment options can still be proposed and used if determined to be the best or an acceptable option by the pole owner while accounting for future needs. This methodology is meant to improve and protect all the services provided on the poles and any alternative means of attachment shall be vetted and approved accordingly. Department Staff, therefore, recommends that telecommunications pole attachment and make-ready work should not be installed within the electric space on the pole, except for pole-top attachments as outlined below, and all associated NESC clearances should be maintained.

Alternative Pole Attachment Methods

DPS Staff does not support blanket restrictions on any of the pole attachment methods listed below. The pole attachment methods should comply with all industry standards and the NESC as a minimum. These pole attachment methods can be considered as an option when deemed necessary and have been reviewed and approved by the pole owners on a case-by-

case basis. Pole owners may not deny access to a pole based solely on the attachment method and must provide a rationale for such denial citing specific safety, reliability and code compliance issues. In addition, certain pole attachment methods, specifically pole-top attachments, shall be constructed and installed only by a qualified contractor approved by the utility. Potentially acceptable pole attachment methods include, but are not limited to the following:

- Pole-top attachments;
- Strand-mounted attachments and Overlashing;
- Use of Boxing & Bracketing;
- Extension arms; and
- Temporary attachments.

One Touch Make Ready for “Simple” Attachments

Department Staff recommends that the Commission adopt a new pole attachment process that encourages OTMR for “simple” attachments, in which the new attacher performs all make-ready work, but only where the use of OTMR is consistent with existing collective bargaining agreements between the pole owners and CWA or another entity. OTMR is expected to speed-up and reduce the cost of broadband deployment by allowing the new attacher to prepare the pole more quickly by performing all of the work itself, rather than spreading the work across multiple attachers.

However, as described herein and consistent with the FCC’s approach, DPS Staff recommends excluding from OTMR new attachments that are more complicated or above the communications space of a pole, where safety and reliability risks can be more prevalent. Hence, consistent with the FCC’s approach, DPS Staff recommends that the Commission modify its current rules to allow new attachers to elect OTMR for “simple” make-ready for wireline attachments in the communications space on a pole (so long as there is no conflict with collective bargaining agreements). Pursuant to the FCC, simple make-ready is defined as existing attachments in the communications space of a pole that can be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of

any existing communication attachment or relocation of an existing wireless attachment.¹¹⁴ All other attachments would constitute “complex” make-ready.

Consistent with FCC rules on OTMR, DPS Staff also recommends that the Commission require new attachers to use a utility-approved contractor to perform OTMR work, except when the utility does not provide a list of approved contractors, in which case new attachers must use qualified contractors. This requirement protects against delays that result when utilities fail to maintain approved contractor lists. Department Staff recommends that the Commission require new attachers to provide advance notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when surveys and OTMR work are performed in order to encourage new attachers to perform quality work and to provide the utility and existing attachers an opportunity for oversight to protect safety and prevent equipment damage. The Commission should further require new attachers to allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work to address existing attachers’ and utilities’ concerns that the new attacher’s contractor may damage equipment or cause an outage without their knowledge and with no opportunity for prompt recourse.¹¹⁵ Lastly, as discussed above, DPS Staff does not, at this time, endorse other self-help remedies that allow attachers to complete make-ready work themselves since that could result in unsafe or NESC non-complaint attachments, but recommends that stakeholders explore self-help remedies further in future collaborative efforts.

Post-Construction Inspections

The 2004 Pole Order stated that attachers were generally in favor of mandatory post-construction inspections while the utilities opposed requiring them.¹¹⁶ Utilities were opposed due to the stress such inspections would put on available personnel and resources to perform such inspection on all related work. As such, the 2004 Pole Order encouraged, but did not require, electric utilities to perform post-construction inspections with the attacher bearing

¹¹⁴ Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7711-75, ¶17 (2018).

¹¹⁵ *Id.*, ¶27.

¹¹⁶ 2004 Pole Order, p. 8.

such costs. Utilities perform post attachment inspections at the request and cost of the third-party attacher.

As discussed in detail in the previous sections above, there continues to be concerns with pre-existing conditions impacting the need for pole replacements and the associated reconfiguration costs as well the safety and reliability concerns associated with pole attachment methods. DPS Staff recommends that pole owners be required as opposed to “encouraged” to perform post-construction inspections on all work associated with pole attachment/make ready jobs but does not recommend modifying the funding of such inspections.

CONCLUSION

Department Staff submits this White Paper for additional comments prior to the Commission’s consideration of its recommendations. Interested persons or stakeholders should file comments on or before March 4, 2024, in conjunction with the SAPA public comment process.