

By Hand Delivery

Hon. Jaclyn A. Brilling Secretary NYS Public Service Commission Three Empire State Plaza Albany, New York 12223

RE: Case 07-M-0741 - Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles

Dear Secretary Brilling:

Enclosed for filing in the referenced proceeding is an original and five (5) copies of Joint Comments of Owners of Distribution Poles in New York Responding to the Commission's Notice Requesting Comments. The specific companies on whose behalf this filing is made are identified on the first page of the document.

Those parties appearing on the Active Party List dated August 7, 2007 have been served with this filing by electronic mail.

Please date stamp the additional enclosed copy and return it to the person making this delivery.

Thank you.

Respectfully submitted,

Thamas P. Riaggi all

Thomas P. Riozzi

Enclosures

cc: Active Party List (August 7, 2007)

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STATE OF NEW YORK PUBLIC SERVICE COMMISSION

PROCEEDING ON MOTION OF THE COMMISSION CONCERNING WIRELESS FACILITY ATTACHMENTS TO UTILITY DISTRIBUTION POLES

Case 07-M-0741

Joint Comments of Owners of Distribution Poles in New York Responding to the Commission's Notice Requesting Comments

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Counsel for Central Hudson Gas & Electric Corporation On Behalf of the Parties Identified Herein

New York, New York September 10, 2007

STATE OF NEW YORK PUBLIC SERVICE COMMISSION

PROCEEDING ON MOTION OF THE COMMISSION CONCERNING WIRELESS FACILITY ATTACHMENTS TO UTILITY DISTRIBUTION POLES

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I. INTRODUCTION:

These comments are submitted on behalf of the following owners of distribution poles in New York State: Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc. ("Con Edison"), Frontier Communications¹, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange & Rockland Utilities, Inc. ("O&R"), Rochester Gas and Electric Corporation and the New York State Telecommunications Association, Inc., on behalf of its incumbent local exchange carrier members except Verizon New York Inc. ("Verizon") (referred to collectively herein as "Pole Owners").

II. PROCEDURAL HISTORY

The Public Service Commission ("Commission") issued an Order and Policy Statement governing wire span attachments to utility distribution poles on August 6, 2004

¹ The following incumbent local exchange carriers of Frontier Communications are Pole Owners in the State of New York: Frontier Telephone of Rochester, Inc., Ogden Telephone Company, Citizens Telecommunications Company of New York, Inc., Frontier Communications of New York, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Communications of Ausable Valley, Inc., and Frontier Communications of Seneca Gorham, Inc.

in Case 03-M-0432 (the "Pole Attachment Order" and the "Pole Attachment Proceeding," respectively).² On August 7, 2006, Omnipoint Communications, Inc. d/b/a T-Mobile USA ("T-Mobile") requested active party status in the Pole Attachment Proceeding³ and, on November 29, 2006, filed a request for relief asking, generally, that the Commission's policies respecting wire span attachments be made applicable to wireless facility attachments as well (the "T-Mobile Petition").⁴

A Notice of Proposed Rulemaking, pursuant to the State Administrative Procedure Act (SAPA) seeking comments on the T-Mobile Petition was published in the New York State Register on December 27, 2006. Pursuant to the SAPA notice, on February 12, 2007, the Pole Owners (joined by Verizon) submitted joint comments opposing the request by T-Mobile. The Pole Owners and Verizon argued that the Pole Attachment Proceeding did not address wireless attachment practices, procedures or rates in any fashion; that the T-Mobile Petition, coming more than two years after the Commission issued the Pole Attachment Order, was untimely filed; that the issues involved with wireless facilities are significantly different from those associated with wire span facilities precluding application of the Pole Attachment Order to wireless facilities; and that the Commission's Opinion No. 97-10⁵ requiring that the terms and conditions of wireless facility attachments be subject to case by case negotiation between the relevant parties should continue to govern attachments of wireless facilities.

² Case 03-M-0432, <u>Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues</u>, Order Adopting Policy Statement on Pole Attachments (issued August 6, 2004).

³ Letter from Rothfelder Stern, L.L.C. to Jaclyn A. Brilling, Secretary, dated August 7, 2006.

⁴ Case 03-M-0432, Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues, <u>Request for Order Addressing Wireless Attachment Issues</u>, dated November 29, 2006.

⁵ Case 95-C-0341, <u>In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095</u>, Opinion and Order Setting Pole Attachment Rates, Opinion No. 97-10 (issued June 17, 1997), p. 22. ("Opinion No. 97-10").

The Commission's Order Instituting Proceeding, issued June 27, 2007, in this proceeding addressed T-Mobile's Petition and the comments submitted thereon and concluded that more information about wireless facility attachments is needed.⁶ A Notice Requesting Comments was issued concurrently with the Order Instituting Proceeding and a related SAPA Notice was published in the New York State Register on July 11, 2007. These comments on behalf of the Pole Owners are in response to that Notice including the specific questions presented by the Commission in the Order Instituting Proceeding.

