BEFORE THE
NEW YORK PUBLIC SERVICE COMMISSION

Reply Comments of

CTIA – THE WIRELESS ASSOCIATION®

Docket No. 16-M-0330

In re Proceeding to Update and Clarify
Wireless Pole Attachment Protections

REPLY COMMENTS

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CTIA – The Wireless Association® ("CTIA") files these Reply Comments to respond to points raised by other parties in Comments filed August 1, 2016.

I. Background

Granting CTIA's Petition and the measures suggested in the Petition will break an access logjam and facilitate the flow of wireless infrastructure investment into New York. This investment is necessary for mobile broadband deployment in New York because it will allow for the rollout of 5G and other advanced services, public safety enhancements, and wider and more deeply penetrated mobile services.

Initial Comments broadly support this imperative. The other wireless infrastructure Comments provide evidence completely harmonious with CTIA members' experiences. The Comments of the Wireless Infrastructure Association ("WIA"), SQF, Lightower, the New York Wireless Association ("NYSWA") and Verizon New York, Inc. ("Verizon NY") paint a picture of years of waiting for pole attachment agreements to access these essential facilities, of unreasonably restrictive access standards and other terms and conditions, and of unreasonable rates.

By contrast, the joint electric utilities ("Joint Utilities") and Frontier Communications say "all is well, change nothing," and urge the Commission to maintain a *status quo* which would favor utility interests at the expense of consumer access to broadband. Despite their opposition, their Comments present no credible reason why standard pole-attachment processes and the FCC's telecommunications rate methodology cannot be applied to wireless installations on

utility poles, and offer no credible reason why expedited dispute resolution procedures should not be imposed. Further, their arguments about the supposed legal insufficiency of the Petition are equally without merit. Their repetition of long-discredited arguments about pole use, access procedures, and supposedly unique cost considerations actually illuminate the source of the problem.

If the Joint Utilities' unabashed invitation to do nothing were accepted by the Commission, New York would find itself in a place where the utilities' self-interest reigned supreme over the public interest, denying New Yorkers the benefits of advanced mobile broadband deployment. Accepting this "do nothing" invitation would make New York a far less hospitable place for small-cell and DAS deployments, handicapping investment and harming the State's ability to achieve its stated broadband deployment goals. Denying the Petition, and refusing the modest measures sought by CTIA, WIA, SQF, Lightower, NYSWA, and Verizon NY, virtually guarantees the perpetuation of a *status quo* in which electric utilities are the omnipotent gatekeepers who control access to New York's mobile broadband future. As such, the pole owners' initial Comments reinforce the need for the Commission to explicitly extend rights and protections to wireless attachers.

Timely action by the Commission is critical. All four national carriers have announced that they are engaged in 5G testing.[1] Speeds achieved in their testing have been blazingly fast, with some tests achieving speeds above 10 Gbps.[2] Such speeds meet any definition of broadband. As explained in CTIA's Petition and its initial Comments, transitioning 5G services from testing to commercial availability requires deployment of network infrastructure. Due to the characteristics of the spectrum on which 5G services will be offered, 5G networks' equipment must be deployed densely and close to consumers. This is very different than the deployment patterns of current networks, but even current networks will benefit from utility pole access as it enables carriers to improve coverage and capacity. Commercial launch of 5G

[1] *See* Dan Meyer, *Verizon, AT&T, T-Mobile and Sprint deep into 5G testing across high-band spectrum*, RCR WIRELESS NEWS, July 14, 2016, *available at* http://www.rcrwireless.com/20160714/carriers/verizon-att-t-mobile-sprint-deep-5g-testing-across-high-band-spectrum-tag2 (describing testing by all four national carriers).

[2] *See* Sue Marek, *Verizon's 5G tests hit 10-Gig speeds, commercial deployment in 2017 possible*, FIERCE WIRELESS, Feb. 22, 2016, *available at* http://www.fiercewireless.com/tech/verizon-s-5g-tests-hit-10-gig-speeds-commercial-deployment-2017-possible ("*10-Gig Speeds*"); Stephanie Mlot, *AT&T Expands 5G Testing With Nokia*, FOX BUSINESS, June 6, 2016, *available at* http://www.foxbusiness.com/features/2016/06/06/att-expands-5g-testing-with-nokia.html.

networks may occur as early as next year (2017),[3] so access to utility poles is not a question for extended deliberation, it is a pressing issue to be addressed now. Only by ensuring wireless carriers have reasonable access to utility poles can the Commission ensure that New Yorkers will have access to the most advanced communications networks and services.

