

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
MAW Communications, Inc.,) EB Docket No. 19-29
Complainant) File No. EB-19-MD-001
v.)
PPL Electric Utilities Corporation,)
Defendant.)

MEMORANDUM OPINION AND ORDER

Adopted: August 12, 2019

Released: August 12, 2019

By the Deputy Chief, Enforcement Bureau:

I. INTRODUCTION

1. To deploy their networks, telecommunications service providers often rely on access to rights-of-way owned by electric utilities. In this proceeding, MAW Communications, Inc. (MAW), a telecommunications and broadband internet access service provider, filed a complaint alleging that PPL Electric Utilities Corporation (PPL) wrongfully refused to accept or process MAW’s pole attachment applications. MAW’s complaint here is part of a larger dispute involving MAW, PPL, and the City of Lancaster, Pennsylvania, that is currently pending before a state court. We find in this order that PPL violated section 224(f) of the Communications Act of 1934 (Act) and section 1.1403(a) of the Commission’s rules¹ by denying access to its poles and refusing to process MAW’s pole attachment applications for reasons other than insufficient capacity, safety, reliability, or generally applicable engineering standards. We therefore order PPL immediately to respond to those applications in the manner prescribed by our rules. We deny the remainder of MAW’s requested relief.

II. BACKGROUND

2. Complainant MAW provides telecommunications services and broadband internet access to businesses and residents in Pennsylvania.² MAW has a Certificate of Public Convenience issued by

¹ See 47 U.S.C. § 224(f); 47 CFR § 1.1403(a). On August 3, 2018, the Commission released an order that updated the Commission’s pole attachment access rules. See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7711-75, paras. 13-139 (2018) (Third Wireline Infrastructure Order). As of May 20, 2019, all the new rules adopted were in effect. See Announcement of Effective Date for Final Rule of Federal Communications Commission, 84 Fed. Reg. 16412-13 (Apr. 19, 2019). The text and meaning of 47 CFR § 1.1403(a) were unaffected by the Third Wireline Infrastructure Order and have remained unchanged for all times relevant here. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 61 Fed. Reg. 45476 at 45618 (Aug. 29, 1996). Unless otherwise noted, all citations to rules refer to the rules that were in place as of May 20, 2019.

² Complaint at 2-4, paras. 6, 15; id., Attachment B, Declaration of Mindy Wiczkowski (MW Decl.), at 2, para. 4. See Complaint, Attachment C, MAW/PPL Pole Attachment Agreement at 3 (reciting that “Licensee [MAW]

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the Pennsylvania Public Utility Commission (Public Utility Commission) to provide facilities-based telecommunications services in Pennsylvania.³ To support the delivery of services to its customers, MAW has a fiber-optic network.⁴ MAW asserts that its network supports the provision of mobile backhaul and other high-speed services (including data, video, voice, and advanced E911 service) to businesses, households, public safety agencies and other critical community organizations and institutions.⁵

3. Respondent PPL is an electric utility operating in Pennsylvania that provides electric transmission and distribution services.⁶ PPL owns numerous utility poles, and it has established a process by which certain third parties may make attachments to its poles.⁷

4. MAW and PPL executed an agreement setting forth the terms of MAW's access and attachment to PPL poles.⁸ The Pole Attachment Agreement became effective in 2003 and is still in effect.⁹ The Agreement requires MAW to submit applications and obtain PPL's approval before it may perform a rebuild project on any existing attachments to PPL poles¹⁰ and before it may place a new attachment on a PPL pole.¹¹

5. This case relates to approximately 142 pole attachment applications that MAW submitted to PPL in or after April 2018 for poles located in the City of Lancaster, Pennsylvania.¹² Some background information is necessary to put those applications in context.

6. *MAW Agreement With City of Lancaster.* In December 2014, MAW and the City of Lancaster entered into a Municipal Carrier Agreement.¹³ Under the Municipal Carrier Agreement, MAW undertook to rebuild the network that supports the City's traffic controllers and camera network and to deploy a community broadband network.¹⁴ MAW began its rebuild of the municipal network in 2015.¹⁵

furnishes, or is about to furnish, telecommunication services within PPL's service territory in the Commonwealth of Pennsylvania").

³ Jt. Statement at 1, para. 1; Complaint, Attachment A, Declaration of Frank T. Wiczowski (FW Decl.) at 1-2, paras. 2, 4; *id.*, FW Decl. at Exhibit 1 (Certificate of Public Convenience); Complaint at 4, para. 13.

⁴ *See* Jt. Statement at 2-3, paras. 7, 24, 27.

⁵ *See* Complaint at 3, para. 6. *See also* Jt. Statement at 2-3, paras. 7, 24, 27.

⁶ Complaint at 3, para. 7; Answer at 3.

⁷ *See* Complaint, Attachment C, MAW/PPL Pole Attachment Agreement (Pole Attachment Agreement or Agreement); Complaint at 3, para. 8; Answer at 3, 5. PPL states that it "recently adopted a new policy permitting PPL to provide detailed make-ready cost estimates on a per-pole basis, consistent with the FCC's August 3, 2018 Pole Attachment Order." Answer at 22.

⁸ Jt. Statement at 1, para. 2. *See* Pole Attachment Agreement.

⁹ Jt. Statement at 1, para. 3.

¹⁰ *See* Jt. Statement at 3, para. 20; Pole Attachment Agreement at 20-21, sections 9.2, 9.4.

¹¹ Jt. Statement at 7, para. 78; Pole Attachment Agreement at 14, section 6.4.

