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Comments

HARRIS, WILTSHIRE & GRANNIS LLP

1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

10 September 2007

By Hand Delivery

Jaclyn A. Brilling
Secretary
New York Public Service Commission
Empire State Plaza
Agency Building 3
Albany, NY 12223-1350

Re: *Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles*, Case No. 07-M-0741

Dear Ms. Brilling:

Enclosed please find the original and five copies of the Comments of CTIA – The Wireless Association® for filing in the above-captioned proceeding.

Thank you for your assistance with this matter. Please contact the undersigned at 202-730-1300 if you have any questions.

Sincerely yours,

John T. Nakahata
Brita D. Strandberg
Counsel to CTIA – The Wireless Association®

Encl.
cc: Active Party List
Lisa M. Zaina, CTIA – The Wireless Association®
Marlo A. Go, CTIA – The Wireless Association®

Before the
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles	Case No. 07-M-0741

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

Lisa M. Zaina
Assistant Vice President – State Regulatory Affairs
Marlo A. Go
Staff Counsel
CTIA-THE WIRELESS ASSOCIATION®
1400 Sixteenth Street, NW Suite 600
Washington, DC 20036
(202) 785-0081

John T. Nakahata
Brita D. Strandberg
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, D.C. 20036
(202) 730-1300

Counsel to CTIA – The Wireless Association®

September 10, 2007

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Before the
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles	Case No. 07-M-0741

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

CTIA – The Wireless Association® (CTIA)[1] commends the New York Public Service Commission ("Commission") for initiating this important proceeding and continuing its national leadership in the area of pole attachments.[2] This Commission has long recognized the importance of timely and reasonable access to poles to the development of innovative communications services and competition. CTIA urges the Commission to continue to foster competition, improve public safety, encourage continued innovation, and minimize the environmental impact of wireless infrastructure by clarifying that its existing pole attachment policies apply to all wireless attachments.

[1] CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, and AWS, as well as providers and manufacturers of wireless data services and products.

[2] *Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles,* Notice Requesting Comments, Case 07-M-0741 (issued June 27, 2007).

I. INTRODUCTION.

Wireless communications are critical to today's evolving communications landscape. Nationally, over 242 million consumers now subscribe to wireless services. Wireless has been the fastest growing segment in broadband services, with over 11 million wireless broadband subscribes as of mid-2006.[3] Wireless communications provide consumers with flexibility and mobility that cannot be matched by wired services, improving both quality of life and public safety by ensuring consumers have the ability to make calls (including E911 calls) from nearly anywhere. Consumers nationwide use wireless services to place over 260,000 911 calls per day,[4] and total wireless usage nationwide now approaches *2 trillion* minutes annually.[5]

The wireless industry has a particularly strong presence in New York, accounting for more than $5.84 billion of New York's economy in 2004 alone. Well over 13 million New Yorkers subscribe to wireless services.[6] In 2006, the wireless industry employed at least 3,263 New Yorkers, and operated at least 345 business locations. Wireless subscribership in New York skyrocketed 166% between 2000 and 2006, driving both infrastructure investment (the wireless industry spends $25 billion nationally per year on

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[3] Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *High Speed Services for Internet Access: Status as of June 30, 2006* at Table 1 (Jan. 2007), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf.

[4] CTIA estimates based on data as of the end of 2005, the most recent available.

[5] CTIA-The Wireless Association®, Background on CTIA's Semi-Annual Wireless Industry Survey, at "Reported Wireless Minutes of Use Near Two Trillion in 2006" (2006), *available at* http://files.ctia.org/pdf/CTIA_Survey_Year_End_2006_Graphics.pdf ("*CTIA Semi-Annual Survey Summary*").

[6] Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition Status as of June 30, 2006* at Table 14 (Jan. 2007), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-270133A1.pdf (reporting 13,338,040 wireless subscribers in New York as of June 30, 2006)

infrastructure, and has invested $225 billion in total) and broadband adoption (from December 2005 to June 2006, for example, nearly 60% of all new broadband lines nationally were attributable to mobile wireless).

Both in New York and nationally, wireless providers are developing and deploying exciting new services that make broadband truly mobile and bring consumers new flexibility and benefits. Smart phones allow users to email, review documents, and browse the web without being tied down by wires or the weight of a laptop. T-Mobile USA ("T-Mobile") now offers a service (T-Mobile@Home) that allows users to make calls using either commercial mobile radio service ("CMRS") or Wi-Fi (over home, office or T-Mobile HotSpot wireless access points) using a single integrated phone that can hand off seamlessly between cellular and Wi-Fi connections. Sprint Nextel's Family Locator service uses the GPS capabilities of Sprint Nextel's phones to enable parents to quickly locate their children using the parents' phone or a personal computer. AT&T's Wi-Fi Access service helps its mobile subscribers stay productive while traveling within the U.S. and abroad using AT&T's 48,000 hot spots in 79 countries.

