

**DEPARTMENT OF STATE
PUBLIC SERVICE COMMISSION**

Statutory Authority: 26 Delaware Code, Sections 209(a)(1) and 10113(b) (26 **Del.C.** §§209(a)(1) and 10113(b))
26 **DE Admin. Code** 1004

FINAL

ORDER

1004 Regulations Governing Tariffs Which Set Forth Rates, Terms, and Conditions for the Attachment to Any Pole, Duct, Conduit, Right-of-Way, or Other Similar Facilities of Any Public Utility

IN THE MATTER OF THE REGULATION
ESTABLISHING TARIFFS WHICH SET
FORTH RATES, TERMS, AND
CONDITIONS FOR THE ATTACHMENT
TO ANY POLE, DUCT, CONDUIT, RIGHT-
OF-WAY, OR OTHER SIMILAR
FACILITIES OF ANY PUBLIC UTILITY
(RE-OPENED MARCH 27, 2024)

PSC REGULATION DOCKET NO. 16

ORDER NO. 10410

AND NOW, this 27th day of March 2024, the Delaware Public Service Commission ("Commission") determines and orders the following:

WHEREAS, under the provisions of 26 *Del. C.* § 209(a)(1) and 29 *Del. C.* § 10113(b), the Commission is authorized to amend existing regulations to make them consistent with changes in basic law but which do not otherwise alter the substance of the regulations; and

WHEREAS, the Commission has previously adopted the *Tariffs Which Set Forth Rates, Terms, and Conditions for the Attachment to Any Pole, Duct, Conduit, Right-of-Way, or Other Similar Facilities of Any Public Utility*, codified at 26 *Del. Admin. C.* § 1004 et seq. (the "Attachment Regulation"), which were adopted on January 26, 1988, by PSC Order No. 2917, revised on September 26, 1989, by PSC Order No. 3092; revised on March 19, 1991, by PSC Order No. 3247; revised on April 11, 2006, by PSC Order No. 6891; and revised on November 11, 2003, by PSC Order No. 7069; and

WHEREAS, minor revisions to the tariffs which set forth rates, terms, and conditions for the attachment to any pole, duct, conduit, right-of-way, or other similar facilities of any public utility are necessary to update certain noticing requirements to conform with 26 *Del. C.* § 102A; and

WHEREAS, under 29 *Del. C.* § 10113(b)(5), an agency's amendment of existing regulations to make them consistent with changes in basic law but which do not otherwise alter the substance of the regulations is exempt from the requirements of 29 *Del. C.* Ch. 101 relating to notice and public comment and may instead be informally adopted or amended; and

WHEREAS, the Commission finds that the amendments are exempt from the requirement of public notice and comment because they include "amendments to existing regulations to make them consistent with changes in basic law but which do not otherwise alter the substance of the regulations," pursuant to 29 *Del. C.* § 10113(b)(5);

**NOW, THEREFORE, IT IS ORDERED BY THE AFFIRMATIVE
VOTE OF NOT FEWER THAN THREE COMMISSIONERS:**

1. That, pursuant to 26 *Del. C.* § 209(a) and 29 *Del. C.* § 10113(b)(5), the Commission hereby adopts the *Tariffs Which Set Forth Rates, Terms, and Conditions for the Attachment to Any Pole, Duct, Conduit, Right-of-Way, or Other Similar Facilities of Any Public Utility* as amended herein as its official regulation as defined by 29 *Del. C.* § 1132(3). A marked-up version of the Attachment Regulation reflecting only the amended sections is attached as Exhibit "A".

2. That, pursuant to 26 *Del. C.* §§ 10113 and 10118, the Secretary of the Commission shall transmit a copy of this Order, including the exhibits, to the Registrar of Regulations for publication in the May 1, 2024 edition of the *Delaware Register of Regulations*. An exact copy of the Attachment Regulation, as amended, shall be published as the current official

regulations in the *Delaware Register of Regulations*.

3. That, as mandated by the *Delaware Register of Regulations* formatting requirements, Commission Staff is authorized to perform any necessary nonsubstantive edits to conform Exhibit "A" to the *Delaware Register of Regulations* Style Manual for May 1, 2024 submission.

4. That, pursuant to 29 *Del. C.* § 10118(g), the effective date of the amendments shall be the later of May 11, 2024, or ten (10) days after publication in the *Delaware Register of Regulations*.

5. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Dallas Winslow, Chairman (Voted via Teleconference pursuant to 29 *Del.C.* §10006(A)(d))

Joann Conaway, Commissioner

Harold B. Gray, Commissioner

Manubhai Karia, Commissioner

K. F. Drexler, Commissioner

ATTEST: Crystal Beenik, Secretary

***Please note: Electronic signatures ("/s/") were accepted pursuant to 6 Del.C. §12A-107(d).**

1004 Regulations Governing Tariffs Which Set Forth Rates, Terms, and Conditions for the Attachment to Any Pole, Duct, Conduit, Right-of-Way, or Other Similar Facilities of Any Public Utility

EFFECTIVE DATE: NOVEMBER 1, 1989

ADMINISTRATIVE HISTORY:

ISSUED: PSC ORDER NO. 3092 (SEPT. 26, 1989); PSC REGULATION DOCKET NO. 16

AMENDED: PSC ORDER NO. 3247 (MAR. 19, 1991)

1.0 Short Title

This regulation shall be known and referred to as "Delaware PSC Attachment Regulation."

2.0 Authority

This Regulation is enacted pursuant to 26 **Del.C.** §209, 26 **Del.C.** §201 (64 **Del. Law** Ch. 227), and 29 **Del.C.** Ch. 101.

3.0 Definitions

3.1 Attaching Entity Means the entity seeking attachment.

3.2 Attachment: Means connection to the poles, ducts, conduits, rights-of-ways, or other similar facilities of any public utility by any other public utility, cable television system (hereinafter "CATV"), other entity or individual.

3.3 Commission: Means the Public Service Commission of the State of Delaware.

3.4 Existing Agreement: Means a written attachment agreement between a public utility and one or more attaching entities entered into prior to, but still in effect as of, the effective date of these regulations.

3.5 Future Agreement: Means a written attachment agreement between a public utility and one or more attaching entities entered into, on, or after the effective date of these regulations. "Future Agreement" shall also include any amendment to an existing agreement which is made on or after the effective date of these regulations.

3.6 Owned or Controlled: This term, when used in the context of facilities which are within the scope of these regulations (hereinafter "facilities") shall include both property interests owned in fee and those held or controlled by a public utility which are less than fee simple property interests, such as a right-of-way, provided that the public utility has the legal right to allow attachment to such property interests.

3.7 Public Utility Means for purposes of this regulation, a utility, as defined by 26 **Del.C.** §102(2) (and not exempt by 26 **Del.C.** §202 from regulation by the Public Service Commission) which owns or controls poles, ducts, conduits, and rights-of-way, or other similar facilities appropriate for shared use.

3.8 Similar Utility Facilities: Means utility facilities suitable and appropriate for shared use with attaching entities, e.g., poles, conduits, and rights-of-way. As used in this regulation, this term specifically excludes any electric, gas, or water transmission or distribution mains or lines owned, controlled, or used by any public utility.

4.0 Applicability

This regulation applies to the rates, terms, and conditions for any attachment to poles, ducts, conduits, rights-of-way, or other similar facilities owned or controlled by any public utility.

This regulation specifically does not apply to attachments by a governmental agency insofar as it is acting on behalf of the public health, safety, or welfare in the performance of traditionally governmental functions, but does apply to common use by such agencies or their instrumentalities if the use is to provide any service other than those traditionally provided by governmental agencies.

5.0 Filing Of Attachment Agreements

5.1 Existing Agreements

Within thirty (30) days from the effective date of these regulations, each public utility which presently permits attachment to any facilities owned or controlled by it shall file certified copies of all written agreements governing such attachments with the Commission.

5.2 Future Agreements

Within thirty (30) days from the mutual execution of any future attachment agreement, a certified copy thereof shall be filed with the Commission by the public utility which is a party to such agreement.

5.3 Failure to File Attachment Agreement

Any attachment agreement not filed within the time limits specified above shall be voidable by any party thereto or by the Commission.

6.0 Commission Approval Of Attachment Agreements

6.1 Notice of Filing

6.1.1 Existing Agreements

6.1.1.1 Each public utility filing an existing agreement under §5.1 shall provide written notice of such filing to each attaching entity which is a party to such agreement. Such notice shall contain a brief explanation of such attaching entity's rights under §§6.2 and 6.3 and shall include a copy of these regulations. Proof of the sending of such notices shall be filed with the Commission within forty-five (45) days of the effective date of these regulations.

