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September 10, 2007

Via Hand Delivery

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

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

Secretary Brilling:

In accordance with the Notice Requesting Comments dated June 27, 2007, in the above-referenced proceeding, enclosed for filing please find an original and five (5) copies the Joint Comments of Omnipoint Communications Inc. d/b/a T-Mobile USA, Sprint Spectrum, L.P., Nextel of New York, Inc., Nextel Partners of Upstate New York, Inc., and AT&T Mobility. These wireless carriers greatly appreciate the opportunity to comment on this important issue, and the Commission's consideration thereof.

Should there be any questions or concerns with regard to this matter, please do not hesitate to contact the undersigned.

Respectfully submitted,

Mary E Burgess

Mary E. Burgess
On behalf of AT&T, T-Mobile and Sprint Nextel

cc: Active Parties to Case 07-M-0741 (via email, per Notice)
Maureen E. Farley, Esq., NY Department of Public Service

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 T-Mobile, Sprint Nextel and AT&T Mobility

Omnipoint Communications Inc. d/b/a T-Mobile USA ("T-Mobile"); Sprint Spectrum, L.P., Nextel of New York, Inc. and Nextel Partners of Upstate New York, Inc. (collectively "Sprint Nextel"); and New Cingular Wireless PCS LLC d/b/a AT&T Mobility ("AT&T Mobility") (collectively, the "Wireless Carriers")[1] hereby respond to the Notice Requesting Comments ("Notice") issued on June 27, 2007 by the New York Public Service Commission (the "Commission") in the above-captioned proceeding.[2]

I. SUMMARY

New Yorkers increasingly rely on wireless services as an essential means of communications. At the same time, the Wireless Carriers attempting to provide more ubiquitous and consistent coverage throughout the state face persistent challenges in siting their facilities. Existing utility distribution poles are proving to be a technically viable and feasible infrastructure option for the most efficient and cost-effective means of siting wireless antennas. The attachment of small wireless facilities to utility distribution poles permits Wireless Carriers to fill coverage gaps and expand coverage in a manner that is generally less disruptive and more aesthetically pleasing than new towers.

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[1] The Wireless Carriers are Commercial Mobile Radio Service ("CMRS") providers individually operating in New York pursuant to licenses granted by the Federal Communications Commission under Title III of the Communications Act of 1934.

[2] The Wireless Carriers make this filing without intending to affect their jurisdictional status with the Commission.

Utility distribution poles remain a bottleneck facility in New York and pole owners have little economic incentive to reach agreement on reasonable rates, terms and conditions for pole attachments. Within the past few years, the Commission has adopted progressive, pro-competitive orders addressing wireline attachments and has established regulated rates for wireless attachments to Niagara Mohawk utility distribution poles. Consistent with the Commission's Order initiating this proceeding, the Commission should now continue that progress and extend its prior determinations to wireless attachments on utility distribution poles.

To date, the Wireless Carriers generally have been unable to negotiate reasonable rates, terms and conditions for the attachment of wireless facilities in New York because the pole owners have demanded extortionate rents and have imposed severe restrictions on access to pole tops. This situation will continue absent an affirmative order from the Commission mandating reasonable, non-discriminatory access to utility distribution poles for wireless attachments. The Commission should therefore follow the approach of the *Niagara Mohawk/GridCom Order*[3] and prescribe a rate formula for wireless attachments, using the standard, regulated wireline pole attachment rate, modified only to reflect the total pole space occupied by the wireless attachments.[4]

Consideration of the factors identified in the Notice Requesting Comments militates in favor of extension of the Commission's prior determinations to wireless attachments. The

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[3] 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 (April 7, 2004) (hereinafter "*Niagara Mohawk/GridCom Order*").

[4] The Wireless Carriers note that these comments do not advocate usurping local jurisdiction over zoning. Further, AT&T Mobility notes the FCC's Declaratory Ruling *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, FCC-07-30, WT Docket No. 07-53 (March 23, 2007) and does not join in any comments in this brief inconsistent with that ruling.

alleged, unsubstantiated concerns about radio frequency ("RF") emissions and safety issues (*e.g.*, pole loading, antennas falling onto power lines, ice and snow) often have been used as a convenient pretext to deny or severely limit the Wireless Carriers' access to poles. These issues, however, have already been addressed and resolved by a variety of statutes and regulations with which the Wireless Carriers are required to comply, including the National Electrical Safety Code ("NESC"), Federal Communications Commission ("FCC") rules, Occupational Safety and Health Administration ("OSHA") rules, Environmental Protection Agency ("EPA") rules and New York State Building Code standards, among others. There is simply no need for the Commission to create, as the pole owners will likely advocate, a redundant layer of regulations on top of those already in place. Similarly, the Commission should proactively prevent the pole owners from imposing unnecessary – and typically arbitrary – technical standards in addition to those already in effect.

The Wireless Carriers are not seeking advance approval of every conceivable type of wireless attachment, nor unlimited access to every utility pole. The Wireless Carriers are ready and willing to work cooperatively with pole owners, and of course to strictly adhere to the NESC, FCC and other regulations and standards to ensure safe installations. The Wireless Carriers simply ask the Commission to extend its existing pro-competitive attachment policies and rules to wireless attachments and to adopt a rebuttable presumption that wireless antenna attachments that meet NESC and other reasonable, non-discriminatory requirements will be allowed on utility distribution poles in New York. Such a presumption would be rebuttable, on a case-by-case basis, with the pole owner bearing the burden of proving that the wireless equipment should be denied based on safety, reliability or generally accepted engineering standards. To introduce the attendant benefits without delay, the Wireless Carriers also urge the

Commission to make clear that the policies, rules and presumptions adopted are effective immediately, without being contingent upon the eventual adoption of a model contract.

II. BACKGROUND

To adequately address policies for wireless pole attachments, it is important for the Commission to appreciate the competitive nature of the wireless marketplace, how expanding coverage and capacity of wireless networks is essential to remain competitive and the historical siting problems that exist within the wireless industry. With this background, the Commission can be better informed in adopting policies that ensure that wireless providers are given competitive, nondiscriminatory access to utility distribution poles at just and reasonable rates.

The Wireless Carriers appreciate the Commission's leadership on the issue of wireless facility attachments to utility distribution poles and commend the Commission for initiating this important proceeding. As New Yorkers increasingly rely on wireless services in lieu of landline services, the Wireless Carriers are focused on providing more ubiquitous coverage throughout the state, corresponding access to Enhanced 911 services, and ensuring the reliability of our respective wireless networks.[5] Attachment of wireless antennas to utility distribution poles in New York can assist in achieving these goals, and help ensure robust intermodal competition in New York.

In its order initiating this proceeding, the Commission noted "the benefits of allowing attachment of [wireless attachers'] facilities to utility poles quickly and at reasonable rates," but

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[5] Case 05-C-0616, *Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services*, Statement of Policy on Further Steps Toward Competition in the Intermodal Telecommunications Market and Order Allowing Rate Filings (April 11, 2006) (hereinafter "Comp III Order") at 91 ("As intermodal competition brings forth new and technologically different networks, and as consumers transition to these intermodal competitors, we believe it critical that these networks be similarly reliable.").

understandably sought to collect additional information to determine whether wireless providers warrant different treatment than landline providers.[6] As set forth more fully herein, the Wireless Carriers submit that there are no safety concerns or other reasons to justify different regulatory treatment of wireless facility pole attachments. Indeed, ten years ago, the Commission adopted its pole attachment rate formula for wireless attachments in the usable space occupied by other telecommunications providers.[7] More recently, the Commission appropriately extended its pro-competitive pole attachment regulations to wireless facilities attached to poles owned by Niagara Mohawk, not only by its affiliate National Grid Communications, but by *all* Commercial Mobile Radio Service ("CMRS") providers, and found those attachments to be safe and compliant under the State Environmental Quality Review Act.[8] In taking these pro-competitive actions, the Commission led the nation in developing specific rules and policies for wireless attachments.

The time has come to extend these rulings, and the pro-competitive processes adopted by the Commission in its August 2004 Policy Statement governing pole attachments to wireless attachments on all utility distribution poles in New York to help ensure that wireless providers' coverage needs can be met.[9] As recognized by this Commission, poles continue to be a bottleneck facility in New York and pole owners have little economic incentive to reach agreement on reasonable rates, terms and conditions for pole attachments.[10] Indeed, as New

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[6] Case 07-M-0741, *Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles*, Order Instituting Proceeding (June 27, 2007) at 5.

[7] Case 95-C-0341, *Proceeding on Motion for the Commission to Consider Certain Pole Attachment Issues*, Opinion and Order Setting Pole Attachment Rates (June 17, 1997) (hereinafter "97-10 Order"); *recon. denied* (Oct. 7, 1997).

[8] *Niagara Mohawk/GridCom Order.*

[9] Case 03-M-0432, *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement on Pole Attachments (Aug. 6, 2004) (hereinafter "Policy Statement").

[10] *See* Case Nos. 01-E-0026, 01-E-0202, 01-E-0250, 01-E-0379 and 01-E-0428, *Proceedings on Motions of the Commission as to Proposed Tariff Filings of New York State Electric & Gas Corporation, et al. to Revise the Annual Rental Charges for Cable Television Pole Attachment and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Companies*, Order Directing Utilities to Cancel

York pole owners continue to develop and deploy their own competitive communications services, including traditional phone service, distributed antenna systems and broadband over powerline ("BPL") technologies, they have obvious incentives to thwart Wireless Carrier access to utility distribution poles upon just and reasonable rates, terms and conditions. Thus, extending the rates, terms and conditions of pole attachments prescribed by this Commission pursuant to Public Service Law § 119-a to wireless providers is not only required by law, it is essential to fostering robust intermodal competition in New York in furtherance of the Commission's goals championed in its "Comp III Order"[11] – including its stated desire to ensure that New York maintains its position as "the most competitive market in the nation for new telecommunications services"[12] – and to enable carriers' to meet their goals of deploying increased coverage, improved 911 services, and reliable networks in New York.

