NEW HAMPSHIRE
Local Government Center

June 24, 2008

F. Anne Ross, Esq.
Director, Legal Division
NH Public Utilities Commission
21 South Fruit St. Suite 10
Concord, NH 03301-2429

Re: Docket No. DRM 08-004

Dear Ms. Ross,

Please find attached the comments of the Local Government Center to the Circulation Draft, Proposed Rules PUC 1300, dated June 10, 2008.

Sincerely,

Paul G. Sanderson
Staff Attorney

cc. Commission's Service List Docket No. DM 05-172

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

No. DRM 08-004
Proposed PUC Rule 1300 "Utility Pole Attachments"

COMMENTS OF LOCAL GOVERNMENT CENTER

The Local Government Center supports the efforts of the Public Utilities Commission to timely adopt rules to implement the authority granted by RSA 374:34-a. For the reasons that follow, it appears that if the terms set forth in the "Circulation draft of final rules, 6-10-08" are filed with the Division of Administrative Rules for consideration by the Joint Legislative Committee on Administrative Rules and maintained into the Final Proposal stage, the likely result will be the entry of a Final Objection to the proposal in accordance with RSA 541-A:13, IV (a)-(d). Therefore, we believe that there is significant work to be done upon the text before an official rulemaking proceeding is commenced.

I. The Proposed Rules Fail to Consider the Legal Relationship Between the Owner of the Pole and the Owner of the Land Upon Which the Pole is Set.

These comments acknowledge and accept the definition of "pole" used in the proposed rule at Puc 1302.04, namely, "any pole, duct, conduit, or right of way that is used for wire communications or electricity distribution, and is owned in whole or in part by a public utility…". The "pole" may be set upon land with four possible ownership types, which are:

A. Land owned by the public utility;

B. Land owned by a private landowner;

C. Land owned by a public entity, but used for other than transportation purposes; and

D. Land upon which a public highway has been created in accordance with RSA 229:1.

We make no comment with respect to poles to be located on land owned by a public utility, as all of the property interests in such poles and in the land owned by the regulated utilities are clearly subject to regulation by the Commission.

With respect to poles set on privately owned land, or upon publicly owned land used for other than transportation purposes, the proposed rules appear to be beyond the statutory authority of the agency. In these situations, the utility or utilities owning the pole have received from the landowner a grant by deed of certain limited non-possessory property rights, including the right to erect the pole. This conveyance to the utility creates an "easement in gross", as opposed to an "appurtenant easement" because there is no land owned by the utility to serve as the dominant estate. Under New Hampshire law, an easement in gross is a "mere personal interest", which does not permit the holder to license others to enter upon and use the burdened, or servient real

estate. See Arcidi v. Town of Rye, 150 N.H. 694, 700 (2004). Thus, the rights of potential attachers are not to be controlled by an adjudicative proceeding in the Public Utilities Commission because they are not persons who are parties to the grant of the easement in gross. Instead, they must seek the right to enter the land from the landowner, or their claimed right of entry may be adjudicated in the first instance in the Superior Court, which alone has the statutory jurisdiction to try the title to land. See RSA 491:7. As noted in Arcidi, supra., at 703, the court will look first to the clear and unambiguous terms of the deed, and imply only such other supplemental rights as may be necessary to assure a reasonable use of the easement granted to the utility.

Therefore, in these situations, while the Public Utilities Commission does have the regulatory authority to regulate the owners of the poles, it does not have the statutory authority to alter the fundamental legal relationship of the landowner to the pole owner. There is no authority contained in RSA 374:34-a for the commission to create rights for a public utility to use real property which the landowner has not granted, and it has no legal authority under that statute to order the landowner to grant additional rights that the public utility may need or desire to facilitate pole attachments by additional persons. Instead, a separate adjudicative proceeding pursuant to RSA 371 would be required to acquire these rights, and the powers to acquire these rights may not be available to serve a proposed attachment of a provider that is not a public utility.