Thus, the Commission should grant the relief requested in CTIA's Petition to the benefit of broadband deployment in New York and the State's consumers.

II. Wireless Provider Commenters Support Adoption of CTIA's Petition

Other communications infrastructure providers and their representatives strongly endorse CTIA's Petition. Their Comments are uniform in recognizing that the telecommunications landscape has changed since the Commission last considered the issue of wireless attachers' rights and that, in the face of pole owners' highly restrictive practices, the Commission needs to take the steps suggested in the Petition.

The wireless providers' Comments acknowledge that the need for expanded wireless broadband capacity will continue to grow for a variety of reasons. For example, WIA notes that "[m]obile video will continue to be a key driver of growth in data consumption, with traffic expected to grow 6-fold by 2020."[4] Their Comments explain that "New Yorkers' reliance upon wireless services and their voracious appetite for data is on a steep upward trajectory and shows no signs of abating."[5] Furthermore, they note that the emergence of the Internet of Things ("IoT") is also driving the need for new infrastructure.[6]

Lightower also fully supports CTIA's Petition. Lightower notes in particular that the "[f]ailure to extend the protections offered by the attachment rules and regulations to wireless attachments will pose an unnecessary and avoidable hardship on parties seeking to strengthen existing wireless networks and potentially disadvantage individuals and businesses in New York that rely exclusively on wireless broadband connectivity."[7]

In the face of increasing demand, commenting providers have faced deployment challenges similar to the ones detailed in CTIA's Comments and the attached Declarations from CTIA's members. SQF, a facilities-based provider of fiber and wireless infrastructure based in Portland, Maine, speaks of its efforts to deploy hundreds of wireless installations across New

[3] *See 10-Gig Speeds*.
[4] WIA Comments at 4.
[5] *Id*. at 5.
[6] *Id*.
[7] Lightower Comments at 4.

York, but has faced substantial delays in making some of those deployments.[8] SQF's experiences are entirely consistent with those of CTIA's members. SQF notes that some pole owners have reasonable standards,[9] but that the standards of some New York pole owners are among "the most restrictive in the country,"[10] and reports that its affiliate, Tilson Technology Management, Inc., "has been seeking a pole attachment agreement for a client from a New York pole owner for over two years without success."[11] NYSWA reports that its members face "'de facto' moratoriums" on wireless deployments in some parts of the State, caused by excessively high rental rate demands and utilities' refusal to enter into attachment agreements even after years of negotiation.[12]

Verizon NY expresses concern about adoption of the FCC's timeframes, but supports CTIA's Petition overall: "CTIA raises important and valid points about the benefits to the State of ensuring the application of reasonable and non-discriminatory terms to wireless attachers."[13]

III. The Basis of the Utilities' Opposition to the Petition Runs Contrary to Record Evidence

A. Electric Utility Pole Owners and Frontier Oppose the Petition[14]

The Joint Utilities oppose CTIA's Petition. Their Comments, however, actually illustrate the need to grant the Petition. Their factual observations about poles, wireless infrastructure, and attachment processes quickly give way to attempts to resuscitate numerous discredited theories and myths about wireless attachments. The prevalence of these attitudes among utility pole owners is exactly why regulations are necessary to ensure fair treatment and reasonable terms of access.

The Joint Utilities also ignore the long-established truth that utility poles are essential facilities for communications network deployments – a fact that has led to the adoption in the vast majority of states of policies that are similar to those sought in the Petition. Despite all the

[8] SQF Comments at 2.
[9] *Id*.
[10] *Id*.
[11] *Id.; see also* CTIA Comments at 11 (describing the 28-month, ultimately fruitless pursuit of an attachment agreement by Verizon Wireless).
[12] NYSWA Comments at 2.
[13] Verizon Comments at 4-5.
[14] The City of New York and the Town of New Hempstead also oppose the Petition. Their Comments are concerned primarily with local ROW authority. CTIA's Petition and the bulk of the initial Comments in this proceeding, however, focus on the processes and costs associated with placement of wireless facilities on utility poles. The Reply Comments maintain this focus.

evidence indicating that wireless access to poles ranges from slow, difficult, and expensive to constructively impossible, the utilities insist that there is no problem, and that they should be trusted to set the future pace and cost of mobile broadband infrastructure deployment in New York. CTIA disagrees. That is why CTIA requests specific guidelines, timetables, and expedited dispute resolution procedures for wireless attachments.

