

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265**

Public Meeting held July 12, 2018

Commissioners Present:

Gladys M. Brown, Chairman, Statement  
Andrew G. Place, Vice Chairman, Statement  
Norman J. Kennard, Statement  
David W. Sweet, Statement  
John F. Coleman, Jr.

Assumption of Commission Jurisdiction  
Over Pole Attachments from the Federal  
Communications Commission

L-2018-3002672

**NOTICE OF PROPOSED RULEMAKING**

**BY THE COMMISSION:**

At its June 14, 2018 Public Meeting, the Pennsylvania Public Utility Commission (Commission) unanimously approved the Motion of Commissioner Norman J. Kennard to begin a rulemaking to assert Commission jurisdiction over pole attachments pursuant to the Telecommunications Act of 1996 (TA96).<sup>1</sup> TA96 provides that the Federal Communications Commission (FCC) regulates pole attachments by default but contains procedures by which states may reverse-preempt FCC jurisdiction over pole attachments. Approximately twenty states have opted to regulate pole attachments through the reverse-preemption provision of TA96.<sup>2</sup> While the Commission informally considered assuming

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<sup>1</sup> The Pole Attachment Act (PAA) section of TA96 may be found at 47 U.S.C. § 224, and the attendant FCC regulations may be found at 47 C.F.R. §§ 1.1401 – 1.1425; the current iteration of which are attached. Because the Commission does not propose to alter existing FCC pole attachment regulations at this time it will not reiterate the regulations in the body of this Order.

<sup>2</sup> 47 U.S.C. § 224(c). The comprehensive list: Alaska, Arkansas, California, Connecticut, Delaware, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Utah, Vermont, and Washington, as well as the District of Columbia.

jurisdiction over pole attachments in the past, recent public demand for ubiquitous access to wireline and wireless data technology has increased the need for more streamlined pole attachment procedures in Pennsylvania. The June 14 Motion and this Notice of Proposed Rulemaking (NPRM) are responsive to that public need.

This Rulemaking will address network elements on which all broadband deployment relies – essential physical infrastructure used to deliver these services to end-users. It will provide stakeholders with the opportunity to shape how the Commission may provide its expertise and adjudicatory resources to benefit stakeholders as they seek to address the challenges of broadband deployment in Pennsylvania. The initial step in this process is to establish which pole attachment rules the Commission will apply and how it will apply them. The Commission invites interested persons to provide comment and to offer recommendations for consideration on its proposal to exercise reverse-preemption of FCC pole attachment jurisdiction and on its proposal to adopt the FCC pole attachment regulatory regime without modification at this time. In furtherance of this proposal, the Commission has included the attached Annex to this Notice of Proposed Rulemaking Order to establish Chapter 77, *Pole Attachments*, to Title 52 of the Pennsylvania Code.

## **ENHANCING OPPORTUNITIES FOR BROADBAND DEPLOYMENT**

Stakeholders seeking enhanced broadband deployment opportunities have long advocated for pole attachment reform before the FCC. As early as 2005, attaching entities requested that the FCC provide more favorable pole attachment terms. In 2007, the FCC obliged with a forum to consider the requested relief.<sup>3</sup> On March 16, 2010, the FCC released its *National Broadband Plan* that, in part, recognized that a lack of reliable, timely, and affordable access to utility poles is often a significant barrier to deploying

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<sup>3</sup> *In re Implementation of Section 224 of the Act*, 22 FCC Rcd. 20195, 20199 (F.C.C. 2007).

wireline and wireless services.<sup>4</sup> The *National Broadband Plan* recommended that enhanced pole attachment rights could promote broadband deployment and specifically recommended that:

- (1) The FCC establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, as amended, to promote broadband deployment;
- (2) The FCC implement rules that will lower the cost of the pole attachment “make-ready” process. For example, the FCC should authorize attachers to use space and cost-saving techniques, such as boxing or extension arms, where practical and in a way that is consistent with pole owners' use of those techniques;
- (3) The FCC establish a comprehensive timeline for each step of the Section 224 access process and reform the process used for resolving disputes regarding infrastructure access; and
- (4) The FCC improve the collection and availability of information regarding the location and availability of poles, ducts, conduits and rights-of-way.<sup>5</sup>

The FCC later adopted these aspects of pole attachment reform as it worked to enhance access to broadband service throughout the nation.

