STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on May 21, 2008

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
Robert E. Curry, Jr.
Cheryl A. Buley

CASE 06-E-1427 – Proceeding on Motion of the Commission To Determine Pole Attachment Rates for Municipal-Owned Poles.

ORDER DENYING PETITION FOR REHEARING

(Issued and Effective May 28, 2008)

BY THE COMMISSION:

INTRODUCTION

On June 8, 2007, the Cable Telecommunications Association of New York, Inc. (CTANY) submitted a petition for rehearing (CTANY petition) of our Order on Municipal Pole Attachment Rates.[1] CTANY contends that we incorrectly rejected the Federal Communication Commission's (FCC) formula rate for pole attachments and violated the Public Service Law (PSL) by adopting a rebuttable presumption for pole attachment rates of municipal-owned electric companies. Moreover, CTANY argues that we failed to justify the adoption of a proxy rate for municipal-owned pole attachments. The New York Municipal Power Agency (NYMPA) responds[2] to CTANY's petition and

[1] Case 06-E-1427, Pole Attachment Rates for Municipal-Owned Poles, Order on Municipal Pole Attachment Rates (issued May 9, 2007) (Pole Attachment Order).

[2] Case 06-E-1427, supra, Response of the New York Municipal Power Agency to the CTANY Petition for Rehearing (filed June 26, 2007) (NYMPA Response).

urges that we reject the petition. In addition, NYMPA seeks reestablishment of a proxy pole attachment rate for municipal-owned poles at the low end of the range, rather than the lowest rate in effect for investor-owned electric utility. NYMPA also requests authorization to impose a surcharge to recover municipal administrative and litigation costs.[3]

We find that CTANY neither identifies an error of law or fact in the Pole Attachment Order nor presents new circumstances that warrant departure from the Order and, thus, its petition is denied. Furthermore, NYMPA's request for changes in our Pole Attachment Order, even if it were to be treated as a request for rehearing or reconsideration, fails to justify the use of a different proxy rate for municipal-owned poles. The surcharge NYMPA proposes may be justified in the context of a litigated pole attachment rate proceeding, as we observed in the Pole Attachment Order.

BACKGROUND

Municipal Pole Attachment Rates

As a consequence of reviewing the pole attachment rates of Bath Electric, Gas & Water Systems (Bath), we determined that it was "an appropriate time to reconsider our overall approach to setting municipal pole attachment rates."[4] In the Bath Rehearing Order, we recognized the complexity associated with setting pole attachment rates for municipal systems and the insignificant amount of revenue generated

[3] NYMPA's response to the CTANY petition is not a proper request for rehearing of the Pole Attachment Order because it fails to meet the timeliness criteria of PSL §22 and the substantive requirements of 16 NYCRR §3.7. Consequently we will treat NYMPA's request for a different proxy rate and authorization to implement a surcharge as argument in support of our decision.

[4] Case 04-E-1471, Bath Electric, Gas & Water Systems – Pole Attachment Rates, Order Granting, In Part, Petition for Rehearing, (issued November 17, 2006) (Bath Rehearing Order), p. 6.

for municipalities due "to their smaller size and small footprint" as compared to the revenue earned by investor-owned electric utilities.[5] Furthermore, the complexity associated with applying the FCC formula to municipalities was highlighted by the attempt to apply that formula to Bath. Specifically, we noted that "the FCC formula requires a variety of cost allocations that it appears are not cost-effective to apply in setting municipal pole attachment rates."[6]

In the Bath Rehearing Order we determined that "our responsibility under the law is better served by proposing that municipals be allowed to charge pole attachment rates at the lower end of the range currently in effect for investor-owned electric utilities."[7] We issued a Notice Requesting Comments[8] on whether the use of a proxy rate for pole attachments on municipal-owned poles, using the lower range currently in effect for investor-owned electric utilities, was a reasonable approach.

After review of the comments received on the notice published in the State Register pursuant to the State Administrative Procedure Act, we issued the Pole Attachment Order. The Order determined that application of a proxy rate for municipal pole attachments is the most cost-effective way to establish just and reasonable pole attachment rates for municipal-owned electric companies. The Pole Attachment Order rejected CTANY's call for a collaborative on the issue, finding that "such an approach will not provide the needed standard method for setting municipal pole attachment rates that can be easily applied by the municipalities and Staff, without unnecessary controversies and expenditures of more money in filing and administrative costs by all

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[5] Id.

[6] Id.

[7] Bath Rehearing Order, p. 7.