B. Utility Poles Are Essential Facilities for Communications Infrastructure Deployment

The principle that utility poles are essential facilities for the installation of communications infrastructure is long-established and beyond dispute. Beginning with the Pole Attachment Act in 1978, Congress recognized that the FCC or the states themselves should regulate how pole owners do business with communications operators, in order to prevent pole owners from using their monopoly power to cut off customers' access to services (at that time, cable service).[15] The law was based on the "general principle [that] monopoly utility facilities should be available to serve the general public good," and sought to remedy the situation attested to by cable company representatives before Congress – namely, that cable communications companies were "totally dependent" on attachment to utility poles, and that utilities, "by virtue of their monopoly ownership of poles," were forcing them into "virtual contracts of adhesion."[16]

Since then, courts have widely recognized that access to utility poles is essential to communications deployment.[17] Without some guarantee of fair and reasonable access to poles, public access to vital communications services may be cut off by pole owners at any time.[18] This is why poles have been regulated by the FCC for nearly 40 years. Indeed, the United States Supreme Court has ruled that pole "attachments . . . which provide wireless telecommunications

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[15] *See* 47 U.S.C. § 224.

[16] H.R. REP. NO. 95-721, at 3, 11 (1977) , *available at* ftp://ftp.fcc.gov/pub/Bureaus/OSEC/library/legislative_histories/1118.pdf.

[17] *See, e.g.*, *Nat'l Cable & Telecommc'ns Ass'n v. Gulf Power Co.,* 534 U.S. 327, 330 ("Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents."); *FCC v. Florida Power Corp*., 480 U.S. 245, 247 (1987) (where underground installation is impossible, utility poles are "virtually the only practical physical medium for the installation of television cables"); *Georgia Power Co. v. Teleport Commc'ns Atlanta, Inc*., 346 F.3d 1033, 1036 (11th Cir. 2003) (noting "lack of alternatives to . . . existing poles"); *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1362 (11th Cir. 2002) (noting utilities are "the owner of . . . 'essential' facilities").

[18] H.R. REP. NO. 95-721, at 3 (describing how the initial House Resolution was introduced by a Representative following a pole attachment dispute in his district and the neighboring district, which caused loss of cable service to 1,200 subscribers and threatened disruption to 2,000 more).

. . . fall within the heartland of the [Pole Attachment A]ct"[19] and thus are properly regulated under that Act.

Wireless attachers deploying small cell units face the same obstacles to attachment, with few alternative solutions, that prompted passage of the Pole Attachment Act. Wireless antennas must transmit their signals over the air, so underground installation is not an option. Likewise, buildings or light poles may be available in some locales (light poles present a viable option in downtown areas where utility plant is underground), but they can't be counted on in all areas. In addition, the propagation characteristics of high-band spectrum, crucial to 5G, require facilities to be placed more densely and closer to customers.[20] Utility poles are widely available and are already used across the nation to support communications and other network infrastructure – including small cells and DAS. The Commission should resist assertions that they are not similarly suitable for mobile broadband deployments in New York.

C. The Standards, Processes, and Rate Methodology Supported by CTIA and the Wireless Commenters Can Be Easily Applied to Wireless Installations

In their Comments, the Joint Utilities contend that pole-mounted wireless attachments cannot be subject to standardized attachment processes. This is simply not true. They can be and they are, on an increasingly routine basis.

As engineering consultant David J. Marne attested in a recent proceeding before the Arkansas Public Service Commission on pole attachment rules, wireless attachments are perfectly safe if they follow the standards set out in the National Electrical Safety Code ("NESC").[21] CTIA members and other Commenters agree. For example, T-Mobile points out that the NESC permits wireless pole attachments, and that they have been installed in other states in a perfectly safe manner.[22] Lightower observes that certain attachment methods and equipment, including boxing and vertical connectivity, are essential to wireless deployment and can readily be fit within the parameters of New York's existing rules for those practices.[23] SQF addresses the Commission's technical questions point-by-point, showing that FCC rules have

[19] *Gulf Power Co.*, 534 U.S. at 342.
[20] *See* CTIA Comments at 16.
[21] *In re Rulemaking Proceeding to Consider Changes to the Arkansas Public Service Commission's Pole Attachment Rules*, Docket No. 15-019-R, Expert Report of David J. Marne at 4, 13-14 (filed Aug. 19, 2015) ("Marne Expert Report") (Attachment E to CTIA Comments).
[22] Declaration of Kevin Griswold, T-Mobile, at ¶ 12 (Attachment A to CTIA Comments).
[23] Lightower Comments at 8-9.