These services, and innovations to come, will bring consumers even more useful and customizable ways to connect to the Internet. Innovative providers are also using wireless to bring broadband and cellular services to rural and tribal areas, ensuring that traditionally underserved consumers enjoy the full range of today's communications choices. And to support all these new subscribers and innovative services, wireless carriers need to continually add cell sites.[7]

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[7] To illustrate, the number of wireless cell sites nationwide nearly doubled between 2000 and 2006, growing from 104,288 in 2000 to 195,613 in 2006. *CTIA Semi-Annual Survey Summary* at "Cell Sites."

While not the sole solution, wireless attachments are a critical source for new cell sites – for both traditional services and Wi-Fi and WiMax-based services. Attaching wireless equipment to existing poles enables carriers to extend the coverage and capacity of these services economically while minimizing environmental impact, as carriers can use wireless attachments to minimize the number of new towers constructed and the associated groundwork required. Wireless attachments also improve public safety by improving the reach and reliability of wireless services, including the reach of 911 coverage. Public safety benefits as well from the information about outages that can be derived from wireless attachments.

As the Commission considers application of its existing pole attachment policies to wireless attachments, it should consider the Federal Communications Commission's ("FCC") approach to parallel issues as the Commission has done in the past. This Commission has already recognized the benefit of harmonizing federal and state approaches to pole attachments, explaining that "cooperative federalism" can "provide consumers the full benefits available from the development of competitive markets."[8] In some areas, the FCC's treatment of issues is instructive; in others, it is dispositive. At the same time, this Commission can continue its national leadership in this area by continuing to apply the same procedural timeframes, pricing formula, and other safeguards to wireless that it has applied to wireline attachments. Thus, the Commission can ensure that its wireless pole attachment policies are consistent with federal limits on state barriers to entry and state and local regulation of radiofrequency ("RF") emissions. The Commission can continue its leadership and promote the sustained growth and

[8] *Certain Pole Attachment Issues Which Arose in Case 94-C-0095,* Opinion No. 97-10, Case 95-C-0341, at 6 (issued June 17, 1997) ("*Opinion 97-10*").

development of wireless as a consumer-friendly communications alternative by confirming that its existing policies and precedents apply to all wireless attachments.[9]

II. THE COMMISSION SHOULD RECOGNIZE THE PUBLIC BENEFITS OF WIRELESS ATTACHMENTS BY ADOPTING RULES AND GUIDELINES THAT FACILITATE THEIR DEPLOYMENT.

Wireless attachments benefit the public by enabling wireless carriers to extend and improve their wireless coverage, and bring even more innovative services to New Yorkers. Attachments are used to eliminate "dead spots," improve coverage indoors, extend the range of existing services, and bring entirely new services to consumers. Local governments and their citizens benefit from the use of existing infrastructure, such as poles, by reducing the need to construct new towers. This is particularly important in residential, park and similar areas where consumers expect wireless coverage but likely prefer the minimal aesthetic and environmental impact of antennas on utility poles over towers and other large infrastructure. Moreover, by allowing carriers to extend their networks economically, and without adding infrastructure such as new towers, wireless attachments increase the availability and reliability of both new and existing services, including 911 service, while minimizing environmental impact. Wireless attachments also bring the incidental benefit of pinpointing power outages, as wireless carriers continually monitor the status of each antenna site. The Commission should ensure that the public can capture these benefits by providing clear and fair ground rules for wireless attachments.

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[9] *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Request for Order Addressing Wireless Attachment Issues at 7, Case 03-M-0432 (filed Nov. 29, 2006).

Adopting wireless attachment guidelines as proposed by T-Mobile would be consistent with federal treatment of this critical facility. As pithily stated by the United States Supreme Court, attachers "have found it convenient, and often essential to lease space . . . on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents."[10] Congress has twice recognized the importance of access to poles and conduit, explicitly mandating nondiscriminatory access. In 1978, Congress enacted the Pole Attachment Act, recognizing that cable television services could not be widely deployed without access to poles and conduit, and providing cable operators with an assurance of access to poles on just and reasonable rates, terms and conditions.[11] In language equally applicable here, Congress found,

> Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate [cable] poles . . . there is often no practical alternative to a [cable] system operator except to utilize available space on existing poles. . . . Due to the local monopoly in ownership or control of poles to which cable system operators, out of necessity or business convenience, must attach their distribution facilities, it is contended that the utilities enjoy a superior bargaining position over [cable] systems in negotiating the rates, terms and conditions for pole attachments.[12]

The Telecommunications Act of 1996 (the 1996 Act) extended this access to telecommunications carriers, again demonstrating Congress's commitment to nondiscriminatory access. Specifically, the 1996 Act requires utilities, including Local Exchange Carriers (LECs) and electric utilities, to "provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned

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[10] *National Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330 (2002) ("*Gulf Power*").

[11] P.L. 95-234, § 6, 92 Stat. 33, 35 (1978).