A. Access To Utility Poles Is Necessary To Achieve Improved Coverage, Increased Access to Enhanced 911 Service, And Network Reliability In New York For The Wireless Carriers

The Wireless Carriers compete in the New York marketplace not only on price but also on non-price characteristics, namely, network quality. The most recent CMRS Competition Report issued by the FCC recognizes this fact.[13] It also explains that with an increasingly competitive environment and an increase in the number of services used on wireless networks (*e.g.*, wireless broadband), it is essential for wireless providers to offer superior network quality.[14] What was considered adequate coverage and signal strength fifteen years ago is no

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Tariffs (Jan. 15, 2002) ("The New York Public Service Commission has recognized that keeping attachments at a standard tariffed rate is the only way to maintain the desired effect of "encouraging telecommunications competition and stimulating economic development").

[11] *See* Comp III Order *passim*.

[12] Comp III Order at 3.

[13] *See* Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Radio Services, 21 FCC Rcd. 1094 (September 25, 2006) at ¶ 101.

[14] *Id.* at ¶ 130.

longer the case. The Wireless Carriers now must meet higher consumer expectations. Without continuous upgrades to wireless networks and expansion of coverage, service quality is sacrificed and customers experience busy signals, dropped calls and bad connections. This is especially important when customers rely on wireless networks to call 911 in emergency situations. Additionally, with the growth of the wireless broadband market, some carriers currently have the capability or are poised to offer average download speeds of 600 kbps – 1.4 Mbps and average upload speeds of 350 - 500 kbps, but they must have adequate coverage and capacity to offer such wireless broadband services.

To address these challenges, the Wireless Carriers are constantly looking for the most efficient, cost-effective means of siting. While carriers continue to pursue various options for siting antennas, including traditional cell sites (e.g., collocation on communications towers, buildings, church steeples, etc.) utility distribution poles are becoming a viable option. Attaching small wireless facilities to utility distribution poles will allow wireless providers to fill coverage gaps and expand coverage in areas near consumers' neighborhoods, retail stores, parks and roadways -- areas where the public now demands wireless services and views antennas on utility distribution poles as less disruptive and more aesthetically acceptable compared to placement of new towers.

1. The Wireless Carriers Have Experienced Excessive Delays and Opposition For Siting on Monopoles and Tower Sites[15]

The Wireless Carriers have experienced extensive delays and often face significant opposition in locating new wireless towers in residential neighborhoods. This stems in part due to traditional local zoning authority that municipalities have over land uses within their borders. The State of New York is a "home rule" state in which significant statutory authority is delegated

[15] The Wireless Carriers note that these comments do not advocate usurping local jurisdiction over zoning.

to the various political subdivisions of the state to regulate in furtherance of the public's health, safety and general welfare.[16] Zoning authority is specifically delegated to local municipalities by New York State enabling statutes.[17] While the Telecommunications Act of 1996 ("TCA") preserves traditional local zoning authority, the TCA expressly prohibits local governments from (i) unreasonably discriminating among providers of functionally equivalent services, and (ii) prohibiting or having the effect of prohibiting the provision of personal wireless services.[18] The TCA is an exercise in cooperative federalism -- striking a fine balance between preserving traditional state and local zoning authority while enforcing the rapid expansion of advanced telecommunications services across the nation through Congressionally-mandated pro-competitive and deregulatory goals.

Some local municipalities have increasingly pointed to the availability of attaching wireless facilities to utility distribution poles as reasons to justify denials of special use permits, variances, etc. sought by the Wireless Carriers in conjunction with an application for a new tower.[19] For example, the Town of New Scotland's Zoning Board of Appeals denied a wireless carrier's request to build a tower within the confines of the town to address coverage gaps because the Town believed there were less visually intrusive alternatives, specifically mentioning attaching wireless facilities to Niagara Mohawk's power poles as an alternative.[20] Additionally, in the Town of Brookhaven, the zoning board denied a wireless carrier's request to build a monopole due to the aesthetics of the structure and was told that other alternatives such as

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[16] NY Const., Art IX, § 2.

[17] *See generally,* Town Law § 261, Village Law § 7-700 and General City Law § 20.

[18] *See* 47 U.S.C. § 332 (c)(7)(B)(i)(I) and (II).

[19] The cases cited are mere examples of where local governments point to utility poles and transmission as alternative locations for carriers to site wireless facilities. By citing these cases, the Wireless Carriers neither endorse the local government decisions nor any appellate resolutions.

[20] *See Site Acquisitions, Inc., et al. v. Town of New Scotland et al.,* Supreme Court of New York, Appellate Division, Third Department, 2 A.D.3d 1135, 770 N.Y.S.2d 157. The Court agreed with the Zoning Board and found that there was evidence of less intrusive means of remedying coverage gaps.

existing utility poles were available to the wireless carrier.[21] The extensive delays, costs and difficulties in obtaining approval for new tower structures are a serious constraint on wireless providers' ability to compete effectively in the marketplace, address coverage gaps and increase capacity to meet the demands of customers. As a result of recommendations from local governments and advances in technology, including the development of much smaller self-contained wireless facilities that can be easily attached to utility poles[22], the Wireless Carriers are becoming more reliant on alternative forms of siting, and wireless pole attachments may be a viable alternative.

2. Utility Poles are an Important Siting Opportunity for the Wireless Carriers

As cities and towns adopt more restrictive regulations on new wireless facilities, particularly for those located in residential neighborhoods, the importance of attaching wireless equipment on utility distribution poles is increasing as it becomes ever more difficult for the Wireless Carriers to find suitable tower or other existing sites in some areas to meet coverage objectives. In order to reduce the number of new tower structures in these "hard to serve" areas, local governments typically require the carriers to blend their antennas and facilities into existing facilities. As articulated by some local authorities, utility poles may present a viable option for deploying cell sites in a manner that will satisfy the concerns of local government and residents who are already accustomed to utility pole infrastructure in their neighborhoods.

There are a number of benefits to collocating wireless facilities on existing utility infrastructure not only for the Wireless Carriers, but also for their customers and local residents. Utility distribution poles often are located in residential and "hard to serve" areas; encouraging

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[21] *See SiteTech Group, LTD, Nextel of New York, Inc. and Sprint Spectrum v. The Board of Zoning Appeals of the Town of Brookhaven*, 140 F. Supp. 2d 255 (E.D.N.Y. 2001) (upholding zoning board's decision to deny carriers' application for monopole).

22 *See* Craig Kuhl, *Practical Realities*, Wireless Week (September 1, 2007) at14-16.

the collocation of wireless antennas on these facilities could benefit consumers enormously by increasing their quality of wireless service, the deployment of ubiquitous Enhanced 911 services and the number of competitive choices available for consumers to meet their telecommunications needs. The use of existing utility distribution poles also means that fewer new tower structures will have to be built – something favored by local government and which benefits all of the residents in the communities, and the environment. Wireless installations on utility distribution poles also are unobtrusive, as depicted in Attachment 1. This photo shows a neutral host distributed antenna system ("DAS") on a utility distribution pole located in Andover, Massachusetts (an area with winter weather conditions similar to those of New York) that can accommodate all carrier/technology protocols through the same system and currently consists of nine nodes. Utility distribution poles can support a variety of wireless installations. Pole attachments may include but not be limited to, microcells or DAS used to provide wireless carrier services. In either case, antennas, associated RF communications equipment, electrical power connections and equipment boxes are typically attached to utility poles with power and communications typically made at the pole.

Challenges still exist in New York for CMRS carriers to expand their networks. The siting of wireless facilities in residential areas remains a significant and historical impediment to CMRS coverage expansion. Access to utility distribution poles could be an important tool for carriers to use in their goal of providing ubiquitous coverage throughout New York -- including those "hard to serve" areas of the state.

B. The Commission Has Consistently Recognized That Access To Utility Poles Upon Just And Reasonable Rates, Terms And Conditions Is Essential To Robust Competition In New York's Telecommunications Markets

The State of New York consistently has adopted policies and regulations for pole attachment rates, terms and conditions that promote competitive markets for telecommunications services. For example, in fulfillment of its obligation to "prescribe just and reasonable rates, terms and conditions for attachments to utility poles" pursuant to Public Service Law § 119-a, the Commission adopted the FCC approach for setting pole attachment rates for cable television – the so-called "cable formula" – for cable television and wired telecommunications attachments and wireless attachments in "usable space that is normally used by telecommunications carriers."[23] In adopting the FCC's cable formula in these contexts, the Commission found that:

> Since the enactment of the Telecommunications Act of 1996 there has emerged a clear need for cooperative federalism in this and other areas of telecommunications so as to provide consumers the full benefits available from the development of competitive markets. By embarking on this course, we hope to make it easier for service providers to do business [in New York] by eliminating unnecessary variation in regulatory requirements.[24]

In fact, the Commission's adoption of the "cable formula" for both cable and telecommunications attachments, which generally results in lower pole rents than produced using the FCC's "telecommunications formula," exceeded even the pro-competitive regulations of the FCC. In boldly adopting a single rate formula for cable and telecom, including wireline and certain wireless attachments, the Commission at once achieved regulatory parity and facilitated affordable access to a monopoly facility.[25] The Commission likewise adopted the FCC approach for setting conduit rental rates in New York.[26]

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[23] *See* 97-10 Order.

[24] 97-10 Order at 6.

[25] White Paper at 102 (citing Case 95-C-0341, *Pole Attachment Rates*, Order Denying Petitions for Reconsideration and Rehearing (March 8, 1995).