#### **A. 2010 Pole Attachment Order**

On May 20, 2010, the FCC issued its *Pole Attachment Order and Further Notice*.<sup>6</sup> There, it took initial steps to clarify pole attachment rules and streamline the attachment process. For example, it clarified that communications providers had a right to use the same space and cost-saving techniques employed by pole owners, such as placing attachments on both sides of a pole (‘boxing’) and established that providers have a

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<sup>4</sup> *In re Implementation of Section 224 of the Act*, 26 FCC Rcd. 5240, 5241 (F.C.C. Apr. 7, 2011) (*April 2011 Order*).

<sup>5</sup> *In re Implementation of Section 224 of the Act et al.*, 25 FCC Rcd. 11864, 11868 (F.C.C. 2010).

<sup>6</sup> *2010 Order and Further Notice*, 25 FCC Rcd. 11864.

statutory right to timely access to poles.<sup>7</sup> Regarding the Further Notice, the FCC focused on measures to speed attaching entities' access to poles.<sup>8</sup> Affected industries responded, and the FCC released its *April 2011 Order* to address what it believed were the major concerns impeding the expansion of broadband throughout the United States.

## **B. 2011 Report And Order On Reconsideration**

The *April 2011 Order* adopted many of the proposals of the affected stakeholders.<sup>9</sup> That Order, applicable to EDC and ILEC poles, limited the number of pole attachments that may be requested per month (no more than 3,000 poles state-wide).<sup>10</sup> It also established a four-stage timeline for wireline and wireless attachment to a pole's communications space, with a maximum timeframe of up to 148 days for completion of all four stages. When pole owners failed to meet these deadlines, attaching entities could engage utility-approved contractors to complete the work. In addition, attaching entities now had access to space above the communications space, but only using workers qualified to perform such work.<sup>11</sup> Wireless attachments above the communications space are subject to a 178-day response and have a complaint remedy process. An electric utility must specifically explain any attachment refusal based on capacity, safety, reliability, or engineering concerns.

Regarding rates, the *April 2011 Order* reduced the disparity between current telecommunications rates and the lower, and perhaps subsidized, CATV rates.<sup>12</sup> Specifically, the FCC adopted a definition of cost that yielded a new "just and reasonable" telecommunications rate designed to recover the same portion of pole costs as current cable rates. The April 2011 Order also confirms that wireless providers are

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<sup>7</sup> *In re Implementation of Section 224 of the Act*, 26 FCC Rcd. 5240, 5248-5249 (F.C.C. Apr. 7, 2011).

<sup>8</sup> *Id.*

<sup>9</sup> *In re Implementation of Section 224 of the Act*, 26 FCC Rcd. 5240, 5241 (F.C.C. Apr. 7, 2011).

<sup>10</sup> *Id.* at 5270 (the timelines of the Order apply to poles -- not to conduit, ducts, or utility rights of way).

<sup>11</sup> *Id.*

entitled to the same rate under the statute as other telecommunications carriers.<sup>13</sup>

Noting a decline in ILEC pole ownership rates, the FCC exercised oversight to ensure just and reasonable rates, terms, and conditions that might not otherwise result from arm-length negotiations with EDCs. In a break from previous interpretations of Section 224, an ILEC may file a pole attachment complaint if it believes a particular rate, term, or condition is unjust or unreasonable. However, the FCC hedged its acknowledgement of ILECs' pole attachment interests. While ILECs continue to have no statutory right of access to utility poles pursuant to the PAA, the FCC concluded that, where ILECs are granted such access, ILECs are entitled to rates, terms and conditions that are "just and reasonable" in accordance with section 224(b)(1).<sup>14</sup>

Regarding FCC enforcement actions, the *April 2011 Order* encouraged negotiated resolutions of attachment disputes, including a certification of good faith "executive-level discussions" prior to the filing of a complaint with the FCC.<sup>15</sup> The Order retained the "sign and sue" rule, which permits attaching entities to sue over the terms of a signed attachment agreement where the attaching entity claims coercion to accept certain terms to gain pole access. The *April 2011 Order* declined to adopt rules for compensatory damage awards and removed the cap on penalties for unauthorized attachments.

