

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on July 18, 2024

COMMISSIONERS PRESENT:

Rory M. Christian, Chair
James S. Alesi
David J. Valesky
John B. Maggiore
Uchenna S. Bright
Denise M. Sheehan
Radina R. Valova

CASE 22-M-0101 - Proceeding to Review Certain Pole Attachment
Rules.

ORDER ADOPTING MODIFICATIONS TO THE 2004 POLICY STATEMENT ON
POLE ATTACHMENTS AND RELATED PROCEEDINGS

(Issued and Effective July 22, 2024)

BY THE COMMISSION:

INTRODUCTION

In March 2022, an amendment to Public Service Law (PSL) §119-a went into effect requiring the Commission to consider modifying its existing rules relating to utility pole attachments.¹ Specifically, PSL §119-a(4) requires the Commission to initiate a proceeding to examine a process for streamlining utility pole attachments and directs the Commission to consider dispute resolution, cost sharing models, impacts on the expansion of broadband, alternative pole attachment methods, and the existing rules regarding cost obligations. In accordance with the legislative directive, the Commission

¹ PSL §119-a(4); L.2021, ch.723, L.2022, ch.68.

initiated this proceeding to consider what, if any, changes to its existing pole attachment rules are warranted.²

Through this Order, pursuant to amended PSL §119-a, the Commission approves certain modifications to its 2004 Policy Statement on Pole Attachments and related proceedings. In sum, the Commission adopts new timelines for expedited dispute resolution; the establishment of a collaborative working group; mandatory filing of annual reports; consideration of alternative attachments including pole-top attachments; the use of "One Touch Make Ready" (OTMR) under certain circumstances; and mandatory post-construction inspections, as discussed in more detail below.

BACKGROUND

Generally, poles throughout New York State are owned by electric utilities (e.g., Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) and New York State Electric & Gas Corporation (NYSEG)) and large telecommunication companies (e.g., Verizon New York Inc. (Verizon) and Frontier Telephone of Rochester); in some instances, poles are jointly owned by these entities. Attachers are typically telecommunication and cable companies who submit their applications to the pole owners requesting a license for the use of space on the poles and approval to attach their facilities. Every pole owner has individualized pole attachment agreements and application processes. Once the applications are submitted to the pole owners, they have a certain amount of time to process surveys

² See Case 22-M-0101, Proceeding to Review Certain Pole Attachment Rules, Notice Seeking Comments (issued March 1, 2022).

and conduct make-ready work³ to facilitate third-party attachments.

Over the years, the Commission has taken several actions to coordinate and oversee attachments to utility poles. In a June 1997 Order, the Commission established a rate methodology for "horizontal" attachments by wireline cable and telephone companies.⁴ The rate adopted by the Commission uses the Federal Communications Commission's (FCC) cable formula and is based on a 7.4 percent space factor applied to pole costs to produce a per-foot attachment rental rate.⁵ The cost of the pole is determined as the net cost of a bare pole multiplied by a fully allocated carrying charge.⁶

More recently, additional pole attachment rules were set forth in the 2004 Pole Order,⁷ and subsequently extended to include wireless attachments.⁸ The March 2019 Order also established an interim wireless pole attachment rate, consistent with the horizontal wireline rate, which was subsequently made

³ Make-ready work generally refers to the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on that pole.

⁴ Case 95-C-0341, In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095, Opinion and Order Setting Pole Attachment Rates (issued June 17, 1997).

⁵ The 7.4 percent space factor relies on the assumption that a 37.5-foot pole has 13.5 feet of "usable" space, and thus, yields a space factor of 1 ft./13.5 ft., or 7.4 percent.

⁶ Pole attachment rates are beyond the scope of this proceeding.

⁷ Case 03-M-0432, Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues, Order Adopting Policy Statement on Pole Attachments (issued August 6, 2004) (2004 Pole Order).

⁸ Case 16-M-0330, Petition of CTIA - The Wireless Association to Update and Clarify Wireless Pole Attachment Protections, Order Approving Petition in Part and Continuing Proceeding (issued March 14, 2019) (March 2019 Order).

permanent.⁹ Specifically, the 2004 Pole Order establishes a timeline for the processing of wireline pole attachment applications, including an allocation of costs for subsequent attachers, authority for attachers to use temporary attachments¹⁰ and overlashing¹¹ under certain conditions, and requirements related to audits, periodic inspections, post construction inspections,¹² standard pole attachment agreements, and dispute resolution.¹³ The timeline consists of the following segments:

- The pole owner shall complete pre-construction surveys within 45 days after a complete application is received by the pole owner.

⁹ Case 16-M-0330, supra, Order Establishing Updated Pole Attachment Rates with Modifications (issued November 18, 2019).

¹⁰ Boxing of poles and extension arms may be used if they meet all safety requirements and if a utility is unable to meet the make-ready work timeline. The attacher is required to pay for all make-ready work and must replace the temporary attachment with a standard attachment within 30 days of the completion of all make-ready work. Boxing of facilities, which involves attaching wires on opposite sides of the pole in order to meet required distances between attachments, is allowed in cases where the cost of a conventional attachment would be exorbitant; so long as the boxing complies with safety codes and the utility's practices allow boxing.

¹¹ Overlashing is the process of physically tying a wire/cable to a previously installed cable that is attached to utility poles.

¹² Currently, utilities are not required to perform post attachment inspections, but do so at the request and cost of a third-party attacher.

¹³ The process requires some review at the company level before a formal complaint can be filed with the Secretary. Specifically, a dispute shall be discussed at the intermediate level in a company for 10 days before going to the company Ombudsman. The dispute shall remain with the Ombudsman for 12 days before being taken to the Commission. Parties may request expedited dispute resolution in their complaint. See, 2004 Pole Order, Appendix A, p. 14.

- The pole owner shall provide the attacher with make-ready estimates of the costs of any required changes to the pole to accommodate the attacher within 14 days of completion of the survey.
- The attacher shall pay the make-ready charges to the pole owner within 14 days of receiving the estimate.
- The pole owner shall complete make-ready work within 45 days of the date it receives payment.

The 2004 Pole Order also determined that an attacher already attached to a utility pole shall not pay rearrangement or pole replacement costs required for subsequent attachers. In other words, if an attachment is legal when made, subsequent rearrangements or replacements should be paid for by the attacher that requires the rearrangement or pole replacement and not previous attachers provided the pole is functional at the time of attachment.¹⁴

In accordance with amended PSL §119-a, on March 1, 2022, the Secretary issued a Notice Seeking Comments. Comments

¹⁴ 2004 Pole Order, p. 4.

were received from various stakeholders.¹⁵ Following these comments, the Secretary issued a second Notice Seeking Further Comments on Cost Allocations on September 28, 2022, and additional comments were received.¹⁶ Thereafter, Department of Public Service Staff (Department Staff) filed a White Paper on Review of Certain Pole Attachment Rules (Staff White Paper), which analyzed the comments received and provided recommendations to modify the Commission's existing pole attachment rules to help facilitate the deployment of high-speed

¹⁵ Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., National Grid, Orange and Rockland Utilities, Inc., PSEG Long Island LLC, Rochester Gas and Electric Corporation, and NYSEG (Joint Utilities); Frontier Telephone of Rochester, Inc., Citizens Telecommunications Company of New York, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Communications of AuSable Valley, Inc., Frontier Communications of Seneca-Gorham, Inc., and Ogden Telephone Company (Frontier); Verizon; Altice USA, Inc. (Altice); the Communication Workers of America (CWA); CenturyLink Communications, LLC, Broadwing Communications, LLC, Global Crossing Local Services, Inc., Global Crossing Telecommunications, Inc., Level 3 Communications, LLC, Level 3 Telecom of New York, LP, TelCove Operations, LLC, and WilTel Communications, LLC (Lumen Companies); CTIA - The Wireless Association (CTIA); ExteNet Systems, LLC (Extenet); Finger Lakes Communication Group, Inc. dba Upstate Fiber Networks, NetSpeed Management Inc., Ontario Telephone Company, Inc., Trumansburg Telephone Company, Inc. (OTTC); Comcast of New York LLC (Comcast); SLIC Networks, Inc. (SLIC); Mid-Hudson Cablevision (Mid-Hudson); the NYS Telecommunications Association (NYSTA); Crown Castle Fiber LLC (Crown Castle); FirstLight Fiber (FirstLight); Empire Telephone Corporation (Empire); Charter Communications, Inc., on behalf of its affiliates Spectrum Northeast, LLC, and Spectrum New York Metro, LLC (Charter); and Greenlight Networks, Inc. (Greenlight).

