

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**COMMENTS OF CTIA**  
**REGARDING PROPOSED AMENDMENTS TO COMMISSION RULES**

CTIA<sup>1</sup> respectfully submits the following comments regarding the Commission’s February 19, 2020 letter seeking comment on its proposed amendments to the Commission’s rules at 807 K.A.R. *et seq.* CTIA appreciates the Commission’s efforts to update and modernize its rules, especially with regard to pole attachments, in light of current technological and policy advances, and herein addresses the Commission’s proposed new regulation at 807 K.A.R. 50XX (the “Proposed Rule”).

As the wireless industry is presently engaged in deploying advanced 4G and 5G networks to benefit Kentuckians, it is important for the Commission to streamline and facilitate infrastructure deployment. Timely and reliable pole access, for wireless and wireline attachers alike, is essential. For example, the 5G networks presently being deployed by carriers require thousands of small cells, making pole locations crucial for efficient deployment, increasing wireless capacity to meet the growing needs of consumer data consumption, and driving significant investment and job creation in Kentucky. Wireless carriers’ overall site deployments increased by 46,218 in 2019 – more than in the previous three years combined<sup>2</sup> – and Accenture

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<sup>1</sup> CTIA – The Wireless Association (“CTIA”) ([www.ctia.org](http://www.ctia.org)) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21<sup>st</sup> century connected life. The association’s members include wireless carriers, device manufacturers, and suppliers as well as app and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry’s voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

<sup>2</sup> See CTIA, “2020 Annual Survey Highlights” (August 25, 2020), available at <https://www.ctia.org/news/report-2020-annual-survey-highlights> (“CTIA Annual Survey for 2020”) (last accessed September 15, 2020).

projects that small cell deployments will escalate rapidly from a nationwide cumulative deployment of roughly 52,000 in 2017 to over 800,000 nationwide by 2026.<sup>3</sup> Accenture also projects that this investment will lead to \$500 billion in national GDP growth, three million jobs created, and over \$275 billion invested in 5G wireless infrastructure nationwide,<sup>4</sup> but only if wireless infrastructure can be deployed efficiently. Wireless providers' capital expenditures in 2019 totaled \$29.1 billion, and total over \$261 billion since 2010.<sup>5</sup>

The wireless industry is a driver of Kentucky's economy, and deployment of 5G networks will only enhance the wireless industry's contributions to Kentucky's economy. There are already over 53,000 wireless-related jobs in Kentucky, and the wireless industry is responsible for a \$4.7 billion contribution to Kentucky's GDP.<sup>6</sup> Going forward, Accenture estimates that in Louisville, 5G deployment will lead to an estimated 5,788 new jobs and \$944 million in new GDP; in Lexington, 5G deployment will lead to an estimated 3,022 new jobs and \$493 million in new GDP; and in Bowling Green, 5G deployment will lead to an estimated 638 new jobs and \$104 million in new GDP.<sup>7</sup>

Recognizing the importance of sound pole attachment policy to promote broadband deployment, the Federal Communications Commission ("FCC") has taken multiple steps to

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<sup>3</sup> See *accenturestrategy*, "Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities" (February 2017) at 11, available at <https://api.ctia.org/wp-content/uploads/2017/02/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf> (last accessed September 15, 2020).

<sup>4</sup> See *accenturestrategy*, "Impact of Federal Regulatory Review on Small Cell Deployment" (March 12, 2018) at 3, available at [https://api.ctia.org/docs/default-source/default-document-library/small-cell-deployment-regulatory-review-costs\\_3-12-2018.pdf](https://api.ctia.org/docs/default-source/default-document-library/small-cell-deployment-regulatory-review-costs_3-12-2018.pdf) (last accessed September 15, 2020).

<sup>5</sup> See CTIA Annual Survey for 2020.

<sup>6</sup> See CTIA, "Our Economic Impact," available at <https://www.ctia.org/the-wireless-industry/map/4g> (last accessed September 15, 2020).

<sup>7</sup> See CTIA, "The 5G Economy," available at <https://www.ctia.org/the-wireless-industry/the-5g-economy> (last accessed September 15, 2020).

streamline its rules in recent years, including accelerated timelines and “shot clocks” for make-ready,<sup>8</sup> and implementing one-touch make-ready and self-help provisions for attachers.<sup>9</sup>

To that end, CTIA has suggestions to improve the Commission’s Proposed Rule. In particular, the Commission should amend the Proposed Rule to include rate provisions and a timely dispute resolution process, both to comply with the Commission’s certification of reverse preemption to the FCC, and as sound pole attachment policy. Further, the Commission should amend the Proposed Rule to reflect Commission policy by explicitly affirming the right of attachers to attach to pole tops on a non-discriminatory basis, and to apply to all pole owners under the Commission’s jurisdiction. These changes will bring the Proposed Rule in line with FCC requirements, and better improve the efficiency of broadband deployment in Kentucky to the benefit of the state and its citizens.

