Orange & Rockland
a conEdison, inc. company

Francis W. Peverly
Vice President
Operations

February 15, 2018

VIA EMAIL AND
REGULAR MAIL
Honorable Charlotte Madigan
Town Clerk
Town of Orangetown
26 Orangeburg Road
Orangeburg, New York 10962

Re: Proposed Ordinance Regulating Non-Utility Devices on Utility Poles

Dear Ms. Madigan:

Orange and Rockland Utilities, Inc. ("Orange and Rockland" or the "Company") submits these comments in response to the Town of Orangetown's ("Town") Proposed Local Law Amending Town Code Chapter 43, Entitled Zoning – Regulations of Devices in Public Rights-of-Way and Easements ("Local Law"). The Company would note that the version of the Local Law included in the minutes for the Town Board workshop of February 6, 2018 contains various typographical errors and other inaccuracies. The Company reserves the right to supplement these comments in the event that the Town issues a corrected version of the Local Law.

As explained below, the proposed Local Law is improper, as the regulation of public utility facilities is specifically preempted by New York State Law. In addition, Orange and Rockland has other concerns regarding specific provisions of the proposed Local Law.

I. The Public Service Commission's Broad Regulatory Authority Over Essentially Every Aspect Of Utility Service Preempts The Proposed Local Law.

The New York State Legislature has granted the Public Service Commission ("Commission") broad statutory authority to regulate the installation, maintenance, and safety of all public utility facilities throughout the State. The Commission has implemented a comprehensive regulatory scheme over essentially every aspect of utility services. Consequently, the Commission

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occupies the entire field, and preempts any attempts by local municipalities, such as the Town, to regulate the provision of utility services.

The following are provisions of the Public Service Law, and Commission rules and regulations, showing the scope of the Commission's regulatory authority.

- Section 66(1) of the Public Service Law gives the Commission general authority over electric and gas utilities to install and maintain facilities in, over, or under the streets and public places of any municipality.
- Section 66(2) of the Public Service Law grants the Commission the broad power to examine or investigate the methods electric utilities use to transmit electricity and order reasonable improvements.
- Section 66(5) of the Public Service Law gives the Commission explicit authority to supervise the methods, practices, regulations, and property used by a utility in transacting its business; to determine whether such methods, practices, and regulations are unjust or unreasonable; and to determine just and reasonable methods, practices, and regulations that the utility must observe along with the safe and adequate equipment that the utility must use.
- Section 66(5) of the Public Service Law gives the Commission explicit authority to determine and prescribe the standards for the safety, efficiency, and adequacy of a utility's use, maintenance, and operation of its equipment.

The Commission has adopted statewide regulations governing the installation, maintenance, and replacement of electric facilities in the public right-of-way, which make the utilities solely responsible for the maintenance and replacement of all facilities. For example, Section 98.5 of the Commission's rules (16 NYCRR 98.5) states:

> Facilities within public rights-of-way.
>
> Each utility shall hereafter be solely responsible for the maintenance and replacement of all facilities placed within a public R/W (or another R/W when such utility elects to use another R/W for the construction of distribution lines in lieu of constructing facilities in a public R/W) used by such utility for supplying electricity to its customers. If adequate maintenance requires the reconstruction or replacement of such facilities, they shall be reconstructed or replaced by the utility responsible for maintenance as hereinbefore provided.

In addition, the Commission has established Electric Safety Standards for the installation, construction, maintenance, operation, and inspection of electric facilities. In adopting these Standards, the Commission stated its intent to "replace and supersede" local governmental efforts to establish local regulation of the safety and reliability of electric utility facilities. The Commission's Order

Instituting Safety Standards, Commission Case No. 04-M-0159 (January 5, 2005) ("Safety Standards Order"), at 2, states:

> The State Legislature has granted us plenary power in Articles 1 and 4 of the Public Service Law (PSL) to regulate utility safety, including the authority to impose safety-related requirements. **These requirements replace and supersede any similar efforts taken on a localized basis. Pursuant to this general and comprehensive authority, we are adopting a set of state-wide safety standards that will apply to all electric utilities subject to our jurisdiction.** The safety standards are described in Appendix A. They include: (1) annual stray voltage testing of utility electric facilities accessible to the public, using qualified voltage detection devices; (2) inspections of utility electric facilities on a minimum of a five-year cycle; (3) recordkeeping, certification, and reporting requirements; and (4) **adoption of the National Electric Safety Code (NESC) as the minimum standard governing utility construction, maintenance, and operations**. (Footnote omitted) (emphasis added).

Pursuant to this authority, the Commission adopted the NESC as the standard governing utility construction, maintenance, and operations (Safety Standards Order, Appendix A, at 2). The Commission intended the Electric Safety Standards to be the only safety standard that governs in New York State. For the sake of consistency throughout the State, and to allow the Commission to perform its statutory function of regulating and monitoring compliance by utilities, no other safety standard can be allowed.