III. THE POLE OWNERS' COMMENTS

A. Summary

Attachments of wireless communication facilities to utility distribution poles present issues and circumstances that differ greatly from those presented by wire span attachments. Wire span attachments are essentially uniform from pole to pole throughout New York. As such, the standardized procedures and policies established by the Commission in the Pole Attachment Order along with a standard formulaic approach to setting pole attachment rates are a practicable approach for managing the relationship between a pole owner and an attacher during the attachment process and thereafter.

Wireless facility attachments, however, can vary significantly from location to location depending on the wireless service provider's needs at a particular location. Wireless attachment facilities and configurations vary greatly from wire span attachment facilities and configurations as does the extent to which wireless attachments occupy pole space in comparison to wire span attachments. As addressed subsequently, the foregoing points are consistent with prior assessments and determinations by the Commission. In

⁶ Case 07-M-0741, <u>Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to</u> <u>Utility Distribution Poles</u>, Order Instituting Proceeding (issued June 27, 2007) (the "Order Instituting Proceeding").

addition, local municipal requirements with respect to right of way use can be quite variable with respect to the installation of wireless facilities. Consequently, the Pole Owners renew their objection to the premise of the T-Mobile Petition that gave rise to this proceeding⁷ - that the Commission treat wireless attachments in the same manner as it does wire span attachments.

In addition, the Pole Owners urge the Commission to approach this proceeding from the perspective that the Commission articulated some thirty years ago respecting the then growing use of utility poles for providing cable television service. The Commission said:

> Cable operators use the same poles that are used to deliver essential electric and telephone service Our obligation to assure that the State's citizens receive safe and adequate telephone and electric service requires us to do what is in our power to prevent the growing use of utility poles for cable service from interfering with the primary purpose of utility poles – the provision of electric and telephone service.⁸

The Pole Owners recognize that there is public interest in wireless communication service. However, now that so many utility poles bear the presence of cable attachments in addition to telephone and electric service facilities, there should be even greater concern about preventing interference with existing uses of poles as additional potential occupants desire access to those poles. This is particularly so when the potential interference may well reasonably be avoided given that wireless service providers have alternatives to utility poles for locating their facilities.⁹ The Pole Owners believe that the

⁷ Order Instituting Proceeding, generally.

⁸ Case 26494, <u>Investigation of Pole Attachment and Related Agreements between Utilities and CATV</u> <u>Systems</u>, Opinion and Order Promulgating Standards for Utility Pole Attachment Agreements, Opinion No. 77-1 (issued February 28, 1977).

⁸ As discussed subsequently, utility companies do not have a monopoly with respect to wireless facility attachment locations.

best approach to assuring that such interference is prevented, while also accommodating the desire of wireless service providers to burden the poles with additional facilities, is to provide pole owners with the flexibility to address such attachments on a case by case basis with an aggrieved party having recourse to the Commission, if needed, all as is now provided for by Opinion No. 97-10.¹⁰ As discussed subsequently, the Pole Owners believe that not only their rights as owners of the poles and as providers of existing services for which the poles are used, but the rights and obligations of existing attachers as well (as previously established by the Commission) are jeopardized by the rights of wireless communication providers that are demanded, requested or suggested in the T-Mobile Petition.

B. Pole Owners' Responses to the Questions Presented by the Commission

Each of the specific questions presented by the Commission in the Notice

Requesting Comments is addressed below.

1. Are pole attachment policies, time frames and procedures in the August 6, 2004 order in Case 03-M-0432 appropriate for wireless pole attachments?

The Commission has previously, and correctly, determined that wireless pole attachments are not the same as traditional wire span attachments and that wireless attachments lack the uniformity of wire span attachments. The Commission stated in Opinion No. 97-10 that:

> <u>The record</u> in this case indicates that wireless attachments to utility distribution poles may or may not resemble or conform to the traditional use of such facilities. This depends on the technology that they use and the wireless firms' requirements. . . [I]f a wireless firm requires a nonstandard or unique attachment to a utility pole, and <u>if</u> the [pole owner] is willing to make the necessary pole modifications to accommodate such a use, the price and

¹⁰ Opinion No. 97-10 at 22.

terms for such attachments should be determined through private negotiations. (Emphasis added.)¹¹

Wireless attachments are significantly different from wire span attachments and the manner and type of wireless attachments vary considerably (e.g., a microwave dish located in the communication zone of a pole would present issues significantly different from those presented by an omni-directional antenna located at the top of a pole). As the Commission points out in the Order Instituting Proceeding:

> National Grid Standard GS 1169 details practices and procedures for a 35kV Maximum Distribution Wood Pole Mounted Meter Power Supply and Antenna Installations (Fall 2003). The National Grid Standard for the installation of wireless antennas demonstrates the uniqueness of these attachments and provides specific guidelines for the antenna and its associated equipment. Figure 4 titled Wireless Communication Installation Details shows a communications antenna with a height of 9 feet at the top of a utility pole that is connected with communication cables that run from the antenna through the electric supply space to equipment enclosures, power supply and electrical meter that can be mounted at a minimum of 8 feet above grade. That installation demonstrates that the space used for such installations requires almost 100% of a utility pole if the antenna and all associated equipment and interconnecting cables are considered. (Emphasis added.)¹²