[26] Case 98-C-1357, Order on Unbundled Network Element Rates (2002) at 154 (finding that the FCC rate approach "was sound when adopted; remains so now (as the FCC, too, recently held yet again); and deserves to be extended to ducts and conduits"). Public Service Law § 119-a, like 47 U.S.C. § 224, provides for regulation of utility poles, duct, trenches and conduit.

In Case 03-M-0432, the Commission again paved the way for pro-competitive pole attachment policies in adopting its landmark "Policy Statement on Pole Attachments." In so doing, the Commission sought "to clarify and where reasonable streamline the process by which attachments to utility poles are made in order to *promote the deployment of competitive telecommunications networks*."[27] For example, recognizing that "time is the critical factor in allowing Attachers to serve new customers," the Policy Statement requires pole owners to perform make-ready work within 45 days of receiving payment.[28] In addition, the Commission eliminated the ability of pole owners to charge rent for overlashing of existing facilities by third parties, finding that "[n]o additional space on the pole is used so no rental charge shall be made."[29] The Policy Statement also adopted rules that prohibit unfair and discriminatory pole attachment practices. For example, the Commission eliminated the "but for rule" pursuant to which utilities would charge attaching entities for rearrangements or pole replacements made necessary by the pole owners' reclamation of reserved space on the pole.[30] The Commission also ruled that certain construction techniques that had been employed by the utility pole owner (such as boxing and the use of extension arms) could not be prohibited for attachers.[31]

Perhaps most significantly for purposes of this proceeding, the Commission has led the nation in regulations promoting wireless pole attachments. The Commission held in 1997 that for wireless facilities attached in the "usable space that is normally used by telecommunications carriers," "the prevailing rates for span wire pole attachments should apply."[32] For non-standard or unique wireless pole attachments requiring pole modifications, the Commission initially found

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[27] Policy Statement at 1 (emphasis added).
[28] *Id.* at Appendix A, p. 4.
[29] *Id.* at 6, App. 9.
[30] *Id.* at 4 ("[I]n fairness to all Attachers, if an attachment is legal when made, subsequent rearrangements should be paid for by the Attacher that requires the rearrangement and not previous Attachers.").
[31] *Id.* at Appendix A, pp 6-7.
[32] Case 95-C-0341, Order Denying Petitions for Reconsideration and Rehearing at 10 (Oct. 7, 1997).

that "the price and terms for such attachments should be determined through private negotiations," but that the Commission would step in "should any unreasonable obstacles to negotiations arise."[33] The Commission has retained its regulatory jurisdiction over such attachments through its complaint process.

In April 2004, the Commission granted the joint petition filed by Niagara Mohawk Power Co. d/b/a National Grid ("Niagara Mohawk") and National Grid's then-affiliate, National Grid Communications, Inc. ("GridCom") to install GridCom's pole top-mounted antennas on Niagara Mohawk poles, finding that pole top-mounted wireless antennas conform to the NESC, and do not compromise the safety of the poles on which they are attached.[34] The Commission also prescribed an annual attachment rate of $59.84 for the wireless attachment -- a rate based on Niagara Mohawk's standard wireline rate, derived using the FCC approach, modified only "to reflect the total pole space occupied by wireless attachments including an antenna on the top usable space on the pole and a panel in the unusable space on the lower portion of the pole."[35] In the same month, the Commission also approved procedures that permit the attachment of wireless equipment on transmission towers and facilities.[36] Most recently, in 2006, the Commission required Niagara Mohawk to revise its tariff to clarify that wireless facility attachment rates extend to CMRS providers generally, and not just to "certified" telecommunications carriers.[37]

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[33] 97-10 Order at 22-23.
[34] *Niagara Mohawk/GridCom Order* at 4-5.
[35] *Id.* at 3-4.
[36] Case 02-M-1288, *Joint Petition of Niagara Mohawk Power Corporation and National Grid Communications, Inc. for Approval to Authorize National Grid Communications to Attach Wireless Facilities on Niagara Power Corporation Transmission Facilities*, Order Approving Procedure (April 14, 2004).
[37] *See* Case 06-E-0082, *Tariff filing by Niagara Mohawk Power Corp d/b/a National Grid to make revisions to Rule 35 – Cable Television Pole Attachment Rate and Electric Distribution Pole Wireless Attachment Rate*, Order Adopting Staff Recommendation at 5 (June 23, 2006).

Through these orders, the Commission has established itself as *the* leading state regulatory agency in the realm of pole attachments generally, and wireless attachments specifically. The Wireless Carriers respectfully submit that the Commission should now reaffirm the rights of wireless providers to utilize utility poles, and that it is in the public interest for the Commission to do so. By extending its pro-competitive pole attachment rate formula and policies to wireless facility attachments on all utility poles, the Commission will establish the level playing field necessary for fair and robust intermodal competition in New York. By doing so, the Commission will ensure that both the goals of ubiquitous wireless coverage is maintained, access to Enhanced 911 services is provided to all wireless customers where achievable, and network reliability in New York will continue to improve via advanced technologies. These goals are shared by the Commission and the Wireless Carriers.

C. Federal Laws And Regulations Extend Pole Attachment Rights To Wireless Attachments

In adopting the federal Pole Attachment Act in 1978, Congress sought to facilitate robust competition in all communications markets by creating competitively-neutral, non-discriminatory, regulatory conditions that would speed the deployment of advanced services to all Americans. In furtherance of this objective, Congress treated poles, ducts conduits and rights-of-way as potential "bottleneck" facilities. Congress expanded the FCC's authority to ensure non-discriminatory treatment for all telecommunications providers.

With the passage of the TCA, Congress added Section 224(f)(1) which requires every covered utility to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it."[38] The FCC recognized that wireless pole attachments are pole attachments protected by federal

[38] 47 U.S.C. § 224(f)(1).

statutes that provide for rights of access and non-discrimination.[39] The FCC's decision that wireless attachments were included within the scope of federal pole attachment protections was further upheld by the United States Supreme Court.[40] To that end, utilities subject to federal regulation also are required to treat wireless attachments on a nondiscriminatory basis. The Commission has certified to the FCC that it regulates pole attachment matters and exercises its jurisdiction pursuant to Public Service Law § 119-a, requiring the Commission to "prescribe just and reasonable rates, terms and conditions for attachments to utility poles."[41] Nevertheless, in reality, the Wireless Carriers have experienced considerable difficulties in receiving reasonable rates, terms and conditions for access to utility poles.

D. Other State Regulatory Actions Regarding Wireless Access To Utility Distribution Poles

The Commission has led the way nationally for the development of policy and regulations which foster a competitive telecommunications marketplace and facilitate the deployment of advanced services in the state of New York. In so doing, the Commission has been vigilant in monitoring the marketplace and has routinely identified areas where intervention and in certain instances, the adoption of regulations are necessary and appropriate to ensure an environment where competition can flourish for the ultimate benefit of consumers.

For the last decade, the Commission has routinely monitored, surveyed, and instituted proceedings in order to carefully consider and determine whether updates to policies and regulations regarding the use of utility distribution poles for the attachment of telecommunications equipment are necessary. New York's leadership has clearly lead the way

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[39] *See Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd. 6777 at ¶¶ 39 - 41 (1998).

[40] *See generally, National Cable & Telecommunications Assoc. v. Gulf Power Co., 534 U.S. 327* (2002).

[41] *See States That Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd. 1498 (1992); 47 U.S.C. § 224.

for other jurisdictions to follow similar paths by also considering the adoption of general policies and regulations to spur the deployment of new technology and advanced services, including some recent activity in other jurisdictions on the use of utility distribution poles for wireless equipment, DAS providers and other advanced services (*e.g.*, BPL).

Like New York, the other jurisdictions have had similar goals and objectives of preserving the competitive marketplace and hence protecting consumers. Those jurisdictions have also similarly investigated and addressed the consistent issues and concerns raised by attachers regarding the inability to gain access to utility owned distribution poles via commercial negotiations, unsubstantiated obstacles raised by pole owners during such negotiations and the use of discriminatory and unlawful rates, terms and conditions to thwart such attachments.

Most recently, the state of Oregon adopted a revised set of comprehensive pole attachment rules in response to claims by attachers that existing rules and corresponding commercial negotiations were more often than not reaching insurmountable impasses and in effect impeding the ability of attachers to utilize the poles for the deployment of services throughout the state. The Oregon Public Utility Commission's Order acknowledged the obstacles and revised the existing rule in order to immediately facilitate non-discriminatory access for communications companies, including wireless providers, to utility-owned and controlled facilities – such as poles, ducts, conduits and rights-of-way – at just and reasonable rates, terms and conditions.[42] In the area of rates, the Oregon Commission rejected calls to adopt the FCC "telecom" rate formula for all attachments and adopted the FCC cable rate formula (with certain modifications required by Oregon statute) to govern the calculation of pole

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[42] *See* Public Utility Commission of Oregon *Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment use and Safety (AR 506)* and *Rulemaking to Amend Rules in OAR 860, Division 028 relating to Sanctions for Attachments to Utility Poles and Facilities (AR 510)*, Order No. 07-137, adopted April 10, 2007 ("Oregon Order").

attachment rules (including rates for telecommunications providers) in Oregon, prohibited pole owners from charging rents for equipment in unusable space (*e.g.*, risers) and allowed pole owners to be reimbursed for "actual engineering costs," while prohibiting the imposition of flat fees for application processing and pre-construction surveys. Such actions by the Oregon Commission have provided necessary regulations and thereby cleared the way for more meaningful commercial negotiations among the parties.

