

STATE OF MAINE )  
PUBLIC UTILITIES COMMISSION ) Docket No. 2018-00010  
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MAINE PUBLIC UTILITIES COMMISSION )  
Inquiry into Amendment of Chapter 880 of ) February 9, 2018  
the Commission’s Rules Regarding Rates )

**COMMENTS OF CTIA-THE WIRELESS ASSOCIATION®**

**I. INTRODUCTION AND SUMMARY**

On January 17, 2018, the State of Maine Public Utilities Commission (the “Commission”) issued a Notice of Inquiry (the “Notice”) “to obtain information and viewpoints from interested persons regarding possible amendments to Sections 4 through 10 of Chapter 880 of the Commission’s rules” relating to rates charged for attachment to joint use utility poles.<sup>1</sup> CTIA<sup>2</sup> hereby submits its Comments in response to the Notice.

This proceeding stems from previous dockets considering pole attachment rules in Maine. In 2015, the Commission issued a Notice of Inquiry to consider amendments to its pole attachment rules; that proceeding was closed in late 2016.<sup>3</sup> The Commission opened a subsequent proceeding, Docket No. 2017-00183, by issuing a Notice of Inquiry “to obtain information and viewpoints from interested persons regarding forthcoming amendments to Chapter 880 of the Commission’s

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<sup>1</sup> Notice at 1.

<sup>2</sup> CTIA – The Wireless Association® (“CTIA”) ([www.ctia.org](http://www.ctia.org)) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association’s members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry’s voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

<sup>3</sup> See generally *Me. Pub. Utils. Comm’n, Inquiry into Amendment of Ch. 880 of the Commission’s Rules*, No. 2015-00295.

rules” governing attachments to joint use utility poles.<sup>4</sup> CTIA filed comments in response to that Notice of Inquiry on August 25, 2017.<sup>5</sup>

On September 27, 2017, the Commission issued a Notice of Rulemaking in a new docket, Docket No. 2017-00247, closing Docket No. 2017-00183.<sup>6</sup> In that Notice of Rulemaking, the Commission stated that “the Act does not require the Commission to address rates by [January 15, 2018],”<sup>7</sup> and so the Commission did not in its proposed rules. CTIA filed comments in response on December 15, 2017.<sup>8</sup>

On January 12, 2018, the Commission issued an Order Amending Rule in Docket No. 2017-00247, declining to address rates at that time but saying it would open a separate proceeding to do so.<sup>9</sup> On January 17, the Commission opened the present docket and issued the pendant Notice of Inquiry to consider the rate issue.

CTIA supports the Commission’s consideration of rates at this time. As previously noted in CTIA’s advocacy, the establishment of pole attachment rates by the Commission is both required by the Legislature and also sound policy to forestall disputes.<sup>10</sup> Consistent with that advocacy, CTIA believes the Commission should adopt the Federal Communications Commission (“FCC”) rate formulae for pole attachments, which have been proven fair and reasonable, and

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<sup>4</sup> *Me. Pub. Utils. Comm’n, Inquiry into Chapter 880 of the Commission’s Rules*, No. 2017-00183, Notice of Inquiry (Me. P.U.C. July 28, 2017) (“2017 NOI”).

<sup>5</sup> *Me. Pub. Utils. Comm’n, Inquiry into Chapter 880 of the Commission’s Rules*, No. 2017-00183, Comments of CTIA – The Wireless Association® (Me. P.U.C. Aug. 25, 2017) (“CTIA August 2017 Comments”).

<sup>6</sup> *Me. Pub. Utils. Comm’n, Amendment Chapter 880 of the Commission’s Rules – Attachments to Joint Use Utility Poles; Determination and Allocation of Costs; Procedure*, No. 2017-00247, Notice of Rulemaking (Me. P.U.C. Sept. 27, 2017) (“2017 NOR”).

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Me. Pub. Utils. Comm’n, Amendment Chapter 880 of the Commission’s Rules – Attachments to Joint Use Utility Poles; Determination and Allocation of Costs; Procedure*, No. 2017-00247, Comments of CTIA (Me. P.U.C. Dec. 15, 2017) (“CTIA December 2017 Comments”).

<sup>9</sup> *Me. Pub. Utils. Comm’n, Amendment Chapter 880 of the Commission’s Rules – Attachments to Joint Use Utility Poles; Determination and Allocation of Costs; Procedure*, No. 2017-00247, Order Amending Rule and Factual and Policy Basis (Me. P.U.C. Jan. 12, 2018) (“January 2018 Order”).

<sup>10</sup> See CTIA August 2017 Comments at 8-10.

would promote efficiency by keeping Maine’s rules consistent with both the federal rules and those in other states that either mirror or adhere closely to the FCC’s rate formulae.