The Order looked to the practical experience of the states to deal with unauthorized attachments.<sup>16</sup> In the past, a successful claim against an unauthorized attachment amounted to little more than an award of back rent. The FCC expanded allowable recovery to include per-pole penalties of up to five times the current annual rental fee per

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<sup>12</sup> *Id.* at 5298 (Believing the telecom rate should be lowered to more effectively achieve Congress' goals under TA96).

<sup>13</sup> *Id.* at 5244.

<sup>14</sup> *Id.* at 5328.

<sup>15</sup> *Id.* at 5286 (adopted from California's pole attachment dispute resolution practices).

<sup>16</sup> *Id.* at 5245.

pole for unauthorized attachments. These penalties allowed for additional charges if pole owners identify unauthorized attachments during inspections in which the unauthorized attaching entity declined to participate.<sup>17</sup>

### **C. 2013 D.C. Circuit Ruling On The 2011 Report And Order On Reconsideration**

Consistent with its efforts in its *Connect America Fund* Order, the FCC's *April 2011 Order* seeks to promote broadband deployment by reforming the pole attachment process to make it faster, easier, and more accessible with a lower unified rate for all attaching entities. In 2013, the D.C. Circuit Court of Appeals upheld the reforms of the *April 2011 Order* in *Am. Elec. Power Serv. Corp. v. FCC*, 2013 U.S. App. LEXIS 3924 (D.C. Cir. Feb. 26, 2013). Specifically, a group of electric companies affected by the *April 2011 Order* challenged the FCC's revised interpretations. CATV providers and telecommunications carriers intervened in support of the new interpretation. The Court agreed with the FCC that a reasonable interpretation of 47 U.S.C. § 224, while not bringing ILECs under the statute for purposes of requesting pole attachments, could provide ILECs with pole attachment rate relief comparable to CATV providers and allow them to use the FCC complaint process to resolve disputes with pole owners.<sup>18</sup>

### **D. November 2015 Order On Reconsideration**

In 2011, the National Cable Television Association petitioned for reconsideration or clarification of the *April 2011 Order* seeking to characterize the 2011 formula for cost, which included an urban allocation factor of 66% and a non-urban allocation factor of 44% as merely illustrative.<sup>19</sup> In response, the FCC redefined its definition of "cost" in its rate calculation (rate = space factor x cost) and revised its cost allocators to move wireless and telecommunications carrier rates further toward CATV rates.

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<sup>17</sup> *In re Implementation of Section 224 of the Act*, 26 FCC Rcd. 5240, 5290 (F. C.C. Apr. 7, 2011).

<sup>18</sup> *Am. Elec. Power Serv. Corp. v. FCC*, 2013 U.S. App. LEXIS 3924 \*7-\*13 (D.C. Cir. Feb. 26, 2013).

<sup>19</sup> November 2015 Order at ¶ 2.

Through these changes, the FCC sought to promote a flexible series of cost allocators to realize the intent of the *April 2011 Order*: bringing telecom costs closer to parity with cable attachment rates. The new allocators also have the effect of preventing pole owners from charging cable operators higher rates just because those cable operators also deliver telecommunications services.<sup>20</sup> The FCC opined that it sought to advance its goal of accelerating broadband deployment by removing barriers to infrastructure investment, particularly in rural areas, and to harmonize regulatory treatment between FCC-regulated pole attachments and those regulated by the states. The FCC stated that it would not deter investment by subjecting cable operators to higher telecommunications carrier rates merely because cable facilities also provide broadband access.<sup>21</sup>

#### **E. Recent Pennsylvania Efforts To Enhance Broadband Deployment**

The Commission believes that asserting state jurisdiction over pole attachments at this time will assist policymakers in their efforts to expand access to both wireline and wireless broadband services for all Commonwealth residents, businesses, schools, hospitals -- particularly in rural areas of the Commonwealth.