In 2006, the Commonwealth of Massachusetts also adopted revised policies regarding the non-discriminatory access to any utility distribution pole or right of way for the attachment of wireless equipment. Such action by the Massachusetts Legislature was in response to concerns raised by attachers regarding commercial negotiations with pole owners; and a willingness on the part of the Commonwealth to facilitate the deployment of more ubiquitous wireless coverage and the deployment of new and advanced services to areas of the state not currently covered. Specifically, the statute provides for: (1) regulated rates to be determined by the Department of Telecommunications and Energy; (2) prohibits the application of rent to non-usable space on the pole; and (3) requires the expansion of capacity of poles, ducts, conduits, or rights of way to allow access by the wireless provider where such capacity may be reasonably expanded by rearrangement or replacement.[43]

Additional jurisdictions have also promoted non-discriminate access to utility distribution poles and adopted similar policies to allow the placement and attachment of wireless equipment in the public rights of ways, including the attachment on facilities along state highways and other public roads.[44] In summary, these policies and regulations have provided wireless providers and other advanced services access to utility distribtuion poles and rights-of-way in order to deploy

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[43] *See* Massachusetts General Laws Chapter 166 Section 25A.

[44] *See* Utah Administrative Code R746-345; Indiana Administrative Code Section 8-1-2-101(a).

services in places not previously served. In so doing, those jurisdictions have followed the leadership of New York and fostered an environment for true intermodal competition to thrive.

E. The Commission Should Extend Its Reasonable Rates, Terms And Conditions For Pole Attachments To All Wireless Carriers And All New York Pole Owners

The Commission recognizes that utility distribution pole access continues to be a monopoly bottleneck in New York.[45] As the Commission Staff reported in its White Paper on telecommunications competition in New York, "[t]he conditions that prompted the Commission to adopt the federal approach to pole attachment rates still exist today: make it easier for attachers to do business by eliminating unnecessary variation in regulatory requirements."[46] Moreover, as catalogued by the Commission,[47] the FCC,[48] and the courts,[49] some utilities indeed use their monopoly control over poles to extract unreasonable rates, terms and conditions from telecommunications providers that wish to attach facilities to existing poles. The Commission's continued oversight of pole attachments is necessary to establish a level playing field in the

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[45] Comp III Order at 7 ("We note especially that regulation is important where incumbents control monopoly bottleneck facilities and we establish a proceeding to consider pole attachment issues.") and at 109 ("Also, some services continue to be a bottleneck, even for facilities based providers (*e.g.*, pole attachments).").

[46] Case 05-C-0616, *Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services*, White Paper: Telecommunications in New York: Competition and Consumer Protection (September 21, 2005) at 102-103.

[47] *See* citation in footnote 45.

[48] *See e.g., Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report & Order, 13 FCC Rcd. 6777 at ¶ 21 (1998).

[49] *National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330 (2002) ("Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents.").

provision of telecommunications services and eliminate monopoly control of a bottleneck facility which acts as a barrier to robust intermodal competition.[50]

To date in New York, the Wireless Carriers have been unable to negotiate reasonable rates, terms and conditions for attaching wireless facilities because the utility distribution pole owners often have adopted an absolute "take it or leave it" approach during negotiations. In justifying their hard ball approach in negotiations, the utilities have relied in part, on the Commission's statement in the 97-10 Order that "the price and terms for such attachments should be determined through private negotiations."[51]

For example, several New York utilities have made it perfectly clear that, absent further regulation by the Commission, they will impose monopoly rents for wireless attachments. The pole rental rates being charged or demanded by some New York pole owners range from $1,200 to $3,000 per pole per year. These rates have no basis in the utility's actual, historic cost of the pole or the amount of space on the pole actually occupied by the wireless attachment. Indeed, in its 2003 Joint Petition, Niagara Mohawk reported a net book cost for each *entire* utility distribution pole of $393.[52] These rates instead reflect an attempt to extract monopoly profits. The regulated rate prescribed by the Commission for wireless attachments in the *Niagara Mohawk/GridCom Order* – which was based on the fully allocated share of the pole costs attributable to the use proposed by the wireless attacher – was less than $60 – or ***only 2 to 5 percent*** of the monopoly pole rents currently being demanded by other utility pole owners in

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[50] Comp III Order at 3 ("[T]he information economy requires widespread access to broadband, wireless, and flexible telecommunications applications that facilitate economic development and investments in jobs from the private sector. Achieving that objective requires a level playing field where all telecommunications service providers have the proper market-based incentives to invest in infrastructure.").

[51] 97-10 Order at 22.

[52] *See* Wireless Attachments to Distribution Poles 2003 Rate Development, submitted as Attachment 2 of the Joint Petition filed by Niagara Mohawk and GridCom in Case 03-M-1578.

New York.[53] Indeed, yearly rental fees in the range of $1,200 to $3,000 would allow the pole owner to recover *annually* more than three times the remaining book value of the entire pole.

This situation will continue indefinitely – and the Wireless Carriers will continue to be denied reasonable, non-discriminatory access to poles – unless the Commission adopts regulations prescribing reasonable rates, terms and conditions for all wireless facility attachments. It is well recognized that utilities have "scant, if any, economic incentive to reach agreement" on reasonable rates terms and conditions for pole attachments[54] and strong, anticompetitive incentives to charge unreasonably high rates. Aside from the obvious incentive to extract as much pole rent as possible, certain pole owners may lose existing and future customers to wireless providers as wireless coverage improves. Indeed, some utilities that own poles currently compete with wireless providers in the provision of telecommunications services, be it through traditional landline telephone service, DAS service or BPL technology. The anticompetitive impulse that motivates utility pole owners will only increase as BPL is deployed throughout New York.[55]

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[53] To its credit, Verizon New York has recognized its obligation to offer wireless carriers regulated pole attachment rates. Verizon currently charges a reasonable annual attachment fees of $8.97 per foot of vertical occupancy per attachment per pole per year for wireless facility attachments.

[54] *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report & Order, 13 FCC Rcd. 6777 at ¶ 21 (1998).

[55] On August 2, 2007, the Commission authorized Niagara Mohawk to commercially deploy BPL in two regions. Case 06-M-1582, *Joint Petition of Niarara Mohawk Power Corp. and New Visions Powerline Communications, Inc. for Approval under PSL §§ 70 & 107 to Authorize Installation of Broadband over Powerline Facilities*, Order Authorizing Installation of Broadband Over Powerlines (Aug. 2, 2007). Con Edison and Orange & Rockland Utilities have launched several pilot and demonstration projects in Westchester County, Rockland County and New York City, and now are installing second generation BPL equipment on their underground electrical systems in conjunction with Ambient Corp., *see* Case 06-M-0043, *Deployment of Broadband over Powerline Technologies*, Statement of Policy on Deployment of Broadband over Powerline Technologies, Appendix A at 3 (Oct. 18, 2006), and Central Hudson Gas & Electric began evaluating BPL technologies as early as 2004. *See* Case 06-M-0043, *Deployment of Broadband over Powerline Technologies*, Comments of Central Hudson Gas & Electric at 1 (filed Mar. 13, 2006).

The reality is that the monopoly rents and unfair terms and conditions being demanded by the electric utilities in particular render many, if not most, wireless facility installations on utility distribution poles economically infeasible and technically impossible. Reasonable access to utility distribution poles is necessary for the Wireless Carriers to increase capacity and coverage – and thus, call reliability – in New York. Simply put, reasonable access will only be possible if the Commission mandates just and reasonable rates, terms and conditions for the attachment of wireless facilities on utility distribution poles.

The Commission should follow the approach of the *Niagara Mohawk/GridCom Order* and prescribe a default formula for wireless attachments to be the standard, regulated wireline pole attachment rate modified only "to reflect the total pole space occupied by wireless attachments" and any appropriate changes to the amount of usable space.[56] This approach is consistent with the approach advanced by the FCC in *Omnipoint Corp. v. PECO Energy Co.*, where the FCC stated: "the pole attachment formula presumptions may be modified or adjusted in order to address unique attachments associated with wireless systems."[57] Such attachment fees will allow pole owners reasonable cost recovery on a pro-rata basis for the space used and will not exceed the reasonable costs related to the attachment. The Commission should extend the pro-competitive rules and policies adopted in its Policy Statement, and any standard pole attachment agreement ultimately adopted by the Commission, to wireless attachments.[58]

F. Alleged Safety And Radio Frequency Emissions Issues Are Red Herrings

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[56] *Niagara Mohawk/GridCom Order* at 3.

[57] *Omnipoint Corp. v. PECO Energy Co* Memorandum Opinion and Order, 15 FCC Rcd. 5484 at n. 20 (2003) (citing *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd. 6777 at ¶ 42 (1998)).

[58] New York pole owners have taken the position that the policies, procedures and time frames adopted in the Policy Statement are not effective until the Commission adopts a standard pole attachment agreement embodying (and further developing) those policies, procedures and time frames. The Commission should affirmatively state that this is not the case.

Alleged concerns about safety and RF emissions are often used as a convenient pretext to deny or severely limit wireless providers' access to poles or to otherwise force the carriers to pay inflated "market" rents. While the Wireless Carriers agree that safety as a general rule is a very important consideration for any Commission undertaking, wireless pole attachment safety issues are already regulated extensively by the FCC, OSHA, the EPA, and the NESC and New York State Building Code ("Building Code") standards.

In fact, antennas and wireless attachments on utility distribution poles have an exceptional safety record. In New York, for example, the Long Island Power Authority ("LIPA") has allowed wireless pole top access for several years and has not reported any safety related issues. In the *Niagara Mohawk/GridCom Order*, the Commission expressly found, based on the representations of Niagara Mohawk and GridCom, that the proposed pole top-mounted antennas conform to the NESC and do not compromise the safety of the poles on which they are attached. Any party that proposes safety obligations on wireless pole attachments beyond what is already required for other pole attachers should have the burden of establishing why those discriminatory additional obligations are necessary.