¹⁶ INCOMPAS, USTelecom - The Broadband Association (USTelecom), Senator Dan Stec, Assemblymember Carrie Woerner, Frontier, ExteNet, Greenlight, OTTC, Altice, Verizon, Charter, SLIC, and the Joint Utilities.

broadband and wireless cellular services. In summary, the Staff White Paper recommends the following:

- Dispute resolution - More concrete time frames to facilitate resolution of disputes after existing requirements for inter-company discussion and company Ombudsman activities are exhausted. Any complaint should be served to the pole owner on the day it is filed with the Commission, the pole owner should be given 10 business days to respond to the complaint and the complainant should have five business days to reply to the response. The Commission should endeavor to resolve any such disputes within 90 days.
- Collaboration - Establish a working group of all interested stakeholders, including pole owners, attachers, Department Staff, and other interested persons or companies operating in New York State, to meet regularly (e.g., monthly) and facilitate the discussion and resolution of issues relating to pole attachments, including, but not limited to make-ready estimates, surveys, self-help remedies, and scheduling.
- Pole reconfiguration/replacement costs - No modification to the requirement that the attacher necessitating a pole replacement bear the cost of pole replacements not otherwise needed by the utility.
- Pole replacement reporting - Require pole owners to file annual reports detailing third-party attachments. The report would include, at minimum: the number of third-party pole attachment requests, and for each third-party attachment request completed in the reporting year: the number of poles sought for attachment, the number of new attachments licensed, and the total number of poles in need of replacement associated with those licenses. The total number of poles replaced should be further differentiated by the number funded by the

utility and the number funded by third-party attachers.

- Pole attachment methods - Adopt a new pole attachment process that includes, but does not require OTMR,¹⁷ in which the new attacher performs all make-ready work on "simple" attachments within the communications space provided it does not conflict with existing collective bargaining agreements.¹⁸

NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act §202(1), a Notice of Proposed Rulemaking (Notice) was published in the State Register on January 3, 2024 [SAPA No. 22-M-0101SP1]. The time for submission of comments expired on March 4, 2024. In addition, the Secretary issued a Notice Soliciting Comments on the Staff White Paper on December 20, 2023. Various comments and reply comments were received and

¹⁷ OTMR allows a single contractor or pool of contractors to do all the necessary simple make-ready work that can be done without cutting, splicing, or discontinuation of service. This potentially speeds up the make-ready process by eliminating the need to wait for each attacher's individual contractor to visit the pole. See, e.g., In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84 WT Docket No. 17-79, Third Report and Order and Declaratory Ruling (released August 3, 2018).

¹⁸ Notably, PSL §119-a was further amended to include subsection 5 which states: "[n]othing in this section shall be construed to authorize the public service commission to interfere in any manner with provisions of collective bargaining agreements relating to pole attachment work between a utility corporation, telephone corporation, cable television corporation or any entity subject to article eleven of this chapter and its employees."

form the basis of the record in this case and are discussed in more detail below.¹⁹

LEGAL AUTHORITY

Federal law permits states to regulate pole attachments in place of the FCC.²⁰ If a state opts to assert its jurisdiction to regulate pole attachments in lieu of the FCC, it is obligated to certify that in regulating the rates, terms and conditions of pole attachments the state considers the interests of the subscribers to the services offered through such attachments, as well as the interests of the consumers of the utility services.²¹

New York has exercised its regulatory authority over pole attachments, as permitted under federal law, through section 119-a of the PSL, which states in relevant part that “[t]he commission shall prescribe just and reasonable rates, terms and conditions for attachments to utility poles and the use of utility ducts, trenches and conduits.”²²

Moreover, pursuant to amended PSL §119-a(4), the Commission is required to initiate this proceeding to examine its current pole attachment rules and consider any necessary changes.

DISCUSSION

Closing the digital divide and ensuring that high-speed broadband and wireless service is available to all New

¹⁹ Crown Castle, OTTC, Verizon, CWA, the Joint Utilities, Charter, PSEG Long Island LLC (PSEG), TDS Telecommunications, LLC (TDS), and CTIA - The Wireless Association (CTIA).

²⁰ 47 U.S.C. §224(c).

²¹ 47 U.S.C. §224(c)(2)(B).

²² PSL §119-a(1).

Yorkers is a crucial goal for the State. The Commission shares that goal and has taken important steps to facilitate the deployment of broadband throughout New York.²³ As discussed above, over the years the Commission has adopted policies to make it easier for telecommunication and cable systems to co-locate on utility-owned poles. At the same time, however, the Commission has an obligation under the PSL to ensure safe, adequate, and reliable utility service at just and reasonable rates.²⁴ While amended PSL §119-a requires the Commission to consider changes to its utility pole attachment rules, we must also balance this initiative against the potential impacts on ratepayers.

Based upon a review of the Staff White Paper's recommendations and all the comments received, the Commission determines that the following modifications to our existing pole attachment rules are warranted.

Dispute Resolution

1. Timelines

The Staff White Paper recommends retaining the 2004 Pole Order's 10-day company-to-company and 12-day Ombudsman (22 total days) reviews before filing a formal dispute with the Commission. When a dispute is ultimately filed with the Commission, the Staff White Paper recommends that it be served

²³ See, e.g., Case 15-M-0388, Joint Petition of Charter Communications, Inc., Order Granting Joint Petition Subject to Conditions (issued January 8, 2016); Case 15-M-0647, Joint Petition of Altice N.V., Order Granting Joint Petition Subject to Conditions (issued June 15, 2016); Case 22-M-0698, Joint Petition of Archtop Fiber LLC, Order Granting Joint Petition Subject to Conditions (issued July 21, 2023); and Case 23-M-0042, Joint Petition of Archtop Fiber LLC, Order Granting Joint Petition Subject to Conditions (issued September 15, 2023).

²⁴ See, generally, PSL §§65 and 91.

on the respondent at the same time, the respondent be given 10 business days to respond, and the complainant be given five business days to reply to the response. Additionally, the Staff White Paper recommends that pole owners be required to provide accounting and plant record information where it is relevant to the calculation of pole rates. Finally, the Staff White Paper states that while the Commission should "endeavor" to resolve any such disputes within 90 days although it is not mandatory; and rejects the use of "self-help" as a form of recourse for disputes that are not resolved within that timeframe.²⁵

Comments

Charter submits that the Commission should establish concrete timeframes. Referring to the FCC's Rapid Broadband Assessment Team, Charter proposes a 90-day shot clock, accompanied by a screening process, to assess high-priority disputes for which a 90-day timeframe can be achieved. According to Charter, this type of structure will allow complex disputes to be narrowed or simplified by identifying "test cases" that can be resolved on an accelerated basis.²⁶

Crown Castle also urges for more concrete deadlines and recommends a 60-day timeline to resolve disputes. Crown Castle submits that the Commission should eliminate the current 10-day company-to-company discussion period and the 12-day Ombudsman review, arguing that this amounts to additional delay.²⁷

The Joint Utilities generally agree with the existing dispute resolution procedures and the Staff White Paper's proposed timelines. However, they oppose allowing any self-help

²⁵ Staff White Paper, p. 13.

²⁶ Charter comments, pp. 4-6.

²⁷ Crown Castle comments, pp. 3-5.

remedies by attachers, emphasizing safety related concerns, and request the Commission continue its prohibition against unauthorized pole attachments. They further request that the Commission clarify that the dispute resolution process will remain available for both attachers and pole owners to seek relief through the filing of a formal complaint.²⁸

In reply comments, the Joint Utilities oppose the elimination of pre-dispute resolution discussion period and referral to an Ombudsman. According to the Joint Utilities, engagement by company leadership as a condition precedent to filing a formal complaint provides an incentive to economically resolve disputes and avoid unnecessary litigation. They similarly oppose formal timelines for Commission complaint resolution stating that the Commission should give itself discretion to resolve particular matters.²⁹

CTIA generally agrees with the dispute resolution timeframes proposed in the Staff White Paper. According to CTIA, these changes will improve the pole attachment process and the ability of wireless providers, as well as other broadband providers, to deploy their networks and secure necessary attachments to utility-owned poles throughout the State.³⁰

Moreover, OTTC also supports an expedited dispute resolution process but suggests implementing an accelerated dispute assessment and decision-making timeframe that is substantially less than the proposed 90-days. According to OTTC while a 90-day aspirational timeframe for resolving disputes is better than the indeterminate, open-ended period that currently exists, the Commission should do more. OTTC also refers to

²⁸ Joint Utilities comments, pp. 2-3.