provided a standardized framework for wireless-attachment pole access on each point.[24] And as SQF emphasizes, FCC regulations provide for different treatment of wireless and wireline attachments in the rare circumstances where it is merited (*e.g.*, allowing additional time for the attachment of a pole-top antenna), but they do not use the unique nature of wireless attachments as an excuse to completely exclude them from utility poles.[25] And, of course, the existence and success of FCC and state regulations prove that attachment of wireless facilities to utility poles can be regulated successfully.[26]

The utilities also assert that pole-top access cannot be mandated. They point out that pole tops are sometimes reserved for use by the electric utility, and that installation and maintenance work pose additional challenges and worker safety concerns where an attachment is placed in the electric space.[27] CTIA and its members understand that not every utility pole in service is feasible for a pole-top antenna, and that pole-top antenna attachments may require additional cooperation with the utility on maintenance and worker safety issues. But the pole owners' proposed blanket prohibition against the installation of these facilities is neither credible nor reasonable. Attachments to be made at the pole top, or anywhere else on the pole, should be reviewed individually for compliance with the NESC and standards of reliability, safety and generally accepted engineering practices – and, if found compliant, permitted.[28]

CTIA members recognize the importance of worker safety. The Joint Utilities' Comments seem to assume that wireless infrastructure providers would propose attaching to utility poles without conducting thorough engineering and design studies, which of course include detailed consideration of safety rules. The assumption is erroneous. These factors are already provided for in the standards of the NESC and are already engrained in the joint-use practices of electric utilities and communications providers. Moreover, attachers are typically contractually bound to comply with OSHA and other safety standards.

[24] SQF Comments at 4-6.
[25] *Id*. at 4-5.
[26] *See In the Matter of Implementation of Section 224 of the Act: A National Broadband Plan for Our Future*, WC Docket No. 07-245, Report and Order and Order on Reconsideration (April 7, 2011) ("*2011 FCC Pole Attachment Order*"); CTIA Comments at 15 (citing all of the states that have adopted regulations governing attachment of wireless infrastructure to utility poles).
[27] Joint Utilities Comments at 17-19.
[28] *See* Marne Expert Report at 13-14.

Taken as a whole, the concerns asserted by the utilities have all been addressed successfully in other states, and there is no reason why they should prevent the Commission from extending equal rights and protections to wireless attachers.

D. The Commission Should Adopt the FCC Telecommunications Rate Methodology, or a Similar Formula, for Wireless Attachments

The pole owners argue that attachment rates should be "market" rates, "negotiated" between the parties. Frontier even goes so far as to state that "negotiations" are a "cost methodology." There is, however, no true "market" for pole attachments, and the Commission should reject such assertions in favor of a proven rate methodology, such as that employed by the FCC for telecommunications attachments.

Competitive markets require competitors (and actual competition) and alternative instrumentalities or product sources. A monopolist with ownership and control of an essential facility, where no feasible alternatives exist, can exclude users or demand extortionate prices for access. As established in Section B, *supra*, utility poles are such an essential facility. With no regulation and no viable alternative supply of support structures, pole attachment "negotiations" in New York are "take it or leave it" propositions – and pole agreements are mere contracts of adhesion.[29] In fact, it is this monopoly ownership and control of the essential pole resource that led to the passage of the federal Pole Attachment Act and resulted in comprehensive pole attachment regulation.[30]

The utilities' announcement that they plan to pursue "market-based rates"[31] should give the Commission particular pause, and underscores the need for positive and decisive Commission action on CTIA's Petition. Given the pole owners' monopoly position, pole-attachment rates under such a plan would not be limited by any competitive market forces. The utilities' assertion also provides further support for the Commission's adoption of a tried-and-true cost-based formula. No party to this proceeding disagrees that pole owners should be

[29] *See* Griswold Declaration at ¶¶ 11, 13-14 (discussing some New York utilities' "take it or leave it" approach, including non-negotiable but highly restrictive terms and "veto power" over attachments); *see also TCA Mgmt. Co. v. Sw. Pub. Serv. Co.*, 10 FCC Rcd 11832, 11838 (1995) ("In enacting Section 224, Congress recognized the utilities' superior bargaining power in pole attachment matters. To remedy the effects of that superior bargaining power, Congress gave [the FCC] jurisdiction to hear and resolve complaints regarding pole attachment rates."); *Southern Co. v. FCC*, 293 F.3d 1338, 1341 (11th Cir. 2002) ("As a practical matter, cable companies have had little choice but to" attach "their distribution cables to utility poles owned and maintained by power and telephone companies.").