The NESC is and should be the primary standard governing the attachment of wireless service facilities to utility distribution poles. The Commission has already ordered compliance with the NESC as the attachment standard for all electric transmission and distribution systems and all facilities-based telephone plant.[59] There is no reason why the NESC should not be the same standard for wireless attachments. In fact, the NESC expressly permits the attachment of

[59] Case 04-M-0159, *Proceeding on Motion of the Commission to Examine the Safety of Electric Transmission and Distribution Systems* (Jan.5, 2005 and July 3, 2006).

"communications antennas in the supply space" on poles with conductors carrying voltages of up to 814 kV.[60] Indeed, the Wireless Carriers will strictly adhere to the NESC requirements.

Moreover, the Wireless Carriers are also subject to and comply with the safety requirements of the Building Code. For example, Sections 1605, 1608 and 1609 of the Building Code set forth the specific requirements for loads, including ice, snow and wind loads. These are the same load requirements for all pole attachers and are sufficient for wireless attachments as well. Pole top antennas do not add significant weight to poles, and equipment cabinets are located relatively low on the poles.

In fact, other states have recognized the like position of wireless pole attachments to pole attachments of other utilities and chosen not to impose discriminatory safety obligations on the wireless attachments. For example, Massachusetts, with winters similar to those of New York, do not impose discriminatory safety obligations on wireless attachments.[61] Neither do Michigan or Ohio, with their corresponding Great Lakes weather effects, discriminate against wireless attachments.[62]

NESC Rule 233C specifies the required clearance between wires, conductors, and cables carried on different supporting structures, which would apply to the connection of a wireless

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[60] *See* NESC Rule 235I and Table 235-6 (line 1b) (2007 Ed.)

[61] *See* Mass. Gen. Laws ch. 166, § 25A (A utility shall provide a wireless provider with nondiscriminatory access to any pole or right-of-way used or useful, in whole or in part, owned or controlled by it for the purpose of installing a wireless attachment).

[62] *See* MCL 460.6g (requires that the Michigan PSC regulate the rates, terms, and conditions of attachments by attaching parties, but does not contain separate obligations for wireless attachments; see also 200 CMR 45.03); *also see* MPSC Case No. U-13522 (Michigan PSC has adopted NESC standards and applied them to pole attachments); *see* ORC § 4905.71(A) (Every telephone, telegraph, or electric light company, which is a public utility ... shall permit, upon reasonable terms and conditions and the payment of reasonable charges, the attachment of any wire, cable, facility, or apparatus to its poles, pedestals, or placement of same in conduit duct space, by any person or entity other than a public utility that is authorized and has obtained, under law, any necessary public or private authorization and permission to construct and maintain the attachment, so long as the attachment does not interfere, obstruct, or delay the service and operation of the telephone, telegraph, or electric light company, or create a hazard to safety); *also see* PUCO Case No. 96-1309-EL- CSS (all pole attachments must conform to the standards of the most current NESC).

whip antenna to a cabinet on the ground. NESC Rule 234C(3)(d) addresses clearance issues with regard to wires, cables, and antennas, and also applies to the placement of wireless facilities (antennas and cabinets) on poles and their proximity to electric facilities. These and the other safety rules currently set forth in the NESC should be sufficient to address any clearance concerns associated with the placement of wireless facilities on utility distribution poles in close proximity to electric facilities, especially since wireless equipment is similar to and no more obtrusive than the equipment already permitted on utility distribution poles.

Moreover, because only qualified electric technicians (either employees of the electric company or approved contractors) are permitted to work on equipment located in the power space of the poles, clearance concerns are sufficiently addressed by current requirements and the NESC. Additionally, wireless equipment cabinets are located below the communications lines and thus do not present any material clearance issues. The NESC is sufficient to address any climbing and work space issues associated with wireless attachments, and OSHA rules also address issues associated with climbing safety and protocol..

The safety of RF emissions from wireless attachments is already well regulated by the FCC and OSHA.[63] Section 332 of the TCA states in relevant part:

> [n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emission to the extent that such facilities comply with the [FCC's] regulations concerning such emissions.[64]

The FCC has confirmed that is has exclusive jurisdiction to adopt rules for RF emissions,[65] and this position has been upheld by the U.S. Second Circuit Court of Appeals.[66]

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[63] RF emissions are addressed by FCC Rule 1.1310, 47 C.F.R. § 1.1310, FCC OET Bulletins Nos. 56 and 65 and OSHA rules, 29 C.F.R. §§ 1910.97 and 1910.268.

[64] 47 USC § 332(c)(7)(B)(4).

[65] Report and Order, ET Docket 93-62, 11 FCC Rcd. 15123 at ¶ 166 (1996). The FCC subsequently decided that its preemptive authority under this section extended to state or local laws or rules that

Moreover, federal courts have interpreted this section of the TCA to preclude local governments from even considering the impact of RF emissions in making their zoning decisions, much less regulating the placement of wireless antennas on such grounds.[67]

Even if the FCC did not have exclusive jurisdiction over RF safety, there is no need for the Commission to regulate in this area. The FCC already has a comprehensive regime in place to protect both the general public and occupational workers from unacceptable RF exposure.[68] The FCC is required by the National Environmental Policy Act of 1969 ("NEPA") to evaluate the effects of RF emission from FCC regulated transmitters on the quality of the human environment. The FCC issued a decision in August 1996 establishing updated rules regarding the environmental effects of RF emissions[69] and revised these rules in 1997.[70]

The FCC's rules are designed to protect the public health by limiting the maximum amount of RF emission to which a licensee's facilities, in combination with other sources of RF emission, may cause workers and the general public to be exposed. The FCC's rules are based on standards developed the by the Institute of Electrical and Electronic Engineers and adopted by the American National Standards Institute ("ANSI") as well as guidelines recommended by the National Council on Radiation Protection and Measurements. The rules were coordinated with and are supported by federal agencies with health and safety responsibilities including the EPA, FDA, the National Institute of Occupational Safety and Health and OSHA.

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purported to regulate the operation (in addition to the placement, construction and modification) of personal wireless facilities. Second Report and Order, ET Docket 93-62, 12 FCC Rcd. 13494 at ¶ 80 (1997).

[66] *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000).

[67] *See, e.g., Telespectrum v. Public Service Comm'n*, 227 F.3d 414, 423-24 (6th Cir. 2000).

[68] *See* 47 C.F.R. § 1.1307 *et seq.*

[69] Report and Order ET Docket 93-62, 11 FCC Rcd. 15123 at ¶ 166 (1996).

[70] Second Report and Order, ET Docket 93-62, 12 FCC Rcd. 13494 at ¶ 80 (1997).

Specifically, the FCC has established maximum permissible exposure ("MPE") levels for occupational controlled exposure and for general population uncontrolled exposure.[71] Occupational controlled limits apply in those situations in which persons are exposed as a consequence of their employment provided these persons are fully aware of the potential for exposure and can exercise control over their exposures. The occupational controlled limits apply not only to wireless carrier workers but also to transient visitors to the site, like utility pole workers.[72] The limits set by the FCC are "based on a very conservative, 'worst case' scenario"[73] and "are themselves many times below levels that are generally accepted as having the potential to cause adverse health effects."[74]

The FCC has outlined a general procedure for evaluating and/or determining compliance with the FCC's RF safety rules.[75] Pursuant to that procedure, state or local officials with "a genuine question regarding a site's compliance with RF exposure limits" are directed to refer such questions to the FCC, which will investigate and take whatever action the FCC may deem necessary or appropriate.[76] Where "genuine" compliance questions exist, "[FCC] staff will promptly take all appropriate actions to ensure compliance."

In June 2000, the FCC released the *Local Official's Guide*, a publication "designed ... to provide [local government officials] with information and guidance in devising efficient procedures for assuring that the antenna facilities located [in their communities] comply with the

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[71] 47 CFR § 1.1310, Table 1.
[72] *See* FCC Office of Engineering and Technology, Bulletin 65.
[73] Local Guide at 12.
[74] Local Guide at 1.
[75] *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*, 15 FCC Rcd. 22821 at ¶ 18 (2000)
[76] *Id.* at ¶ 18.

[FCC's] limits for human exposure to radiofrequency (RF) electromagnetic fields."[77] The FCC directs state and local officials to consult the *Local Official's Guide* for "guidance" in determining whether a particular site or sites raises legitimate RF compliance concerns. The FCC's Spectrum Enforcement Division (a division of the FCC's Enforcement Bureau) is responsible for enforcing the FCC's RF safety rules.[78]

III. RESPONSES TO QUESTIONS POSED BY THE COMMISSION

The Wireless Carriers appreciate the opportunity presented by the Commission in this matter. As the Commission considers the Wireless Carriers responses to the following questions, we respectfully request that the background information previously included in this document be incorporated by reference into the responses provided below.

Question 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 Wireless Carriers submit that the pro-competitive pole attachment policies, time frames and procedures adopted in the Policy Statement are appropriate for, and should be extended to, wireless attachments. Indeed, the majority of the rulings adopted in the Policy Statement have nothing to do with the type of facilities being attached – whether a strand, an antenna or an equipment box. For example, the Commission's determination that attachers should be permitted to hire and supervise approved, qualified contractors to perform pre-construction surveys[79] is sound regardless of the type of facilities being attached. Similarly, its rulings requiring binding estimates for make-ready work, limiting increases in pole owners' unit

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[77] *A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance* ("*Local Official's Guide*"), at 1 (2000) available at <www.fcc.gov/wtb/siting/FCC_LSGAC_RF_Guide.pdf>.

[78] *See* www.fcc.gov/eb/sed/PSGuide.html.

[79] Policy Statement at 3.

charges to once annually, and adopting an expedited dispute resolution process[80] are technology neutral. Obviously, rules that relate only to strand attachments, such as the undergrounding rules for slack in manholes, would not apply to standard wireless antenna attachments. For those limited instances in which the Policy Statement pronouncements may only be read to apply to strand attachments, the Wireless Carriers submit that will be readily apparent, and it is unnecessary to take any specific actions with regard to such issues.