[12] S. Rep. 95-580 at 13, 1978 U.S. Code Cong. & Admin. News 109, 121 (1977).

or controlled by it"[13] and to do so on just and reasonable rates, terms and conditions.[14] For LECs, Congress underscored the importance of access to poles and conduits by separately and expressly imposing upon all LECs the duty to provide "access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224."[15] Significantly, in extending federal guarantees of just and reasonable pole access to telecommunications carriers, Congress did not distinguish between attachments for which there may be some more potential alternatives, and those for which there are few or none. The Supreme Court confirmed this in *Gulf Power,* where it firmly rejected efforts to draw a distinction between wireless and wired attachments on the theory that poles are less of a "bottleneck facility" for wireless attachments.[16] In the Court's words, "the proposed distinction [between bottleneck and other situations] . . . finds no support in the text."[17]

Following Congress's statutory directives, the FCC's rules and precedents likewise require "nondiscriminatory access" on "rates, terms, and conditions that are just and reasonable."[18] Such "fair and nondiscriminatory access" is essential to the

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[13] 47 U.S.C. § 224(f)(1).

[14] 47 U.S.C. § 224(b)(1).

[15] 47 U.S.C. § 251(b)(4).

[16] *Gulf Power*, 534 U.S. at 331-2.

[17] *Id.*

[18] 47 CFR § 1.1401.

competitive deployment of communications networks.[19] The FCC has specifically and expressly recognized the benefits of wireless attachments:

> Providing wireless carriers with access to existing utility poles facilitates the deployment of cell sites to improve coverage and reliability of their wireless networks in a cost-effective and environmentally friendly manner. Such deployments . . . promote public safety, enable wireless carriers to better provide telecommunications and broadband services, and increase competition and consumer welfare in these markets.[20]

Consistent with these conclusions, the FCC has made clear that utilities and pole owners are obligated to provide wireless telecommunications providers with access to utility poles at reasonable rates pursuant to section 224 of the federal Communications Act.[21]

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[19] *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd. 6777, 6780 (¶ 2) (1998).

[20] *Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates*, Public Notice, 19 FCC Rcd. 24930 (2004) ("*Wireless Attachments Notice*"), *citing Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd. at 6798-9 (¶¶ 37, 39-40).

[21] *Id.; cf. Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, FCC 07-30, 22 FCC Rcd. 5901 (2007).

This Commission has likewise concluded that wireless attachments are pole attachments within the meaning of New York's pole attachment statute.[22] As a result, rates, terms and conditions for wireless attachments must be "just and reasonable."[23] The FCC's decision that wireless pole attachments are included within the scope of federal pole attachment protections has been upheld by no less an authority than the United States Supreme Court, which concluded unequivocally that attachments used to provide wireless telecommunications "fall within the heartland of the Act."[24] This conclusion, the Supreme Court explained, follows directly from the clear language of the Act:

> the dispositive text requires the FCC to 'regulate the rates, terms, and conditions for pole attachments,' *§ 224(b)*, and defines these to include 'any attachment by a . . . provider of telecommunications service,' *§ 224(a)(4)*. 'Telecommunications service,' in turn, is defined as the offering of telecommunications to the public for a fee, 'regardless of the facilities used,' § 154(46). A provider of wireless telecommunications service is a 'provider of telecommunications service,' so its attachment is a 'pole attachment.'[25]

This overwhelmingly favorable authority confirms that wireless pole attachments, like wireline pole attachments, are protected by New York and federal pole attachment statutes.

The FCC has made it clear that the only permissible grounds for limiting wireless attachments are the statutory bases applicable to all attachers: "'insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes.'"[26]

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[22] *Opinion 97-10.*

[23] N.Y. Pub. Serv. L. § 119-a.

[24] *Gulf Power Co*, 534 U.S. at 342.

[25] *Id.* at 340.

[26] *Wireless Attachment Notice,* 19 FCC Rcd. at 24930 (quoting 47 U.S.C. § 224(f)(2)).

Similarly, the FCC has specifically rejected the invitation to create a presumption that space above traditional communications space may be reserved for utility use only.[27] Section 224 and the FCC's rules also limit pole attachment fees "to the statutory pole rental rate . . . together with reasonable make-ready fees."[28] This limitation is designed to prevent "anticompetitive effects on telecommunications competition" that may result from "overcharges or denial of access."[29] The federal statute, rules, and policies thus make clear that wireless attachments are entitled to the same protections as wireline attachments, and utilities and pole owners cannot use the pole attachment process to prevent competitive entry by wireless attachers.

Further, the federal Communications Act prohibits state or local barriers to entry except in limited circumstances, such as where they are necessary to "protect the public safety and welfare,"[30] and requires that such restrictions, at minimum, be "competitively neutral."[31] As a consequence, Section 253 of the federal Communications Act precludes pole attachment policies that create barriers to entry by restricting access to poles for reasons other than insufficient capacity, safety, reliability, or generally applicable engineering purposes.

Of course, there is no need for conflict between federal law and New York law and policies with respect to wireless attachments. The Commission has already

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[27] *Id., citing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Order on Reconsideration,* 14 FCC Rcd. 18049, 18074 (¶ 72) (1999).