¹² *See* Jt. Statement at 6, para. 65.

¹³ Jt. Statement at 2, para. 4; FW Decl. at Exhibit 2 (Municipal Carrier Agreement Between MAW Communications, Inc. and The City of Lancaster (Public Version)). This order will refer to the City of Lancaster and the Lancaster Community Safety Coalition collectively as "the City."

¹⁴ Jt. Statement at 3, para. 15; FW Decl. at 2, 9, paras. 8, 37; *id.* at Exhibit 2; *id.* at Exhibit 13 (Email from Frank Wiczowski to William P. Klokis (Apr. 7, 2015)); Complaint at 5, para. 18; Answer at 6.

¹⁵ Jt. Statement at 3, paras. 15, 21.

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Although the Pole Attachment Agreement required MAW to submit an application for the rebuild project,¹⁶ MAW did not do so.¹⁷ PPL asserts that it was unaware that MAW had performed the rebuild work until October of 2017 and that MAW's rebuild attachments are unauthorized.¹⁸

7. MAW did, however, submit several attachment applications to PPL in 2016 for new attachments (as distinct from rebuild attachments) in connection with the Lancaster City project.¹⁹ PPL responded with estimates for "Make Ready – Construction" charges and also invoiced MAW \$56,624 in "Make Ready – Engineering" charges for pre-construction survey and engineering work performed in response to the applications.²⁰ MAW did not proceed with the work on these applications, as it found the charges to be prohibitively costly,²¹ nor did it pay the invoiced \$56,624, which MAW describes as a "disputed" amount.²² PPL contends that MAW is required to pay these "past due invoices," because MAW is obligated to reimburse PPL for services that MAW requested to be performed as part of the attachment application process.²³

8. *PPL's State Proceedings Against MAW.* In November 2017, PPL accused MAW of making unauthorized and unsafe attachments to PPL's poles.²⁴ On December 5, 2017, PPL filed claims for breach of contract and trespass against MAW in Lehigh County Court in Pennsylvania (Court).²⁵ Following a hearing, in April 2018 the Court issued an order that, among other things: (a) prohibited MAW from "accessing, working on, or connecting to any of PPL's poles, including those on which

¹⁶ See Jt. Statement at 3, para. 20; Pole Attachment Agreement at 20-21, sections 9.2, 9.4.

¹⁷ Jt. Statement at 2, para. 14. See *id.* at 2, para. 13; Pole Attachment Agreement at 20, section 9.2.

¹⁸ Answer at 4 (asserting that the only MAW-owned attachments that were originally authorized are the 428 attachments that were transferred from the City to MAW in March or April of 2015, and that because MAW's rebuild of these attachments was performed without PPL's authorization these rebuilt attachments are now also unauthorized); Jt. Statement at 2, para. 9; Yanek Decl. at 3, para. 11; Answer at 11, 27, 29.

¹⁹ Jt. Statement at 3-4, para. 31.

²⁰ Jt. Statement at 3-4, paras. 31, 39. See Complaint at 7, para. 27; Answer at 16-17, 21.

²¹ See Jt. Statement at 4, para. 39.

²² See Jt. Statement at 3-4, para. 31; Complaint at 10-11, paras. 36-38. MAW has requested executive-level discussions with PPL to dispute these charges. See FW Decl. at 6, paras. 27-28.

²³ See Jt. Statement at 5, para. 52; Answer at 21, 74 (response to Complaint paras. 35, 93). MAW's Complaint does not ask the Commission to determine whether the invoiced charges are just and reasonable. See Jt. Statement at 4, para. 39.

²⁴ In 2017, PPL contacted the Pennsylvania Public Utility Commission and alleged that MAW had created exigent safety violations by making unauthorized attachments to PPL poles. Jt. Statement at 5, para. 42. The Public Utility Commission's Bureau of Investigation and Enforcement subsequently conducted a field conference with its representatives, PPL, and MAW. Jt. Statement at 5, para. 43. In a letter dated December 15, 2017, the Bureau of Investigation and Enforcement directed MAW to cease and desist "any and all broadband deployment that attaches or touches any PPL pole or facility IMMEDIATELY" and to not "remove, modify, or otherwise change any of the facilities at issue in this investigation. . . ." Answer, Attachment D, at Exhibit 10 (Letter from Bradley R. Gorter, Prosecutor, PA Public Utility Commission, to Frank T. Wiczowski, President, MAW Communications, Inc. (Dec. 15, 2017)), at 2; Answer at 52-53; Jt. Statement at 5, para. 44. Approximately a month later, the Bureau of Investigation and Enforcement sent a letter stating that it lacked authority to issue such cease-and-desist orders and that it did not intend to be an active participant in any legal proceeding between the parties. See FW Decl. at Exhibit 19 (Letter from Michael L. Swindler, Deputy Chief Prosecutor, PA Public Utility Commission, to Jeffrey A. Franklin, Counsel to MAW Communications, Inc. at 1 (Jan. 17, 2018)); Answer at 55.

²⁵ Jt. Statement at 5, para. 45. See *PPL Electric Utilities Corporation v. MAW Commc'ns, Inc.*, Complaint, Ct. Comm. Pl. of Lehigh Cty., Pa., No. 2017-C-3755 (Dec. 5, 2017), File No. EB-19-MD-001 (filed May 8, 2019) (State Court Complaint).