²⁹ Joint Utilities reply comments, pp. 1-2.

³⁰ CTIA comments, p. 1.

other agencies that have developed procedures with shorter timeframes citing to the FCC's expedited procedures involving an intra-agency response team to provide coordinated review and assessment of such disputes.³¹

Verizon contends that any matter submitted for dispute resolution should be limited to specific issues and larger policy debates should be reserved for fully litigated proceedings. With respect to timelines, Verizon objects to the removal of the 22-day pre-complaint period and states that greater flexibility is needed for some disputes, including those with complex make-ready work, and pole owners should be allowed to demonstrate to the Commission that additional time is needed for business-to-business resolution of such disputes.³²

Determination

The Commission adopts the Staff White Paper recommendation except as specifically modified herein. First, the Commission agrees with those commenters who seek removal of the 12-day Ombudsman review but disagrees with removing the 10-day company-to-company review before seeking formal dispute resolution at the Commission. The company-to-company review period facilitates resolution before a dispute is formally filed with the Commission, thus helping to avoid a potential backlog of cases that could cause additional delay. However, the 12-day Ombudsman review does seem duplicative and unnecessary. Moreover, it could delay resolution of critical disputes in the event the company-to-company review reaches an impasse.

Second, while the Commission finds that the timeframes for serving and responding to a complaint, along with the information to be provided by the pole owners, if necessary,

³¹ OTTC comments, pp. 15-16.

³² Verizon comments, pp. 2-4.

pursuant to the Staff White Paper are reasonable, the Commission agrees there should be a more definitive timeframe for final dispute resolution to avoid unreasonable delays. Accordingly, the Commission establishes a 90-day shot clock for dispute resolution once a complaint is formally filed. However, since dispute resolution may not always be attainable within that timeframe, the 90-day shot clock may be extended by the Secretary, if necessary. As such, the Commission sees no reason to establish a screening process to target those disputes that could be resolved within the 90-day shot clock.

Finally, the Commission clarifies that dispute resolution is available to both pole owners and attachers. Moreover, we agree that the process should not be used for generic policy proceedings which should be subject to more traditional rulemaking reviews under SAPA. As discussed in more detail below, we prohibit the use of "self-help" as a remedy for missed deadlines or any other circumstance.

The Commission adopts the timelines and dispute resolution requirements contained in the Staff White Paper as modified herein. These modified rules shall take effect immediately upon the issuance of this Order and apply to any new complaints going forward.

2. Collaborative Working Group

The 2004 Pole Order acknowledges a working group but provides no further description for how it should be coordinated.³³ The Staff White Paper recommends a working group comprised of all interested stakeholders, including pole owners, pole attachers, Department Staff, and other interested persons or companies operating in New York State, to meet regularly (e.g., monthly) to discuss issues relating to pole attachment

³³ 2004 Pole Order, p. 14.

concerns, including, but not limited to make-ready estimates, surveys, pole replacements, alternative attachment methods, self-help remedies, scheduling, etc. The purpose of this working group would be to provide pole owners and pole attachers with a convenient venue to address and potentially resolve issues, and to coordinate with each other, especially on large, complex projects.

Comments

Crown Castle contends the working group should focus on encouraging communication between pole owners and pole attachers but should not serve as a venue for individual case disputes.³⁴

Charter supports the Staff White Paper's recommendation to create a standing pole attachment working group of interested stakeholders to meet regularly and discuss outstanding issues. Charter notes that such a forum would provide useful opportunities for Department Staff to become aware of problems early, and, where possible, informally coordinate resolution of disagreements before they escalate to formal disputes.³⁵

CWA generally supports the creation of a working group to facilitate pole attachment issues. However, CWA urges the Commission to ensure that labor unions and municipal representatives are part of any working group as these entities would be able to provide important perspectives regarding the "on-the-ground realities" of pole attachments.³⁶

Verizon supports the working group so long as it is limited to technical issues and suggests the working group avoid

³⁴ Crown Castle comments, pp. 6-7.

³⁵ Charter comments, p. 3.

³⁶ CWA comments, p. 1.

topics that involve broader issues impacting the industry or two-party disputes related to a specific project. Verizon believes that the real value of the working group is its potential for resolving "technical" issues that have wide application to the industry.³⁷

The Joint Utilities do not support a monthly working group arguing that disputes are typically project-specific and would be better addressed through direct meetings between interested parties and Department Staff. Nevertheless, they state, if the Commission establishes a working group, meetings should be held on an as needed basis only, have a detailed agenda, and include all pole owners. According to the Joint Utilities, this would enhance the productivity of these collaborative meetings.³⁸

Determination

The Commission adopts the Staff White Paper's recommendation to establish a collaborative working group to meet periodically. The working group is expected to provide pole owners and pole attachers with a regular convenient venue to address and resolve issues and to coordinate with each other in a timely manner. The working group should seek to encourage consistency in pole attachment methods and identify areas that may require additional resources and timelines, especially for large, complex projects. As stated in the Staff White Paper, however, the Commission agrees that the working group should not serve as the dispute resolution process for pending formal complaints before the Commission. As discussed above, that process is separate and distinct from the collaborative process.

³⁷ Verizon comments, pp. 5-6.

³⁸ Joint Utilities comments, pp. 3-4.

The Commission also declines to provide strict parameters for the working group, other than to clarify that: (1) all interested stakeholders should include any entity that has a legitimate interest in pole attachments, including all telephone (incumbent and competitive) and cable companies, pole owners, and pole attachers; (2) the working group should be facilitated by Department Staff; (3) the working group should be held on a regular (e.g., monthly, quarterly, etc.) basis unless otherwise determined by Department Staff; and (4) Department Staff should set the agenda for each meeting of the working group.

Finally, as indicated, the working group is not a forum to discuss generic policy issues, but rather to provide pole owners and pole attachers an opportunity to address and resolve discrete issues and to coordinate with each other in a timely manner.

The Commission adopts the Staff White Paper's recommendation consistent with the discussion herein. Department Staff shall endeavor to commence the collaborative working group within 90 days after the issuance of this Order.

Pole Replacements

1. Pole Replacement and Reconfiguration Costs

Under the 2004 Pole Order, if an attachment is legal when made, subsequent rearrangements or pole replacements must be paid for by the attacher that requires the rearrangement or replacement and not the previous attachers.³⁹ The Staff White Paper does not recommend any changes to the current policy.⁴⁰

³⁹ 2004 Pole Order, p, 4.

⁴⁰ Staff White Paper, p. 34.

Comments

Charter argues that pole attachers should not bear the entire cost of pole replacements and, instead, pole owners and attachers should share the cost of pole replacements when poles must be replaced to accommodate new attachments. Charter submits that the Staff White Paper contains a flawed and incomplete discussion of the pole owner's economic incentives. According to Charter, the Staff White Paper incorrectly concludes that utility ratepayers do not economically benefit from pole replacements to allow third-party attachments, even when the attacher entirely funds the replacements. Moreover, Charter states that the Staff White Paper inappropriately focuses on the immediate impact of a pole replacement on utility rates, reasoning that utilities do not earn a return or depreciation expense on contributed assets such as third-party funded pole replacements and that utilities remain responsible for the undepreciated value of the old pole, as well as any property taxes on the new ones. In the medium-term, according to Charter, the Staff White Paper's analysis fails to address the fact that utilities receive brand-new poles with longer expected lives than the remaining lives of the older poles being replaced, thereby enabling utilities to forgo or defer otherwise-needed investments to replace those poles with ratepayer funds.⁴¹

Crown Castle argues that pole owners do not pay their fair share of pole replacement costs and recommends that the Commission adopt the cost allocation methodology proposed by the Brattle Group to the FCC. Specifically, Crown Castle recommends that an economically efficient pole replacement cost allocation rate can be calculated as the value of the pole owner's stranded

⁴¹ Charter comments, pp. 6-8.

investment plus the attacher's appropriate share of incremental cost of upgrade, if any, plus the cost incurred on time value of money, minus the incremental betterment and cost savings from early replacement.⁴²

The Joint Utilities support continuing the current cost allocation method for pole replacements wherein the third-party attacher bears the cost for make-ready work necessary to attach its equipment and the cost of replacing an existing utility pole when the proposed attacher's equipment would exceed the pole's capacity, clearance, or loading. According to the Joint Utilities, pole owners are responsible for payment of State, local, and federal taxes associated with a contributed pole. They also state that ratepayers pay for the remaining book value on a pole that is prematurely retired as a result of pole replacement by an attacher and, as a result, ratepayers derive no benefit from pole replacements. Finally, they contend that electric customers should not be burdened with the additional cost of pole replacement for a third-party attacher in light of the significant investments they already support. As such, the Joint Utilities state that the Staff White Paper's recommendation on cost allocation methodology is consistent with equitable principles.⁴³

In their reply comments, the Joint Utilities state that the third-party attachers raise a number of conclusory arguments and recommendations without providing adequate support. According to the Joint Utilities, Charter's assertions that pole owners are actively and intentionally using the third-party make ready process as a means of avoiding the cost of replacing aging utility pole infrastructure is without merit.