Consequently, a "one size fits all" approach for communication attachments on utility poles clearly would not properly recognize fundamental differences among a large number of possible combinations and configurations of attachments on a pole and the resulting but differing operational and safety precautions and requirements that would need to be addressed in response to them. Consequently, applying wire span attachment policies, time frames and procedures established in Case 03-M-0432 to wireless

[&]quot; <u>Id.</u>

¹² Order Instituting Proceeding at 6, n.6.

attachments would not be appropriate.¹³ A specific example here is that because the variety of wireless facilities and configurations is far greater than that related to wire span attachments, wireless attachment application review and evaluation requires more time than is needed to review and evaluate a wire span attachment application.

In the event the Commission considers establishing standardized attachment processes, time lines and procedures for wireless attachments as opposed to continuing the more flexible and, therefore, more responsive approach of Opinion 97-10, the Commission should review wireless attachment issues and circumstances with the same rigor as it has done with respect to wire span attachments. The traditional wire span attachment process has evolved over three (3) decades. Indeed, the attachment policies, time frames and procedures adopted in the Pole Attachment Order are predominantly those that resulted from extensive discussion, analysis and negotiation by and between the parties.¹⁴

Furthermore, no wireless attachments to distribution poles of the Pole Owners have been made to date in New York. Consequently, the associated licensing process (e.g., construction standards, roles and responsibilities of the attacher and the pole owner, necessary recordkeeping, personnel training, etc.) that would be appropriate has not been defined, developed or tested whether by rulemaking or by the exercise of the negotiation right provided by Opinion 97-10. Application of the Pole Attachment Order to wireless attachments (a process not vetted in the Pole Attachment Proceeding) before wireless communication service providers and pole owners have meaningful experience with the

¹³ The reasons for which applying wire span attachment policies, time frames and procedures established in Case 03-M-0432 to wireless attachments would not be appropriate are addressed further herein in response to various other questions presented by the Commission in the Notice Requesting comments.
¹⁴ T-Mobile did not become a party to the Pole Attachment Proceeding until more than two years after the

^{1°} T-Mobile did not become a party to the Pole Attachment Proceeding until more than two years after the Pole Attachment Order was issued and more than four and a half years after the proceeding began. A reasonable inference from that fact is that T-Mobile recognized, correctly, that the proceeding was not addressing practices and procedures related to wireless attachments.

wireless attachment process, which has been made possible by Opinion 97-10, would be premature in that lessons to be learned from that practical experience would not guide the decision. Given the fundamental differences between wireless and wire span attachments, the Pole Attachment Order should be considered as presumptively inapplicable to wireless attachments. In these circumstances, holding pole owners accountable for performance standards applicable to the relatively routine activity of wire span attachments would be an unreasonable requirement that need not be established given the currently available and more appropriate approach provided by Opinion No. 97-10.

What can reasonably be expected is that the provision of wireless communication service is likely to be of greater interest to local governments than what has now become the relatively routine expansion of cable service. The Pole Owners believe that such interest is legitimate and worthy of accomodation. In addition, depending on the particular circumstances, such interests must be taken into account as a matter of law such as arises in connection with compliance with the State Environmental Quality Review Act (SEQRA) as addressed subsequently in these comments.

2. Should the Commission create a presumption that [wireless]¹⁵ antennas approved for National Grid be allowed on all poles?

The Commission should not create a presumption that any particular type of wireless attachment should be allowed on any, much less "all" poles. This is because of the highly variable nature of wireless attachments and the highly variable size, location and current stress level of poles.

¹⁵ The word "wireline" appears in the Notice Requesting Comments. The Pole Owners believe that the term "wireless" was intended.

What wireless facilities are to be attached to a pole, where on the pole they are to be attached and which particular pole is under consideration will create highly varied circumstances that will require different approaches and solutions. One approach or solution could very well be that a pole top wireless facility of the nature of those considered in the National Grid matter referred to in the Order Instituting Proceeding¹⁶ would be exceedingly inadvisable due to safety, operational or esthetic concerns. For example, Con Edison and O&R have, for over twenty years, been installing tripod mounts on the tops of distribution poles to carry primary electric service facilities. Consequently, as to those and future poles with the pole top tripod mount, the pole top is not available for attachment of wireless facilities and no pole top should be presumed reserved for use by wireless service providers.

In addition, the pole owner might not have adequate property rights to grant a license for some types of facilities on certain poles including local municipal restrictions. Simply creating a presumption that any type of wireless facility is "approved" for all poles would fail to take into account, for example, that the New York City Department of Information Technology and Telecommunications has developed extensive franchising and licensing requirements (including such related to facility size and dimensions and aesthetics) with regard to installation of wireless facilities within New York City owned rights-of-way including on utility poles located on any such right-of-way.