CTIA also urges the Commission to adopt prescriptive rate rules in the present docket. The guiding statute and legislative history indicate definitively that the Commission has the authority to adopt prescriptive pole attachment rate rules, which will forestall potential conflicts between owners and attachers, rather than presumptive rules, which have the potential to engender more such disputes.

## **II. THE COMMISSION SHOULD ADOPT THE FCC RATE FORMULAE, AS MODIFIED FOR WIRELESS ATTACHMENTS**

In the Notice, the Commission cites to 35-A M.R.S. § 711(4), which states that “In establishing rates, the commission shall consider various formulas, including, but not limited to, the formula adopted by the Federal Communications Commission as codified in 47 Code of Federal Regulations, Part 1, Subpart J, as amended.”<sup>11</sup> Throughout Maine’s previous pole attachment dockets, CTIA called for the Commission to adopt the FCC rate formulae, 47 C.F.R. §§ 1.1409(e), as modified for wireless attachments.<sup>12</sup> For a number of reasons, CTIA reiterates that request in the present docket.

First, although Maine has pre-empted authority over pole attachments from the FCC,<sup>13</sup> Maine is required by federal law to have rules that ensure pole attachment rates are fair and reasonable.<sup>14</sup> While devising an original formula for rates would create uncertainty whether rates

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<sup>11</sup> Notice at 1.

<sup>12</sup> See CTIA August 2017 Comments at 3-5; CTIA December 2017 Comments at 7.

<sup>13</sup> See State of Maine Public Utilities Commission, *Letter*, WC Docket No. 10-101 (Apr. 26, 2010).

<sup>14</sup> See 47 U.S.C. § 224.

meet those criteria, the FCC’s rate formulae for pole attachments are presumptively fair and reasonable, and have withstood a number of legal challenges.<sup>15</sup>

The FCC’s rate formulae also have proven effective in promoting network deployment. The FCC concluded in its 2011 Pole Attachment Order that its revised rates would “more effectively achieve Congress’ goals under the 1996 Act to promote competition and ‘advanced telecommunications capability’ by both wired and wireless providers by ‘remov[ing] barriers to infrastructure investment,’ and the broader pro-competitive goals and policies that Congress directed the Commission to carry out under the 1996 Act.”<sup>16</sup> Wireless investment statistics support this conclusion: since 2011, wireless providers have invested over \$153.6 billion in their networks, not including billions more spent on spectrum at auction.<sup>17</sup> Consistency with the FCC’s rules governing pole access will also promote efficiency by ensuring that larger, multistate attachers and owners have a consistent, familiar set of rules across multiple states.<sup>18</sup>

Similar to the FCC’s goals, the Commission has previously acknowledged Maine’s strong public policy favoring wide deployment of broadband services throughout the state:

A modern state-of-the-art telecommunications network is essential for the economic health and vitality of the State and for improvement in the quality of life for all Maine citizens. Therefore, it is the goal of the State that all Maine’s businesses and citizens should have affordable access to an integrated telecommunication infrastructure capable of providing voice, data and image-based services...<sup>19</sup>

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<sup>15</sup> See, e.g., *City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863 (2013); *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013).

<sup>16</sup> See *In re the Implementation of Section 224 of the Act and a National Broadband Plan for Our Future*, WC Docket No. 07-245 and GN Docket No. 09-51, Report and Order and Order on Reconsideration (Apr. 7, 2011), FCC 11-50 (“2011 Pole Attachment Order”).

<sup>17</sup> See, e.g., CTIA Annual Wireless Industry Survey for 2016, available at <https://www.ctia.org/industry-data/ctia-annual-wireless-industry-survey>.

<sup>18</sup> Presently, 30 states are under the FCC’s jurisdiction regarding pole attachment and thus follow the federal rate. See *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 25 FCC Rcd 5541 (WCB 2010). This does not include other, non-FCC regulated states where the rate formulas closely mirror the federal formula.

<sup>19</sup> See *Maine Fiber Rapid Response Complaint – 12/29/11*, No. 2011-00524, Decision at 5 (Me. P.U.C. Feb. 3, 2012) (quoting 35-A M.R.S. § 7101).

For the reasons described above, adopting the FCC’s rate formulae for pole attachments would best serve Maine’s public policy goals.

**III. THE COMMISSION SHOULD ADOPT PRESCRIPTIVE RATE RULES AS CONTEMPLATED BY THE PLAIN MEANING OF THE STATUTE, THE CANONS OF STATUTORY INTERPRETATION, AND THE LEGISLATIVE HISTORY**

In the 2017 Order, the Commission noted that all but one commenter, including CTIA, supported making the Commission’s pole rules prescriptive, rather than presumptive, in order to provide efficiency and forestall disputes.<sup>20</sup> Nevertheless, the Commission erroneously concluded that the 2017 legislation amending 35-A M.R.S. § 711 only provided the Commission authority to promulgate presumptive rather than prescriptive rules.<sup>21</sup> Such conclusion belies the legislative history, the plain language of the statute, and canons of statutory interpretation, and accordingly, CTIA believes the Commission should promulgate prescriptive pole attachment rate rules.