⁴² Crown Castle comments, p. 7.

⁴³ Joint Utilities comments, pp. 4-5.

Consistent with the Staff White Paper, the Joint Utilities state that this assertion is false since they have no active practice of defraying the economic cost of pole replacements to the attachers, nor do they have any incentive to do so. According to the Joint Utilities, neither Charter nor Crown Castle's response acknowledges that the pole owners bear the full cost of replacing any pole that has been (i) "red tagged" (i.e., requiring replacement within three years or less) according to their distribution line inspection programs, as well as where (ii) a pre-existing National Electric Safety Code (NESC) violation cannot be cleared absent a pole replacement. In contrast, the Joint Utilities state that the Staff White Paper includes an extensive discussion of historical pole replacement activity at both National Grid and NYSEG, respectively, two of the largest pole owners, which directly contradicts any argument that pole owners have not paid their fair share for pole replacements.⁴⁴

Verizon supports the Staff White Paper's recommendation. According to Verizon, it is consistent with long-standing Commission precedent, and with the FCC's recent pole attachment rules, in which that FCC declined to adopt a proposal to shift the responsibility for the costs of pole replacements necessitated by new attachment requests from attachers to pole owners.⁴⁵

Determination

The Commission agrees with the Staff White Paper's recommendation to maintain the current policy on cost allocation. With regard to Charter's comments on the Staff White Paper's revenue requirement analysis associated with

⁴⁴ Joint Utilities reply comments, p. 3.

⁴⁵ Verizon comments, p. 6.

electric utility- and attacher-funded pole replacements, we note that the revenue requirement analysis summarized in the Staff White Paper was done on a net present value basis that considers forecasted estimated revenue requirements for utility- versus attacher-funded pole replacements. The Commission notes that the analysis includes estimated revenue requirements for 90 years after a pole replacement. The 90-year period considers the long service life of utility distribution poles and reflects a full replacement cycle of both an existing pole and a replacement pole based on average service lives. Further, the analysis includes estimates for all major components of a utility revenue requirement related to a pole replacement, including estimates for return on rate base,⁴⁶ depreciation, maintenance expenses, State and federal taxes, property taxes, and offsetting incremental pole attachment revenues.⁴⁷

Accordingly, the Commission is not persuaded that the Staff White Paper's analysis inappropriately focuses only on the immediate impact of a pole replacement on utility rates, nor does it fail to address medium-term savings, or consider other costs/benefits to utility pole owners.

Turning to Charter's, Crown Castle's, and other commenters' assertions that the analysis in the Staff White Paper is "flawed" because it fails to consider the pole owner's incentive to shift replacement costs and incorrectly concludes that pole owners do not financially benefit from pole replacements,⁴⁸ the Commission notes that no commenter provided any quantifiable analysis associated with pole replacements by third-party attachers or any other evidence to support these

⁴⁶ The return on rate base estimates considered accumulated deferred income tax benefits.

⁴⁷ Staff White Paper, pp. 32-33.

⁴⁸ Charter's comments, p. 7.

assertions. Similarly, Crown Castle also fails to provide any new information to support its position to use the cost allocation methodology proposed by the Brattle Group to the FCC.

In contrast, the Staff White Paper provides an evaluation of the revenue requirements associated with electric utility and attacher funded pole replacements and determines that ratepayers do not receive any economic value of poles being replaced to enable third-party attachments even when the attacher entirely funds such replacements. According to the Staff White Paper, the utilities' ratepayers are ultimately responsible for the one-time State and federal tax associated with the value of the contributed pole, the on-going local property taxes,⁴⁹ and the remaining net book value of the pole being prematurely retired. Further, electric utilities do not have an incentive to require attachers to pay for pole replacements because utilities do not earn a return or depreciation expense on contributed assets such as third-party funded pole replacements.⁵⁰

As recognized by Verizon and the Joint Utilities, the Staff White Paper's recommendation is consistent with the FCC's recent order regarding accelerating broadband deployment on poles.⁵¹ The FCC declined to shift the responsibility for the costs of pole replacements necessitated by new attachment requests from attachers to pole owners. Among other things, the

⁴⁹ Utility property tax obligations are based on the reproduction cost of the asset less depreciation. Therefore, property tax obligations are higher for newer assets.

⁵⁰ Staff White Paper, p. 32.

⁵¹ See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, Fourth Report and Order, Declaratory Ruling, and Third Further Notice of Proposed Rulemaking (rel. December 15, 2023) (FCC Order).

FCC Order: (1) affirmed that only pole replacements “necessitated solely” due to an attachment request are subject to cost causation principles and (2) declined to codify a definition of the term “necessitated solely” as it relates to pole replacements. The FCC Order did, however, provide clarification on how to determine if pole replacements are or are not “necessitated solely,” due an attachment request. Examples of pole replacements not “necessitated solely” by an attachment request include: (1) a pole replacement required pursuant to applicable law; (2) the current pole fails applicable engineering standards, such as those contained in the NESC; (3) a utility’s previous or contemporaneous change to its internal construction standards necessitates replacement of an existing pole; (4) the pole is required to be replaced due to road expansion or moves, property development, in connection with storm hardening, or similar government-imposed requirements; or (5) the current pole is already on the utility’s internal replacement schedule, regardless of when the replacement is scheduled to take place.⁵² These principles are consistent with the discussion herein.

Finally, the Commission acknowledges the Staff White Paper’s observations that electric utility customers are expected to fund various traditional and public policy-related projects and programs, including, vehicle electrification, energy efficiency, initiatives related to achieving the goals of the Climate Leadership and Community Protection Act, and affordability programs for low-income customers. While expanding broadband in New York is critically important, utility customer funds are not unlimited. The Staff White Paper estimates that recovering attacher-necessitated pole replacement

⁵² Id., ¶¶46-47.

costs through electric rates would result in annual delivery bill increases of about 0.6 percent and 1.0 percent each year for a 600 kWh per month per customer at National Grid and NYSEG, respectively, and remain over the average service life of the poles, which is about 60 years.⁵³ While this impact is moderate on a standalone basis, combined with the impacts of other traditional and public policy-related projects and programs they become significant.

The Commission, therefore, agrees with the Staff White Paper recommendation that no change to the current cost allocation policy is warranted at this time.