Furthermore, as the Commission noted, National Grid, while it has received Commission approval to make pole top attachments, "reserve[d] the right to refuse to put

¹⁶ Case 03-E-1578, 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 Poles, Order Approving Petition With Modifications (issued April 7, 2004) (the "National Grid Order").

wireless attachments on its poles."¹⁷ Consequently, no wireless communication service provider may "presume" that it has "approval" to make an attachment of the nature approved for National Grid even on a National Grid pole. The Commission should not create any presumptions regarding acceptable wireless attachment installations. The Commission's "approval" of pole top attachments in the National Grid matter, given National Grid's reserved right to refuse to allow <u>any</u> wireless attachments on its poles (pole top or otherwise), does not rise to the level of "approval" that would be reasonably necessary to support the creation of any such presumption.

3. Should pole owners be required to provide taller poles to accommodate wireless attachers?

Pole owners should not be required to provide taller poles or otherwise replace existing poles to accommodate attachments of wireless facilities. As the Commission has previously stated, the Commission should be concerned about the expanded use of poles interfering with their use in providing existing telephone and electric service. There can be no doubt that the process of replacing an adequately functioning pole to accommodate attachment of wireless facilities would constitute an interference with the providing of those services.

Unlike wire span attachers, wireless attachers have several alternatives to the use of utility poles to provide their service and utility poles should not be a mandated default structure especially if the pole itself is not suitable for the wireless service provider's purposes. Wireless service providers can attach to existing buildings and other structures or install their own structures uniquely suitable for their purposes. These alternatives are,

¹⁷ Order Instituting Proceeding at 6.

in particular, free of the safety risks associated with the presence of primary electric supply lines or equipment while merely providing a taller utility pole would not be so.¹⁸

There are practical matters that also weigh against requiring pole owners to make changes to their system for the convenience of wireless attachers. Regardless of whether wireless facilities are installed above or below primary electric supply lines or equipment, with a taller pole additional pole strength requirements would need to be met to comply with the National Electrical Safety Code (NESC). For example, if a pole needs to exceed sixty (60) feet in height to accommodate a wireless attachment, the NESC loading and strength requirements change and a detailed and costly engineering analysis would need to be performed on the added loading.¹⁹ Proper guving and anchoring of taller poles would also have to be addressed. In the event that additional guying is required, such guying may need to be located above the primary electric supply lines and extend beyond existing easement boundaries.²⁰ In addition, the replacement of an existing pole with a taller one requires considerable time, effort and expense. Jointly owned poles are very prevalent as is the existence of third party wire span attachments. As a result, replacing a pole with a taller one very often requires the coordination three service providers (telephone, electricity and cable) and carries the possibility of service interruptions all while diverting the efforts and attention of utility personnel to the interests of the wireless

¹⁸ Pole top attachments of wireless facilities will likely require that taller poles be installed in order to achieve the necessary vertical clearances from primary electric supply lines or equipment. The Pole Owners, however, believe that wireless facilities should generally not be placed above or in the proximity of primary electric supply lines or equipment because of employee safety concerns. These concerns stem from the fact that, even if required vertical clearances are met, grounded conductors connected to wireless facilities would still be in close proximity to electric supply lines thereby increasing the likelihood of phase-to-ground faults occurring during construction, operation and maintenance procedures. As the Commission noted in the Order Instituting Proceeding (at 6), National Grid adopted "comprehensive safety standards and requirements" for pole top attachments and still reserved the right to refuse them.
¹⁹ NESC Rule 250C.

²⁰ The Pole Owners should not have any obligation to secure or modify any property rights in order to accommodate the attachment of wireless facilities in this or any other circumstance.

service provider notwithstanding the "primary purpose" of the pole. Moreover, as the Commission has noted, the National Grid tariff respecting wireless attachments that the Commission has approved reserves to National Grid "the right to refuse to . . . increase the height of poles to accommodate wireless attachments.^{"21}

The Commission should also refrain from requiring pole owners to accommodate wireless attachments by installing taller poles for the very reason that T-Mobile claims access to utility poles is critical. T-Mobile has complained that, "deploying wireless cellular networks in residential neighborhoods presents a number of challenges ... [l]ocal zoning ordinances make the siting of building and tower mounted wireless antennae increasingly difficult.²² Requiring utilities to install taller poles (along with the likely required additional guying and anchoring) to accommodate wireless attachments would result in utility structures that are more obtrusive than would otherwise exist while, if not circumventing, at least short-cutting, the legitimate local processes that are intended to serve the public interest with respect to such matters. Furthermore, a Commissionimposed obligation upon pole owners to provide taller poles, would be contrary to the Commission's earlier acknowledgement in the National Grid Order that "[w]hen specific attachments are proposed, other State and local permits may be required."²³ The Commission should not require the use of or modification to utility property that has the potential to position the utility when needing to comply with any such requirement in a three-way whipsaw of Commission requirements, other State or local governmental requirements or objections, and the interests of wireless communication service providers.