[28] *Id.*

[29] *Id.*

[30] 47 U.S.C. § 253(b).

[31] *Id.*

expressed a preference for "cooperative federalism" in this area "to provide consumers the full benefits available from the development of competitive markets."[32] The Commission sought to "make it easier for service providers to do business by eliminating unnecessary variation in regulatory requirements" and "make it possible for firms operating nationally to compare favorably New York's practices and those followed elsewhere."[33] The Commission finally indicated its intent to consider "depart[ing] from the federal approach" only if necessary to "protect the public interest."[34] Because any departure from the federal approach that discourages wireless attachments would harm the public interest by hampering competition and deployment of new services, it is appropriate for the Commission to continue harmonizing the New York and federal requirements.

The many real-world difficulties reported by wireless competitors demonstrate the need for the Commission to act. Tower siting can be an extremely contentious and time-consuming process, particularly in residential neighborhoods. When carriers seek access to poles, pole owners often respond with unreasonable demands or unnecessary delays. These obstacles are faced nationwide, including by smaller providers. Entities seeking to install wireless pole attachments around the country have reported delays of months or even years in pole licensing processes – when they have even been able to get those processes started – and demands for exorbitant fees.[35]

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[32] *Opinion 97-10* at 6.

[33] *Id.*

[34] *Id.*

[35] In comments filed before the FCC, for example, NextG Networks, Inc. ("NextG"), a provider of telecommunications services to wireless providers, reports "*significant* delays in simply getting utilities to discuss attachment." *Petition for Rulemaking of Fibertech Networks, LLC*, Comments of NextG Networks,

Such delays and fees – which deny the public the benefits of increased wireless coverage, more convenient and reliable access to public safety, new and better wireless service, and greater competition – only serve the interests of utilities seeking to prevent competition or capture monopoly pole rental rates. The Commission can ensure that New York consumers are protected from these anticompetitive harms by acting quickly to adopt a competitively neutral and easily administrable wireless pole attachment regime. This Commission has already demonstrated its vision and leadership in this area by adopting rules that permit fair competition by wired attachers, and should continue this leadership by by acting quickly to confirm that its existing competitively neutral and easily administrable pole attachment policies apply to wireless attachments.[36] Forward-looking Commissions like this one benefit attachers throughout the nation by establishing model practices that others, including the FCC, can emulate.[37]

Inc., RM-11303 at 6 (filed Jan. 30, 2006). At the time that NextG noted those delays, it had already been waiting more than two years for one utility to provide it with wireless-specific exhibits to the utility's form pole attachment agreement. Another wireless provider, Tropos Networks reported, as an "extreme but not exceptional example" that a utility "refus[ed] the request of a local police department to place mesh routers on its poles for purposes of extending the department's broadband network." *Petition of the United States Telecom Association For a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures*, Reply Comments of Tropos Networks, RM -11293 at 6 (filed Dec. 19, 2005). Furthermore, Tropos notes, refusing access is "the norm" in some parts of the country. *Id.* Another small wireless broadband provider reported proposed attachment rates of $12,000 per pole per year. Comments of Virtual Hipster, RM-11303 at 5 (filed Jan. 30, 2006).

[36] The Commission has a long history of adopting policies and regulations for pole attachments that promote competition. *See, e.g., Opinion 97-10; Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues,* Case 03-M-0432, Order Adopting Policy Statement on Pole Attachments (Aug. 6, 2004) (adopting policies including requiring fixed times for make ready work, prohibiting rental charges for overlashing, and permitting use of boxing and extension arms).

[37] *See, e.g.,* Petition for Rulemaking of Fibertech Networks, RM-11303, at 14-15, 17-18, 19, 28-29 (filed Dec. 7, 2005) (urging the FCC to follow the example of this Commission by adopting rules similar to those adopted in New York).

In particular, the Commission should act on T-Mobile's request that the Commission apply its wire pole attachment policies and rates under PSL § 119-a to wireless attachments by adopting an order:

- Stating that the pole attachment policies, time frames, and procedures in the Commission's August 2004 Order and rates under PSL §119-a apply to wireless attachments;
- Clarifying that pole owners must provide wireless carriers with reasonable attachment agreements;
- Confirming that the finding in Case 03-E-1578 that the pole-top attachment did not compromise pole safety creates a presumption that pole top-mounted antennas are allowed; and
- Clarifying that pole owners must provide pole change outs and other alterations to accommodate wireless attachments as required of National Grid in Case 06-E-0082.

Taking these simple pro-competitive steps to clarify and formalize New York's equal treatment of wireless attachments will "promote public safety, enable wireless carriers to better provide telecommunications and broadband services, and increase competition and consumer welfare"[38] for all New Yorkers.