[30] *See* Section III.B, *supra*.

[31] Joint Utilities Comments at 6.

compensated fairly, and the FCC's formula has time and again been shown to be fully compensatory.[32] Rather than permitting utilities to charge whatever arbitrary price can be set through "negotiations," the Commission should set a formula that will ensure fair pricing for attachers *and* full compensation for use of the space for the pole owner.

The Joint Utilities oppose this approach, arguing that higher "market-based" attachment rates support lower electric rates. This assertion is highly questionable. Even assuming new small-cell attachments to thousands of utility poles and rental rates many times over what the telecom rate (or similar) formula would produce, the revenues such rentals would generate would be a drop in the bucket in the utilities' electric-rate revenue requirements.

The Joint Utilities' argument that lower pole attachment rates will not make a difference in the pace of wireless deployment deserves special mention. The utilities compare the number of attachments made to ConEd poles versus Niagara Mohawk poles (Niagara Mohawk's rates upstate are lower), and conclude that "lower rates are not the driver of the market for wireless attachments."[33] This argument misses the point.

First, and most obviously, the Joint Utilities are comparing two different service territories. Deployment of wireless attachments is driven not just by rental rates, but also by consumer demand for service. The population densities in the greater New York City area where Con Ed operates obviously require a much higher volume of wireless infrastructure. Network demands in Manhattan or Staten Island are and will continue to be greater than in Skaneateles – or Syracuse.

Second, differences in attachment requirements other than rental rates may be driving the different utilization rates. Non-rental terms, such as the blanket exclusions on risers or other types of equipment referred to in Verizon's Declaration,[34] may make attachment to certain utilities' poles prohibitive or impossible even where attachment rates in themselves are not a barrier. If a utility were to set a per-pole annual attachment rate at a nickel a year, but imposed an application fee of $1 million, there would be no takers. Yet this is the logic that the utilities

[32] *See 2011 FCC Pole Attachment Order* at ¶ 183 & n.569 (listing cases in which federal courts found the cable rate to be "fully compensatory" to pole owners, and concluding that "in virtually all cases the new telecom rate will recover at least an equivalent amount of costs"); *Alabama Power Co*., 311 F.3d at 1370-71 ("any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation").
[33] Joint Utilities Comments at 8.
[34] Declaration of Randall Wilson, Verizon Wireless, at ¶ 7 (Attachment B to CTIA Comments).

here ask the Commission to accept. As CTIA will discuss in more depth *infra*, the Commission can help to address such oppressive requirements by adopting the Petition.

Market-based rates for wireless attachments, beyond being facially discriminatory as compared to the regulated rates for other attachers, would discourage broadband investment and are not necessary to fairly compensate utilities for pole rental. The Commission should reject such rates in favor of a tested formula for wireless attachments similar or equivalent to the FCC's formula for telecom rate attachments.

E. The Commission Should Adopt CTIA's Dispute Resolution Proposal

CTIA and other commenters have provided ample evidence of significant disputes in the attachment process that unnecessarily delay or prevent deployment. Many of these disputes have lasted for months or even years, or were never actually resolved.[35] Utility commenters would have the Commission believe existing dispute resolution procedures are sufficient, but the record evidence detailed in the initial Comments proves otherwise.

Arguments against expedited dispute resolution only support delays in the attachment process, and militate against a level playing field for attachers. If utilities are negotiating in good faith, there is no downside to expedited dispute resolution procedures; if attachers are being unreasonable or unfair, the Commission would say so promptly and provide a fair and swift decision in situations where good-faith negotiations have failed. Stalemated contract negotiations provide an avenue for utilities to indefinitely delay or constructively reject pole applications without due cause, which could be why utility attachers see no issue with them.

When pole attachment negotiations reach an impasse, there must be a forum for prompt resolution. The Commission, as the appropriate forum for such resolution, should adopt the expedited dispute resolution proposal in the Petition.

IV. CTIA's Petition is Supported by Evidence and is Legally Sufficient

As detailed in Sections II and III of these Reply Comments, and contrary to the pole owners' assertions, the record is replete with sworn Declarations and other examples of utility-inflicted obstacles to attachment. CTIA members' sworn Declarations illustrate starkly the delay and obstacles also described by other communications parties. As such, the utilities' contentions that CTIA's Petition is legally insufficient are without merit.