**I. THE COMMISSION’S PROPOSED RULE SHOULD MIRROR THE FCC’S EXISTING POLE ATTACHMENT REGIME AS CLOSELY AS POSSIBLE**

As an overarching goal, the Commission’s Proposed Rule should mirror the FCC’s current pole attachment regime, which is presently in effect in at least 28 states,<sup>10</sup> as closely as possible. The FCC’s pole attachment regime, codified at 47 C.F.R. §1.1401 *et seq.*, has proven fair and effective in balancing the needs of pole owners and pole attachers while promoting

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<sup>8</sup> See, e.g., *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009).

<sup>9</sup> See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018).

<sup>10</sup> See Public Notice, *States That Have Certified that they Regulate Pole Attachments*, WC Docket No. 10-101 (March 19, 2020). The states not listed on the Notice are subject to federal jurisdiction, but as will be discussed further below, even a number of states that have reverse-preempted the FCC’s pole attachment authority have nonetheless adopted rules substantially similar to the FCC’s.

efficient broadband deployment. Having a consistent framework for pole attachments from state to state facilitates broadband deployment by promoting efficient use of resources.

Simply because the Commission has reverse-preempted the FCC's authority does not necessarily mean the Commission must "reinvent the wheel" and develop new pole attachment rules from scratch. Basing the Commission's pole attachment rules on the FCC's present and future regime would help to ensure that Kentucky benefits from the FCC's work to streamline deployment without tying up valuable Commission resources with repeated proceedings to address the same issues. Meanwhile, the Commission would still benefit from the advantages of reverse preemption - in particular, from the ability to settle disputes at the Commission and apply the rules more broadly to all pole owners under its jurisdiction (as will be discussed further below). Many states that have reverse-preempted the FCC's pole attachment authority have taken this approach. In fact, since the start of 2019, West Virginia adopted rules nearly identical to the FCC's in substance,<sup>11</sup> and Pennsylvania simply incorporated the FCC's rules by reference, including all precedent and future updates.<sup>12</sup>

Accordingly, as the Commission proceeds, it should ensure that the Proposed Rule mirrors the FCC's fair and tested pole attachment regime as much as possible.

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<sup>11</sup> See Public Service Commission of West Virginia, *Commission Order*, General Order No. 261 (Dec. 5, 2019), as codified at 150 C.S.R. 38 *et seq.*

<sup>12</sup> See Pennsylvania Public Utility Commission, *Final Rulemaking Order*, L-2018-3002672 (Sep. 3, 2019), as codified at 52 Pa. Code §77.1 *et seq.*

## **II. THE PROPOSED RULE MUST ADDRESS RATES AND DISPUTE RESOLUTION TO BE VALID AND EFFECTIVE UNDER FEDERAL LAW**

As presently written, the Proposed Rule does not address pole rates or dispute resolution procedures. These omissions create a number of issues for attachers and the Commission, and must be corrected.

Most crucially, the statute enabling the Commission to reverse-preempt the FCC's jurisdiction over pole attachments, 47 U.S.C. §224(c), indicates "a State shall not be considered to regulate the rates, terms, and conditions for pole attachments" "unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments." (emphasis added). The most reasonable interpretation of Section 224(c) is that a state does not wrest jurisdiction from the FCC until and unless it promulgates rules establishing rates or formulae to determine rates, criteria to evaluate reasonable terms and conditions of access, and processes for complaint resolution. FCC regulations also presume that a state is not regulating pole attachments if it has not "issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state)."<sup>13</sup>

Although the Commission has previously certified to the FCC that it regulates rates, terms, and conditions of pole attachment,<sup>14</sup> the Proposed Rule contains no provisions regarding rates and only a general referral to 807 KAR 5:001, Section 17, which is the Commission's "Notice of General Rate Adjustment" provision, subsection on disputes, and which does not specifically address terms and conditions of pole attachments in any way. The Commission relies

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<sup>13</sup> 47 C.F.R. § 1.1405(b)(3).

<sup>14</sup> See Commission Letter to FCC (January 29, 1988), as submitted to WC Docket 10-101 on Apr. 26, 2010.

on a series of orders from 1982 to govern rates of pole attachments. This arrangement is imprudent in light of changing circumstances,<sup>15</sup> and does not seem to meet the federal “specific methodology” standard for effective rules and regulations implementing the state’s regulatory authority over pole attachments. And when a state’s reverse preemption is ineffective, the FCC remains the default regulatory agency in such instances.<sup>16</sup> Accordingly, without proper address of rates, terms, or conditions, the Proposed Rule would be ineffective and merely create confusion over whether the Commission or the FCC properly has jurisdiction.