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MAW has already made attachments, without prior approval of PPL”; (b) required MAW to file applications for “all unauthorized attachments to PPL’s poles” and directed that “PPL shall respond to any such requests as promptly as the situation may reasonably require giving priority to safety concerns and minimizing disruption of service to critical public services”; (c) stated that PPL “may remove or remediate any unauthorized attachment” made by MAW “at MAW’s sole cost and expense”; and (d) required MAW to “place \$75,000 in escrow with PPL to ensure reimbursement of PPL for any costs, fees, expenses or damages” incurred in enforcing the order or the Pole Attachment Agreement and to maintain the \$75,000 balance in the event PPL draws it down.²⁶ The April 2018 Order was issued “without prejudice to any party with respect to the underlying merits.”²⁷ The Court action remains pending.²⁸ Neither party has indicated that it has asked the Court to modify, amend, or enforce the April 2018 Order.

9. *Applications at Issue Before the Commission.* In response to the April 2018 Order, MAW submitted approximately 142 applications between April and August 2018, although the parties dispute whether all of those applications were submitted completely and in the proper format.²⁹ In February 2019, MAW filed a Complaint with the Commission.³⁰ The Complaint contains a single count directed at PPL’s treatment of the 142 pole attachment applications MAW submitted to PPL following the April 2018 Order. MAW alleges that PPL’s refusal to accept or process MAW’s 2018 pole attachment applications until MAW pays in full disputed invoices for pre-engineering and make-ready design work from its separate 2016 applications is a violation of PPL’s duty under section 1.1403(a) to provide access to its poles.³¹ That rule requires a utility to provide “nondiscriminatory access,” although it may deny access “where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.”³² MAW contends that PPL’s conduct is a denial of access that is not legitimately based on capacity, safety, reliability, or engineering concerns.³³ The relief MAW seeks includes an expedited order: directing PPL to immediately allow MAW access to its network so that it can restore service outages and maintain the network; prohibiting PPL from removing attachments and allowing MAW to remediate any compliance issues per the terms of the Pole Attachment Agreement; and directing PPL to promptly process all of MAW’s pending attachment applications.³⁴

²⁶ See FW Decl. at Exhibit 20 (*PPL Electric Utilities Corporation v. MAW Commc’ns, Inc.*, Order, Ct. Comm. Pl. of Lehigh Cty., Pa., No. 2017-C-3755 (Apr. 13, 2018)) (April 2018 Order), at 2-3, paras. 4-6, 8; Complaint at 23, para. 79; Answer at 25, 27, 60-62. The Court also granted a petition by the City to intervene in the action. April 2018 Order at 1, para. 1. On April 5, 2019, the City sought leave from the Court to file a cross-claim against MAW seeking declaratory relief regarding the City’s rights and obligations under the Municipal Carrier Agreement. See *PPL Electric Utilities Corporation v. MAW Commc’ns, Inc.*, Motion of Intervenor for Leave to File Cross-Claim, Ct. Comm. Pl. of Lehigh Cty., Pa., No. 2017-C-3755 (Apr. 5, 2019)).

²⁷ April 2018 Order at 1.

²⁸ Jt. Statement at 6, para. 68. See Complaint at 24-25, para. 83; Answer at 67.

²⁹ See Jt. Statement at 6, paras. 55, 57-60; Lloyd Decl. at 4, para. 12; Answer at 69 (response to Complaint para. 85). Some of these applications are resubmissions of previously rejected applications. See Jt. Statement at 6, paras. 55, 60.

³⁰ See Complaint.

³¹ Complaint at 39, paras. 137-38. The disputed invoices covered work by a third-party contractor. *Id.*

³² 47 CFR § 1.1403(a).

³³ See Complaint at 39, paras. 137-139.

³⁴ See Complaint at 39-40, section VI. See also Reply at 2. As discussed below, the Complaint seeks additional relief, including an order: (a) prohibiting PPL from requiring that MAW occupy the uppermost position in the communications zone when other space lower on the pole is available to attach consistent with governing safety standards; (b) prohibiting PPL from charging MAW to correct pre-existing non-compliant conditions on PPL poles where such work would be required regardless of whether MAW attaches to the pole; (c) requiring PPL to provide

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10. In its Answer to the Complaint, PPL admits that it is refusing to process MAW's 2018 attachment applications because of MAW's refusal to pay its 2016 invoices for survey and engineering work performed for MAW,³⁵ arguing that such refusal is permitted under the Pole Attachment Agreement.³⁶ PPL asserts that it is also refusing to process MAW's 2018 attachment applications: (1) to the extent they are incomplete;³⁷ (2) because MAW has failed to replenish the \$75,000 escrow amount as required by the April 2018 Order after PPL drew down the escrow funds;³⁸ and (3) because MAW's applications are not part of a "holistic solution" that includes removing unauthorized attachments, fixing alleged safety violations, and reconciling questions about which of the City's attachments are to be transferred to MAW.³⁹

III. DISCUSSION

A. MAW's Denial-of-Access Claim is Granted in Part

1. MAW's Right of Pole Access under the Commission's Rules

11. Under Section 224(f) of the Act, utilities are required to provide telecommunications carriers with "nondiscriminatory access" to their poles, and they may deny access only "where there is

sufficiently detailed cost information supporting the past and prospective survey and make-ready cost estimates submitted to MAW; (d) requiring PPL to collaborate with MAW to identify less costly make-ready alternatives; and (e) awarding MAW damages for any costs incurred as a result of PPL's removal of MAW's attachments. *See id.*; Reply at 2. MAW omitted its request for damages from the recapitulation of requested relief in its Reply. *See* Reply at 2.