II. The Courts Recognize That The Public Service Law Preempts Local Laws.

The courts have recognized that a municipality cannot regulate the safe and reliable provision of utility service because that very matter is already comprehensively regulated by the Commission under the broad regulatory powers vested in it by the Legislature and through a detailed and ever-growing body of rules, regulations, orders, and proceedings. State regulation provides for a uniform and consistent regulatory environment, which minimizes utility costs, maximizes efficiencies, and maintains a safe and reliable utility infrastructure for all of New York. If every town and village across New York were vested with authority to establish its own body of laws, rules, and regulations, the very purpose of the Commission and the Public Service Law would be undermined. The resulting patchwork of regulations would cause confusion, result in inefficiencies and increase utility costs, and could cause substantial safety and reliability concerns.

The courts have recognized that preemption can be based on the Legislature's implied intent to occupy the field, even without an express preemption clause. Preemption may be implied from various factors, including: (a) a declaration of State policy by the Legislature; (b) that the Legislature has enacted a broad, comprehensive, or detailed statutory or regulatory scheme in a particular area; (c) evidence that a regulatory body has been vested expressly or

implicitly with exclusive jurisdiction over the matter; or (d) "the nature of the subject matter being regulated and the purpose and scope of the State legislative scheme, including the need for State-wide uniformity in a given area." *Consolidated Edison Co. of New York, Inc. v. City of New Rochelle*, 140 A.D.2d 125, 129–30 (2d Dep't 1988), rev'g 136 Misc.2d 505 (Sup. Ct. Westchester Co. 1987); *Albany Area Builders Association v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989).

Where an agency's regulatory scheme occupies the field, a local law need not directly conflict with a State-wide statute or regulation to be preempted. Instead, a local law is invalid if it attempts to (a) prohibit conduct that the State law, although perhaps not expressly speaking to, considers acceptable, or at least does not proscribe, or (b) impose additional restrictions on rights granted by State law. *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 97 (1987); *Consolidated Edison Co. of New York, Inc. v. City of New Rochelle*, 140 A.D.2d at 129.

In a directly relevant preemption case, the Second Department reversed the trial court and invalidated a local law that attempted to require Con Edison to use licensed plumbers to install gas service on customer property. *Consolidated Edison Co. of New York, Inc. v. City of New Rochelle*, 140 A.D.2d 125. In that case, although there was no express conflict between New Rochelle's local ordinance and the Commission's regulatory scheme, the Second Department found that the scope of the regulatory authority given to and exercised by the Commission implicitly preempted the entire field. For instance, the Commission was given broad regulatory authority over gas service "for the preservation of the health and general welfare and . . . in the public interest." Id. at 130. Moreover, the court found that the Commission intended its regulations to cover installation of gas service, even though neither the statute nor the regulations expressly mentioned "installation." It was sufficient that the Commission had considered and discussed installation during its proceedings. Id. at 131-32. Accordingly, local municipalities were precluded from any attempts to regulate in this field. Id. at 133.

The Second Department explained that New Rochelle's attempt to regulate the installation of gas service was not permissible because it "imposes an additional layer of regulation in an area where the Legislature has evinced its intent to preempt the field of regulation, [and] adds further restrictions to the plaintiff's duty and ability to install service lines . . . ." Id. at 133-34. As regards the Local Law, the case of preemption is even stronger because the Town's proposed law would impose obligations in areas where the Commission has already implemented a detailed regulatory scheme.

III. Additional Specific Concerns.

The Company has concerns with the following specific provisions of the Local Law.

1. Section 1. A. (4) states that regulation of Non-Utility Devices on Utility Poles throughout the Town is essential to secure the public health and

safety of the Town's residents. The Local Law does not describe the nature of these public health and safety concerns, most likely because they are non-existent.

2. Section I. B. defines the term "Non-Utility Devices" to include "lechis", which are wooden or plastic strips used to construct an eruv. An eruv is a virtually invisible unbroken demarcation of an area which may be established through various natural and man-made boundaries, including wires and utility poles. In attempting to broadly regulate the installation of lechis on Utility Poles, and thereby regulate eruv installations, the Town ignores existing and compelling legal precedent regarding the regulation of lechis.

For example, the United States Second Circuit Court of Appeals has held that lechis are "nearly invisible" and contain no "overtly religious features that would distinguish them to a casual observer as any different from strips of material that might be attached to utility poles for secular purposes." *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 395 (2d Cir. 2015). Moreover, every court to have considered the matter has determined that the establishment of an eruv is a reasonable accommodation of religious practice under the First Amendment of the United States Constitution. See *Tenafly Eruv Ass 'n v. Borough of Tenafly*, 309 F.3d 144,177 (3d Cir. 2002); *ACLU of NJ. v. City of Long Branch*, 670 F. Supp. 1293, 1295 (D.N.J. 1987); *Westhampton Beach*, 778 F.3d at 395.