Specifically, in early 2018 Governor Thomas W. Wolf launched the Pennsylvania Broadband Initiative to make a dedicated effort to provide high-speed internet access to every household and business in Pennsylvania, noting that over 800,000 Pennsylvania residents lack high-speed internet access.<sup>22</sup> That effort includes the Pennsylvania Broadband Investment Incentive Program whereby the Wolf Administration will offer up to \$35 million in financial incentives to private telecommunications providers bidding on service areas within Pennsylvania in the FCC Connect America Fund Phase II auction.

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<sup>20</sup> *Id.* at ¶ 3.

<sup>21</sup> *Id.* at ¶ 4.

<sup>22</sup> <https://www.governor.pa.gov/broadband/#about-initiative> visited June 26, 2018.

*Id.* Similarly, in the General Assembly, Representatives Pam Snyder and Kristin Phillips-Hill have formed the bipartisan Broadband Caucus to promote a legislative agenda that furthers the deployment of high-speed broadband services throughout the Commonwealth.<sup>23</sup>

This chronology illustrates the state and federal desire for enhanced broadband opportunities and the close relationship between pole attachments and broadband deployment. By working to take this important issue in-hand at the state level, the goals of this NPRM will work to support the Commonwealth’s efforts to provide advanced telecommunications tools to its citizens. Similarly, this NPRM is a natural outgrowth of the goals of Chapter 30 of the Public Utility Code<sup>24</sup> which is intended to promote and encourage the provision of advanced telecommunications services and broadband deployment in the Commonwealth.

#### **SCOPE OF JURISDICTION ESTABLISHED BY 47 U.S.C. § 224**

As an initial matter, the term “pole attachment” in the context of TA96 is a term of art used to describe the physical facilities employed to support or protect cabling, transponders, or similar facilities used in outside communications plants. While the term evokes the image of the ubiquitous creosote-slathered utility pole, the term “pole attachment” refers to more. Federal law defines a “pole attachment” as any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.<sup>25</sup> Thus, the definition extends to utility structures above and below ground and encompasses utility property rights.

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<sup>23</sup> <http://www.pahouse.com/Snyder/InTheNews/NewsRelease/?id=98089> visited June 26, 2018.

<sup>24</sup> 66 Pa. C.S. §§ 3001 *et. seq.*

<sup>25</sup> 47 U.S.C. § 224(a)(4).

While it is important to understand where and how pole attachment law applies, it is equally important to understand where it does not. The PAA expressly exempts cooperative utilities, railroads, and federal or state-owned utilities from the definition of a “utility,” and thus, from the reach of the PAA.<sup>26</sup> Entities wishing to attach to the infrastructure of the exempted entities must obtain private attachment agreements at negotiated rates and terms. The Public Utility Code does not regulate some of the entities exempted by the PAA. Thus, even with reverse preemption, Commission jurisdiction may not reach all facilities subject to attachment in the Commonwealth. Accordingly, there may be little for the PUC to consider regarding these entities absent additional statutory authorization from the General Assembly.

The PAA provides that a state may assume responsibility for pole attachments, and concurrently divest the FCC of that responsibility, if the state certifies that it regulates the rates, terms, and conditions of pole attachments and balances the needs of attaching entities, pole owners, and consumers of services provided by the former.<sup>27</sup> To formally divest the FCC of jurisdiction and assume that jurisdiction itself, a state must certify to the FCC that it has established effective rules and regulations over pole attachments and provides for the prompt resolution of pole attachment complaints. *Id.* That is, a state must certify to the FCC that it will assume responsibility for the enforcement of 47 U.S.C. § 224 in a manner like that of the FCC. This NPRM proposes to achieve this federal threshold with reasonable expediency.