³⁵ *See, e.g.*, Answer at 75 (response to Complaint para. 94); *id.* at 74-75 (response to Complaint para. 93); FW Decl. at Exhibit 7 (email from Michael J. Shafer to Eric Winter (July 18, 2018)) (stating that "it is PPL's policy to not consider any additional attachment applications until past due make ready invoices are paid. If MAW wants PPL to consider its new attachment applications it must first satisfy its past due invoices from 2016. Otherwise MAW's new applications to remediate the unauthorized attachments will not be considered by PPL."); Jt. Statement at 5, para. 52.

³⁶ Specifically, PPL relies on section 12.5 of the Pole Attachment Agreement, which states: "PPL reserves the right not to process any new attachment installation or removal applications for attachment under the terms of this Agreement while any past due charges remain unpaid." *See* Pole Attachment Agreement at 26, section 12.5.

³⁷ Answer at 75 (response to Complaint para. 94). At least in some instances, PPL's view that MAW's application "is not part of a holistic solution" to the parties' dispute may be the basis for PPL's position that an application is "incomplete," rather than a specific defect with a given application. *See* Answer at 73 (response to Complaint para. 91). PPL there asserts, "Only one of MAW's August 2018 resubmitted applications has been marked 'Incomplete.' This application was not marked 'Incomplete' because of MAW's refusal to pay the 2016 make-ready survey and engineering charges, but rather because the application is not part of a holistic solution that includes the removal of unauthorized attachments while new applications are being processed."

³⁸ Answer at 75 (response to Complaint para. 94); Jt. Statement at 7, para. 72 ("PPL is currently not granting any of MAW's new attachment applications because to date, MAW has not restored the \$75,000 escrow fund as mandated by the Lehigh County Court Order."). MAW argues that before MAW filed the Complaint, PPL refused to engage in meaningful remediation discussions "until MAW replenished the escrow fund related to the Lehigh County order, which MAW has every reason to believe PPL will then use to further dismantle MAW's network under the guise of its holistic approach." Reply at 22.

³⁹ *See* Answer at 71. PPL asserts: "[T]he problem with MAW's 29 rebuild application online portal filings from August 1 and 2, 2018 is, that of the 757 poles in those applications which MAW sought to rebuild, MAW was authorized to be on only 308 of them. MAW cannot rebuild an attachment that does not belong to MAW and for which MAW is not authorized." Answer at 74 (response to Complaint para. 91). Although the City sent PPL a list of City attachments in March 2015 and requested that PPL transfer the listed attachments to MAW, *see* Jt. Statement at 2, para. 7, MAW acknowledges that it rebuilt City attachments that were not on the list and that the City has declined to transfer all of its attachments to MAW until MAW and PPL agree upon a remediation plan to address the dispute concerning MAW's alleged unauthorized attachments on PPL poles. Complaint at 6-7, 19 paras. 24, 66.

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insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.”⁴⁰ To ensure this access, the Commission has established a framework governing telecommunications providers’ attachment to utility poles.⁴¹

12. As an initial matter, PPL questions MAW’s status as a telecommunications carrier, asserting that “a factual question exists whether many if not all of MAW’s attachments to PPL’s poles are not being used to provide any telecommunications service.”⁴² PPL argues that “[t]o the extent MAW’s attachments are not being used to provide any telecommunications service, MAW has no federal pole attachment rights to attach to PPL’s poles and the Commission has no jurisdiction.”⁴³ PPL failed to seek discovery on this factual question.

13. The Commission’s rules provide that a complainant alleging a denial of access has “the burden of establishing a *prima facie* showing that...the denial of access violates 47 U.S.C. 224(f).”⁴⁴ Once a *prima facie* case is established, “the utility shall have the burden of proving that the denial was lawful.”⁴⁵ MAW provided sworn testimony from its executives affirming that MAW provides telecommunications service in Lancaster, Pennsylvania.⁴⁶ This testimony, together with the Certificate of Public Convenience from the Public Utility Commission authorizing MAW to provide facilities-based telecommunications services in Pennsylvania,⁴⁷ are sufficient to make a *prima facie* showing that MAW is a “telecommunications carrier” with a right of access under Section 224(f) of the Act.⁴⁸ The only evidence that PPL offers to rebut MAW’s *prima facie* showing are MAW’s statements that its attachments to PPL poles will be used for MAW’s “LanCity Connect” project with the City of Lancaster, and a citation to material on the project’s website stating that “LanCity Connect is a Community-Based

⁴⁰ 47 U.S.C. § 224(f)(1)-(2).

⁴¹ See 47 CFR § 1.1401 *et seq.* Although states have the authority under section 224(c) of the Act to preempt the Commission’s regulation in this area, Pennsylvania has not done so. See *Corrected List of States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 07-245, Public Notice, DA 08-653 (rel. Mar. 21, 2008); Amended Pole Attachment Complaint, File No. EB-19-MD-001 (filed Feb. 15, 2019) (Complaint) at 3, para. 11; *id.* at 11 n.2; Answer of PPL Electric Utilities Corporation to the Amended Pole Attachment Complaint of MAW Communications, Inc., File No. EB-19-MD-001 (filed Mar. 13, 2019) (Answer) at 4 (response to Complaint para. 11).

⁴² See Answer of PPL Electric Utilities Corporation to the Amended Pole Attachment Complaint of MAW Communications, Inc., File No. EB-19-MD-001 (filed Mar. 13, 2019) (Answer) at 1; *see id.* at 2-3.