For its rules to be effective, the Commission therefore needs to amend them to address pole rates. The Commission should adopt the FCC rate formulae for pole attachments, which have been extensively reviewed and consistently held by courts and regulatory bodies to be compensatory and reasonable for pole owners.<sup>17</sup>

The Commission should also establish a specific, accelerated resolution process for pole attachment disputes. One benefit of reverse-preemption is the ability for state commissions to

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<sup>15</sup> To contrast, FCC has updated its rate formulae multiple times in the intervening thirty-eight years. *See, e.g., Implementation of Section 224 of the Act et al.*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011); *Implementation of Section 224 of the Act et al.*, Order on Reconsideration, 30 FCC Rcd 13731 (2015).

<sup>16</sup> *See* FCC Enforcement Bureau, *In re: Crown Castle Fiber LLC v. Commw. Edison Co.*, 34 FCC Rcd 5959 (2019), and related letter from the Illinois Commerce Commission to the FCC (Dec 12, 2018), available at [https://ecfsapi.fcc.gov/file/121259500518/FCC%20Letter-pole%20attachments%20\(10-18\)%20for%20filing.pdf](https://ecfsapi.fcc.gov/file/121259500518/FCC%20Letter-pole%20attachments%20(10-18)%20for%20filing.pdf) (last accessed September 15, 2020).

<sup>17</sup> *See, e.g., FCC v. Florida Power Corp.*, 480 U.S. 245, 253–54 (1987) (finding that it could not “seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory”); *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002), *cert. denied*, 540 U.S. 937 (2003) (“[A]ny implementation of the [FCC’s cable pole attachment rate] (which provides for much more than marginal cost) necessarily provides just compensation.”); *Cablevision of Boston Co., et al. v. Boston Edison*, Docket No. D.T.E. 97-82, 1998 WL 35235111, 18-19 (Mass. D.T.E. Apr. 15, 1998) (finding that FCC formula “meets Massachusetts statutory standards as it adequately assures that [the utility] recovers any additional costs caused by the attachment of [] cables . . . while assuring that the [attachers] are required to pay no more than the fully allocated costs for the pole space occupied by them.”); *California Competition Decision*, 1998 Cal. PUC LEXIS 879 at 87-89 (“We conclude that the adoption of attachment rates based on the formula provides reasonable compensation to the utility owner . . . [T]he formula does not result in a subsidy since the formula is based upon the costs of the utility. A subsidy would require that the rate be set below cost. The fact that the rate is below the maximum amount that the utility could extract for its pole attachment through market power absent Commission intervention does not constitute a subsidy.”)

expedite dispute resolution by establishing processes to handle disputes rapidly, in-state, and at Commissions that already engaged with the pole owners and attachers and are closer to the facts on the ground. Across states without accelerated dispute processes, CTIA's members note delays from owners in every stage of the attachment process: drawn-out contract negotiations and permit application processes, engineering reviews longer than local zoning processes, and excessive engineering and design requirements.<sup>18</sup>

It is therefore critical for the Commission's rules to include a specific, accelerated timeline to govern its adjudication of pole attachment complaints. This should include timelines for the Commission to issue decisions, and timelines governing action by staff members in instances where staff action is required. The Commission should look to Maine for an example of a specific dispute resolution process that has proven effective and efficient; Maine's rules require a final order from the Commission resolving a dispute within seven business days of a complaint being filed.<sup>19</sup>

Even if a seven-day response time is not feasible, the Proposed Rule's requirement for final action on complaints "within 360 days [of] the complaint being filed" is far too long.<sup>20</sup> Allowing nearly a year before action is required would result in significant delays to deployment. The Proposed Rule should mandate a shorter timeframe for dispute resolution, especially when

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<sup>18</sup> See, e.g., New York Public Service Commission, *In re Proceeding to Update and Clarify Wireless Pole Attachment Protections*, Comments of CTIA, Docket No. 16-M-0330 (Aug. 1, 2016) at 10-11 (describing variety of delay tactics employed by NY pole owners); Connecticut Public Utilities Regulatory Authority, *Application of MCImetro Access Transmission Services Corp. for Approval to Install Facilities Within Certain Public Rights-of-Way*, Letter to J. Gaudiosi, Docket No. 18-03-37 (Apr. 23, 2019) (noting growing number of pole attachment applications in Connecticut with delays approaching one year).