Proposed Rule Puc 1303.01 Access Standard does not accurately set forth the reasons why a pole owner either could or must deny a request for an attachment. If the easement interest owned by the pole owner does not expressly include a right to grant access *to the land upon which the pole sits* (emphasis added) to additional persons, the pole owner may be legally unable to grant a request for such an attachment. The remedy for the prospective attacher is to negotiate with the landowner for the right to access the land. If and only if the landowner grants additional rights to that prospective attacher, in the form of an easement or license to access such real property, will the pole owner be obligated to review the proposed attachment under these rules and determine if there is capacity on the pole to permit a safe installation of the new equipment.

Even if the landowner is willing to convey such additional rights, he or she could not grant such additional rights if the proposed attachment proved to be contrary to the terms of local zoning ordinances, conditions of approval received from local land use boards, or contrary to the terms of condominium declarations, property owner association restrictions, or private restrictive covenants that touch and concern the land and run to the benefit of other real property owners. Further, such additional attachments if granted may prove to violate covenants contained in mortgages or other security interests. If such mortgagees refuse to subordinate or release their security interests, the public utilities commission has no statutory authority to require these holders to alter their contractual and security relationships to the affected landowner. Thus, a proposed rule which purports to compel a utility to allow the placement of an attachment on all poles, regardless of the legal right of the attacher to access the land upon which the pole sits, could have a substantial economic impact upon the utility, the landowner, and the attacher as the legal rights and duties of each at specific locations are litigated.

With respect to land upon which a public way has been created pursuant to RSA 229:1, we make no comment as to the authority of the State of New Hampshire to regulate pole sets and related equipment additions upon Class I, II, III, or III-a highways, as the licensing authority on these ways is granted to the Commissioner of Transportation by RSA 231:161, I(c).

II. The Proposed Rules Fail to Acknowledge the Role of the Municipalities as the Licensing Authority for Installation of Equipment in the Municipal Right of Way.

Since 1881, it has been the public policy of this state to allow the erection of utility facilities within the public highway right of way. See RSA 231:160 and 160-a. These comments are limited to facilities located in the Class IV, V, or VI highways, since those classes of highways are regulated by the municipalities. See RSA 229:5 and RSA 236:1. The placement of these facilities requires either the review and approval of a local land use board, or the issuance of a license by the municipal governing body.

Since 1929, it has been clear under our state law that the licensing powers of municipal reviewing authorities are limited to the prevention of undue interference with other public uses of the highway. See Parker-Young Co. v. State, 83 N.H. 551 (1929). As noted in the opinion at 556, the statute "…confers no express power upon the selectmen to determine who may or may not occupy the highway with poles and wires, nor to choose between two utilities competing for the right." In this sense our state law foreshadowed the public policy adopted in the Telecommunications Act of 1996, in that local authorities may not erect artificial barriers to the entry of electricity or communications providers into any given market location. However, our Supreme Court also made clear that the duties of the local review bodies are not "perfunctory", noting that

> "It is their function to regulate and control the use to be made of highways by any utility which may be permitted to occupy them that such use will not unduly interfere with other public uses. To the accomplishment of this end, by the proper location of the route and appliances, the powers of the selectmen remain supreme…" Id. At 557.

When a regulated utility petitions a municipality for the grant of a license to erect a pole or install other facilities in the public right of way, the only issue for the municipality is whether the proposed location, or other aspects of the installation, interferes with other permitted uses of the right of way. The municipality analyzes the location in accordance with its duty to maintain the highway imposed by RSA 231:3, using standards for access and safety adopted in accordance with the regulatory authority contained in RSA 236:1, all with a view to avoid the creation of an "insufficiency" as defined in RSA 231:90. Every new structure placed into the right of way is a potential obstruction to the safe use of the highway for the purpose of transportation, and thus the new obstruction must somehow be seen as serving the public good. For this reason, only public utilities have the "right" to use the airspace reserved to the public by RSA 236:18. A proposal to place a privately owned facility into the public way for the convenience of a private landowner would not meet this standard, and could not be allowed.