2. Filing of Annual Reports

PSL §119-a(3) provides that “[w]here a pole owner performs a pole replacement to accommodate an attachment request, the pole owner may not require the attacher, or any existing attacher, to pay any portion of the cost of such replacement, except where there is insufficient capacity, clearance or loading to accommodate the request.” The Staff White Paper acknowledges this provision of law by recommending that pole owners be required to file annual reports detailing third-party attachments including, at a minimum, the number of pole attachment requests and, for each request completed in the reporting year, detail: the number of poles sought for attachment, the number of new attachments licensed resulting from the request, and the number of poles replaced associated with each licensed attachment request (differentiated by those funded by the utility with those funded by third-party attachers). The Staff White Paper further recommends that the

⁵³ Staff White Paper, p. 34.

report include the time to complete make-ready and make-ready charges to respective attachers, for each requested license.⁵⁴

Comments

Charter expresses concern that pole owners will use the pole replacement process to inappropriately shift infrastructure costs to attachers. To ensure that utilities do not require attachers to pay for pole replacements when attachment is not the sole reason for the pole's replacement, Charter suggests that pole owners be required to: (1) share their most recent pole inspection data with applicants in order to identify pre-existing pole issues (or lack thereof) and assist the attacher with its buildout plans; and (2) demonstrate that the pole in question is on a regular five-year inspection cycle and passed a routine inspection within the last three years. Charter agrees that pole owners should be required to file annual reports for third-party attachments but contends that these reports should include processing times for pole applications and make-ready in "under" and "unserved" areas.⁵⁵

The Joint Utilities disagree with Charter's three-year pole inspection recommendation and suggestion that an attacher should only be compelled to replace a pole if the owner can show that it has passed inspection within the previous three years. According to the Joint Utilities, inspection programs occur on a five-year cycle, thus it would be unjust to hold them to a higher standard and adding an additional administrative responsibility for pole owners is unreasonable.⁵⁶

Crown Castle supports annual reporting and states that annual reporting should "specify whether the attacher, pole

⁵⁴ Id., pp. 34-35.

⁵⁵ Charter comments, pp. 9-10.

⁵⁶ Joint Utilities reply comments, p. 3.

owner, or some combination of the two paid for each pole replacement.”⁵⁷

CWA also believes pole owners should file annual reports detailing third-party attachments and recommends including names of the contractor or subcontractors performing the work.⁵⁸

Verizon states that it does not have the systems needed to create such reports and notes that this reporting requirement would likely impose a burden and expense on the pole owners. Instead, Verizon suggests that Department Staff investigate these issues and address them accordingly. Verizon further states that the Staff White Paper indicates that the purpose in seeking this information is “ensure that utilities are complying with their obligations under PSL § 119-a(3).” Verizon questions how the Staff White Paper’s recommendation provides insight into utility compliance with this requirement, since it would not enable Department Staff to identify pole replacements where the statutory requirements had or had not been met.⁵⁹

Determination

The Commission agrees with the Staff White Paper’s recommendation subject to some modifications. As an initial matter, we disagree with CWA. Providing the names of contractors has the potential for competitive harm and public reporting of contracts between business entities is therefore not appropriate or necessary. The purpose of the annual reporting is to provide transparency into the pole replacement and attachment processes; in the absence of specific disputes,

⁵⁷ Crown Castle comments, p. 8.

⁵⁸ CWA comments, p. 3.

⁵⁹ Verizon comments, pp. 7-8.

the identity of contractors is not relevant to pole attachment completion and processing times. In addition, the Commission find Verizon's comments unpersuasive. Each pole owner has information on pole attachment requests, processing times, and outcomes. Maintaining a database of this type of information and filing it with the Commission annually should not be a heavy burden. Moreover, as explained below, there is a significant benefit to requiring this reporting going forward.

Both Charter and Crown Castle make recommendations that the Commission agrees with, in part, and should enhance annual reporting. First, the Commission agrees with Charter's recommendation that the annual reporting include processing times for pole applications and make-ready. However, we find that this information is relevant throughout the pole owners' respective territories and contrary to Charter's point, should be expanded beyond "underserved" and "unserved" areas. Second, we agree with Crown Castle's suggestion that reporting should detail pole replacement cost responsibility and specify if the pole replacement was paid for by the attacher, the pole owner, or a combination of the two. The Commission does not, however, agree that pole owners must demonstrate that the pole in question has passed a routine inspection within the last three years to assign replacement costs. The Commission agrees that the Joint Utilities should not be held to a higher burden than what is in place today. Nevertheless, the mandatory reporting in the instant case should mitigate concerns that pole owners are shifting replacement costs onto attachers.

Annual reporting with detailed information on pole attachment requests, completed licenses, and make-ready data is expected to result in increased transparency in the pole attachment process and assist both pole owners and attachers. The Commission anticipates that pole owners will benefit from

compiling this data by deriving lessons learned and potentially identifying process improvements for their internal pole attachment reviews. Third-party attachers will benefit by having increased insight into timing and volume of the pole attachment process across different territories. In addition, regular reporting will provide all interested stakeholders with baseline information to engage in productive discussions and aid in resolving disputes. Annual reporting will further assist Department Staff, help manage the collaborative working group, and ensure pole owners' compliance with PSL §119-a(3).

The Commission clarifies here, however, that jointly owned poles should be included in reporting by each electric utility to avoid duplicate pole reporting information and different pole tracking information. As indicated, this information is also important regardless of whether a build is in a "served" or "unserved" area of the State.

The Commission adopts the annual reporting requirement set forth in the Staff White Paper as modified herein. This reporting must include, at a minimum, for each reporting year:

1. The number of pole attachment requests received;
2. For each request received:
 - a. Processing time;
 - b. Whether make-ready is required;
3. The number of pole attachment requests completed in the reporting year;
4. For each completed request:
 - a. The number of poles sought for attachment;
 - b. The number of new attachments licensed resulting from the request;
 - c. The number of poles replaced associated with each licensed attachment request, differentiated by payment source (e.g., the number of poles funded by the pole owner, those funded by the third-party attacher, or a combination of the two);
5. For each request licensed:
 - a. The time to complete make-ready;
 - b. Make-ready charges to third-party attacher(s).

Annual reporting shall be filed by each pole owner with the Secretary to the Commission by January 31st of each year. As indicated, to the extent poles are jointly owned, the electric utility is required to report on both their solely and jointly owned poles. All pole owners are encouraged to include any additional information in their reporting that is relevant to pole replacement cost.

Pole Owners shall file annual reports consistent with the Staff White Paper's recommendation as modified herein beginning in 2025.

Alternative Pole Attachment Methods, Pole-Top Attachments & OTMR

1. Alternative Pole Attachment Methods and Timelines

Pursuant to PSL § 119-a(4), the Commission is required to consider "new, less expensive pole attachment methods." The Staff White Paper recommends against a blanket prohibition of alternative pole attachment methods favoring a case-by-case review instead. It recommends that the Commission require that pole owners consider certain types of alternative pole attachment methods, provided they comply with all industry standards and the NESC, at a minimum. Moreover, the Staff White Paper recommends that, in instances when a pole owner denies the use of an alternative pole attachment method, the Commission require pole owners to provide a rationale for the denial citing specific safety, reliability and code compliance concerns. According to the Staff White Paper, potentially acceptable pole attachment methods include but are not limited to pole-top attachments (discussed below), strand-mounted attachments and overlashing, boxing and bracketing, extension arms, and temporary attachments.⁶⁰

⁶⁰ Staff White Paper, pp. 44-45.

Comments

Charter supports the use of alternative pole attachment methods as proposed; and, in certain aspects, encourages the Commission to go further. Specifically, Charter agrees there should be no blanket ban on alternative attachment methods and pole owners should be required to provide an individualized reason for denying use of a certain attachment techniques. However, Charter submits that there should be rebuttable presumption in favor of alternative attachments and the burden should be on the pole owners to establish that a specific alternative attachment technique is not safe. With respect to make-ready, Charter advocates for self-help when a pole owner fails to meet make-ready deadlines.⁶¹

Crown Castle also opposes any blanket restrictions on certain types of alternative pole attachment methods and argues that alternative pole attachment methods should only be prohibited on a case-by-case basis. According to Crown Castle, this recommendation is consistent with the FCC's declaration that blanket bans are unlawful, but the problem persists in New York.⁶²

CTIA agrees with the case-by-case alternative attachment review process recommended in the Staff White Paper. It states that the proposal is reasonable and strikes the right balance between pole owners and attachers and appropriately requires pole owners to carry the burden of providing a valid, fact-based justification when denying alternative attachment methods.⁶³

⁶¹ Charter comments, pp. 12-13.

⁶² Crown Castle comments, pp. 9-11.

⁶³ CTIA comments, pp. 2-3.