²¹ Order Instituting Proceeding at 6. ²² T-Mobile Petition at 6.

²³ National Grid Order at 5.

In all circumstances, any and all costs that are incurred by pole owners to accommodate the placement of wireless facilities, should be born by the wireless attacher.²⁴

4. How should safety issues about antennas falling over onto power lines in high winds and heavy wet snow conditions be addressed?

Placing antennas and other facilities in locations where there is the potential for them to fall onto power lines presents safety and system reliability concerns whether due to weather conditions (snow, ice, wind) or other causes. Other causes, without limitation, would include (a) wireless attachment equipment failure or defect, (b) pole vibration due to motor vehicle contact or (c) wireless attachment facilities being dislodged by fallen trees or branches. Situating wireless facility attachments where such risks are avoided or minimized should be the most favored placement alternative. To the extent such risks may be mitigated, strict adherence to the construction standards of the pole owner, the wireless provider, other attachers present on the pole and compliance with relevant standards such as the NESC is necessary.

The existence of these several such appropriate considerations indicates the complexity of addressing the highly important safety and reliability issues respecting the presence of wireless attachments on utility poles and the providing of assurance of the safe and reliable placement of them. In addition, there is the matter of the appropriate placement of liability with respect to the risks presented by wireless attachments which the Pole Owners do not believe should fall upon them (and by extension their customers) given their ownership and installation of the poles for the "primary purpose" of providing

²⁴ The Pole Owners request that the Commission view this comment regarding cost responsibility as being broadly applicable to all circumstances pertaining to the accommodation of the attachment of wireless facilities to utility poles although the comment may not specifically appear in connection with all issues and matters addressed in these comments.

their telephone and electric services. Such responsibility should be placed on the party whose interest in using a pole in a manner that creates these risks is accommodated.

5. Are there clearance concerns with placing wireless facilities in close proximity to electric facilities?

Worker safety, electric system reliability and efficient operation/maintenance of electric and telephone systems mandate adherence to minimum clearance standards.²⁵ Wireless facilities are typically grounded per the National Electrical Code (NEC).²⁶ Installing grounded conductors or equipment in close proximity to high voltage phase conductors presents a worker safety concern with respect to both electric and telephone operations. This is due to the degradation of the insulating value of the pole top assembly and, consequently, the increased likelihood of phase-to-ground faults occurring during construction, operation and maintenance procedures. Additionally, radio frequency emissions require establishment of minimum clearance standards in order to minimize worker exposure from operating wireless devices. Furthermore, the Pole Owners have concerns about whether wireless communication service provider workers, contractors and subcontractors are sufficiently trained and otherwise qualified to work on or near electric supply lines. Adequate clearance is necessary and the placing of wireless facilities in the communication space on a pole below the communication worker safety zone as defined by the NESC should be the preferred approach.

6. Are there pole loading concerns with ice and wind prevalent during New York State winters that should be considered with wireless attachments?

There are pole loading concerns with respect to wireless attachments as there are with wire span attachments. There are pole loading concerns respecting conditions

²⁵ See NESC Rule 235.

 ²⁶ See NEC Article 830 - Network Powered Broadband Communications Systems, Section IV: Grounding Methods

presented by wireless attachments on distribution poles associated with the effects of snow and ice during the winter (and the <u>combined</u> effects of those forces). In addition, the effects of wind present pole loading concerns not only during winter but all yearround. Moreover, the Pole Owners have pole loading concerns respecting the attachment of wireless facilities irrespective of weather conditions that might arise because wireless facilities are not of a standardized nature as are wire line attachments. That is, each proposed attachment by a wireless service provider must be reviewed and assessed on a case-by-case basis taking into account the particular attachment configuration that the wireless attacher desires in combination with the presence of existing facilities respecting other services. These pole loading concerns are related to utility worker and public safety and utility system reliability.

Installing wireless facilities on existing poles will, obviously, add weight and other types of loads such as those related to weather conditions to pole structures and, depending on which of the many possible wireless attachment configurations is present, such additional weight and load may not be adequately supported without pole reinforcement measures. For example, but without limitation, the NESC requires that if any portion of a distribution pole extends sixty (60) feet above ground level, the pole and its supported facilities (e.g., crossarms, braces, insulators, attaching hardware, etc.) be designed to withstand extreme ice with <u>concurrent</u> wind loading.²⁷ The great majority of distribution poles extend less than sixty (60) feet above ground level but many poles would exceed the sixty (60) feet threshold with the attachment of pole top wireless facilities such as antennas that are typically several feet high. All such poles and supporting facilities would then have to be re-engineered and adequately reinforced or

²⁷ NESC Rule 250 D.

even replaced to meet the NESC requirements. But even if the foregoing NESC requirement is not invoked by the attachment of wireless facilities, the added weight and other pole load consequences of the attachment of wireless facilities would have to be assessed on a case by case basis (including the effects of which of the many variations in wireless attachment configurations might be contemplated).