III. ISSUE 2: THE COMMISSION SHOULD ESTABLISH A PRESUMPTION THAT WIRELESS POLE-TOP ATTACHMENTS ARE SAFE AND PERMISSIBLE.

The Commission's approval of wireless attachments when those installations (1) conform to the National Electronic Safety Code ("NESC") and (2) work in electrical supply space is done only by qualified electrical workers demonstrates that wireless devices may be attached safely to utility poles.[39] The Commission should expressly

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[38] *Wireless Attachment Notice*, 19 FCC Rcd. at 24930.

[39] *Joint Petition of Niagara Mohawk Power Corporation and National Grid Communications, Inc. for Approval of a Pole Attachment Rate for Certain Wireless Attachments to Niagara Mohawk's Distribution*

extend this conclusion to wireless pole-top attachments by adopting a rebuttable presumption that pole-top attachments that meet these conditions are safe and permissible.

These limitations are appropriate for all pole-top attachments. The NESC, which is published by the Institute of Electrical and Electronic Engineers and "sets the ground rules for practical safeguarding of persons during the installation, operation, or maintenance of electric supply and communication lines and associated equipment,"[40] includes standards governing pole-top attachments.[41] The NESC rules address, in Section 233C, clearance between wires, conductors and cables carried on different supporting structures, and would address connections between pole-mounted antennas and their cabinets on the ground. Section 234C3d of the NESC similarly addresses clearance issues with regard to wires, cables, and antennas, and applies to the placement of wireless facilities on poles. Requiring compliance with these and any other applicable NESC standards will thus ensure that pole-top attachments are safe. Rebuttably presuming NESC-compliant attachments are safe would also conform with the FCC's conclusion that wireless attachments may be denied only for reasons of "insufficient capacity, . . . safety, reliability, or generally applicable engineering purposes."[42] By contrast, applying more rigid or additional standards to wireless pole attachments – particularly at the discretion of the utilities – would violate principles of competitive

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Poles, Order Approving Petition with Modifications, Case 03-E-1578 (issued Apr. 7, 2004) ("*Joint Petition Order*").

[40] National Electrical Safety Code Zone, http://standards.ieee.org/nesc/ (last visited Aug. 28, 2007).

[41] National Electronic Safety Code, 2007 Edition, Rules 235I and 420.Q.

[42] *Wireless Attachment Notice*, 19 FCC Rcd. at 24930 (quoting 47 U.S.C. § 224(f)(2)).

neutrality, impermissibly impose requirements not necessary to protect safety and health, and unnecessarily limit New Yorkers' access to the public safety and consumer benefits of wireless services.

IV. ISSUE 8: FEDERAL STANDARDS ENSURE SAFETY AND EXCLUSIVELY REGULATE ANY RF EMISSIONS FROM WIRELESS POLE ATTACHMENTS.

The FCC has exclusive authority to regulate RF emissions from all wireless transmitters, including wireless transmitters used in pole attachments,[43] and has vigorously and effectively discharged this duty.[44] Recent case law supports the FCC's exclusive jurisdiction over RF emissions rules.[45] The FCC's standards are "based substantially" on the recommendations of the U.S. Environmental Protection Agency and the Federal Drug Administration,[46] and reflect "the best scientific thought" on the RF limits necessary to "protect the public health."[47] The United States Occupational Safety and Health Administration has also adopted protections for workers with respect to RF

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[43] 47 U.S.C. § 152(a); 47 U.S.C. § 303.

[44] *See, e.g., Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation,* Report and Order, 11 FCC Rcd. 15123 (1996) (*First RF Guidelines Order*).

[45] *Cellular Phone Task Force v. FCC*, 205 F.3d 82 (2d Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001), (upholding FCC's RF emissions rules and stating FCC alone has authority to determine licensee compliance); *EMR Network v. FCC*, 391 F.3d 269 (DC Cir. 2004)(holding the FCC upheld its duty under § 102 of the National Environmental Policy Act and did not act arbitrarily and capriciously in denying a petition for rulemaking to revise the FCC's RF radiation guidelines); *see also Jasso v. Citizens Telecoms. Co. of Calif., Inc.*, 2007 U.S. Dist. LEXIS 54866 (E.D. Cal. July 30, 2007(Magistrate Judge recommends that the Court hold that FCC RF Guidelines preempt a state tort suit based on allegations of health effects on workers of a RF tower).

[46] *First RF Guidelines Order*, 11 FCC Rcd. at 15124 (¶ 2).

[47] *Id.* at 15184 (¶ 168).

emissions.[48] These federal standards ensure that the public and pole workers are protected from any RF emissions from wireless pole attachments.

The FCC has taken a wide range of steps to ensure that the public and utility workers are not harmed by RF emissions. Most critically, it has adopted guidelines for evaluating the environmental effects of RF radiation, including Maximum Permissible Exposure ("MPE limits").[49] The FCC has concluded that these guidelines "provide a proper balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that the industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible."[50] These MPE limits for field strength and power density are based on the recommendations of the National Council on Radiation Protection and Measurements (NCRP) and the guidelines contained in the RF safety standard developed by the Institute of Electrical and Electronic Engineers, Inc. (IEEE) and adopted by the American National Standards Institute (ANSI).[51] The FCC has also issued a technical bulletin governing RF exposure limits, both for the general public and for workers in occupational settings.[52] This Bulletin includes detailed guidance on controlling exposure

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[48] 29 CFR §§ 1910.97, 1910.268.