While pole owners may argue that certain of the timeframes adopted by the Commission for application processing cannot be extended to wireless, there is nothing in the Wireless Carriers' experience to indicate that these rules would not work for wireless facility attachments. Indeed, the Commission adopted the same application process for underground that it did for overhead attachments – including time frames for pre-construction surveys and make-ready work – over the objections of pole owners.[81]

Extension of the policies, procedures and timeframes adopted in the Policy Statement to wireless attachments is necessary to ensure that pole owners do not unreasonably condition or delay wireless attachments on utility distribution poles. As set forth above, poles are a monopoly bottleneck facility in New York. Absent regulation, utilities often unilaterally dictate the rates, terms and conditions of access and have little incentive to accommodate, much less prioritize, wireless attachments. The Wireless Carriers acknowledge that there may be limited circumstances in which specific time frames or procedures will need to be modified for certain individual wireless attachments. However, these limited situations can be addressed, where necessary, on a case-by-case basis. The important thing is for the Commission to establish a

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[80] *Id.* at 14.
[81] *Id.* at 11 and 12.

general regulatory framework for pole attachments that gives wireless providers the same benefits as their landline and BPL competitors.

In addition to extending the pro-competitive policies, procedures and time frames of the Policy Statement to wireless attachments, the Commission should also ensure that any Standard Pole Attachment Agreement adopted by the Commission for use in New York is extended to wireless attachments.[82] New York pole owners have taken the position that the policies, procedures and time frames adopted in the Policy Statement are not effective until the Commission adopts the Standard Pole Attachment Agreement embodying (and further developing) those policies, procedures and time frames. This argument lacks merit and appears rooted in a disingenuous interpretation of the Commission's Policy Statement, which states on its face that it is "issued and effective August 6, 2004." The rules are clear on their face. However, adoption of a standard pole attachment agreement will eliminate any uncertainty concerning application of the rules to the specific terms and conditions of attachments. Moreover, to the extent that precise terms and conditions of the model agreement need to be adjusted to accommodate the specific attributes of a wireless attachment, the Wireless Carriers submit that the Commission could also adopt a wireless addendum, much like that approved by the Commission in the *Niagara Mohawk/GridCom Order*. While the document may need to be updated and the Wireless Carriers would like the opportunity to comment further on the terms embodied in the addendum, it provides a good foundation for a model. This document was developed by a New York utility for use by its own wireless affiliate. Accordingly, its use should allay concerns by utilities that the terms do not adequately consider utility needs and

[82] The Policy Statement required New York pole owners to develop standard terms and conditions for pole attachment agreements that apply to all owners and attachers, which would be approved by the Commission. The standard terms and conditions developed by the pole owners were submitted to the Commission and are pending review.

interests, but also should ensure *non-discriminatory* treatment for attaching entities, as required by law and to create a level playing field for intermodal competition.

Question 2: Should the Commission create a presumption that wireless antennas approved for National Grid be allowed on poles?

The Wireless Carriers submit that the Commission should adopt a presumption that all wireless antenna attachments that meet the requirements of the NESC in addition to those adopted in the *Niagara Mohawk/GridCom Order* are presumed to be allowed on all utility distribution poles in New York. The NESC thoroughly addresses the safe installation of antennas on utility distribution poles. For example, NESC Rule 235I and Table 235-6 prescribe clearance specifications between antennas attached in the supply space and electrical conductors carrying voltages of up to 814 kV. Further, NESC Rule 235I(1) ensures that "[c]ommunications antennas located in the supply space shall be installed and maintained only by personnel authorized and qualified to work in the supply space ... ." Moreover, the following NESC rules also apply to wireless attachments on utility poles:

- Rule 222 - Joint use of structures;
- Rule 224A - Communications circuits located within the supply space and supply circuits located within the communications space;
- Rule 230A(3) – Clearances, measurement of clearance and spacing;
- Rule 230A(4) – Clearances, rounding of calculation results;
- Rule 236 – Climbing space;
- Rule 237 – Working space;
- **Rule 238 – Vertical clearance** between certain communications and supply facilities located on the same structure;

- Rule 250B – General loading requirements and maps, combined ice and wind loading district; and
- Rule 250C – General loading requirements and maps, extreme wind loading.

In addition, all of the worker safety rules in NESC Sections 42-44, among others, apply to wireless attachments.

As this Commission itself has recognized, "[t]he general standards prescribed by the [NESC] and conventional manuals of construction practices and procedures cover most situations regarding the safe and reliable installation and operation of telecommunications facilities."[83] Similarly, in rejecting a presumption against pole-top attachments, the FCC ruled "the only recognized limits to access for antenna placement by wireless telecommunications carriers [should be] those contained in the [federal Pole Attachment Act]: 'where there is insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes,'" such as the NESC and other objective standards of construction.[84]

The wireless attachments approved by the Commission in the *Niagara Mohawk/GridCom Order* were for a specific type of installation – an outdoor DAS. But as discussed above in Section II(A)(2) above, utility distribution poles can support a variety of different kinds of wireless installations in addition to DAS. Wireless transmission technology is rapidly evolving and advancing. A presumption that the arrangement "approved for National Grid" should apply only to DAS attachments would be too narrow. Instead, the Wireless Carriers submit that the Commission should adopt a more general presumption that any wireless equipment that meets

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[83] Policy Statement at 7.

[84] *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 at ¶ 72 (1999) (citing 47 U.S.C. § 224(f)(2) and reiterating that the FCC has declined "to establish a presumption that space above what has traditionally been referred to as 'communications space' on a pole may be reserved for utility use.").

NESC requirements should be allowed on utility distribution poles in New York. Strict adherence to the NESC is also consistent with individual Wireless Carrier agreements with utility pole owners across the country.

By no means are the Wireless Carriers seeking "advance approval" of every conceivable type of wireless attachment. Any presumption that wireless equipment should be able to be attached to utility distribution poles would be rebuttable on a case-by-case basis, with the pole owner bearing the burden of proving that the attachment should be denied based on safety, reliability or generally accepted engineering standards. This is consistent with the FCC approach.

The Wireless Carriers submit that, at a minimum, the Commission should adopt a presumption that wireless antenna pole top attachments together with necessary telecommunications equipment boxes that meet the criteria established by Niagara Mohawk for wood pole attachments and approved by the Commission in that proceeding should be approved for all poles in New York.[85] The Commission already has approved such attachments as safe and consistent with the NESC.[86] Failing to create this minimum presumption would result in the precise "unnecessary variation in regulatory requirements" this Commission has sought to avoid in regulating pole attachments. It also would create the appearance that uncontested proposals submitted as part of affiliate transactions are entitled to less scrutiny.

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

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[85] The attachments contemplated in that proceeding included "an antenna in length varying from one to eight feet attached to the top two feet of the distribution pole." *Niagara Mohawk/GridCom Order* at 2.

[86] The Commission relied on the fact the installations proposed were to be placed on "relatively clean poles, free of any other major equipment, and accessible by bucket truck throughout the year," and that "any work to be performed in the electrical supply space is to be done only by qualified electrical workers." *Niagara Mohawk/GridCom Order* at 4-5

To fully utilize utility distribution poles as a viable alternative for siting, adequate pole height is necessary to establish the coverage area warranting an installation, and the coverage area of a cell site is tied directly to the height of the antenna. The Commission has recognized the importance of pole height for wireless attachments and gone so far as to approve attachments of wireless facilities to poles up to 100 feet tall.[87] The Commission has also stated that "[s]ince line of sight is important between the DAS antennas, the installation of taller poles may be required to accommodate the DAS."[88]

Consistent with the Commission's finding in the *Niagara Mohawk/GridCom Order*, the Wireless Carriers urge the Commission to extend its current pro-competitive rules and policies to wireless attachments by affirmatively ordering non-discriminatory access to pole tops. Not only will pole-top antennas as outlined in the *Niagara Mohawk/GridCom Order* make efficient use of available space at the top of the pole while alleviating constraints in the communications space on poles, they will also make it easier for wireless providers to provide more reliable communications networks and meet other stated goals -- which will be of tangible benefit to the public.

Certain utilities have expressed concerns about the costs in granting wireless providers extensions to poles. The Wireless Carriers, however, are willing to pay the reasonable actual cost of pole change-outs as required in the *Niagara Mohawk/GridCom Order*. The taller poles benefit the pole owners and other third party attachers because: (i) additional space is created for the pole owner and other third party attachers; and (ii) an old pole is replaced with a new one.

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

[88] 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, (Effective April 7, 2004), page 2.

In order to extend the Commission's pro-competitive, non-discriminatory policies to wireless attachments and also to avoid future problems or confusion in this area, the Commission should use this proceeding to clarify that there is a presumption that pole top-mounted antennas are safe and allowed using the parameters set forth in the *Niagara Mohawk/GridCom Order*.

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

The Wireless Carriers will address these safety issues by complying with the requirements of the Building Code and the NESC. For example, Sections 1605, 1608 and 1609 of the Building Code set forth the specific requirements for loads, including ice, snow and wind loads.

The Wireless Carriers prepare construction drawings in connection with every wireless attachment. In addition, structural analyses by licensed professional engineers are prepared prior to installation of wireless equipment on existing structures. The Commission has required in two previous orders with respect to wireless attachments preparation of construction drawings and structural analyses.[89]

The FCC's Network Reliability and Interoperability Council ("NRIC") has also set forth a number of best practices regarding the construction, operation, and maintenance of communications networks.[90] Specifically, the NRIC suggests that wireless service providers verify that "aerial power lines are not in conflict with hazards that could produce a loss of service during high winds or icy conditions."[91]

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[89] Case 02-M-1288, Order Approving Procedure (April 14, 2004) and Cases 06-M-0087 and 02-M-1288, Order Approving Agreement (April 27, 2006).