This question as to pole loading raises the very important issue of competition for and the prioritization of rights to space on a pole. For example, if cable facilities are not attached before wireless facilities, would a cable provider wishing to attach after wireless facilities are already attached be subject to greater make-ready costs because of additional pole loading or facility rearrangements caused by the attachment of cable facilities than would otherwise be incurred under the Pole Attachment Order in the absence of the wireless attachment? The Pole Owners believe that cable service attachers should bear that risk.

In addition, pole loading issues presented by wireless attachments clearly bear on the reasonable expectation as to the response time of a pole owner with respect to attachment application processing and accommodation making the application of such under the Pole Attachment Order inapplicable. The policies, time frames and procedures in the August 6, 2004 order in Case 03-M-0432 should be found to be patently inapplicable to wireless attachments on this basis alone.

7. Are there climbing and work space issues with the antennas and or their associated equipment on the utility pole (equipment enclosures, power supplies, cabling, etc.)?

The attachment of wireless antennas and related accessory equipment can adversely affect the work space needed on a pole for the safe and reliable provision of all of the services for which a pole is used. The Commission should recognize here that some poles are already occupied by facilities used for many different purposes. These include telephone, electric, cable, municipal lighting, municipal emergency communication systems and municipal surveillance systems. The "cramping" of work space on and around a pole to the jeopardy of the provision of safe and reliable service (of all types for which a pole is used) is a circumstance about which the Commission should have great concern. Consequently, the Commission should recognize that in many instances, it might not be technically feasible to accommodate the additional installation of wireless antennas, equipment enclosures, power supplies, conduits or other associated conductors and equipment in a safe and reliable manner in compliance with all applicable codes and standards.²⁸

Like the earlier question regarding pole loading, this question as to work space raises the very important issue of competition for and the prioritization of rights to space on a pole and the same make-ready cost issue and also highlights the inapplicability of the policies, time frames and procedures in the August 6, 2004 order in Case 03-M-0432 to wireless attachments.

8. Are there concerns with the radio frequency emissions from these devices?

Radio frequency ("RF") emissions, including those from wireless communication installations, have received considerable governmental and private sector attention.²⁹ The prevailing view is that such RF emissions are of legitimate concern with respect to the health and safety of workers and the general public. The degree of concern is variable

 ²⁸ See NESC Rules 236 and 237. These rules require that all workers have adequate space to climb on a pole and to work on its conductors, supports, and equipment.
 ²⁹ For example, <u>Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency</u>

⁴⁷ For example, <u>Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency</u> <u>Electromagnetic Fields</u>, Federal Communications Commission Office of Engineering & Technology, OET Bulletin 65, Edition 97-01, August 1997; <u>Guide for RF Protection of Personnel Working in the Vicinity of</u> <u>Wireless Communication Antennas Attached to Electric Power Line Structures</u>, Institute of Electrical and Electronic Engineers, Draft Standard P1654, June 2, 2007; NESC Rule 420Q.

within the myriad of possible circumstances that might exist based on variations in the strength of the RF emission, the proximity of a person to the source and the duration of the exposure. Warnings of the presence of RF emissions, installation/use of RF detectors, protective clothing and training for workers, development of precautionary work practices, restrictions on access to installation sites are but a few of the exposure control mechanisms that have been adopted or recommended by competent authority.

Unrestricted use of utility distribution poles for wireless communication installations would surely result in an expansion of the universe of persons exposed to RF emissions at reduced distances for longer periods of time whether as a result of occupational activities (e.g., utility workers) or by simply being a member of the general population in the vicinity of the installation. This highly technical/scientific and complicated subject would require significant investigation and deliberation by the Commission prior to the granting of such unrestricted access or use. The Pole Owners urge the Commission to charge its Staff to thoroughly study this subject beyond the extent of the written comments submitted to the Commission pursuant to the Notice Requesting Comments. The Pole Owners also urge the Commission to make any necessary determinations related to this issue and the placement of wireless communication installations and the operation of them in a manner that minimizes the exposure of workers and members of the general public to RF emissions. In connection with that objective, the Pole Owners believe that it would be appropriate to place responsibility for demonstrating the safety of wireless facilities squarely on the wireless attachers and that they be required to promptly address and resolve all issues and questions regarding the safety of those facilities whether raised by a pole owner, another attacher or any member of the general public.

18

In addition to human health and safety concerns, the Pole Owners note that RF emissions from wireless facilities (e.g., fiber media converters), unless proper preventive measures such as enclosing them in shielding materials are taken, have the potential to disrupt or interfere with digital signals in other equipment or non-shielded cables that are in close proximity to the RF-emitting device. Wireless attachers should be responsible for ensuring that their facilities do not cause any such or other interference and to promptly resolve any complaint alleging such interference.