[8] Case 06-E-1427, supra, Notice Requesting Comments (issued November 21, 2006) (Notice).

parties."[9] Moreover, we elected to apply the lowest investor-owned electric utility rate, rather than the second lowest rate charged by an investor-owned electric utility.[10]

The Pole Attachment Order, in addition to authorizing the proxy rate, permitted a negotiated rate or use of existing rates, if no objection from attachers was received.[11] In addition, we provided municipalities with the opportunity to file cost analysis in support of a higher rate.[12] Lastly, we stated that an "attacher may challenge the proxy rate by rebutting the presumption" that the proxy rate is just and reasonable.[13]

CTANY Rehearing Petition

In its petition, CTANY claims that a rebuttable presumption for the proxy rate is an error of law in that, pursuant to Public Service Law (PSL) §119-a, we cannot shift the burden of proof to the party challenging the rate.[14] CTANY contends that the "utility and not the challenging party bears the burden of proof to demonstrate compliance with the just and reasonable doctrine" of PSL §119-a.[15]

CTANY also contends that the use of a proxy rate fails to fulfill our obligation to set forth a just and reasonable rate. CTANY goes on to state that "the rate is meant to assure that the utility will recover not less than the additional cost to provide attachments (incremental costs), nor more than its fully allocated costs."[16] Noting that

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[9] Pole Attachment Order, p. 4.

[10] Id.

[11] Id., p. 5.

[12] Id.

[13] Pole Attachment Order, p. 6.

[14] CTANY petition at Point II.A (the document is not paginated; therefore, we will cite to the point headings of the document).

[15] Id.

[16] Id.

the FCC formula is driven by an analysis of the costs of owning and maintaining poles on a net investment basis, which is derived from adjustment of gross investment data, CTANY argues that the proxy rate is contrary to the FCC formula because it does not rely on an analysis of the gross investment made by the municipal-owned electric utility.[17]

Relying on federal statutes and past federal court decisions, CTANY proclaims that utility poles are an "essential facility" and that competitive alternatives are not available. Thus, it concludes that pole attachment rates are subject to rate regulation, which requires that the rate be just and reasonable in order to promote facilities-based competition. According to CTANY, we relied upon that policy in adopting the FCC pole rental formula; and the same formula should apply to both investor-owned electric utilities as well as municipal-owned electric companies. CTANY asserts that the policies of promoting facilities-based competition and encouraging economic development require that the municipality "demonstrate its accounting methodology and practices so that any party challenging the rate can ensure that the utility is receiving a just and reasonable rate."[18]

CTANY contends that shifting from the FCC formula to a proxy rate "[m]ay lead to super-compensatory recovery by municipal electric utilities."[19] CTANY advocates for a collaborative proceeding to establish a formula-based approach for municipal pole attachment rates that relies on the FCC formula. Noting our application of the FCC formula to Bath, CTANY argues that the application of the formula was possible "because municipal electric utilities are required to maintain accounts according to a uniform system of accounts pursuant to Article 4 of the Public Service Law."[20]

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[17] CTANY petition, Point II.A.

[18] Id.

[19] CTANY petition, Point II.B.

[20] Id.

CTANY acknowledges that municipal-owned electric companies derive less revenue from pole attachment rates than investor-owned electric utilities. It nevertheless asserts that a less significant level of revenues is irrelevant to the question of whether the pole attachment rate of the municipal electric company reimburses the company for the cost of the pole.[21] CTANY, furthermore, disagrees with the assumption that insignificant revenues dictate that the application of the FCC formula is not cost-effective.[22] CTANY contends that the imposition of the proxy rate and the rebuttable presumption will result in expenses for the challenging party each time a new pole attachment tariff rate is filed.[23] Rather than upholding the proxy rate, CTANY requests that we establish a collaborative proceeding for all parties to develop a pole attachment rate based upon application of the data to the FCC formula, consistent with the manner in which the formula was applied to Bath.[24]

NYMPA Response

NYMPA supports the Pole Attachment Order and application of the proxy rate because "[n]either the state nor federal pole attachment laws apply, and the FCC formula has proven particularly inapt to the task" of setting municipal pole attachment rates.[25] Given that the FCC formula is too unreliable and too expensive to use for setting municipal electric pole attachment rates, NYMPA advocates for preservation of the proxy rate.

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[21] Id.

[22] Id.

[23] CTANY petition, Point II.B.

[24] Id.

[25] NYMPA Response, p. 1.