⁴³ *Id.* See also *id.* at 2-3, 7, 45-46.

⁴⁴ 47 CFR § 1.1406(a).

⁴⁵ *Id.* See *Salsgiver Telecom, Inc. v. North Pittsburgh Telephone Company*, Memorandum Opinion and Order, 22 FCC Rcd 9285, 9289-91, paras. 9-12 (EB 2007) (*Salsgiver Telecom*).

⁴⁶ See FW Decl. at 2, para. 9 (stating that “MAW’s existing and planned network facilities in the City provide,” among other things, “broadband and telecommunications services for health care facilities, the City Police Department, City and County Administration Services, and Public Works” and that MAW “has an agreement to provide broadband and telecommunications services to Penn Medicine’s Lancaster General Hospital facility”); FW Decl. at 2, para. 7 (removal of certain MAW attachments in Lancaster “has resulted in a termination of telecommunications service to over 70 of MAW’s customers, including health care facilities”); MW Decl. at 2, para. 4 (“MAW provides telecommunication services to health, governmental, and educational institutions; local governments; and telecommunications carriers, including transport services for nationwide wireless carriers.”).

⁴⁷ See Jt. Statement at 1, para. 1; FW Decl. at Exhibit 1.

⁴⁸ See *Salsgiver Telecom*, 22 FCC Rcd at 9289-91, paras. 9-12 (attacher made a *prima facie* showing that it is a “telecommunications carrier” entitled to access to a utility’s poles under section 224(f)(1) of the Act based on evidence that it had a state-issued certificate of public convenience to provide telecommunications services, and it had filed a state tariff).

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Broadband Solution connecting friends, neighbors, and local businesses to the Internet.”⁴⁹ We find that this evidence, without more, is insufficient to rebut MAW’s *prima facie* showing that it is a telecommunications carrier with a right of access under the Act.

14. Under section 1.1403(a) of the Commission’s rules, PPL was required to provide telecommunications carriers such as MAW non-discriminatory access to its poles, and a denial of access was permitted only “where there [was] insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.”⁵⁰ Further, rule 1.1403(b) required PPL to specify in writing the reason for any denial of access within 45 days of MAW’s request, to “include all relevant evidence and information supporting its denial,” and to “explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.”⁵¹ Rule 1.1403(a)-(b) has remained unchanged during all times relevant here. Additional rules provide a timeline covering such matters as the transmittal and acceptance of estimates for make ready work, notification of existing attachers, completion of make ready work, and the installation of attachments.⁵² These timeline rules were amended in 2018, and all such amendments were in effect by May 20, 2019.⁵³

2. PPL Must Process MAW’s Complete Applications

15. We agree with MAW that “PPL’s refusal to accept or process MAW’s pole attachment applications”⁵⁴ violates PPL’s duty to provide access under section 1.1403(a) of our rules.⁵⁵ The reasons PPL has offered for this refusal—MAW’s failure to pay past charges or escrow amounts or to present a “holistic solution” to disputed matters—run afoul of section 224(f) of the Act and rule 1.1403(a), which permit a denial of access for reasons of insufficient capacity, safety, reliability, and generally applicable engineering purposes, but not simply for nonpayment of a disputed claim.⁵⁶ We therefore direct PPL to process MAW’s pending applications and respond to them with the specificity required by rule 1.1403(b) and the pole attachment timeline rules, 47 CFR § 1.1411(a)-(g).⁵⁷ We require PPL to comply with the amended timeline rules that became effective on May 20, 2019. Given PPL’s long delay in processing

⁴⁹ Answer at 4, 7 and n. 12 (*citing* <https://www.lancityconnect.com/> (last visited Mar. 12, 2019)); *id.* at 45-46 and n. 157.

⁵⁰ 47 CFR § 1.1403(a). Rule 1.1403(a) tracks the language of section 224(f) of the Act.

⁵¹ 47 CFR § 1.1403(b).

⁵² 47 CFR § 1.1420(c), (d) (2017). *See Implementation of Section 224 of the Act; A National Broadband Plan for our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5244, 5254-55, paras. 8, 24, 26 (2011) (*2011 Pole Attachment Order*), *aff’d* *American Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir.), *cert. denied* 134 S.Ct. 118 (2013).

⁵³ As noted above, the Commission released an order on August 3, 2018, that updated the Commission’s pole attachment access rules. *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7711-75, paras. 13-139 (2018) (*Third Wireline Infrastructure Order*). As of May 20, 2019, all the new rules adopted were in effect. *See* Announcement of Effective Date for Final Rule of Federal Communications Commission, 84 Fed. Reg. 16412-13 (Apr. 19, 2019).

⁵⁴ *See* Complaint at 39, paras. 137-38.

⁵⁵ 47 CFR § 1.1403(a).

⁵⁶ *See Kansas City Cable Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599, 11601-02, para. 18 (Cable Serv. Bur. 1999) (holding that KCPL, the utility, could not “condition access on payment of a disputed claim” and observing that “[d]ebt collection is not permissible grounds for denial of access”).

⁵⁷ *See* 47 CFR §§ 1.1403(b), 1.1411(a)-(g).