[90] Chartered in 1992, NRIC has developed and maintains hundreds of best practices for addressing communications infrastructure vulnerabilities. The best practices provide companies with guidance aimed an improving the overall reliability, interoperability and security of wireline, wireless, satellite, cable and public data networks.

[91] NRIC, BP No. 7-7-0634

Moreover, in developing the rules which govern the attachment of antennas to pole tops, the NESC carefully considered the high winds, heavy wet snow, and other severe weather conditions to which poles are subjected.[92] Wireless providers routinely adhere to rigorous engineering and construction standards to minimize the risk of wireless attachments falling onto power lines. Adherence to the NESC will ensure that the attachments of the Wireless Carriers will not adversely affect the reliability of the electric system.[93]

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

The Commission currently requires all pole attachments to comply with the NESC.[94] To ensure that all attachments meet the same standards, the NESC also should govern the placement of wireless facilities on utility distribution poles.

NESC Rule 233C provides rules for clearance between wires, conductors, and cables carried on different supporting structures, which would apply to the connection of a wireless whip antenna to any associated communications equipment. NESC Rule 234C(3)(d) addresses clearance issues with regard to wires, cables, and antennas, and also applies to the placement of wireless facilities (antennas and cabinets) on poles and their proximity to electric facilities. These and the other NESC rules are sufficient to address any clearance concerns associated with

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[92] *See* NESC Section 25 (Loadings) and NESC Rule 235I (clearances between communications antennas and supply line conductors).

[93] *See* Case 05-M-0102 *Joint Petition of Niagara Mohawk Power Corporation and National Grid Communications, Inc., under Public Service Law Section 70 to Authorize Attachment of Omnipoint Communications (T-Mobile) Wireless Facilities to Niagara Mohawk Electric Transmission Facilities*, and Case 02-M-1288 *Joint Petition of Niagara Mohawk Power Corporation and National Grid Communications, Inc. to Attach Wireless Facilities on Niagara Mohawk Transmission Facilities,* (September 11, 2006) addressing the parties' joint petition to attach wireless facilities to certain electric transmission facilities, the Commission stated that approval was in the public interest because the attachment would "not negatively impact the environment or the reliability of the electric system" at 5.

[94] *See* Cases 06-M-0087 and 02-M-1288, Order Approving Agreement (April 27, 2006); *see also* Case 03-M-0432, Order Adopting Policy Statement on Pole Attachments (August 4, 2004).

the placement of wireless facilities on utility distribution poles in close proximity to electric facilities.

Because only qualified electric technicians (either employees of the electric company or approved contractors) are permitted to work on equipment located in the power space of the poles, clearance concerns are sufficiently addressed by current requirements and the NESC. It should be noted that equipment cabinets are located below the communications lines and thus do not present any clearance issues.

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

NESC Rule 250B squarely addresses pole loading issues, and takes into account the weather conditions of the particular geographic region in which the pole is located. As such, the ice and wind conditions of New York State will be part of the engineering analysis that occurs during the make-ready process. In addition, wireless facilities must comply with the current load requirements as set forth in the Building Code. Such facilities are designed and constructed to "support safely the factored loads in load combinations set forth in the Building Code without exceeding the appropriate strength limits stated for the materials used in their construction."[95]

As noted above in response to Question 4, Sections 1605, 1608 and 1609 of the Building Code set forth the specific requirements for loads, including ice, snow and wind loads. Therefore, the Building Code addresses pole loading concerns with regard to ice, snow and wind, and should remain the standard applied to wireless pole attachments.

Question 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.)?

[95] *See* Building Code, Section 1604.2.

Wireless equipment attached to utility distribution poles is unobtrusive and relatively simple to install. A typical installation generally consists of a whip antenna at the top of a pole, attached by a cable to a cabinet located either high on the pole, or on the ground. Such equipment is installed using existing and accepted methods, techniques, and tools, consistent with both the NESC and the Building Code.

Since wireless equipment is similar to and no more obtrusive than the equipment, *e.g.*, transformers, amplifiers, etc., already permitted on utility distribution poles, the installation of wireless equipment does not necessarily raise any unique issues with respect to climbing and work space on such poles. In order to demonstrate this fact to pole owners, wireless attachers may be required to provide pole owners with construction and site plans showing the location of wireless equipment on the pole, as required by the Commission when attaching wireless facilities to electric transmission facilities.[96]

In addition, NESC Rule 234C(3)(d) addresses clearance issues with regard to wires, cables, and antennas. The NESC Interpretations Subcommittee has stated that one of the intentions of the NESC in defining such clearances was to protect communications personnel working on their facilities without risk of contacting supply facilities on utility poles.[97] The safety rules currently set forth in the NESC are sufficient to address any climbing and work space issues associated with wireless attachments, and OSHA rules also address issues associated with climbing safety and protocol.

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

The FCC has promulgated extensive regulations establishing strict limits on RF emissions. These rules are set forth in 47 C.F.R. § 1.1310 and FCC OET Bulletin 56. Table 1 on

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[96] Case 06-M-0087, Order Approving Agreement (April 27, 2006).
[97] NESC Interpretations Subcommittee, IR 362 (Sept. 10, 1984).

page 15 of Bulletin 56 sets forth the guidelines adopted by the FCC for exposure to RF emissions. These guidelines are based on recommended exposure criteria issued by the National Council on Radiation Protection and Measurements and the ANSI committee on RF exposure standards (Standards Coordinating Committee 28), which became a committee of the Institute of Electrical and Electronics Engineers ("IEEE") in 1991 ("ANSI/IEEE").

The FCC's policies with respect to environmental RF fields are designed to ensure that FCC-regulated transmitters do not expose the public or workers to levels of RF radiation that are considered by expert organizations to be potentially harmful. Therefore, if a transmitter and its associated antenna are regulated by the FCC, they must comply with provisions of the FCC's rules regarding human exposure to RF radiation"[98]

In addition, OSHA is responsible for protecting workers from exposure to hazardous chemical and physical agents, including RF emissions. OSHA uses the ANSI/IEEE 1992 guidelines for enforcement purposes under OSHA's "general duty clause," which requires employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[99] The ANSI/IEEE 1992 guidelines are part of the same criteria used by the FCC in promulgating its own guidelines for exposure to RF emissions.

The Wireless Carriers are regulated by the FCC and OSHA, and thus must comply with FCC rules regarding RF emissions. Therefore, there is no need for the Commission to promulgate an additional set of regulations with regard to RF emissions.[100] Nor should the

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[98] Bulletin 56 at p. 17.

[99] Bulletin 56, pp. 27 and 28; 29 U.S.C. § 654(5)(a)(1).

[100] In addition, 47 U.S.C. § 332(7)(B)(iv) provides that no state or local government or instrumentality thereof may regulate the placement of wireless facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with FCC regulations concerning such

Commission permit pole owners to impose unnecessary – and typically arbitrary – technical standards in addition to those already in effect.

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

With respect to rates for wireless attachments, as discussed in Section II(F), the Commission should follow the precedent it established in the *Niagara Mohawk/GridCom Order* and apply the regulated wireline rate multiplied by the number of feet occupied.[101] Such attachment fees will provide pole owners with reasonable cost recovery on a pro-rata basis for the space used and will not exceed the reasonable costs related to the attachment.

As detailed in the Wireless Carriers' response to Question 1, the August 6, 2004 Order is reasonable starting point to address most terms and conditions of service. Using a model agreement such as the August 2004 Order will not only simplify the process of deployment of wireless service using poles, but will also ensure fair, non-discriminatory terms between the parties.

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

Pursuant to the State Environmental Quality Review Act ("SEQRA"), no state or local governmental agency may undertake, fund or approve an action until the agency has performed an adequate environmental review consisting of an evaluation of the nature, type, size and scope of the action and an assessment of whether the action has the potential to have a significant environmental impact.[102] The Commission, as a state agency, is subject to SEQRA and thus, must comply with SEQRA prior to taking any action including authorizing pole attachments.

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emissions. Section 332(7)(B)(iv) provides an additional reason why the Commission should refrain from promulgating new RF emissions regulations.

[101] *Niagara Mohawk/GridCom Order* at 4-6; *see also* Case 03-E-1578 (pages 3-4).

[102] 6 NYCRR § 617.3(a).

One of the first steps in the environmental review process is for the lead agency to classify the action as a Type I action, a Type II action or an unlisted action.[103] A Type I action is one which is more likely to require the preparation of an EIS.[104] Type II actions are those that have been determined not to have a significant adverse environmental impact, or are otherwise precluded from an environmental review.[105] If a particular activity is neither Type I nor Type II, the activity is classified as an unlisted action.[106]

In order to assist with its implementation of SEQRA, the Commission has adopted its own SEQRA implementing regulations found at 16 NYCRR § 7. These regulations include a list of Commission Type II actions that are exempt from SEQRA.[107] With regard to pole attachments, the Commission should amend its Type II list to include pole attachments for wireless communications made in compliance with the NESC. Such an addition to the Commission's Type II list would be based on the fact that such pole attachments are unobtrusive and result in minimal, if any, change in the aesthetics of utility distribution poles. Such an addition is consistent with past determinations by the Commission that authorization of such attachments does not result in any significant adverse impacts to the environment, such as the *Niagara Mohawk/GridCom Order*, which addressed attachments that included "an antenna in length varying from one to eight feet attached to the top two feet of the distribution pole."[108]

In addressing SEQRA and its implementing regulations,[109] the Commission concluded that its decision to approve proposed rates, terms and conditions applicable to the attachment of wireless facilities to utility distribution poles did not "meet the definition of either a Type I or

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[103] 6 NYCRR § 617.6(a).
[104] 6 NYCRR § 617.4(a).
[105] 6 NYCRR § 617.5(a).
[106] 6 NYCRR § 617.2(ak).
[107] *See* 16 NYCRR § 7.2
[108] *Niagara Mohawk/GridCom Order* at 2.
[109] 6 NYCRR Part 617 and 16 NYCRR Part 7.