NYMPA disagrees with CTANY, that application of the FCC formula to Bath supports its application to all municipal-owned electric companies.[26] Noting specifically the difficulties associated with application of the formula to Bath, NYMPA highlights the benefits provided by application of a proxy rate. In addition, NYMPA takes exception to the import CTANY gives the rebuttable presumption.[27] NYMPA finds unpersuasive CTANY's arguments on the rebuttable presumption because labeling the proxy rate a "rebuttable presumption does not render the perfectly reasonable proxy approach somehow newly defective" but rather, according to NYMPA, it is the rate itself that matters and the Commission determination that the proxy rate is just and reasonable.[28] By labeling the proxy rate as a rebuttable presumption the Commission, according to NYMPA, simply acknowledges the opportunity for other approaches in calculating the municipal pole attachment rate.[29]

NYMPA questions the election of the lowest investor-owned electric utility pole attachment rate as the basis for the proxy rate. It asserts that a rate based upon the lowest rate, rather than a rate at the low end of the range of investor-owned electric utility pole attachment rates is "too low, and an unjustifiable gift to the cable interests."[30] Noting the $12.18 rate Bath filed in Case 04-E-1471, NYMPA argues that pole-related capital costs and operation and maintenance expenses for municipalities are significant and warrant setting the proxy rate above the lowest investor-owned electric utility rate.[31] Furthermore, NYMPA contends that other similarly situated municipal-owned electric

[26] Id., p. 3.

[27] Id., p. 4.

[28] Id.

[29] Id.

[30] NYMPA Response, p. 5.

[31] Id.

companies have much higher pole attachment rates than the proxy rate.[32] NYMPA supports establishing the proxy rate at the low end of the range of investor-owned utility pole attachment rates.

NYMPA argues that establishing the proxy rate at the lowest investor-owned utility pole attachment rate and failing to include recovery of municipal administrative and litigation costs relating to the rate will cause unreasonable increases in municipal costs. To avoid this result, NYMPA recommends use of the original noticed rate[33] as the proxy rate and authorization for recovery of "municipal administrative and litigation costs relating to pole attachments" through a direct surcharge imposed on the attaching cable company.[34] Such a surcharge, according to NYMPA, will serve to restrain CTANY, a well funded organization, from exhausting the resources of and driving up costs for "small public power systems."[35]

DISCUSSION AND CONCLUSION

CTANY neither identifies an error of law or fact in the Pole Attachment Order nor does it provide new circumstances that would warrant departure from the Order. CTANY's contention that a rebuttable presumption violates PSL §119-a ignores, as we have previously stated, that PSL §119-a is not applicable to municipal-owned poles. In the Bath Rehearing Order, we stated that "PSL §119-a does not specifically define 'utility' as including municipalities."[36] We reasoned that the Public Service Law

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[32] Id., pp. 5-6.

[33] Although NYMPA references a rate of $12.98 we believe that the rate referred to in its response is the $10.98 one contained in the November 21, 2006 Notice.

[34] NYMPA Response, p. 6.

[35] Id.

[36] Bath Rehearing Order, pp. 3-4.

generally does not include "municipalities" when it refers to "utilities."[37] Consequently, we determined that regulation of municipal pole attachments is within our jurisdiction under PSL §§65, 66(5) and 66(12), not PSL §119-a. In addition, CTANY's claim that PSL §119-a applies to municipal-owned poles is not timely made. As stated above, we determined in the Bath Rehearing Order, that PSL §119-a is not applicable to municipal-owned poles. CTANY failed to timely challenge that determination in the Bath proceeding.

We find equally unpersuasive CTANY's argument that a just and reasonable municipal pole attachment rate must be based upon the FCC formula and an analysis of the specific gross investment in poles made by a municipality. As an initial matter, even if PSL §119-a did pertain, we would still have a choice as to whether to directly use the FCC formula rate. We apply that rate in our discretion; because federal law does not govern pole attachment rates in New York.[38] Moreover, where, as here, PSL §119-a is not applicable, the Public Service Law would still give us authority to set pole attachment rates.[39] That authority to set rates pursuant to PSL §65 and the corresponding case law is broader than the authority under PSL §119-a. The Commission may take into account many factors when setting just and reasonable rates under its general ratemaking authority.[40] Indeed, under the "just and reasonable" standard of PSL §65, we could theoretically set a rate which may be less advantageous to

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[37] Id. We also observed that the federal statute, 47 U.S.C. § 224, specifically defines "utility" as not including any state subdivisions, which would include a municipality. PSL §119-a should be read consistently with the federal statute.

[38] See 47 U.S.C. §224(C)(1), which reserves for the states that regulate pole attachments the jurisdiction over the rates, terms and conditions for pole attachments.

[39] Matter of General Telephone Company of Upstate New York v. Public Serv. Comm'n of the State of New York, 63 A.D.2d 93 (3rd Dept. 1978).

[40] See General Motors Corp. v. PSC, 95 A.D.2d 876 (3rd Dept 1983); appeal denied, 60 N.Y.2d 557.

CTANY than use of the proxy rate.[41] Consequently, concerns regarding the complexity associated with the application of the FCC formula to municipal-owned electric companies and the relatively high costs associated with application of the formula, given the relatively insignificant revenue provided to the municipality from its pole attachment rates, were appropriate factors to consider when electing application of a proxy rate. While CTANY raises concerns about "monopoly" pricing and the status of poles as "essential facilities," the proxy rate we set is still a regulated rate, and "just and reasonable."