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MAW's 2018 applications, it is appropriate to require PPL to comply with the timeline rules that became effective while the applications were stalled.⁵⁸

16. PPL asserts that it justifiably refuses to process MAW's attachment applications based on MAW's non-payment of past invoices and failure to replenish the \$75,000 escrow amount.⁵⁹ Refusing to process the 2018 applications is not a permissible response to alleged non-payment of monies in dispute or non-compliance with the April 2018 Order. To the contrary, refusing to act on the pending applications on this basis is a denial of access that violates rule 1.1403(a), since the refusal to act is not based on capacity, safety, reliability or engineering concerns.

17. We reject PPL's claim that its actions are related to policing the "capacity, safety, reliability, or engineering standards" of its network, and are therefore permitted under our rules.⁶⁰ MAW's alleged failure to meet its financial obligations is not substantially tied to the preservation of PPL's system. To the extent PPL contends that MAW has failed to pay monies in dispute to PPL under the terms of the Agreement or the April 2018 Order, or failed to comply with the escrow requirements in the April 2018 Order, PPL should seek relief from the Court presiding over PPL's pending action for breach of contract and trespass.⁶¹ PPL's refusal to process MAW's applications on the basis of the non-payment of these funds contravenes rule 1.1403(a).⁶²

18. Our ruling today should not be construed as requiring a utility repeatedly to incur expenses for pre-engineering and make-ready design on multiple applications where the attacher has indicated no good-faith intention to pay these expenses. However, no such circumstance is presented here. MAW has not indicated that it refuses to pay reasonable charges for pre-construction survey and engineering work performed in response to its 2016 pole attachment applications. Rather, MAW has

⁵⁸ In any event, the amended timeline rules would apply to any newly submitted or resubmitted MAW applications. We see no reason to require MAW to actually resubmit applications that have been pending since 2018. Rather, it is just and fair to treat the 2018 applications as having been effectively resubmitted as of the date of this Order for purposes of the timeline rules.

⁵⁹ See *supra* notes 35, 38.

⁶⁰ See Answer at 78. PPL has not shown how an outright refusal to process MAW's applications based on MAW's non-payment of disputed survey and engineering charges is necessary to protect PPL's capacity, safety, reliability, or engineering concerns. To be sure, PPL alleges throughout its Answer that MAW has made unauthorized attachments to PPL poles that created unsafe conditions and violated engineering standards. See, e.g., Answer at 15, 37, 52, 55, 64, 82. PPL has not, however, shown how a freeze on processing MAW's pending applications is necessary to address PPL's safety and engineering concerns. As discussed below, in reviewing MAW's pending applications, PPL may determine that existing attachments by MAW do not conform to safety or engineering standards and must be removed, relocated or remediated as part of a make-ready plan. If that is the case, PPL must respond to MAW's applications by identifying the specific work needed on each pole, and PPL may condition access to individual poles on the completion of such work. Processing the pending applications in accordance with our rules will thus allow PPL to protect any legitimate capacity, safety, reliability, or engineering concerns it may have.

⁶¹ PPL's State Court Complaint seeks "[d]amages in excess of \$50,00" that represents, among other things, "costs incurred by PPL Electric with respect to its Make Ready work proposal. . . ." State Court Complaint at para. 57.

⁶² See, e.g., *Kansas City Cable Partners*, 14 FCC Rcd at 11601-02, para. 18. We reject PPL's assertion that because MAW has "failed to restore the \$75,000 escrow account necessary to comply with the Order . . . PPL has no assurance of being compensated for the make-ready work associated with MAW's pending attachment applications." Answer at 61-62, 66. See also *id.* at 75 ("Restoration of the escrow is critical to PPL's ability to process MAW's applications, since PPL would have no assurance of payment without this court-ordered escrow funding."). Our pole attachment rules contemplate that the attacher will accept and pay the utility's estimated make-ready charges before make-ready work begins. See 47 CFR §§ 1.1411(d), (e). Thus, there should be no instance where PPL performs make-ready work before MAW has paid a make ready estimate.

(continued....)

disputed the reasonableness of pre-construction survey and engineering totaling \$56,624, requested further detail substantiating the charges, and sought executive-level discussions with PPL about its dispute of these charges.⁶³

19. PPL also asserts that it is refusing to process MAW's 2018 applications because they are not part of a "holistic solution" that includes removing unauthorized attachments, fixing alleged safety violations, and reconciling which of the City's attachments are to be transferred to MAW.⁶⁴ But PPL is obligated to process MAW's applications in accordance with the requirements of rule 1.1403, regardless of whether they contribute to a "holistic solution" in PPL's view. Moreover, we believe that processing the applications will actually further the parties' efforts to achieve such a solution. Processing each of the 2018 applications with the specificity our rules require will allow both parties to examine the physical condition of each pole listed in MAW's applications and to discuss the specific work or documentation that may be necessary on each pole.⁶⁵

20. If, in reviewing those applications, PPL determines that unauthorized or unsafe attachments by MAW need to be removed, relocated or remediated as part of a make-ready plan, then we instruct PPL to identify to MAW the specific work that is needed on a pole-by-pole basis.⁶⁶ If PPL contends that an application is incomplete, then it must identify to MAW what information is missing and provide an opportunity for MAW to provide the missing information as required by rule 1.1411(c).⁶⁷ If PPL contends that MAW has not established its right to rebuild a particular attachment because it has not provided documentation showing the City has transferred the attachment, PPL may reject the application as incomplete with respect to that pole, but it must specify that reason for finding it incomplete.