## **COMMISSION AUTHORITY TO ACT**

In addition to the federal authority provided under 47 U.S.C. § 224, the Commission concludes it may assert its reverse preemption rights under TA96 without seeking additional authority from the General Assembly. Among other sections of the Public Utility Code, 66 Pa. C.S. § 501(a) provides broad authority for the PUC to act to

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<sup>26</sup> 47 U.S.C. § 224(a)(1).

enforce the Public Utility Code and “the full intent thereof.”<sup>28</sup> Also, many pole attachments involve jurisdictional utility property subject to the full provisions of the Public Utility Code. In addition, the Third Circuit in *AT&T Corp. v. Core Communications, Inc.* determined that the Pennsylvania Public Utility Commission has authority to apply and enforce provisions of TA96 reserved to it, particularly as to FCC formula rates.<sup>29</sup> That Section 224 expressly reserves this authority to the states lends even greater weight to the precedent of that case.

Under that state authority the Commission may adopt current FCC regulations and applicable federal precedent to regulate the full scope of pole attachments in Pennsylvania. As the Commission explained in its June Motion, the regulations at 47 C.F.R. §§ 1.1401 – 1.1425 cover a multitude of issues and are prescriptive. Those regulations establish a four-stage timeline (survey, estimate, acceptance, and make ready) for attachments to the communication space of a pole and provide for procedures for the failure to meet established deadlines and resolve disputes based on pole capacity, safety, reliability, or engineering issues. The FCC regulations also provide for detailed formulas to set rates, many of which are geared toward enhancing opportunities for additional deployment of communications infrastructure.

This NPRM proposes that the Commission assume these duties in a practical (i.e., timely) manner that works to provide near-term results. The Commission understands that pole owners and attaching entities seek more timely alternatives to the FCC complaint resolution process. To address this issue, the Commission can make its

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<sup>27</sup> 47 U.S.C. § 224(c).

<sup>28</sup> Commission authority may be found at 66 Pa. C.S. §§ 313 (authority concurrent with United States); 314 (enforcement of federal rates and service); 501 (enforce the full intent of Public Utility Code, including as it relates to federal law); 701 (ability of affected persons to file complaints with the Commission); 1301 (authority over jurisdictional rates); 1501 (authority over jurisdictional services).

<sup>29</sup> 806 F.3d 715 (2015).

quasi-judicial function available to stakeholders. To ensure for the timely availability of that resource, however, the Commission proposes an initial turn-key adoption of FCC pole attachment regulations and rates (see attached Annex). There exists no prohibition on the adoption of existing FCC regulations as a part of that certification. Other states have taken this approach, a recent example being the Washington Utilities and Transportation Commission (WUTC). The rules adopted by the WUTC are largely modeled on the existing federal rules and provide that the WUTC will look to the FCC orders promulgating and interpreting its pole attachment rules, as well as federal court decisions reviewing those rules, as persuasive authority.<sup>30</sup>

This proposed approach provides two distinct benefits. First, it preserves the status quo in that it does not represent a substantive change in law. As such, it does not impose any unexpected burdens on pole owners or attaching entities. Stakeholders will operate under familiar rules and rates such that Commission jurisdiction will not disrupt existing business practices or regulatory expectations. Second, adoption of existing FCC pole attachment rules and rates will permit timely stakeholder access to adjudicatory resources unique to our Commonwealth – the administrative hearings before this Commission and the specialized administrative jurisdiction of Commonwealth Court. In contrast, a Pennsylvania-specific regulatory paradigm could take many years to develop and implement.<sup>31</sup> And, other than holding the promise of some degree of cost shifting, Pennsylvania-specific regulations would likely provide only incremental improvement over what are now well-established installation practices.

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<sup>30</sup> WAC § 480-54-010.

<sup>31</sup> The Commission understands that the Washington Utilities and Transportation Commission deliberated on the issue for approximately thirty-six years after it was authorized to adopt such rules.

## CONCLUSION AND REQUEST FOR COMMENTS

As it explained in the Motion commencing this Rulemaking, the Commission seeks to adopt a prompt but cautious approach to taking pole attachment issues in hand. While the Commission is prepared to move quickly to provide stakeholders with needed resources, it is apprehensive to make any sudden departures from the federal pole attachment standards that stakeholders currently employ. To this end, the Commission seeks informed comment on its proposal to regulate pole attachments pursuant to 47 U.S.C. § 224 by adopting the existing FCC pole attachment regulations at 47 C.F.R. §§ 1.1401 – 1.1425; **THEREFORE,**