[35] *See* Wilson Declaration at ¶¶ 3-6; SQF Comments at 2; NYSWA Comments at 2.

A. Frontier's Procedural Arguments are Meritless

Frontier, in trying to defend its operating *status quo*, mischaracterizes the Commission's 1997 and 2007 Orders. Frontier asserts that the Commission previously "determined that the rules for wireline attachments should not be applied to wireless attachments."[36] The Commission did no such thing.

In 1997, the Commission addressed the issue of wireless attachments to both utility poles and high-voltage electric transmission towers.[37] Administrative Law Judge ("ALJ") William Bouteiller heard the parties' arguments on a variety of issues (primarily attachment rates, but also wireless attachment terms), and issued a recommended decision addressing the public policy the Commission should follow. The ALJ "proposed that we set rates for wireless attachments to utility poles, [but] allow the price for attachments to high-voltage electric transmission towers to be set through private negotiations," recognizing that transmission tower attachments did not share the parallels to already-regulated wireline pole attachments that wireless pole attachments would have.[38] The Commission determined that wireless attachers to utility poles "should be afforded the same rates and terms as are available to any other attacher," and that different terms should be negotiated only where the wireless attachment required some unique use of the pole.[39]

Despite its evident intent to offer wireless attachers fair terms, the Commission offered nothing further than this blanket statement – never clarifying exactly what terms applied to which types of attachments, or in which cases negotiations would be required. Pole owners have in many cases been treating *all* wireless attachments as unique and subject to negotiation, which was clearly not the Commission's intention. This lack of clarity is why unambiguous policies and procedures for wireless attachments are necessary now.

The Commission's 2007 Order is even less decisive on the issue of wireless attachments than Frontier would imply.[40] That Order defers the issue almost completely, stating that the Commission needs more information about "wireless attachments generally" before it can determine whether and how to regulate them.[41] The Commission concluded that "Opinion 97-10

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[36] Frontier Communications Comments at 2.
[37] In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095, Opinion No. 97-10, Case 95-C-0341 (issued June 17, 1997).
[38] *Id*. at 5.
[39] *Id*. at 22.
[40] Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles, Order Instituting Proceeding, Case No. 07-M-0741 (issued June 27, 2007).
[41] *Id*. at 6.

remains in effect as to non-standard attachments: they are subject to negotiation."[42] However, it still did not note what constitutes a "non-standard" attachment and did little to offer governing principles to either side. It instituted a new proceeding; but that proceeding has not yielded clear results either.[43] Thus, the time is ripe for a clear directive that instructs utility pole owners on what is expected with respect to the terms, conditions, and rates for wireless attachment access.

The Commission should clarify that because wireless attachments are ubiquitous, standardized, and safe, they merit uniform treatment rather than being subject to "negotiations" applicable to "non-standard" attachments (which often translates to rejection by pole owners). Wireless attachments *do* conform to the traditional use of utility poles. The very purpose of utility poles is to elevate critical electric and communications facilities above the ground. The more inherently dangerous electric equipment is installed at or near the pole top. Sometimes cross arms, pole top extenders, and risers are used for electric equipment. These are standard uses for utility poles and pole tops, and the wireless equipment installed by CTIA members and the other supporting parties in this proceeding uses utility poles in exactly the same way.

But even assuming that wireless attachments at one point – say in 1997 or even 2007 – could credibly be considered "nonstandard or unique,"[44] they certainly cannot be now. Today, they are commonplace.[45] As illustrated in CTIA's initial Comments, wireless attachments are often no more obtrusive than wireline attachments and can be attached using the same methods used for wireline attachments.[46] Furthermore, CTIA members recognize that, where this is not the case, the Commission can make minor adjustments rather than allowing pole owners to reject attachments outright. For example, where a wireless attachment occupies more than one foot of usable space, the rate formula offers a mechanism to adjust the rental rate accordingly.[47]

Frontier also argues that "the Commission must find: a) that the New York State regulatory framework treats wireless carriers less favorably than their wireline competitors; and

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[42] *Id.*
[43] *See* Docket in Case No. 07-M-0741, *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterSeq=26223&MNO=07-M-0741.
[44] Opinion No. 97-10 at 22.
[45] Griswold Declaration at ¶ 22 (noting that T-Mobile "has had far more success" with wireless attachments in other states, and noting at least 7 states where it has been able to reach satisfactory agreements with utility pole owners for wireless attachments – a feat it has been unable to accomplish in New York); *see also* WIA Comments at 10 (noting that other states have provided the benefit of clear regulations to wireless attachers, in view of the public benefits at stake).
[46] *See* CTIA Comments at 4-8, 14-15.
[47] *Id.* at 19.

b) that the relief requested is necessary to ensure advanced broadband service in NYS."[48] Such a standard is excessively rigid and should be rejected by the Commission.