3. MAW's Other Requested Relief for Denial of Access is Denied

21. Some of MAW's requests for denial-of-access relief in this proceeding potentially conflict with the terms of the Court's April 2018 Order. Specifically, MAW requests an order: prohibiting PPL from removing attachments and directing PPL to allow MAW access to its network to restore service outages, maintain the network, and remediate any compliance issues.⁶⁸ These requests appear to be an effort to avoid or effectively amend provisions of the April 2018 Order that prohibit MAW from accessing PPL's poles without the prior approval of PPL, and allow PPL to remove or

⁶³ FW Decl. at 6, paras. 27-28. PPL asserts that, in 2017, it began requiring MAW to pre-pay for survey and engineering work associated with MAW's applications because MAW had failed to pay its outstanding survey and engineering charges. *See* Answer at 67 (responding to Complaint para. 82) (citing Yanek Decl. at 13, para. 47). Neither party has raised a dispute in this proceeding as to whether this PPL policy is just and reasonable or consistent with the parties' agreement.

⁶⁴ *See* Answer at 71.

⁶⁵ *See* 47 CFR §§ 1.1403(b) ("The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards."), 1.1411(d).

⁶⁶ *See* 47 CFR § 1.1411(d) ("[A] utility shall present to a new attacher a detailed, itemized estimate, on a pole-by-pole basis where requested, of charges to perform all necessary make-ready The utility shall provide documentation that is sufficient to determine the basis of all estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate.").

⁶⁷ Rule 1.1411(c)(1)(i) provides: "A utility shall determine within 10 business days after receipt of a new attacher's attachment application whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the utility rejects the application as incomplete but fails to specify any reasons in its response, then the application is deemed complete. If the utility timely notifies the new attacher that its attachment application is not complete, then it must specify all reasons for finding it incomplete." 47 CFR § 1.1411(c).

⁶⁸ Complaint at 39-40, section VI.

remediate any unauthorized attachment by MAW at MAW's cost.⁶⁹ There is no indication in the record that MAW has ever asked the Court to rescind, modify, or clarify these provisions of the April 2018 Order.⁷⁰ Nor has MAW sought a ruling here finding unjust and unreasonable any terms of the Pole Attachment Agreement that may have formed the basis for the Court's April 2018 Order.⁷¹ Therefore, in the interest of federal-state comity and based on the record before us, we deny this requested relief. MAW is, of course, free to seek relief from the Court.⁷²

B. MAW's Requested Relief Concerning Rates, Terms, and Conditions is Denied

22. We deny MAW's other requests for relief regarding rates, terms, and conditions of attachment that MAW finds objectionable. Specifically, MAW requests an order: (a) prohibiting PPL from requiring that MAW occupy the uppermost position in the communications zone when other space lower on the pole is available to attach consistent with governing safety standards; (b) prohibiting PPL from charging MAW to correct pre-existing non-compliant conditions on PPL poles where such work would be required regardless of whether MAW attaches to the pole;⁷³ (c) requiring PPL to provide sufficiently detailed cost information supporting the past and prospective survey and make-ready cost

⁶⁹ See April 2018 Order at para. 4 ("MAW is prohibited from accessing, working on, or connecting to any of PPL's poles, including those on which MAW has already made attachments, without the prior approval of PPL. PPL shall respond to any such requests for approval as promptly as the situation may reasonably require giving priority to safety concerns and minimizing disruption of service to critical public services."); *id.* at para. 6 ("PPL may, at MAW's sole cost and expense, remove or remediate any unauthorized attachment to the PPL pole made by MAW, subject to paragraph 4 above"). MAW apparently recognizes a conflict between its requested relief and the April 2018 Order, arguing: "because PPL secured a state court order prohibiting MAW from accessing any PPL poles without PPL's prior approval, MAW cannot make use of the appropriate FCC self-help remedies to deploy or maintain its plant despite the fact that PPL continues to delay action on MAW's applications past the FCC's specified deadlines." See Complaint at 35, para. 126.

⁷⁰ For example, there is no indication that MAW has ever asked the Court to modify the April 2018 Order to provide that MAW's attachments to PPL poles should be remediated rather than removed where remediation is the more efficient and cost-effective option. Nor has MAW asked the Court to modify the order to allow MAW to access PPL poles in order to restore service outages.

⁷¹ See Complaint at 27 n. 111 (stating that MAW is "preparing to file a separate complaint before the Commission "regarding the unreasonable rates, terms and conditions imposed upon MAW pursuant to the parties' Pole Attachment Agreement").

⁷² See *Kansas City Cable Partners*, 14 FCC Rcd at 11601-02 ("The Commission's authority under Section 224 'does not supplant that of the local jurisdiction when the issue between the parties is a breach of contract not involving unjust or unreasonable contractual terms, rates or conditions.'). Cf. *Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc.*, CC Docket No. 99-154, Memorandum Opinion and Order, 14 FCC Rcd 12530, 12538, para. 17 (1999) (principles of federal-state comity and efficiency led the Commission to question the merit of assuming jurisdiction over a completed state proceeding pursuant to section 252(e)(5) of the Act); *Gresham Communications, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 11895, 11900, para. 10 (2011) (discussing the Commission's "long-standing policy" in certain licensing matters "to accommodate the actions of state courts, thereby avoiding conflicts between state and federal authority, unless a public interest determination under the Act would compel a different result") (citing *Radio Station WOW v. Johnson*, 326 US 120 (1945) and *Arecibo Radio Corporation*, Memorandum Opinion and Order, 101 FCC 2d 545 (1985)).