[49] *First RF Guidelines Order, 11 FCC Rcd. 15123.*

[50] *Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934; Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation; Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities*, 12 FCC Rcd. 13494, 13496 (1997)("*Second RF Guidelines Order*").

[51] *First RF Guidelines Order*, 11 FCC Rcd. at 15124 (¶ 1 n.1).

[52] Federal Communications Commission, Office of Engineering and Technology, *Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields*, OET Bulletin No. 65 at 52-55 (Aug. 1997) *available at*

to RF fields for both the general public and those working in the vicinity of RF.[53] In addition, the FCC has produced a Guide for local government officials to assist them in ensuring that antenna facilities located in their communities comply with the FCC's limits for human exposure to RF.[54] OSHA requires additional protections for workers to ensure they are not at risk from exposure to RF emissions.[55] And both the FCC and OSHA have signage requirements to ensure proper notification of those in the vicinity of wireless emissions. The Commission can safely rely on this extensive federal body of requirements and guidance to provide protection for the public and workers, and need not add confusion by layering additional requirements on those already in place.

Typical wireless attachments do not pose any RF exposure risk to the general public or utility workers. Under the FCC's guidelines, cellular and PCS antennas placed at heights above 10 meters are categorically "excluded" from routine evaluation because they are presumed to be within guideline limits.[56] As the FCC's Office of Engineering and Technology has explained, "[f]or antennas mounted higher than 10 meters, measurement data for cellular facilities have indicated that ground-level power densities are typically hundreds to thousands of times below . . . MPE limits."[57] Height alone will therefore protect the public from most wireless pole-top attachments. Moreover, many

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http://www.fcc.gov/Bureau/Engineering_Technology/Documents/bulletins/oet65/oet65.pdf ("OET Bulletin No. 65") (public exposure); *id.* at 55-59 (occupational exposure).

[53] *Id.*

[54] Federal Communications Commission, Local and State Government Advisory Committee, A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures and Practical Guidance (June 2, 2000).

[55] 29 CFR §§ 1910.97, 1910.268.

[56] OET Bulletin No. 65 at 14.

[57] *Id.*

wireless attachments operate at relatively low power levels, further reducing both public and occupational exposure risk. In addition, both the FCC and OSHA require operators to take all steps necessary to ensure that their transmitters will not harm workers.

The FCC and OSHA have the ability to enforce their rules fully. The FCC requires carriers to certify (on a site-by-site basis) that their facilities are within the FCC's guidelines, and the FCC also has the power to request additional information from carriers or conduct inspections to address any concerns about compliance. OSHA likewise has an enforcement regime that includes inspections and fines to monitor compliance and address violations of its rules. Additional steps by this Commission are not necessary to protect either the public or workers from RF emissions from wireless attachments.

In any event, state and local efforts to regulate cellular facilities on RF grounds are barred by the Communications Act. Section 332(c)(7)(B)(iv) of the Act expressly prohibits state or local government regulation of:

> the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.[58]

As the FCC has explained, "[s]tate and local governments are broadly preempted from regulating the operation of personal wireless service facilities based on RF emission considerations."[59] Because federal regulations ensure the safety of the public and utility workers and because Congress has precluded state regulation in this area, this Commission need not require additional rules or to allow pole owners to set arbitrary standards that are above and beyond the federal standards already in place.

V. ISSUE 9: THE COMMISSION SHOULD APPLY THE WIRELINE ATTACHMENT RATE FORMULA TO WIRELESS ATTACHMENTS.

This Commission has already adopted the FCC's cable rate formula for all wireline attachments and applied that formula to wireless attachments.[60] In adopting the FCC's pole attachment rate formula, this Commission noted the importance of "cooperative federalism . . . to provide consumers the full benefits available from the development of competitive markets."[61] This Commission extended this formula to at

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[58] 47 U.S.C. § 332(c)(7)(B)(iv).

[59] *Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, Report and Order, 15 FCC Rcd. 22821, 22828 (¶17) (2000).

[60] *See Joint Petition Order.*

[61] *Opinion 97-10* at 6.

least some wireless attachments on the ground that it is the "formula . . . used for all attachments to distribution poles in New York."[62]

There is no practical or policy reason to depart from this approach now. The Commission's previous decisions illustrate the ease with which the cable formula can be applied to wireless attachments. In order to reflect the actual usage of space by wireless attachments, including the increase in usable space that results when wireless attachments occupy otherwise unusable space, the Commission previously performed simple adjustments to the formula and then applied these changes to calculate an appropriate wireless attachment rate.[63] The Commission likewise has applied the existing formula to calculate rates for wireless attachments that require excess pole height, and has made it clear that wireless attachment rates are available to CMRS providers.[64]

The Commission should continue its practice of applying the cable rate formula (with adjustments as necessary to reflect actual usage of space) to calculate wireless attachment rates. This approach is consistent with Section 224 and FCC rules, which "do not allow pole access fees to be levied against wireless carriers in addition to the statutory pole rental rate."[65] Most importantly, maintaining this competitively neutral approach to pole attachment rates will encourage competition and drive the consumer and public safety benefits that accompany new and expanded wireless service.