6.1.1.2 Within forty-five (45) days of the effective date of these regulations, the Commission shall cause a notice of the filing of all such existing agreements to be published ~~in one edition of two (2) newspapers of general circulation in the State of Delaware~~ in accordance with 26 Del.C. §102A. Such notice shall contain a brief explanation of the purpose of such filing and the rights of any interested person to file written comments or seek formal proceedings before the Commission.

6.1.2 Future Agreements

6.1.2.1 Each public utility filing a future attachment agreement under §5.2 shall submit therewith a written statement from the attaching entity(ies) party thereto acknowledging receipt of a copy of these regulations and knowledge of such attaching entity's rights under §§6.2 and 6.3 hereof.

6.1.2.2 In addition to the written acknowledgement requirement under §6.1.2.1 above, each public utility filing a future agreement under §5.2 shall cause notice of such filing to be published ~~in one (1) edition of two (2) newspapers of general circulation in the State of Delaware~~ in accordance with 26 Del.C. §102A. Such notice shall contain a brief explanation of the purpose of such filing and the right of any interested person to file written comments or seek formal proceedings before the Commission. Proof of the publication of such notice shall be filed with the Commission within fifteen (15) days of such future agreements under §5.2.

6.2 Presumption of Regularity; Complaints; Burden of Proof

6.2.1 Presumption of Regularity

In recognition of the fact that attachment agreements are the result of arms-length negotiations conducted within regulatorily-established perimeters and subject to administrative review, all such agreements filed with the Commission shall be presumed to comply with the standards set out in §7 of these regulations.

6.2.2 Complaints, Investigations, Filing Deadlines

6.2.2.1 Upon written complaint of: the Public Advocate; any interested member of the public who is determined to have sufficient standing; any public utility or attaching entity which is a party to such agreement; or upon its own initiative, the Commission may conduct an investigation into the terms of any attachment agreement filed with it for conformance with the standards set out in §7.

6.2.2.2 Any complaint filed under this section shall specify with particularity those aspects of the agreement(s) complained of and the reasons therefor.

6.2.2.3 Complaints regarding future agreements shall be filed within ninety (90) days of the filing of such agreements with the Commission under §5.2.

6.2.3 Complaint Proceedings; Burden of Proof

Any proceeding under this section shall be conducted in accordance with the Delaware Administrative Procedures Act, the Commission's "Rules of Practice" and these Regulations [to the extent each may be applicable. However, to the extent the matters at issue involve the Commission's legislative ratemaking authority, the Commission may proceed accordingly, and the utility shall have the burden of proof to establish that its proposed terms, conditions, and rates for the proposed attachment are just and reasonable.]

6.3 Commission Approval

6.3.1 Any attachment agreement filed with the Commission shall be deemed to have final Commission approval if no written complaint has been filed within the time limits established by §6.2.2.3 above; provided, however, that the Commission may, upon its own initiative, commence an investigation into the terms of an attachment agreement at any time, modifying such agreement prospectively, by final Order, upon the conclusion of such investigation.

6.3.2 In the event a written complaint is timely filed under §6.2.2.3, such attachment agreement shall remain subject to modification, retroactively, by the Commission until finally approved at the conclusion of such proceedings as the Commission deems appropriate.

7.0 Standards Governing Attachment Agreements

7.1 General Standards

7.1.1 The provision of attachment facilities shall be deemed to be a service which prospective attaching entities may use on an "as-offered" basis. Public utilities shall retain the right to enter, renew, continue, or permit the transfer or assignment of attachment agreements in their sole discretion based upon availability considerations or other grounds which it reasonably deems to be relevant, subject to the controlling provisions, if any, of such attachment agreements regarding renewal, continuation, transfer, or assignment.

7.1.2 Attachment agreements may contain such provisions as deemed necessary or appropriate to the parties thereto but, at a minimum, shall contain the rates, terms, and conditions under which attachments may be made by an attaching entity to any facilities owned or controlled by a public utility.