The issuance of the municipal license only permits the licensee to install and thereafter alter the facilities "…which are required in the reasonable and proper operation of the business carried on by such licensee…" See RSA 231:161, VI. The license does not grant the licensee any authority to sublicense space upon the licensed facility to any other entity. Thus, if a location is licensed to a regulated electric utility, such utility may place such equipment related to the operation of its business at the location as it deems to be necessary without seeking any additional authority from the municipality. See RSA 231:161, VI and Town of Rye v. Public Service Co. of NH, 130 N.H. 365 (1988). That authority does not include the ability to bring the equipment of others to the location unless the municipality issues a new license to the owner of such equipment, and such equipment serves the public good. Accordingly, locations that are burdened with the co-located equipment from multiple providers will have multiple municipal licenses. That has been the law since 1929, and it remains the law today. While we recognize that this is probably not the state of actual practice today, actual practice does not supersede a statutory requirement.

Our Supreme Court as recently as the end of 2007 acknowledged that not all occupants of the public right of way have been issued municipal licenses in accordance with RSA 231:161. The court noted in the case of Verizon New England, Inc. v. City of Rochester, No. 2007-091, Slip Opinion dated December 28, 2007, that the telephone and electric company have been issued pole licenses, the gas companies have written consent to occupy pursuant to RSA 231:184, and the cable television company has a franchise agreement. Each of these separate documents was found to constitute an agreement with the municipality to occupy the public right of way, and each of these agreements was found to constitute the basis for the imposition of real property tax upon the occupant of the public way pursuant to RSA 72:23, I(b). As we review the matter in 2008, the taxing methodology is not yet clear, but the right and duty to separately assess and tax each licensed occupant of the right of way has been affirmed by the court.

Therefore, a proposed attacher needs more than the authorization of the pole owner described in proposed rule Puc 1303.05; the attacher also needs a license from the affected municipality. The license is in fact a jurisdictional prerequisite to review of the proposed attachment by the Public Utilities Commission pursuant to RSA 374:34-a, since the Commission has no authority to license or compel the placement of facilities in the public right of way. The proposed rules appear to say that the Public Utilities Commission can compel the location of facilities in the public right of way over the objection of municipal officials. To the extent that the rules could be interpreted in this manner, the rules exceed the statutory authority of the agency, and should not be approved in a rulemaking proceeding.

III. The Proposed Rules Lack Clarity and Fail to Make Sufficient Reference to Documents Which Should be Incorporated by Reference.

The definition of "pole" in Puc 1302.04 appears to limit the definition of attachments to facilities used for wire communications or electricity distribution. However, persons seek to attach items, including wireless communications equipment. Such items may serve the public good, and thus may be licensed by municipalities for placement in the public right of way. It appears that disputes regarding attachment of these items could not be adjudicated in a proceeding under these rules.

There is no recognition of the special rights of municipalities placed into the terms of the licenses in accordance with RSA 231:161, II. The Public Utilities Commission has no statutory authority to require that licenses be issued in any particular format, and the legislature permits the municipalities to change the terms and conditions of the licenses whenever the public good requires the change. See RSA 231:163. The terms of the license issued will be an important factor in each adjudicative proceeding, and the absence of a license for a particular location should be a prerequisite for the commencement of an adjudicative proceeding under these rules.

The access standard in Puc 1303.01 refers to "generally applicable engineering purposes". This standard is unclear and if reference is made to a code, such code should be incorporated by reference. Attachments must be installed pursuant to Puc 1303.07 to "prevent interference with service". This standard is unclear, and there is no reference to a standard that will be used to measure acceptable levels of "interference". Such standards should be specified, and if reference is made to a code, such code should be incorporated by reference.

The proposed rules refer to PUC 203 for the method of conducting an adjudicative proceeding to deal with the issues raised under RSA 374:34-a. Proposed rules 1304.06 through 1304.08 attempt to change the burden of proof and available remedies. Such provisions should more properly be incorporated as changes to the PUC 203 procedural rules for this type of proceeding, as opposed to being adopted as substantive standards in this section of the rules.

Respectfully submitted,

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