The plain meaning of 35-A M.R.S. § 711, as amended, authorizes the Commission to promulgate prescriptive rules. The amended statute, in relevant part, reads as follows.

The commission shall adopt rules governing the resolution of pole attachment disputes and the rates, terms and conditions of joint use. The rules must promote competition, further the state broadband policy set forth in section 9202-A and ensure safe, nondiscriminatory access on just and reasonable terms.<sup>22</sup>

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<sup>20</sup> 2017 Order at 6. As noted by CTIA in previous comments: “Negotiations over the terms of attachment, as with all contract negotiations, cannot be viewed as a series of separate negotiations over unrelated topics. Parties may be willing to agree to different terms in one section in exchange for concessions in another. Ambiguity over the prevailing rates for pole attachments in Maine may dissuade carriers from agreeing on other terms if they will still need to determine a rate through the Commission’s complaint processes. Promulgating rules governing rates will help to forestall disputes before they happen.” CTIA December 2017 Comments at 6-7.

<sup>21</sup> 2017 Order at 10 (discussing P.L. 2017, ch. 199, “An Act to Amend the Law Regarding Joint Use of Certain Utility and Telecommunications Infrastructure” (the “Act”)).

<sup>22</sup> 35-A M.R.S. § 711(4). CTIA has commented extensively on the proper interpretation of the Section 711 generally, and Section 711(4) specifically. See CTIA December 2017 Comments.

As CTIA explained in its comments in December 2017, there is only one reasonable interpretation of the statute. The statute unambiguously requires the Commission to have two sets of rules: one set of rules governing complaints and one set of rules addressing the rates, terms and conditions of attachment.<sup>23</sup> To reach its conclusion that the statute authorizes presumptive rules only, the Commission misconstrues the meaning of the word “and.” The Commission’s interpretation of the statute essentially replaces “and” in meaning and usage, converting it to a word such as “regarding” or “about.” The Commission’s interpretation of the statute is therefore incorrect.

This interpretation of the statute not only ignores the plain and obvious meaning of the statute, but violates the canon of statutory interpretation requiring courts and agencies to give words their plain and obvious meaning.<sup>24</sup> In accord with this canon, the use of the word “and” in the statute unambiguously means the Commission must promulgate a set of rules for the resolution of disputes and a set of rules regarding the rates, terms and conditions of attachment.

The Commission’s interpretation of the statute ignores the legislative history that indicates that the statute’s drafters intended to – and did – empower the Commission to devise prescriptive rules. Review of the legislative history makes abundantly clear that the Legislature considered itself to have granted the Commission exactly the authority – to promulgate prescriptive rules – that the Commission claims the statute does not convey.<sup>25</sup> As the bill’s sponsor, Senator David

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<sup>23</sup> See CTIA December 2017 Comments at 4-6. The plain language of Section 711(4), as amended, makes clear that the Commission: (1) “shall adopt” rules governing the resolution of pole attachment disputes, and (2) “shall adopt” rules governing the rates, terms and conditions of joint use. See 35-A M.R.S. § 711(4).

<sup>24</sup> In construing a statute, the Maine Supreme Judicial Court determines and gives effect to the legislative intent first from the plain meaning of the statutory language and in the context of the whole statutory scheme. *State of Maine v. Chittim*, 775 A.2d 381, 383 (Me. 2001).

<sup>25</sup> See Testimony of Senator David Woodsome presenting LD 406, <http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=46719> (March 7, 2017); see also *Me. Pub. Utils. Comm’n, Amendment Chapter 880 of the Commission’s Rules – Attachments to Joint Use Utility Poles; Determination and Allocation of Costs; Procedure*, No. 2017-00247, Testimony from Senator David Woodsome, (Me. P.U.C. Dec. 6, 2017).

Woodsome, testified, “the very purpose of the amendments to the legislation was to “clarif[y] that the Commission may promote rules of general applicability with regard to the joint use of utility equipment, not just rules for matters that may arise in the context of a dispute regarding that equipment.”<sup>26</sup> If, as the Commission itself stated, “[t]he Commission also would prefer that the terms and conditions in Chapter 880 be prescriptive,”<sup>27</sup> then it should give the statute its plain and obvious meaning, as intended by the Legislature, and adopt prescriptive pole attachment rate rules.

#### IV. CONCLUSION

In revising its pole attachment rules and establishment of rates, the Commission is taking positive steps towards removing barriers to broadband deployment in Maine. The Commission should continue down that path by adopting the FCC’s rate formulae for pole attachments as prescriptive rules in order to encourage network investment and deployment in Maine.

Respectfully submitted,

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<sup>26</sup> *Id.*

<sup>27</sup> 2017 Order at 7.