I would further note that the Company's practice of allowing eruv attachments to its Utility Poles is consistent with federal and New York State laws governing utility pole attachments in the broad sense, and required based upon a number of court rulings pertaining to eruvs in the specific sense. Both federal and state courts have ruled that, because a wide variety of attachments are already legally allowed to be mounted on utility poles, eruv attachments cannot be excluded.

3. Section I. B. contains a definition of the term "Utility Devices" as materials that are used to carry electrical current. This definition is incomplete, however, as there are utility devices on Utility Poles necessary for the transmission, distribution and measurement of energy, which do not directly transmit electricity or are directly connected to wires or similar electric transmitting equipment. These devices are necessary for the safe and reliable operation of the Company's energy system and, as discussed above, are under the purview of the Commission.

4. Section II requires that the location of a security camera shall be at the written direction of the Town's Police Department. As discussed above, the Town's interest in this area is superseded by that of the Commission. In addition, the one-year prison term and $50,000 fine is plainly excessive, arbitrary and capricious, as it fails to reflect the perceived value of harm to the public good.

5. Section III. C. (2) requires the submission of extensive documentation along with any permit application for Non-Utility Devices. The Company would

note that its franchise agreement with the Town would supersede these requirements.

6. Section III. E. (1) (c) requires that Non-Utility Devices must be of a completely translucent material. The Company is not aware of any such translucent material for the application of utility type services and attachments to poles. Accordingly, this provision is neither reasonable nor achievable.

7. Section III. E. (1) (e) requires a Code 811 call to the Town prior to the installation of any Non-Utility devices. Code 811 requirements, however, only apply to subsurface excavations and not to attachments to poles.

8. Section III. E. (1) (g) provides that no Non-Utility Device can cross over or under or on a Town roadway or Town right-of-way. This requirement would prohibit the installation of communication circuits, third-party fiber optic data and communication lines and other similar sensing and control technologies. This provision is contrary to the best interests of the Town's health, safety and welfare.

9. Section III. F. (3) requires that Non-Utility Devices must maintain appropriate clearances from electrical conductors. As noted above, the matter of appropriate clearances is wholly within the Commission's jurisdiction. It is inappropriate for the Town to be determining whether facilities on Utility Poles comply with the Commission's orders and regulations. In addition, the reference to the National Electric Code is incorrect. Rather, the reference should be to the National Electric Safety Code.

10. Section III. G. (1) provides that any Non-Utility Device that does not meet the standards of the Local Law for 30 days shall be deemed abandoned. This provision is overly restrictive, as it fails to take into account that the build out, replacement or upgrade requirements may take more than 30 days.

11. Section III. H. seeks to regulate existing Non-Utility Devices located on Utility Poles. There currently are in place hundreds of attachments on the Company's Utility Poles, pursuant to license agreements and consistent with the attachment requirements of the Commission and the Federal Communications Commission. Moreover, currently there are transmission facilities with major communication hubs on the Company's Utility Poles, which arguably would be non-conforming with the Local Law. Any attempt by the Town to regulate these attachments will result in time consuming and costly litigation.

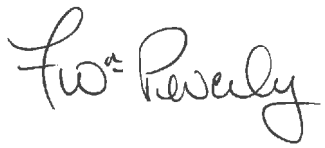
12. Section III. I. (4) provides that by allowing Non-Utility Devices to be installed, the owner of the Utility Pole "waives all appeals and agrees to be strictly liable for any amounts due to the Town pursuant to this Provision and Regulation." The Town has no authority to impose such a provision on the Company and it is plainly unenforceable. In addition, the owner of a Utility Pole should not be held liable for the action or inaction of third-party attachees in regards to fees and expenses. Finally, the 9.0% interest rate is out of line with CPI and current interest expense/rates.

13. Section III. L. (2) authorizes the Town to impose a penalty of $1,500, as well as a term of imprisonment of not more than ten days, for each and every violation of the Local Law. As is the case with Section II, this provision is plainly excessive, arbitrary and capricious.

As a final point, the Company would note that all attachment fees that it collects for non-utility attachments are used to offset rate increases. These fees are not re-distributed to the Company's shareholders. Attachment fees directly reduce future base rate increases and leverage the Company's existing infrastructure in order to maximize its value.

Please contact me if you have any questions regarding this matter.

Very truly yours,



cc: Mike Worden, NYS Public Service Commission
NYS Attorney General