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[62] *Joint Petition Order* at 3.

[63] *Id.* at 4.

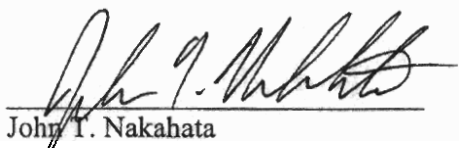
[64] *Tariff filing by Niagara Mohawk Power Corporation d/b/a National Grid to make revisions to Rule 35 – Cable Television Pole Attachment Rate and Electric Distribution Pole Wireless Attachment Rate,* Order Approving Staff Recommendation, Case 06-E-0082 (issued June 23, 2006).

[65] *Wireless Attachment Notice.* 19 FCC Rcd. at 24930.

CONCLUSION

The New York Public Service Commission has already recognized the benefits of adopting fair ground rules for wireless pole attachments. The Commission should build on this forward-looking approach by clarifying that its wireline pole attachment policies and rates under PSL § 119-a apply to wireless attachments, as proposed by T-Mobile, and by continuing to harmonize New York and federal pole attachment rates and polices. These simple, pro-competitive steps will help bring all New Yorkers the most reliable, robust, and innovative wireless services in the nation.

Respectfully Submitted,



John T. Nakahata
Brita D. Strandberg
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036
(202) 730-1300

Counsel to CTIA –The Wireless Association®

Lisa M. Zaina
Assistant Vice President – State Regulatory Affairs
Marlo A. Go
Staff Counsel
CTIA-THE WIRELESS ASSOCIATION®
1400 Sixteenth Street, NW Suite 600
Washington, DC 20036
(202) 785-0081

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CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of September 2007, I directed that a true and correct copy of the foregoing Comments of CTIA – The Wireless Association® served by electronic mail on the following:

New York State Department of Public Service
Maureen E. Farley, Esq.
Three Empire State Plaza Albany, NY
12223-1350
Phone: 518-474-1634
Fax: 518-473-7081
Email: maureen_farley@dps.state.ny.us

The City of New York Department of
Information Technology &
Telecommunications
Radhika Karmarkar
Senior Counsel for Regulatory Affairs
75 Park Place, 9th Floor New York,
New York 10007 Phone: 212-788-6565
Email: rkarmarkar@doitt.nyc.gov

AT&T
Mary E. Burgess, Senior Counsel
Katherine Pearson, Attorney
Suite 706
111 Washington Avenue
Albany, NY 12210-2213
Phone: 518-463-3148
Fax: 518-463-5943
Email: meburgess@att.com
Katherin.peason@att.com

Consolidated Edison Company of New York,
Inc. and Orange & Rockland Utilities, Inc.
David P. Warner, Esq
4 Irving Place, Room 1815-S
New York, NY 10003
Phone: 212-460-4286
Fax: 212-677-5850
Email: warnerd@coned.com

Mary Jane Zazzero
Orange & Rockland Utilities, Inc.
390 W. Route 59
Spring Valley, NY 10977
Phone: 845-577-3648
Fax: 845-577-3074
Email: zazzeromj@oru.com

Consolidated Edison Company of New York,
Inc.
Dominick Maugeri
4 Irving Place, Room 1815-S
New York, NY 10003
Phone: 212-460-4286
Fax: 212-677-5850
Email: maugerid@coned.com

New York State Telecommunications, Inc.
Robert Puckett
100 State Street
Suite 650
Albany, NY 12207
Phone: 518-443-2700
Fax: 518-443-3810
Email: rpuckett@nysta.com

Center Hudson Gas & Electric Corp.
Michael Mosher
Vice President for Regulatory Affairs
284 South Avenue
Poughkeepsie, NY 12601
Phone: 845-486-5577
Fax: 845-486-5894
Email: mmosher@cenhud.com

Caroline Hill, Director
NY State Telecommunications Association, Inc. Tariffs & Educations New York State Telecommunications Association
100 State Street
Suite 650
Albany, NY 12207
Phone: 518-443-2700
Fax: 518-443-3810
Email: chill@nysta.com

EXteNET SYSTEMS, INC.
Kris P. Bennett
6375 FM 311
Spring Branch, TX 78070
Phone: 830-885-7724
Email: kbc@gvtc.com

Leslie J. Brown
General Counsel
National Grid Communications, Inc.
80 Central Street
Boxborough, MA 01719
Phone: 978-264-6076
Email: leslie.brown@us.ngridwireless.com