TDS believes that temporary attachments should not be allowed because they create impediments for those performing make-ready work and, in some cases, temporary attachments are not safe due to capacity, lack of separation, or clearance issues. TDS further notes that temporary attachments are routinely not made permanent within 30 days, as required by the current rules, and believes that there should be a financial penalty for any violations in this regard.⁶⁴

The Joint Utilities submit that pole owners should be allowed to prohibit certain alternative attachment methods based upon each pole owner's construction standards and policies and, therefore, disagree with the case-by-case approach. The Joint Utilities contend that certain alternative attachment methods are unsafe and request the Commission allow discretion and oversight over how and when to incorporate alternative attachments. They further submit that the Staff White Paper's proposed pole-by-pole review of alternative attachments (and a pole owner's rationale for denial of an alternative attachment) is vague and will lead to increased delays and disputes. The Joint Utilities oppose the removal of a blanket prohibition on certain alternative attachment methods and reiterate that the NESC code is the minimum standard on pole attachments and should not be the sole source of safety requirements for pole attachments. With regard to attachment in the supply space on the pole which has historically been reserved for electric distribution and transmission facilities, they oppose any proposal that would limit their access and use of that space. If attachments are allowed in the supply space, they believe

⁶⁴ TDS comments, p. 1.

this would limit their ability to make operational improvements.⁶⁵

Verizon agrees with the Staff White Paper's proposal to prohibit blanket restrictions on pole attachment methods, though it believes the Commission should extend the same reasoning and ban blanket restrictions on attachments in the electrical space, in order to address congestion in the communications space. Verizon also agrees with the Staff White Paper's proposal to allow temporary attachments on a case-by-case basis. Verizon submits this proposal should be clarified so as not to preclude the pole owner's adoption of general policies that, subject to exceptions where local circumstances might dictate, would set forth presumptive guidelines and criteria for judging the permissibility of particular attachment methods. Verizon expresses its general support for use of temporary attachments and notes its policies and requirements for temporary attachments.⁶⁶

OTTC agrees there should be no blanket restrictions on certain pole attachments and that certain restrictions in existing Commission rules should be eliminated. OTTC further comments that the specific pole attachment methods should be presumed acceptable and that a pole owner should be required to cite a pole specific reason for a denial. In addition, OTTC suggests the Commission adopt rules encouraging alternative new, less expensive pole attachment methods that encourage timeliness of pole replacements and other make-ready work. OTTC believes the Commission should acknowledge self-help remedies that include both simple and complex make-ready, including in and above the electrical space and require pole owners to maintain

⁶⁵ Joint Utilities, pp. 4-7.

⁶⁶ Verizon comments, pp. 8-11.

lists of pre-approved contractors to facilitate alternative attachments.⁶⁷

Lastly CWA agrees that telecommunications pole attachment and make-ready work should not be installed within the electric space on poles and that all make-ready work comply with the NESC, at a minimum.

Determination

The Commission agrees with the Staff White Paper's recommendation to allow certain alternative types of attachments on a case-by case basis. We recognize concerns regarding the safety, reliability, and resiliency of the electric and telecommunication systems for customers throughout New York State. Pole owners and attachers must remain focused on the safety and integrity of the electric and telecommunication systems. The Staff White Paper correctly notes the increased awareness of the need for systems to withstand severe storm conditions associated with climate change. It is imperative that make-ready work associated with pole attachments be completed in a manner that complies with the NESC, follows industry standards, and meets the increased resiliency needs.

To balance these interests and maintain focus on safety, reliability, and resiliency, the Commission adopts the Staff White Paper's recommendation to preserve the electric space on the poles for electric facilities only, with the exception of pole-top attachments, as discussed below. Telecommunication pole attachments and make-ready work cannot be installed within the electric space and all NESC clearances should be maintained. Accordingly, Verizon's request to "open up" the pole's electric space for additional pole attachments is denied. The electric space is designated for qualified and

⁶⁷ OTTC comments, pp. 7-8; 12-15.

approved electric workers and only includes electric facilities to help protect those working in that space as well as ensure the work performed is done professionally and to code to satisfy reliability and resiliency concerns. Opening up the electric space to additional or alternative pole attachment methods raises significant safety, reliability and resiliency concerns and negatively impacts these efforts.

Despite the 2004 Pole Order's provision for alternative attachments, the commenters describe instances where pole owners have instituted blanket bans on certain alternative attachments and routinely deny pole applications based upon the proposed attachment methods. To facilitate the expansion of high-speed broadband, the Commission will adopt the Staff White Paper's recommendation that precludes pole owners from implementing blanket bans on certain methods of pole attachments. Therefore, alternative attachment methods should be considered as an option for all attachments, when necessary. As indicated, potentially acceptable pole attachment methods include, but are not limited to the following: pole-top attachments (discussed below), strand-mounted attachments and overlashing, boxing and bracketing, extension arms, and temporary attachments.

However, alternative pole attachment methods must comply with the NESC and industry standards. Pole owners must review and approve the use of an alternative attachments on a case-by-case basis, i.e., proposed alternative attachment for a particular pole. The Commission further agrees that if a pole owner seeks to deny access to a particular pole, the pole owner must provide a rationale for that denial. Specifically, in a denial, the pole owner must cite the specific provision (including subsection) of NESC or other safety code and provide a description of the particular safety, reliability, or code

issue as it relates to that pole. We also encourage pole owners to provide engineering plans and drawings to the pole attacher if doing so would assist in describing the basis for the denial.

Because the pole owner's review is on a case-by-case (i.e., pole-by-pole) basis, the denial must not be vague, must be easily understood by the attacher, and must adequately describe the basis for the denial. If an attacher disagrees with the pole owner's denial, the attacher may seek recourse through, among other things, the expedited dispute resolution process set forth above. The Commission's expectation is that all parties will work efficiently in the pole application process and minimize delay. Self-help, however, is not an available remedy if a pole owner fails to meet make-ready deadlines. As the Staff White Paper acknowledges, the Commission agrees that self-help could potentially undermine system safety and reliability and jeopardize the safety of workers on the utility poles. Moreover, the case-by-case review process outlined herein, and the enhanced expedited dispute resolution now available, diminishes any need for self-help.

Some commenters state that alternative attachments should presumptively not be used due to safety concerns. While the Commission emphasizes worker safety and reiterates the importance of compliance with the NESC and industry standards, upon receiving a pole application, the pole owner is obligated to do an analysis on the specific poles where attachment is sought; if there are specific safety, reliability, or code compliance issues, the pole owner may deny the request and explain its rationale to the attacher. The case-by-case review adopted here should alleviate these commenter's concerns by revealing in detail potential safety issues and allow the pole owner and attacher to develop a plan for each application that is appropriate to that pole.

With regard to TDS' comments that temporary attachments should not be allowed, temporary attachments have been and continue to be a potentially acceptable form of alternative attachment. Alternative attachments must comply with the NESC and cannot undermine safety. As the 2004 Pole Order states, "[t]he methodology used for temporary attachments must be cognizant of all relevant safety requirements and the equipment used must be manufactured and intended for the application."⁶⁸ Temporary attachments are only allowed for a limited amount of time, specifically 30 days, after which they must be replaced with a standard attachment. If a temporary attachment is not made permanent, then the pole owner's recourse is through the expedited dispute resolution process outlines above. We, therefore, also disagree with any suggestion to impose a financial penalty for failure to replace a temporary attachment. The mandatory post-construction inspections, discussed below, should assist with identifying post 30-day temporary attachments and facilitate installation of permanent facilities.

The Commission adopts the Staff White Paper's recommendation on alternative pole attachment methods. This modification shall go into effect 60 days after the issuance of this Order.

2. Pole-Top Attachments

With respect to pole-top attachments, the Staff White Paper concludes that this form of alternative attachment is reasonable and should at least be considered by pole owners. Nevertheless, if approved, according to the Staff White Paper, pole-top attachments should be constructed and installed only by a qualified contractor approved by the pole owner.

⁶⁸ 2004 Pole Order, Appendix A, p.5.

Comments

PSEG submits that pole-top attachments on primary poles in the Long Island Power Authority (LIPA) service territory should be prohibited. According to PSEG, certain poles within LIPA's territory have been installed as part of the Federal Emergency Management Agency (FEMA) funded storm hardening program and are designed to withstand severe weather conditions that can occur on Long Island. PSEG further states that these newly redesigned FEMA poles exceed NESC standards, however, the poles are not able to withstand pole-top attachments. PSEG contends that use of pole-top attachments would be detrimental to safety and reliability on these poles. PSEG submits that although pole-top attachments on secondary poles still present safety concerns, it allows for such provided there is proper indemnification. PSEG states that to accommodate pole-top attachments would negatively impact system reliability and storm response.⁶⁹

In its reply comments, PSEG reiterates its concern regarding allowing alternative attachment methods, primarily pole-top attachments. PSEG opposes the position of Charter and other parties that the Commission should establish a rebuttable presumption that prohibitions against specific alternative attachment methods are unreasonable. PSEG states the Commission should also reject Crown Castle's proposal that attachment methods should be permitted as long as they meet NESC standards. Contrary to Verizon's assertion, PSEG states that dispute resolution and stakeholder collaborative processes are not the appropriate forums for deciding whether a utility should be permitted to prohibit pole-top attachments.⁷⁰

⁶⁹ PSEG comments, pp. 2-3; 5-7.