Type II action under 6 NYCRR §§ 617.4, 617.5, and 16 NYCRR § 7.2 and should be classified as an 'unlisted action' requiring SEQRA review."[110] The Commission further concluded that its decision to approve the proposed rates, terms and conditions for these wireless attachments would:

> cause no changes to the operation of the distribution system that will result in significant adverse environmental impacts. Moreover, approval of the Joint Petition will not cause any physical construction or disturbance of the environment.[111]

Accordingly, the Commission determined that the contemplated wireless attachments would not have a significant impact on the environment and adopted a negative declaration pursuant to SEQRA.[112] Similarly, the Commission recently found that BPL equipment to be placed on Niagara Mohawk utility poles will result in no significant adverse environmental impacts because the equipment represents only a "small incremental increase in the visual intrusion of total overhead utilities."[113] The types of wireless attachments being discussed in this proceeding are similar in size, weight, shape or visual impact from the types of wireless attachments reviewed and approved by the Commission in the *Niagara Mohawk/GridCom Order*, and with advances in technology, these attachment are becoming even more compact and even less obtrusive.

There is no reason for the Commission in this proceeding to depart from its previous findings in the *Niagara Mohawk/GridCom Order* and the *BPL Order* that wireless attachments will not have a significant environmental impact on the environment. The Wireless Carriers

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[110] *Niagara Mohawk/GridCom Order* at 6.
[111] *Id.*
[112] *Id.*
[113] *See* Case 06-M-1582, *Joint Petition of Niagara Mohawk Power Corp. and New Visions Powerline Communications, Inc. for Approval under PSL §§ 70 & 107 to Authorize Installation of Broadband over Powerline Facilities, Order Authorizing Installation of Broadband Over Powerlines* (Aug. 2, 2007), at 24.

suggest that, for future proceedings, the Commission should amend its Type II list to include pole attachments for wireless communications made in compliance with NESC, exempting such attachments from further review under SEQRA.

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

While the Wireless Carriers have experienced unreasonable denials of access to poles from some utilities, there are some that have been flexible in attempting to accommodate wireless attachments on utility distribution pole tops. For example, the electric industry safety code, the NESC, added a rule pertaining to antenna attachments to pole tops in 2002.[114] In addition, Niagara Mohawk has adopted reasonable rates, terms and conditions for wireless attachments, including allowing attachment to pole tops. Another New York utility, LIPA, has allowed pole top antenna installations,[115] and Verizon New York allows access at reasonable rates ($8.97 per foot of vertical occupancy per year) and has stated that it will not prohibit pole top attachments (but, unfortunately, has left open the possibility that it will defer to power company joint users on the issue of pole-top placement, which will likely be problematic).

Utilities outside of New York also allow the placement of wireless antennas on pole tops pursuant to regulated rates, terms and conditions. For example, Dominion Virginia Power allows wireless pole top attachments at regulated rates and has agreed to change out existing poles with taller poles where the attaching entity agrees to pay the cost of replacing the pole. Progress Energy Florida also allows antenna attachments on pole tops. Significantly, both of the examples are from states in which pole attachments are regulated by the FCC. However, this

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[114] *See* NESC Rule 235I, added in the 2002 Edition.

[115] Pre-contractual arrangements with LIPA, pole attachments have been installed, operated and maintained for a decade now in accordance with NESC rules and all other applicable engineering and construction standards for wireless attachments.

also is the case in certified states, such as Utah, for example, where PacifCorp allows pole top wireless attachments and has done so since 2002.

However, other utilities have taken an obstructionist approach or simply insisted that wireless attachers pay substantially more than the regulated rates approved by this Commission for the *Niagara Mohawk/GridCom Order*. As discussed above, some New York electric utilities are charging and/or demanding rates ranging from $1,200 to $3,000 per pole per year and will not negotiate lower amounts. These monopoly rents render many, if not most, wireless facility installations on utility distribution poles are discriminatory, economically infeasible and constitute a denial of reasonable access to utility distribution poles.

In addition to imposing monopoly rents, some New York utility pole owners have not allowed pole top attachments or have placed severe restrictions on pole top access. For example, one major New York electric utility refuses to allow access to the top of primary poles (*i.e.*, any pole carrying electric lines with more than 600 Volts), which it is estimated make up 85 to 90 percent of the company's poles.[116] There is no reasonable safety related rationale for restricting access to the top of primary poles. The NESC makes no such distinction between primary poles and secondary or guy poles, and, in fact, establishes separation requirements for poles with even very high voltage lines (up to 814 kV).[117]

The Wireless Carriers have met considerable resistance from some utilities when attempting to gain access to utility distribution poles outside of New York as well. Certain utilities have cited a lack of comfort with wireless attachments generating from little or no experience with such installations. Other utilities clearly are using "safety," "technical

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[116] The company's subsidiary electric utility has adopted an identical policy. Both utilities allow antennas to be placed on primary poles below power lines, but this policy severely limits the coverage area of the installation and, as a practical matter, renders the overwhelming majority of installations technically and economically infeasible.

[117] *See* NESC Rule 235I and Table 235-6.

concerns," and "lack of experience" as roadblocks to accommodating wireless attachments and/or as an excuse to avoid having to provide access at regulated rates. For example, at least one utility has a master lease agreement with one of the Wireless Carriers in this proceeding, which agreement covers attachments to both towers and utility poles. However, under the master lease agreement the rents for attachments to utility distribution poles greatly exceed the rents produced using the FCC formula. This same utility now is claiming that it cannot accommodate wireless attachments on utility distribution poles at regulated rates without further vetting of the "technical issues" pertaining to utility distribution pole attachments.

The fact that numerous pole owners, in New York and across the country, have agreed to allow wireless attachments to their utility distribution poles, including attachments to pole tops, and upon regulated rates, terms and conditions, speaks volumes about what can be done. The fact that other utilities have allowed wireless attachments, including attachments to pole tops, at unregulated rates that grossly exceed regulated levels is similarly telling. The Wireless Carriers are ready and willing to work cooperatively with pole owners, and of course, to adhere strictly to the NESC and other applicable regulatory rules and standards to ensure safe installations. Wireless attachments made in accordance with the NESC are safe and fill a critical need for wireless providers seeking to improve coverage and network reliability. Utilities should not be permitted to continue to use alleged safety concerns as an excuse to extract monopoly rents or other unreasonable terms and conditions from wireless providers.

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

Although not directly at issue in this proceeding, the Wireless Carriers remind the Commission that there are considerable hurdles faced by carriers seeking to obtain local government approval for the installation of new, stand-alone cell sites. Much like cable

operators experienced in their early efforts to deploy facilities, a variety of factors, including land use and zoning restrictions imposed by local governments, make construction of new freestanding wireless facilities a costly and immensely time consuming effort.[118] Obtaining local governmental approval for a monopole in New York can take multiple years and entail incredible expense. These local regulatory obstacles have made it difficult to fill in coverage gaps in some New York communities, and belatedly and unduly costly in others.

Notwithstanding these experiences, the Wireless Carriers are optimistic that these types of local regulatory impasses could be avoided if the Commission were to issue an order extending the *Niagara Mohawk/GridCom Order* and the Policy Statement to all wireless antenna attachments to all New York utility distribution poles. As discussed above, such an order would ensure prompt access to utility distribution poles upon reasonable rates, terms and conditions, thereby rendering poles a viable option for wireless providers and thereby providing further opportunity for the industry to achieve increased wireless coverage, improved access to Enhanced 911 services, and more reliable wireless services. Because there continue to exist "hard to serve" areas, co-locating wireless installations on utility distribution poles could be an efficient, environmentally friendly, and more aesthetically pleasing approach to the placement of wireless antennas than installing new freestanding wireless facilities. Thus, equal treatment for wireless attachment to utility distribution poles, if regulated by the Commission in a competitively neutral manner, would provide an additional means for wireless infrastructure deployment, especially in areas where local land use and zoning restrictions preclude construction of new freestanding wireless facilities.

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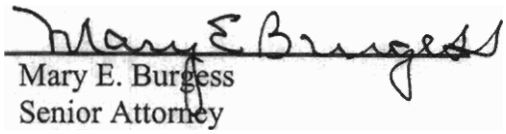
[118] *See, e.g.*, S. REP. NO. 580, 95th Cong. 1st Sess. 13 (1977) ("owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles").

IV. CONCLUSION

The Wireless Carriers recommend that the Commission find that the attachment of wireless equipment to utility distribution poles in New York will serve the public interest. Such a pronouncement from the Commission will assist the wireless industry in its stated goals of improving wireless coverage, deploying new and advanced wireless services, including Enhanced 911 service. To ensure a level playing field needed for intermodal competition to flourish in the state of New York, the Wireless Carriers urge the Commission to extend its pro-competitive attachment policies and rules to wireless attachments and to adopt a rebuttable presumption that wireless antenna attachments that meet NESC and other reasonable, non-discriminatory requirements will be allowed on utility distribution poles in New York. As detailed in these comments, wireless attachments are already subject to FCC, OSHA, EPA, NESC and Building Code regulations. Therefore, it is appropriate for the Commission to adopt this presumption, which would be rebuttable on a case-by-case basis, with the pole owner bearing the burden of providing that a particular attachment should be denied. Such action by the Commission will result in significant steps in bringing ubiquitous wireless coverage throughout New York.

Respectfully submitted:



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