NextG Networks of NY, Inc.
T. Scott Thompson, Esq.
Jill M. Valenstein
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20009
Phone: 202-973-4208
Email: scottthompson@dwt.com
jillvalenstein@dwt.com

Thomas P. Riozzi
Thompson Hine LLP
335 Madison Avenue
New York, NY 10017
Phone: 212-908-3904
Fax: 212-344-6101
Email: Thomas.Riozzi@ThomsonHine.com

Paul E. Haering
Central Hudson Gas & Electric Corporation
284 South Avenue
Poughkeepsie, NY 12601
Phone: 845-486-5351
Fax: 845-677-5850
Email: phaering@cenhud.com
Jeremy J. Euto
Joseph H. Snyder
National Grid
300 Erie Boulevard West
Syracuse, NY 13202
Phone: 315-428-3310
Fax: 315-428-6407
Email: Jeremy.euto@us.ngrid.com
Joseph.snyder@us.ngrid.com

NYSEG and RG&E
Kathy DiStefano
Joint Use of Plant
NY Maintenance Engineering Rochester Gas and Electric Corporation
89 East Avenue
Rochester, NY 14649
Phone: 585-771-2189
Fax: 585-771-2493
Email: kathy_distefano@rge.com

Sprint Spectrum, L.P., Nextel Partners of Upstate New York, Inc. and Nextel of New York, Inc. (collectively, Sprint Nextel)
Garnet Goins
Director & Attorney
State Regulatory
Northeast Region
Sprint Nextel
2001 Edmund Halley Drive
Reston, VA 20191-3436
Phone: 703-433-4248
Fax: 703-433-4142
Email: Garnet.goins@sprint.com

Verizon
Richard C. Fipphen
140 West Street, 27th Floor
New York, NY 10007-2109
Phone: 212-321-8384
Fax: 212-962-1687
Email: Richard.flipphen@verizon.com

Verizon
John Lacy Clark
140 West Street, 26th Floor
New York, NY 10007-2109
Phone: 212-321-8384
Fax: 212-791-8189
Email: VZ-NY-Regulatory@verizon.com

Michelle Salisbury
NY-CLEC LLC
Paralegal
2000 Corporate Drive
Canonsburg, PA 15317
Phone: 724-416-2239
Fax: 724-416-4239
Email: salisbury@crowncastle.com

Larry Malone
Couch White 540
Broadway P.O. Box 22222
Albany, NY 12201
Phone: 518-320-3441
Email: lmalone@couchwhite.com

Gary R. DeWilde
Rochester Gas and Electric Corporation
89 East Avenue
Rochester, NY 14649
Phone: 585-724-8836
Fax: 585-724-8818
Email: gary_dewilde@rge.com

William J. Cronin, Esq.
LeBoeuf Lamb Greene & MacRae LLP
125 West 55th Street
New York, NY 10019
Phone: 212-424-8446
Fax: 212-649-0463
Email: wcronin@llgm.com

BROADCAST SIGNAL LAB
David P. Maxson
Managing Partner
Broadcast Signal Lab, LLP
503 Main Street
Medfield, MA 02052
Phone: 508-359-8833
Email: david@broadcastsignallab.com

Bob Ritter
NY-CLEC LLC
2000 Corporate Drive
Canonsburg, PA 15317
Phone: 724-416-2417
Fax: 724-416-2353
Email: bob.ritter@crowncastle.com

The DAS Forum
500 Montgomery Street, Suite 700
Alexandria, VA 22314
Phone: 800-759-0300
Email: connie.durcsak@thedasforum.org

Lisa M. Zaina, Assistant VP State Regulatory Affairs
CTIA – The Wireless Association Expanding the Wireless Frontier
1400 16th Street, NW
Suite 600
Washington, DC 20036
Phone: 202-785-0081
Direct: 202-736-3246
Wireless: 202-256-9192
Fax: 202-736-3684
Email: lzaina@ctia.org

Michele Thomas
T-Mobile USA Inc.
4 Sylvan Way
Parsippany, NJ 07054
Phone: 973-451-8399
Fax: 973-898-8595
Email: Michele.thomas@t-mobile.com

Gregg C. Sayre,
Associate General Counsel
Christine Burke, Manager
180 S. Clinton Avenue
Rochester, NY 14646
Phone: 585-777-7270
Fax: 585-263-9986
Email: gregg.sayre@frontiercorp.com
Christine.burke@frontiercorp.com

Elise Hiller
General Counsel
C TANY
80 State Street
Albany, NY 12207
Phone: 518-463-6676
Fax: 518-463-0573
Email: Elh@nycap.rr.com

Andrew M. Klein
Counsel for T-Mobile
Klein Law Group, PLLC
4800 Montgomery Lane
Suite 700
Bethesda, MD 20814
Phone: 301-664-6330
Fax: 301-664-6323
Email: aklein@kleinlawPLLC.com

Maureen Helmer
Green & Seifter
194 Washington Avenue
Suite 315
Albany, NY 12210
Phone: 518-689-3570
Email: mhelmer@gslaw.com