Moreover, because we determined that the FCC formula rate is not readily applicable to municipal-owned electric companies, we reasonably required CTANY to rebut application of the presumption that the proxy rate is reasonable.[42] In Allied Chemical, the Court determined that the principal of *res judicata* (i.e., issue preclusion) could apply to agency adjudicative decisions.[43] Thus, according to the holding in Allied Chemical, our finding regarding the applicability of the FCC formula to municipal pole attachment rates precludes CTANY from challenging a municipal pole attachment rate based on the FCC formula, unless CTANY can meet its burden of proving the applicability of the formula to the municipal-owned electric company.

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[41] That possibility arises because a municipality could attempt to base its attachment rate on the gross depreciated cost of a pole, as opposed to the net investment required by PSL §119-a. Thus, contrary to CTANY's argument, we have not deemed gross municipal investment irrelevant, but allowed a municipality the opportunity to defeat the proxy rate by showing that, for instance, its gross pole investment or its identified pole-related expenses would support a higher rate. Use of a proxy rate based on net investment and tested utility pole maintenance expenses seems to more reasonably balance municipal and attacher interests.

[42] See Allied Chemical v. Niagara Mohawk Power Corporation, et al., 72 N.Y.2d 271 (1988) (dismissing the complaint on the basis of *res judicata* because the matter was properly litigated and decided by the Commission, and, thus Allied Chemical could not relitigate the issue before the Court).

[43] Id., pp. 276-277.

We have found in this proceeding that the FCC formula cannot reasonably be applied to municipalities. While CTANY again takes issue with that finding, it has provided no evidence to the contrary either in the initial round of comments or in its petition for rehearing. CTANY repeats its argument that the Commission should conduct a collaborative on how to apply the FCC formula rate to municipalities. It has, however, had ample opportunity to respond to our request for comments and make a showing that the direct application of the FCC formula can provide a workable alternative to the proxy rate. CTANY can reasonably be required to meet the burden of rebutting use of the proxy rate, if it continues to seek use of the FCC formula.[44] Contrary to CTANY's claims, we have been consistent and have not unreasonably departed from our prior decisions adopting the FCC formula. Rather, given the difficulties of applying the FCC formula to municipalities, we have reasonably continued use of that formula by adopting the lowest utility rate, based on that formula, as a proxy for municipalities.

NYMPA's proposal to use the lower end of the utility range, rather than the lowest utility rate, as the proxy rate is procedurally improper since it comes on a response to rehearing. The proposal is, however, also substantively flawed. Use of the lowest utility rate as the proxy allows us to determine that the proxy pole attachment rate is just and reasonable and that a municipality seeking that rate is deemed to have met any

[44] CTANY is free to challenge the proxy pole attachment rate filed by a municipal-owned electric company on grounds other than the FCC formula rate, in the event an analysis based on gross municipal investment in poles would yield a lower rate. The burden of proof under a challenge seeking a lower rate lies with the municipality filing the proxy rate, as required by PSL §65. As such, CTANY can challenge the possible "super-compensatory recovery" that it alleges might result from the proxy rate. We are, however, skeptical that a utility rate based on net pole investment can yield an excessive return on municipal gross investment in poles.

statutory burden by proposing such a rate.[45] The entity challenging the lowest available proxy rate would then appropriately have the responsibility of demonstrating why that proxy rate filed by the municipal-owned electric company is not a just and reasonable rate. Use of the lowest utility rate is also particularly appropriate because a municipality has the option of rebutting the presumption and seeking a higher rate. Of course, if a municipal-owned electric company wishes to file a pole attachment rate that is greater than the proxy rate based on an analysis of its gross pole investment or its specific pole-related expenses, it shall have the burden pursuant to PSL §65 of demonstrating why the proxy rate is not a just and reasonable rate.

NYMPA's request for recovery of the expenses of a contested pole attachment proceeding from attaching entities seems to have merit. Indeed, we noted that recovery of those costs "exclusively from the select group of attaching entities, would be appropriate."[46] The question of the authority to recover these costs should, however, be decided in connection with a proceeding instituted to litigate an attaching entity's claim that a rate other than the proxy rate is just and reasonable. Accordingly, we deter this question for determination on a case-by-case basis in the context of such a litigated proceeding.

[45] Use of the lowest rate also provides guidance for negotiations between municipal-owned electric companies and attaching entities to determine an acceptable rate. Attaching entities and municipal pole owners may negotiate a rate other than the proxy, and the pole owners need only pursue the proxy by filing a tariff containing it if they are unable to resolve their differences with attachers.

[46] Pole Attachment Order, p. 6.

The Commission orders:

1. The Petition for Rehearing submitted by the Cable Telecommunications Association of New York, Inc. is denied.

2. This proceeding is closed.

By the Commission,

(SIGNED) JACLYN A. BRILLING
Secretary