⁷⁰ PSEG reply comments, pp. 2-3.

According to the Joint Utilities, a mandate to allow pole-top attachments is contradictory to the State's policy of promoting a more reliable and resilient electric grid. The Joint Utilities state that Con Edison/Orange & Rockland allow pole-top attachments only on secondary poles.⁷¹ They express concern over the Staff White Paper's proposal to require pole owners to generally permit the installation of pole-top attachments. They submit that high winds and severe weather on Long Island has shown that pole top attachments can cause safety issues. Further, they contend that pole top attachments will complicate and extend the time and resources required to restore power following severe storm events or damage to their facilities.⁷²

CTIA states that the Commission should reject the recommendation by the Joint Utilities and PSEG to prohibit pole-top attachments. According to CTIA, the importance of such attachments has been well-documented in proceedings before this Commission and the FCC and wireless providers have safely and reliably built numerous pole-top attachments throughout the State. Further, while Staff White Paper does not support "blanket restrictions" on specific listed pole attachment methods, including pole-top attachments, it makes clear that those pole attachment methods must comply with all industry standards and the NESC as a minimum. Therefore, pole-top attachments, according to CTIA are an option when deemed

⁷¹ According to Joint Utilities, National Grid is the only company that allows pole-top attachments on primary lines and under limited circumstances. Joint Utilities comments, p. 8, fn. 18.

⁷² Id., pp. 9-10.

necessary and have been reviewed and approved by the pole owners on a case-by-case basis.⁷³

In reply comments, Verizon also opposes the Joint Utilities and PSEG's request to ban pole-top attachments. According to Verizon, the dispute resolution and collaborative processes created by the Commission, supplemented, if necessary, by Department Staff investigation and formal litigated proceedings, provide ample opportunity for pole owners to raise safety issues and for the Commission to resolve them.⁷⁴

Determination

The Commission agrees with the Staff White Paper's recommendation and will not limit or prohibit the use of pole-top attachments. However, consistent with the discussion below, we note that engineering and use of a pole-top attachment must be appropriate and take into consideration the specific type of pole where the pole-top attachment is sought. Although the Commission will not allow PSEG to ban pole top attachments outright, we recognize that these types of attachments may negatively impact storm hardening programs and extend restoration times.

The Commission finds that the recommendation in the Staff White Paper - a case-by-case approach - is reasonable and strikes the right balance between pole owners and third-party attachers. Provided PSEG or any other pole owner identifies a specific safety, reliability, or code compliance issue with a pole, then the denial would be supported. For example, PSEG's claim that removal of the shorter cross arm (designed for storm hardening) in order to accommodate a pole-top attachment may

⁷³ CTIA comments, pp. 3-4.

⁷⁴ Verizon reply comments, pp. 3-4.

cause safety issues could serve as a reasonable basis for denial of such an attachment.

The Commission adopts the Staff White Paper's recommendation on pole-top attachments. This modification shall go into effect 60 days after issuance of this Order.

3. OTMR for "Simple" Attachments

Currently, the industry practice for make-ready involves each existing attacher (and possibly the pole owner) to sequentially take turns to move their respective facilities using their own contractors. OTMR is a proposed alternative, that has been formally implemented in other jurisdictions. Generally, OTMR is the process by which a new attacher has the option of using a single qualified contractor to perform all (or most) of the make-ready work to move existing facilities on the pole and attach the new attacher's facilities in a single pole visit. The 2004 Pole Order does not specifically address OTMR.

The Staff White Paper recommends that the Commission allow the use of OTMR for "simple" attachments in the communications space, but only when use of OTMR is consistent with existing collective bargaining agreements (CBAs) between the pole owner, CWA or another entity. OTMR is expected to accelerate broadband deployment and reduce costs by allowing a new attacher to perform all of the make-ready work itself and avoid the need and wait times associated with each attacher individually moving its facilities.

Comments

While Charter agrees with the Staff White Paper's recommendation, it believes it is unnecessary for OTMR work to meet the standards of CBAs and contends that CBAs cannot constrain a utility's legal or regulatory obligation to third-party attachers. According to Charter, PSL §119-a(5), provides that the Commission cannot directly regulate a utility's CBAs,

it does not allow utilities to restrict the regulatory authority of the Commission by entering into CBAs that prevent the utility's compliance, or prohibit the Commission from imposing regulatory obligations on utilities simply because they have entered into negotiated agreements with their employees.⁷⁵

PSEG opposes OTMR stating that the definition of "simple" make-ready should be revised to exclude situations where relocation of "wired" attachments is required. PSEG states that new attachers could cause damage to pre-existing wired attachments and this should not constitute simple make-ready.⁷⁶

CWA expresses concern that improper attachment work will have safety implications and, therefore, remains opposed to OTMR. CWA supports a requirement that OTMR work must not interfere with CBAs and recommends robust monitoring and enforcement. To this end, CWA recommends the creation of a third-party attacher process and a publicly available database, along with a penalty structure for unsafe work and a complaint process for violations of collective bargaining protections.⁷⁷

The Joint Utilities support the Staff White Paper's recommendation to allow OTMR for "simple" make-ready that does not conflict with applicable CBAs and so long as "simple" make ready is defined to include "wired" attachments. They state that OTMR should not be guaranteed when splicing or relocation of an existing wired or wireless facility is needed to install a new attachment.⁷⁸

⁷⁵ Charter comments, pp. 14-15.

⁷⁶ PSEG comments, p. 10-11.

⁷⁷ CWA comments, p. 2.

⁷⁸ Joint Utilities comments, p. 10.

OTTC supports the use of OTMR modeled after the FCC's rules. According to OTTC, OTMR will be a significant enhancement to the process for expanding broadband availability to New York's citizens. However, OTTC disagrees with the Staff White Paper's approach towards CBAs and OTMR, and believes those concerns are speculative. According to OTTC, whether or not CBAs affect the ability of non-utility attachers to perform work should not be determined on unsupported, conclusory assertions that the CBAs mandate a certain outcome.⁷⁹

Crown Castle states that new attachers should be allowed to perform necessary make-ready work, including OTMR, in the communications space but contends that that this work can be performed by any qualified contractor and should not be limited to utility-approved contractors. Crown Castle expresses concern with utilities' timeliness in approving contractors and suggests the Commission require pole owners to approve a contractor within a fixed timeframe such as 21 days.⁸⁰

Determination

The Commission adopts the Staff White Paper's approach to OTMR consistent with the FCC's approach subject to the following clarifications.

First, since both attachers and pole owners are active stakeholders and participants in the roll-out of high-speed broadband, all parties must be mindful of the pole owners' legal and contractual obligations, including CBAs. To effectuate this, every party operating on a pole is responsible for ensuring they (or their actions) do not conflict with a CBA. A CBA is a legal agreement that binds the pole owner; if a CBA is in place for an attachment on a particular pole, the attacher

⁷⁹ OTTC comments, pp. 6; 9-10.

⁸⁰ Crown Castle comments, pp. 11-12.

must abide by the CBA and use the contractor designated in the CBA, if the CBA so requires. Both pole owners and attachers should work proactively to identify and communicate about applicable CBAs, and there should be no delay in processing or make-ready due to a CBA-related issue. It is the Commission's expectation that, upon receipt of an attacher's application, the pole owner surveys and identifies which entities are on the pole and the pole owner should state to the new attacher which existing attachers (if any) have an applicable CBA, if known.

With respect to CWA's concerns, the Commission agrees that OTMR should not undermine CBAs. However, we do not agree with CWA's request for the creation of an attacher database; this would require data sharing and resources to implement and is not readily available. However, it is our expectation that pole owners have reasonable awareness of their pole infrastructure and, specifically, the attachers and applicable CBAs for each pole. Similarly, each attacher should have reasonable awareness of other companies' facilities and are well positioned to take note during the survey and planning stages and then make inquiries with each attacher regarding potentially applicable CBAs. Coordination on this issue and methods for identifying facilities to which a CBA condition applies is a potential subject for discussion in the collaborative working group.