While it is true that Section 119-a of New York's Public Service Law requires that the rates, terms, and conditions of pole attachment be just, reasonable, and non-discriminatory, the focus of CTIA's Petition and concerns is not on how New York pole owners are treating our members relative to other competitors (*i.e.*, whether we are being treated in a discriminatory fashion), but rather on the objective unreasonableness of the pole owners' treatment of wireless attachers in relation to accepted practices, industry standards, attachers' experience in other states, the rulings of other regulatory agencies, and the rulings of this Commission.

The Commission should reject Frontier's transparent attempt to divert attention from obstructionist pole owner practices by creating a false controversy pitting wire-based providers against their wireless neighbors. As to whether the relief requested in the Petition is necessary to ensure broadband service, the answer – as the developing record here shows – is "yes."

B. The Joint Utilities Are Incorrect in Asserting that CTIA's Petition is Legally or Factually Insufficient

The Joint Utilities likewise offer a tepid challenge to the sufficiency of CTIA's Petition. This, too, should be rejected.

Contrary to the Joint Utilities' arguments,[49] CTIA and other parties have offered "demonstrable evidence" to show that wireless attachers are experiencing delays and obstacles at the hands of pole owners in New York. In sworn declarations, CTIA members have detailed delays in negotiating attachment agreements;[50] unreasonable terms of access[51] or flat-out bans on access for wireless attachers;[52] delays in the post-application review and approval process;[53] and prohibitively expensive rental rates.[54] Other Commenters confirm these experiences.

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[48] Frontier Communications Comments at 2. It should be noted that as to point (b), CTIA and others have established that without reasonable utility pole access New Yorkers will not be able to enjoy advanced wireless broadband networks throughout the State.
[49] Joint Utilities Comments at 2.
[50] Griswold Declaration at ¶ 16; Wilson Declaration at ¶¶ 3-6.
[51] Griswold Declaration at ¶ 14.
[52] Wilson Declaration at ¶ 7; Griswold Declaration at ¶ 13 (describing electric utilities' abuse of "veto power" over pole owners' attachment agreements).
[53] Petti Declaration at ¶ 5.
[54] Griswold Declaration at ¶ 11.

For instance, Lightower notes that wireless attachers must navigate an "inconsistent patchwork" of attachment terms that vary from utility to utility,[55] and that wireless applications languish because it is not clear from the Commission's regulations that they must be dealt with as expediently as wireline applications.[56] NYSWA similarly reports that its members find it difficult to navigate the sheer number of different sets of requirements across the State, and that pole owners do not act expediently on requests to enter into attachment agreements.[57] WIA members note that prices for wireless attachments in New York have reached over $1,000 for a single attachment in some cases,[58] and that some pole owners charge over five times as much for attachments to transmission poles as for attachments to distribution poles.[59] SQF notes that attachment terms vary widely across the State, and unfortunately include some of "the most restrictive in the country."[60] It is simply not credible for the utilities to argue that wireless attachers have not faced any access difficulties.

The Joint Utilities next attempt to paint CTIA's Petition as some kind of a years-late petition for rehearing of earlier Commission Orders.[61] Their attempt to force the Petition – and all the underlying legal, social, and economic forces that demand that existing Commission policy be refreshed – into an inappropriately restrictive legal construct is wrong-headed. The Commission should not be dissuaded from revising outdated, nearly-decades-old policies based on the utilities' disingenuous quibble over how much overlap exists between this docket and the 2007 docket (which, it should be noted, expressly called for more information on wireless attachments, as has been provided in this proceeding). In any event, CTIA is not seeking a "rehearing" of anything. Instead, it seeks an update to the Commission's policies, based on nine years' worth of technological progress and real-world experience with wireless attachment negotiations and deployment.