7.1.3 Such rates, terms, and conditions:

7.1.3.1 shall be just and reasonable;

7.1.3.2 shall not, with respect to common use purposes, be unduly preferential or unjustly discriminatory; and

7.1.3.3 shall give due consideration to the interests of the subscribers of the attaching entity, as well as the interest of the consumers of the public utility.

7.2 Rates and Charges

7.2.1 Parties to attachment agreements may establish such just and reasonable rates as they can agree to.

7.2.2 A pole attachment rate is "just and reasonable" if it assures the host public utility of not less than the additional costs of providing pole attachments, nor more than an annual amount determined by allocating the cost of the support component of the pole equally among all users thereof and the cost of the usable space component of the pole according to the percentage of usable space allocated to each user, as expressed in the following formula:

$$\frac{\text{Pole Cost} \times \text{SS} + \text{Pole Cost} \times \text{US} \times \% \text{US}}{\text{N}} = \text{Maximum Annual Rate}$$

WHERE:

Pole Cost = Annual operation and maintenance expense attributable to the entire pole
PLUS

Annual fixed charges for depreciation, property taxes, return, and related income taxes on capital attributable to the pole, based upon embedded cost of average bare pole less 15% (5% for telecommunications utilities) for cross-arms and other non-pole related items.

SS = Percentage of total average bare pole allocated as "support component."

N = Total number of public utilities and attaching entities making use of the pole [a reasonable system-wide average based on an actual physical inventory not more than three (3) years old may be used.]

US = Percentage of total average pole allocated as "usable space."

%US = Percentage of usable space allocated to attaching entity.

For purposes of this §7.2.2:

7.2.2.1 **"Usable space"** means the space on the pole above the minimum ground clearance level which can be used for the attachment of wires, cables, and associated equipment. Absent proof sufficient to establish some other minimum ground clearance in any specific case, twenty (20) feet shall be the presumed minimum ground clearance.

7.2.2.2 **"Support component"** means the entire length of the pole not deemed to be "usable space."

7.2.2.3 **"Average pole"**. Absent proof sufficient to establish some other average pole length in any specific case, "average pole" length shall be presumed to be:

32.5 feet for telephone utility poles

37.5 feet for electric utility poles.

7.2.3 An attachment rate for conduit, duct, right-of-way, or other similar facilities shall be deemed just and reasonable if it assures the host public utility of not less than the additional cost of providing the facility for attachment nor more than an annual amount determined by allocating the cost of such conduit, duct, right-of-way, or other similar facility equally among all users thereof.

7.3 Make-Ready Charges

Parties to an attachment agreement may establish such one-time "make-ready" charges as they can agree upon provided that the amounts so established must bear a reasonable relationship to the actual one-time costs incurred by the host utility in making the facility available for attachment.

8.0 Failure To Reach Agreement

8.1 Where a public utility and an attaching entity are unable to reach agreement with respect to the rates, terms, and/or conditions under which an attaching entity may use facilities owned or controlled by a public utility, either party may file a petition requesting the Commission to resolve the dispute.

8.2 Any petition filed under this section shall be verified and shall specify:

8.2.1 that the host public utility has determined, under §7.1.1 of these regulations, to make space available to the prospective user;

8.2.2 those points upon which the parties have been able to reach agreement;

8.2.3 those points upon which the parties have not been able to reach agreement, setting forth the reasons therefor.

8.3 Upon receipt of such a petition, the Commission shall commence such proceedings, formal or informal, as it deems most appropriate to expedite a satisfactory resolution of the dispute. All such petitions shall be finally decided or dismissed within 360 days of their filing with the Commission.

8.4 In reviewing the rates, terms, or conditions of any attachment agreement under §§5 or 8 of these regulations, the Commission may consider, among other things:

8.4.1 the annual cost to the public utility of providing the facilities subject to attachment;

8.4.2 the interest of the consumers or subscribers of the attaching entity;

8.4.3 the interest of the customers of the public utility providing the facilities; and

8.4.4 the annual cost to the attaching entity to construct, own, and operate its own facilities.

9.0 Savings Clause

The time limits set out in these regulations have been established to facilitate a smooth and orderly procedure. However, such time limits may be extended or waived by the Commission upon an appropriate showing of just cause.

10.0 Effective Date Of The Regulation

The effective date of this regulation is November 1, 1989.

27 DE Reg. 891 (05/01/24) (Final)