### IT IS ORDERED:

1. That a rulemaking proceeding is hereby initiated at this docket to consider exercising Commission jurisdiction over pole attachments pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 224.
2. That notice of this proposed rulemaking order shall be published in the *Pennsylvania Bulletin*.
3. That interested persons may submit written comments within 30 days from the date the notice is published in the *Pennsylvania Bulletin*, and reply comments 15 days thereafter, by serving an original or electronic copy upon the Secretary, Pennsylvania Public Utility Commission, P.O. Box 3265, Harrisburg, PA 17105-3265.
4. A copy of written comments shall also be served upon Commission Law Bureau Assistant Counsel Shaun A. Sparks ([shsparks@pa.gov](mailto:shsparks@pa.gov)) and Colin W. Scott ([colinscott@pa.gov](mailto:colinscott@pa.gov)) who also serve as the contact persons in this matter.

5. All comments shall be posted on the Commission website within the Telecommunications Utility/Industry index page under the heading “Pole Attachment Rulemaking.”

6. That a copy of this Order shall be served upon all jurisdictional fixed utility service providers, the Pennsylvania Telephone Association, the Broadband Cable Association of Pennsylvania, the Energy Association of Pennsylvania, The Pennsylvania Wireless Association, all jurisdictional Competitive Access Providers, the Office of Consumer Advocate, the Office of Small Business Advocate, and the Commission’s Bureau of Investigation and Enforcement.

**BY THE COMMISSION**



Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: July 12, 2018

ORDER ENTERED: July 13, 2018

**ANNEX**  
**TITLE 52. PUBLIC UTILITIES**  
**PART 1. PUBLIC UTILITY COMMISSION**  
**Subpart C. FIXED SERVICE UTILITIES**  
**CHAPTER 77: POLE ATTACHMENTS**

**§ 77.1. Statement of purpose and preemption.**

This chapter exercises reverse-preemption of the jurisdiction of the Federal Communications Commission over pole attachments under 47 U.S.C. § 224(c) to improve the ability of persons and entities to utilize pole attachments within the Commonwealth and subject to regulation under 47 U.S.C. § 224 and the regulations promulgated thereunder at 47 C.F.R. 1.1401 – 1.1425 (relating to pole attachment complaint procedures).

**§ 77.2. Applicability.**

This chapter applies to all persons, entities, poles, ducts, conduits and rights-of-way subject to 47 U.S.C. § 224 and 47 C.F.R. 1.1401 – 1.1425 as those regulations may be amended.

**§ 77.3. Commission oversight.**

(a) This chapter establishes the Commission’s regulatory authority over the rates, terms and conditions of access to and use of poles, ducts, conduits and rights-of-way to the full extent provided for in 47 U.S.C. § 224 for pole attachments as of sixty days after the effective date of this Chapter.

(b) The Commission has the authority to consider, and will consider, the interests of the subscribers of the services offered via pole attachments, as well as the interests of the consumers of the utility services.

**§ 77.4. Adoption of Federal Communications Commission Regulations.**

This chapter adopts the rates, terms and conditions of access to and use of poles, ducts, conduits and rights-of-way to the full extent provided for in 47 U.S.C. § 224 and 47 C.F.R. 1.1401 – 1.1425, inclusive of future changes as those regulations may be amended.

**§ 77.5. Resolution of disputes.**

(a) Persons and entities subject to this chapter may utilize the mediation, formal complaint and adjudicative procedures under 52 Pa. Code Chapters 1, 3 and 5 (relating to rules of administrative practice and procedure; special provisions; and formal proceedings) of the Commission's regulations to resolve disputes or terminate controversies.

(b) Parties before the Commission under 47 U.S.C. § 224 or 47 C.F.R. 1.1401 – 1.1425 shall employ the procedural requirements therein except where silent or in cases of conflict where 52 Pa. Code Chapters 1, 3, and 5 will control.

(c) When exercising authority under this chapter the Commission will consider Federal Communications Commission orders promulgating and interpreting federal pole attachment rules and federal court decisions reviewing those rules and interpretations as persuasive authority in construing the provisions of 47 U.S.C. § 224 and 47 C.F.R. 1.1401 – 1.1425.