⁷³ In any event, rule 1.1411(d)(4), which governs the applications at issue here, states: "A utility may not charge a new attacher to bring poles, attachments, or third-party equipment into compliance with current published safety, reliability, and pole owner construction standards guidelines if such poles, attachments, or third-party equipment were out of compliance because of work performed by a party other than the new attacher prior to the new attachment." 47 CFR § 1.1411(d)(4).

(continued....)

estimates imposed on MAW;⁷⁴ and (d) requiring PPL to collaborate with MAW to identify less costly make-ready alternatives.⁷⁵ Because the current Complaint contains only a single count alleging a denial of access, we deny these additional requests for relief.⁷⁶ These requests might be appropriate if MAW's complaint contained a count alleging that PPL imposes unjust and unreasonable rates, terms, or conditions of attachment in violation of section 224(b) of the Act, but it does not.⁷⁷ We also deny MAW's request for an award of compensatory damages as such damages are not available under our pole attachment rules.⁷⁸

IV. ORDERING CLAUSES

23. Accordingly, **IT IS ORDERED** that, pursuant to sections 4(i), 4(j), 201, 202, 208, and 224 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201, 202, 208, and 224 and sections 0.111, 0.311, 1.720-1.735, and 1.1401-1.1415 of the Commission's rules, 47 C.F.R. §§ 0.111(a)(1), 0.111(a)(11), 0.311, 1.720-1.735, and 1.1401-1.1415, Complainant's Complaint **IS GRANTED IN PART** as follows:

24. PPL must respond to MAW's pending 2018 applications consistent with the requirements of sections 1.1411(a)-(g) (which, as noted above, went into effect on May 20, 2019) and 1.1403(b) of the Commission's rules.⁷⁹ Specifically,

- (a) Within 10 business days of the date of this order, PPL shall determine whether MAW's pending pole attachment applications are complete and notify MAW of that decision. Within this same 10-day period, PPL shall determine whether MAW has attachment rights to each pole in its applications. To the extent PPL determines that it cannot allow a MAW attachment to a specific pole because PPL's records do not show that the City has transferred attachment rights to MAW for that pole, the application shall be deemed incomplete with respect to that pole, and PPL shall specify that reason for finding it incomplete. If PPL notifies MAW that any application is not complete, PPL must specify all reasons for finding it incomplete in accordance with section 1.1411(c)(1). If PPL does not respond within 10 business days as required, or if PPL rejects any application as incomplete but fails to specify any reasons in its response, then the application will be deemed complete. *See* section 1.1411(c)(1). Any resubmitted application will be treated in accordance with section 1.1411(c)(1)(ii).
- (b) Within 45 days of the date of this order, PPL shall respond to MAW's pending, complete applications either by granting access or denying access on a pole-by-pole basis, consistent with sections 1.1403(b) and 1.1411(c)(2). In the case of any applications that qualify as "large orders"

⁷⁴ In any event, rule 1.1411(d) of our rules, which, pursuant to this Order, governs the applications at issue here, provides in part that "[w]here a new attachers request for access is not denied, a utility shall present to a new attacher a detailed, itemized estimate, on a pole-by-pole basis where requested, of charges to perform all necessary make-ready. . . ." 47 CFR § 1.1411(d).

⁷⁵ Complaint at 39-40, section VI.

⁷⁶ Rule 1.722(d) requires that each alleged violation in a formal complaint "shall be stated in a separate count." 47 CFR § 1.1411(d).

⁷⁷ *See 2017 Infrastructure Order*, 32 FCC Rcd 11128, 11132, para. 9 & n.21 (explaining that a "pole access complaint" is a complaint filed by a cable television system or a provider of telecommunications service that alleges a complete denial of access to a utility pole" and that the term "does not encompass a complaint alleging that a utility is imposing unreasonable rates, terms, or conditions that amount to a denial of pole access"). *See also* Complaint at 27 & n.111.

⁷⁸ *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5288-89, para. 109 (declining to amend rule 1.1410 to allow compensatory damages).

⁷⁹ Because PPL failed to act on the pending applications when they were submitted in 2018, PPL must now comply with the updated pole access rules that became effective on May 20, 2019. *See supra* note 1.

as described in section 1.1411(g), PPL shall respond within 60 days of the date of this order. PPL may not deny MAW pole access based on a preexisting violation not caused by any prior attachments of MAW. *See* section 1.1411(c)(2).

- (c) Within 45 days of the date of this order, PPL shall complete a survey of poles for which MAW has a pending, complete application. *See* section 1.1411(c)(3)(i). In the case of any applications that qualify as “large orders” as described in section 1.1411(g), PPL shall complete this survey within 60 days of the date of this order.
- (d) PPL shall permit MAW and any existing attachers on the affected poles to be present for any field inspection conducted as part of PPL’s survey in accordance with section 1.1411(c)(3)(ii).
- (e) Where MAW’s request for access is not denied, PPL shall provide MAW a detailed, itemized estimate, on a pole-by-pole basis where requested, of charges to perform all necessary make-ready within 14 days of providing the response required by rule 1.1411(c). PPL shall provide documentation that is sufficient to determine the basis of all estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate. *See* section 1.1411(d).
- (f) If PPL determines that unauthorized or unsafe attachments by MAW or another entity need to be removed, relocated or remediated as part of a make-ready plan, PPL must specify the work that is needed on a pole-by-pole basis.

25. MAW’s Complaint **IS DENIED** to the extent described above.

FEDERAL COMMUNICATIONS COMMISSION

Lisa Gelb
Deputy Chief
Enforcement Bureau