Nine years is a long time – and much has changed with regard to wireless technology and deployment requirements in the nine years since the Commission last examined this issue. What might have been considered in the 2007 Order to be "nonstandard" is, today, standard. CTIA

[55] Lightower Comments at 9.
[56] *Id*. at 5.
[57] NYSWA Comments at 2.
[58] WIA Comments at 12, n.33.
[59] *Id*. at 12, n.34.
[60] SQF Comments at 2.
[61] Joint Utilities Comments at 4.

simply requests the Commission acknowledge these changes by establishing fair and non-discriminatory rules for wireless attachers.

V. Adoption of CTIA's Petition is in the Public Interest

The Commission will serve the public interest by granting CTIA's Petition. In accordance with its responsibilities under the New York Public Service Law, the Commission must determine whether a proposed action "provides net public benefits to all New York consumers."[62] This determination "must be undertaken in the context of existing public policy objectives and the realities of the . . . marketplaces."[63] One existing public policy objective that has been clearly espoused by the State of New York is the State Broadband Plan, an initiative to provide high-speed Internet access to all New Yorkers by the end of 2018.[64] As discussed in Section III.D, if New York continues the *status quo* of allowing pole owners to dictate the pace and price of wireless broadband deployment in the ways described by CTIA and other wireless infrastructure providers, essential technologies like small-cell and DAS likely will be marginalized at a time when New York should be embracing all its options to promote broadband deployment.

The Commission thus must determine how to advance broadband availability and access by every means at its disposal. The concrete steps that CTIA has proposed (and which the other wireless infrastructure providers support), including institution of access timelines, a fair and reasonable rate formula, and expedited dispute resolution procedures, are squarely within the mainstream of other state and federal regulatory actions and will facilitate the achievement of New York's broadband goals.

As CTIA and other commenters have noted, New York has a considerable public interest at stake in the form of New Yorkers' ever-increasing demand for broadband access, speed and capacity, and the State's commitment to provide universal broadband access by 2018.[65] That goal comes with a host of other tangible benefits as well. The wireless sector employed an estimated 60,000 people as of 2014, and was responsible for nearly $2.4 billion in tax revenue

[62] *Order Granting Joint Petition Subject to Conditions*, In re Joint Petition of Charter Commc'ns & Time Warner Cable for Approval of a Transfer of Control of Subsidiaries & Franchises, Pro Forma Reorganization, & Certain Financing Arrangements, Case No. 15-M-0388, at 22 (Jan. 8, 2016).
[63] *Id.*
[64] *2015 State of the State Opportunity Agenda*, Office of Governor Andrew M. Cuomo, at 57-58.
[65] *See* CTIA Comments at 16; WIA Comments at 4.

for state and local governments.[66] One way to help "close this unacceptable digital divide," promote widespread access to wireless broadband, and reap the accompanying economic benefits,[67] is to adopt CTIA's proposal.

Against the State's view of the importance of broadband, consider the Joint Utilities' statement that high attachment prices present "an opportunity to reduce electric customer bills."[68] This remarkable admission that regulated utilities plan to use their monopoly status to extract monopoly rents should give the Commission pause as it moves forward with the State's Broadband Plan.

So too should Central Hudson's and Niagara Mohawk's revelation that they "plan to pursue market based rates in order to maximize the value of their assets for the benefit of their electric customers."[69] With these two admissions, the utilities are in effect announcing that they have decided that their interest *is* the public interest, and that setting pole-access prices for small-cell providers as high as they possibly can – ostensibly to subsidize electric service – will serve the public at large.

New York and its citizens and businesses have a considerable interest in ensuring the widest and fastest possible proliferation and enhancement of mobile broadband and other services. This interest must be balanced against the utilities' interest in either excluding these attachments for their own convenience, or charging monopoly rents for access to this precious resource. There is no contest – the public interest in mobile broadband deployment simply must prevail.

Thus, it is decidedly not in the public interest for electric utilities to continue to be the unchaperoned arbiter of wireless access to this critical monopoly-controlled infrastructure. The Commission at this moment stands uniquely qualified and empowered to facilitate and secure a brighter, more vital broadband future for New York. Adoption of CTIA's proposal will help achieve that end.

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[66] *Wireless: Direct Contributor, Catalyst for New Markets – Economic Impact of Wireless in NYS*, Center for Governmental Research, at ii (June 2014).
[67] *See 2015 State of the State* at 57.
[68] Joint Utilities Comments at 6.
[69] *Id*. at 8.

VI. Conclusion

For the foregoing reasons, and for those set forth in CTIA's Petition and initial Comments, CTIA respectfully requests the Commission grant its Petition.

Respectfully submitted,

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