9. What rates, terms, and conditions are appropriate for wireless attachments to utility poles?

As the Commission correctly recognized in Opinion No. 97-10, wireless communication attachments differ from "traditional" wire span attachments. As such, the terms and conditions regarding wireless attachments should differ from those applicable to cable service attachments pursuant to the Pole Attachment Order. Wire span/cable attachments have an essentially standardized attachment location and manner of attachment which allows for their operational effects and consequences to be reasonably predictable by pole owners and the attachers. Attachments of wireless communication facilities, however, are subject to significant variation. For example, there are variations as to the number of antennas, the antenna styles and sizes, attachment location on a pole, equipment transmitting and receiving power, operating frequency, accessory equipment, manner of supplying needed electric service, installation and maintenance work practices and pole height requirements. As noted above, the Commission has recognized that a wireless attachment could occupy almost 100% of a utility pole.³⁰

Consequently, the terms and conditions of attachment agreements and the establishment of a reasonable attachment rate or charge for wireless attachments should

³⁰ Order Instituting Proceeding at 6, n.6.

be flexible so as to be responsive to the many different circumstances that might arise.³¹ Leaving those matters subject to negotiation with recourse to the Commission should a party feel aggrieved as is provided for under Opinion No. 97-10 is the approach that should be continued. The Pole Owners believe that doing so is the proper course so that the Pole Owners' customers do not subsidize the use of utility property for the provision of wireless communication service.

In addition, there are numerous locations for the placement of wireless facilities that are available to and used by wireless service providers (e.g., buildings, towers of various types, streetlights, <u>etc.</u>). The City of New York, for example, has made its streetlights available for the development of wireless networks under the Department of Information and Telecommunications licensing and franchising program mentioned above. Consequently, utility distribution poles are not subject to monopoly powers with respect to their use by wireless service providers. As a result, it is not necessary to require that charges for the use of poles for wireless purposes be subject to cost based ratemaking. Instead such use should be allowed to be subject to market based charges so that the market value of the assets may inure to the benefit of utility **customers**.³² Furthermore, because the use of utility poles for wireless services is not subject to monopoly power, the Commission should consider the possible market effects of requiring charges for wireless attachments to utility poles to be set using a cost based rate approach. Requiring utilities to charge cost based rates could have the anti-competitive

³¹ In any event, wireless attachers should be required to provide the Pole Owner with the manufacturer's equipment specifications for all items of equipment that the attacher wishes to attach.

³² There could, of course, be circumstances where the pole owner concludes that market conditions are best recognized through a cost based wireless attachment rate. Changes in market conditions might later warrant a change to a market based rate.

effect of depriving the owners of alternative attachment locations of being able to charge the attachers on a market value basis by having been "priced out" of the location market.

10. What State Environmental Quality Review Act issues should be addressed for wireless attachments to utility poles?

The State Environmental Quality Review Act (SEORA)³³ and related regulations of the New York State Department of Environmental Conservation³⁴ require that actions proposed or approved by a state agency or local agency³⁵ be subject to differing levels of review and procedures depending on the nature of the action under consideration. That is, the first assessment that must be made with respect to an action subject to SEORA review is whether the action is a Type I, Type II or Unlisted Action. Once that determination is made SEQRA requires the review to proceed in various alternative ways including alternative processes that are dependent upon conclusions at various points in the pertinent path to the agency's determination of the environmental effects of the action under review. Consequently, of great importance with respect to identifying SEQRA "issues" presented by an action is a statement of the action under review.³⁶ As addressed above, wireless attachments can be of many different configurations involving different items of equipment and relate to varying geographic areas. Consequently, "actions" respecting them have the potential to vary considerably as well. Absent a description of a particular action that might be considered by the Commission and/or any other state

³³ Environmental Conservation Law Article 8.

³⁴ 6 NYCRR Part 617.

³⁵ The definition of "local agency" is broad in its reach. Included are "any local agency, board, authority, district, commission or governing body, including any city, county, and other political subdivision of the state." $6 \text{ NYCRR } \S 617.2 (b)(4)(v)$.

³⁶ The Pole Owners believe that an action related to wireless attachments would likely be subject to SEQRA review of that at least required for an Unlisted Action. As such, pursuant to 6 NYCRR § 617.6 (a)(3), an Environmental Assessment Form ("EAF") (at least a short form) would be required (unless a draft Environmental Impact Statement is submitted instead as provided for under 6 NYCRR § 617.6 (a)(4)) with the lead agency for the action having the discretion to require a full EAF. This requirement would enable a more complete identification of SEQRA "issues" with respect an actual action under review.

agency or local agency with respect to wireless attachments to utility poles, this subject of SEQRA "issues" can be addressed in only general terms.³⁷

Generally speaking, and with reference to other portions of these comments, the Pole Owners believe that at least some of the SEQRA review "issues" that could arise in connection with an action related to wireless attachments to utility poles are consideration of matters such as: (1) human health, (2) existing community or neighborhood character, (3) zoning or other land use restrictions and (4) visual or other esthetic effects.