CWA also requests robust enforcement of unsafe work and violations of CBA protections. The Commission disagrees with CWA, but notes that post-construction inspections (discussed below) will assist all parties in promptly identifying safety issues and also notes that the dispute resolution process is available where necessary. With regard to enforcement of the CBAs' protections, those are separately

negotiated agreements, and the Commission has no oversight over them.

Second, in accordance with the FCC, simple make-ready is defined as existing attachments in the communications space of a pole that can be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment.⁸¹ All other attachments would constitute "complex" make-ready and are not appropriate for OTMR. The Commission, therefore, disagrees with comments from PSEG and the Joint Utilities that "simple" attachments should be expanded to exclude instances where a "wired" attachment is relocated.

Third, the Commission agrees with the Staff White Paper's recommendation to exclude OTMR for new attachments that are more complicated or above the communications space on the pole. Safety and reliability concerns are more prevalent when work is performed in the electric space on the pole and as indicated in the Staff White Paper, OTMR is appropriate for the communications space only.

Further, we also agree with the Staff White Paper's recommendations relating to pole owner-approved contractors and processes.⁸² New attachers must endeavor to use a contractor approved by the pole owner to perform OTMR. If a utility or pole owner does not provide a list of contractors, however, the new attacher must use a qualified contractor to perform the work. A pole owner should not delay OTMR or available options

⁸¹ Accelerating Wireline Broadband Development by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7711-75, ¶17 (rel. August 3, 2018).

⁸² Staff White Paper, p. 46.

by failing to compile or maintain a list of approved contractors.

Accordingly, the Commission agrees with Crown Castle that pole owners should be required to approve a contractor within a fixed timeframe to ensure timely approval. To this end, pole owners should provide an initial list of approved contractors within 60 days of the issuance of this Order, and thereafter, shall provide an annually updated list of approved contractors to attachers. To ensure quality work is performed and provide pole owners the opportunity for oversight of safety and equipment, new attachers are required to provide advance notice and allow representatives of existing attachers and the pole owner a reasonable opportunity to be present when surveys and OTMR work are performed. In addition, new attachers are required to allow existing attachers and the pole owner the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work to address existing attachers' and the pole owners' concerns that the new attacher's contractor may damage equipment or cause an outage without their knowledge and with no opportunity for prompt recourse.

As discussed above, however, self-help is not an available remedy for attachers to complete make-ready work (including OTMR) themselves, including instances where deadlines are not met by pole owners. There are significant concerns with safety and maintaining compliance with the NESC. Therefore, all make-ready work must be performed by qualified contractors.

Finally, the Commission notes that the Staff White Paper's recommendation is consistent with the recently amended PSL §119-a which states: "[n]othing in this section shall be construed to authorize the public service commission to interfere in any manner with provisions of collective bargaining

agreements relating to pole attachment work between a utility corporation, telephone corporation, cable television corporation or any entity subject to article eleven of this chapter and its employees.”

The Commission adopts the Staff White Paper’s recommendation to allow for the use of OTMR where it does not conflict with CBAs as clarified herein. This modification shall go into effect 60 days after issuance of the Order. Pole owners should make a list of approved contractors available to attachers on their respective web sites and through any other additional means of communication with third-party attachers.

4. Post-Construction Inspections

The 2004 Pole Order encourages, but does not require, utilities to perform post-construction inspections.⁸³ As a result, utilities typically perform post attachment inspections only at the request and cost of the third-party attacher.

The Staff White Paper acknowledges the continuing concern with pre-existing conditions necessitating pole replacement and associated reconfiguration costs, along with the safety and reliability concerns associated with temporary and permanent pole attachment methods. In light of this, the Staff White Paper recommends that pole owners be required to perform post-construction inspections on all work associated with pole attachment/make-ready jobs, to be funded by third-party attachers.⁸⁴

Comments

Crown Castle disagrees with requiring post-construction inspections at the attacher’s expense. Rather, it states that the Commission should retain its existing rule that

⁸³ 2004 Pole Order, p.8.

⁸⁴ Staff White Paper, p. 47.

encourages, but does not require, inspections. According to Crown Castle, post-construction inspections consume time and resources that can often be better allocated to new deployment.⁸⁵

The Joint Utilities disagree with required inspections and, instead prefer that the Commission retain the pole owners' flexibility to perform post-construction inspections. According to the Joint Utilities, they spend a significant amount of time correcting unauthorized or incorrect attachments. Accordingly, the Joint Utilities, urge the Commission to determine (a) that pole owners should retain the flexibility to perform post-construction inspections within the constraints of the market, and (b) that the Commission establish stronger enforcement mechanisms so that pole owners do not incur time and financial costs due to attacher delays or failures to correct unauthorized or nonconforming attachment.⁸⁶

Verizon submits that post-construction inspections should not be required and, instead, should continue to be at the discretion of the pole owner or the request of the attacher and at the attacher's expense. According to Verizon, the concerns relating to the stress that such inspections put on available personnel and resources remains compelling, especially in light of the increased demand for pole attachments that has resulted from the expanded availability of funding for broadband deployment.⁸⁷

Determination

The Commission adopts the Staff White Paper's recommendation. We believe that the most timely way to address improper or incorrect third-party attachments is through

⁸⁵ Crown Castle comments, pp. 11-12.

⁸⁶ Joint Utilities comments, pp. 12-15.

⁸⁷ Verizon comments, pp. 11-12.

mandatory post-construction inspections. Post-construction inspections will allow pole owners to identify violations and errors and provide an opportunity to identify temporary attachments that need to be made permanent. It will also assist pole owners in managing safety concerns. As for attachers, post-construction inspections will provide an opportunity to correct errors and potentially avoid disputes with pole owners. Routine surveys will also lead to increased accountability for attachers. Since post-construction inspections will continue to be funded by third-party attachers, there is no additional burden on the pole owners.⁸⁸ In sum, post-construction inspections will improve application of the pole attachments rules and issues will be identified and addressed in a timely manner.

The Commission adopts the Staff White Paper's recommendation. Effective 60 days after the issuance of this Order, mandatory post-construction inspections shall be conducted on all attachments for which an attacher applies after that date.

Miscellaneous Comments

The Commission also received several miscellaneous comments that are not within the scope of this proceeding. Verizon's comments regarding wireless attachments to utility-owned light poles, delivered power to wireless attachments and rates for such, and clarification regarding the filing of tariffs by municipal-owned electric companies;⁸⁹ as well as

⁸⁸ The Commission notes that the current rules require third-party attachers to bear the cost of post-construction inspections and the Staff White Paper's recommendation is to maintain this payment responsibility. See, 2004 Pole Order, Appendix A, p.8.

⁸⁹ Verizon comments, pp. 14-15.

PSEG's⁹⁰ and CTIA's⁹¹ comments on tree trimming; and Crown Castle's request for clarification on radio frequency emissions,⁹² are all beyond the scope of this proceeding. Accordingly, the Commission will not address these matters here.

CONCLUSION

Amended PSL §119-a(4) requires the Commission to examine a process for streamlining utility pole attachments and consider dispute resolution, cost sharing models, impact on the expansion of broadband, alternative pole attachment methods, and the existing rules regarding cost obligations. Through this Order, the Commission adopts certain modifications to its 2004 Policy Statement on Pole Attachments and related proceedings as discussed in more detail above.

The Commission orders:

1. The 2004 Policy Statement on Pole Attachments and related proceedings are modified consistent with the discussion in this Order.

2. Pole owners and third-party attachers under the Commission's jurisdiction shall follow all other applicable rules, terms, and conditions of the 2004 Policy Statement on Pole Attachments and related proceedings unless otherwise modified by this Order.

3. In the Secretary's sole discretion, the deadlines set forth in this Order may be extended. Any request for an extension must be in writing, must include a justification for

⁹⁰ PSEG reply comments, pp. 3-4.

⁹¹ CTIA comments, p. 5.

⁹² Crown Castle comments, p. 11.

the extension, and must be filed at least three days prior to the affected deadline.

4. This proceeding is continued.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS
Secretary