<sup>19</sup> See 65-407-880 Me. Code §11 and Attachment A.

<sup>20</sup> Proposed Rule at Sec. 7.2.

access is being denied or delayed because of a dispute concerning responsibility for correcting pre-existing safety violations.<sup>21</sup>

### **III. THE COMMISSION SHOULD EXPLICITLY AFFIRM THE RIGHT OF ATTACHERS TO ATTACH TO POLE TOPS AT THE SAME RATE APPLICABLE TO ANY OTHER PART OF A POLE**

Pole top access is crucial to wireless carriers as they deploy 5G networks and upgrade existing 4G networks. In many cases, empty utility pole tops are ideal locations for wireless antennas and can be deployed there efficiently and safely. The FCC has clarified that “a wireless carrier’s right to attach to pole tops is the same as it is to attach to any other part of a pole.”<sup>22</sup> In many states, including Kentucky, wireless carriers have been safely attaching to pole tops for quite some time. Indeed, CTIA is aware that some electric utilities already have tariffs in place with the Commission that explicitly include pole top attachment provisions, and Commission Staff has issued multiple opinions supporting CTIA’s position that they should be allowed and not discriminated against.<sup>23</sup>

Despite these facts, CTIA’s members have found that pole owners frequently look to exclude or discriminate against pole top attachments by making unfounded or overbroad claims about their engineering or safety.<sup>24</sup> The Commission should therefore codify its existing policy

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<sup>21</sup> Whatever the ultimate dispute resolution timeframe put in place, relatively short interim deadlines for items like briefing are essential. The FCC, for example, provides 30 days for a respondent to file its response to an initial complaint, and 20 days for the complainant to file a reply. *See* 47 C.F.R. § 1.1407(a).

<sup>22</sup> *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 ¶ 77 (2011).

<sup>23</sup> *See, e.g., Opinion re: Wireless Telecommunications Carriers’ Attachment of Facilities to Electric Utility Poles*, PSC Staff Opinion 2016-012 (June 20, 2016) at 3 (“Commission Staff also notes that the Commission’s standard rate methodology as developed in 1982 designated the top of an electric utility’s poles as ‘usable space’... assuming space is available at the top of the pole and an attachment agreement is negotiated, Commission Staff is not aware of any reason why the cost of such attachment should not be at the same per-foot rate as attachments further down the pole”); *Opinion re: An Electric Utility’s Rental of Pole Space to Wireless Telecommunications Carriers*, PSC Staff Opinion 2014-014 (Oct. 23, 2014) at 3 (“...by being determined as ‘usable space,’ pole attachments made to the top of the pole are subject to the same Commission’s regulation regarding pole attachments below the utility’s lines.”)

<sup>24</sup> *See, e.g., fn 18, supra.*



by explicitly indicating in its Proposed Rule that wireless attachments may be installed in other sections of a pole beyond the communications space, including pole tops and unusable space, and as it addresses rates, confirm that the rate applicable to pole top attachments is the same as for any other part of the pole.

#### **IV. THE COMMISSION SHOULD APPLY ITS POLE RULES TO ALL POLE OWNERS UNDER ITS JURISDICTION**

Another significant opportunity reverse-preemption affords the Commission is that it can apply its pole attachment rules and protections more broadly than the FCC has jurisdiction to.

Section 224 of the Communications Act excludes electric cooperatives from the FCC's jurisdiction over pole attachments,<sup>25</sup> leaving those pole owners free to impose rates well above the standard in FCC jurisdictions (or reverse preemption jurisdictions where state commissions also lack jurisdiction over electric cooperatives).

To promote equitable treatment for attachers and ensure that the Commission's rules have the broadest possible impact to promote deployment, CTIA urges the Commission to apply its rules to all pole owners under its jurisdiction, including any electric cooperatives that the Commission has regulatory authority over.<sup>26</sup>

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<sup>25</sup> See 47 U.S.C. 224(a)(1).

<sup>26</sup> CTIA acknowledges the Commission's lack of jurisdiction to regulate the pole attachment rates, terms, and conditions of the five Kentucky electrical cooperatives that purchase electricity from the Tennessee Valley Authority. See Order, Case No. 2012-00544 (June 28, 2013), *petition for rehearing denied by summary judgment* (Order, Oct. 30, 2015).

## V. CONCLUSION

The Commission's work to modernize its pole attachment rules should reflect the overall goal of removing barriers to infrastructure deployment for the benefit of Kentuckians. CTIA looks forward to working with the Commission on its pole attachment rules to help ensure a fair and efficient attachment process for all parties.

Respectfully submitted,

By: \_\_\_\_\_/s/\_\_\_\_\_  
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