With respect to zoning or other land use restrictions, the Pole Owners believe that any EAF should include (or be supplemented by) identification of all applicable state and local laws and regulations and required permits, licenses and approvals that bear on the consideration of the action.³⁸ The Pole Owners also believe that it would be useful to the assessment of visual or other esthetic effects of the proposed action to require the EAF to be supplemented by a Visual EAF Addendum (6 NYCRR § 617.20, Appendix B). In addition the Pole Owners believe that to assist in the review of an action related to wireless attachments to utility poles, any EAF should include or be supplemented by a description of alternative sites and means of providing wireless coverage that have been considered and an explanation of why such have been rejected in favor of those included in the proposed action.³⁹

The Pole Owners believe that at least the following procedural aspects of SEQRA review could be of particular importance in connection with an action respecting wireless attachments to utility poles: (1) compliance with 6 NYCRR § 617.6 regarding the rights

³⁷ The Order Instituting Proceeding (at 7) describes the purpose of this proceeding broadly: "to examine issues related to wireless attachments to utility poles."

³⁸ The Pole Owners should not have any responsibility or obligation with respect identifying or obtaining any of such in order to accommodate a wireless attachment.

³⁹ The Pole Owners make these suggestions even if a short form EAF is used. In such cases "[t]he lead agency may require other information necessary to determine significance" (6 NYCRR § 617.6(a)(3)).

of "involved agencies" with respect to the action, (2) compliance with 6 NYCRR § 617.2(t) regarding the rights of "interested agencies" with respect to the action, (3) the conditional prohibition under 6 NYCRR § 617.3(g)(1) of considering only a part or segment of an action, (4) the requirements of 6 NYCRR § 617.7 (c)(1)(xi) with respect to assessing the cumulative effects of changes in two or more elements of the environment as a result of an action and (5) the requirements of 6 NYCRR § 617.7 (c) (1)(xii) with respect to assessing the cumulative effects on the environment of two or more related actions.

In sum, however, these issues should primarily be addressed by State and local authorities and the wireless service provider, and not the Pole Owners. Wireless service providers should have all requisite approvals and authorizations and have addressed environmental matters with all concerned authorities before seeking Pole Owner permission to attach to Pole Owner facilities. The Pole Owner is not the party requesting approval of an action and should not be required to make any assessments with respect to the action beyond the negotiations needed to provide access to its facilities if and where appropriate based on safety and reliability concerns.

11. What are specific examples of attachers' inability to gain reasonable access to poles?

No wireless communication service provider has yet demonstrated an "inability to gain reasonable access to poles" that would entitle that party to seek recourse through the Commission "should any unreasonable obstacles to negotiations arise" as provided for by Opinion No. 97-10.⁴⁰ Notwithstanding that fact, the allegation of such circumstances has

⁴⁰ Opinion No. 97-10 at 22-23.

been advanced in support of a request for relief from the Commission.⁴¹ The Pole Owners do not believe that the Commission should grant relief where the requesting party has not attempted to exercise related rights that the Commission has provided.

12. What other concerns do attachers, pole owners, local governments or community members have about attachment of wireless facilities to utility distribution poles?

The Pole Owners are concerned that the presence of wireless facilities on distribution poles, which has not yet occurred in the State, will present unfamiliar circumstances to "first responders" (e.g., police, fire fighter, emergency medical technicians) in the event of an emergency such as a motor vehicle accident or weather event that results in a fallen pole. Unless those who provide these critical services are properly educated and trained to recognize the various types of wireless facilities and how to handle or otherwise react to their presence, there is the potential for injury to them or cautionary delay on their part in the performance of their duties to the jeopardy of the general public. Wireless communication service providers who attach their facilities to distribution poles should be required to implement all necessary procedures and practices to provide such education and training and to assure that all first-responders are, at all times, properly prepared to confront the presence of the various forms of wireless facilities so as to assure their personal safety and their unimpaired rendering of their service to the public. In addition, wireless facility attachers should be required to implement all necessary procedures and practices so that they are promptly aware of emergency circumstances in which their facilities are present. They should also be required to promptly dispatch qualified personnel to provide whatever guidance or take whatever action that is appropriate to the protection of persons and property.

⁴¹ T-Mobile Petition at 7.

The Pole Owners are also concerned about whether wireless attachers will have the necessary qualified human resources and properly operating equipment to adequately inspect and maintain their facilities (including oversight of contractors) and to be responsive on a timely basis to emergency as well as non-emergency circumstances related to the provision of service by any and all pole owners, other attachers and themselves irrespective of the geographic location of their attachment. The Pole Owners believe that the Commission should conduct a review or investigation respecting these matters.

IV. CONCLUSION

The Pole Owners respectfully request, for the reasons stated herein, that the Commission credit these comments as being those most appropriate to the setting of Commission policy respecting the attachment of wireless communication facilities to utility distribution poles. In addition, the Pole Owners respectfully request specifically, for the reasons stated herein, that the Commission ratify the Commission's policy respecting such attachments as has been established by Commission's Opinion No. 97-10.

New York, New York September 10, 2007 Respectfully submitted on behalf of the Pole Owners identified herein,

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