

Amend Puc 1300 to read as follows:

CHAPTER Puc 1300 UTILITY POLE ATTACHMENTS

Statutory Authority: RSA 374:3; RSA 374:34-a

PART Puc 1301 PURPOSE AND APPLICABILITY

Puc 1301.01 Purpose. The purpose of Puc 1300, pursuant to the mandate of RSA 374:34-a, is to provide for rates, charges, terms and conditions for pole attachments that are just, reasonable and in the public interest. Nothing in these rules affects municipal and state authority over public highways under RSA 231:159 et seq. and other applicable law.

PSNH Comment: PSNH supports this or similar additional language to remove any uncertainty that the PUC's jurisdiction over pole attachment matters does not affect the authority of municipalities and the state to license and regulate the use and occupancy of public highways. As stated by the municipal and State DOT representatives present at the technical session on November 21, 2008, they consider their authority under RSA 231:159 et seq. and other applicable law as extending to the licensing and regulation of all poles and pole attachments located in a public highway, inclusive of all wires, cables and related facilities of incumbent utilities, cable television systems, CLECs and other telecommunication carriers, and private enterprises, which are run in or along the highway. Contrary to assertions made by CLECs at the technical session that such authority is "preempted" by Federal law, the provisions of the Federal Telecommunications Act of 1996 in fact expressly recognize and protect the authority of state and local governments to manage the public rights of way on a nondiscriminatory basis with respect to the use thereof by telecommunications providers. See 47 USC §253 (b) and (c).

Puc 1301.02 Applicability. Puc 1300 shall apply to:

(a) Public utilities within the meaning of RSA 362, including rural electric cooperatives for which a certificate of deregulation is on file with the commission pursuant to RSA 301:57, that own, in whole or in part, any pole used for wire communications or electric distribution.

(b) [Other persons with facilities attached to such poles, or seeking to attach facilities to such poles.] **[DELETE]**

PSNH Comment: As proposed, subdivision (b) purports to make these rules applicable to the pole attachments or proposed pole attachments of any persons, and should be deleted because it exceeds the scope of the PUC's jurisdiction of and

regulatory authority over pole attachments as provided for by RSA 374:34-a. For further reference, and proposed corrective language, please see the comments submitted by PSNH in Docket DRM 08-004 on March 4, 2008. Furthermore, there is no definition provided with respect to the meaning of the term “facilities” as used in this subdivision; please see comment to Puc 1302.01 below.

PART Puc 1302 DEFINITIONS

Puc 1302.01 [“Attaching entity” means a natural person or an entity that has attached or seeks to attach a facility of any type to a pole, including but not limited to telecommunications providers, cable television service providers, incumbent local exchange carriers, competitive local exchange carriers, electric utilities, and governmental entities.] **[DELETE]**

PSNH Comment: This definition purports to encompass within the term “attaching entity” the pole attachment or proposed pole attachment of any type by any natural person or entity, and should be deleted because it exceeds the scope of the PUC’s jurisdiction of and regulatory authority over pole attachments as provided for in RSA 374:34-a. For further reference, and proposed corrective language, please see the comments submitted by PSNH in Docket DRM 08-004 on March 4, 2008. Additionally, the definition purports to apply to the attachment of “a facility of any type” without further definition or limitation, thus allowing an interpretation which could include such varied attachments (besides the typical wire or cable attachments) as wireless antennas or equipment, flags, banners, basketball backboards and hoops, cameras or other video imaging equipment, traffic signals, lights, signs, advertisements, holiday decorations and countless other attachments of every size, shape and function.

Puc 1302.02 “Commission” means the New Hampshire public utilities commission.

Puc 1302.03 “FCC” means the federal communications commission.

Puc 1302.04 “Pole” means “pole” as defined in RSA 374:34-a, 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, including a rural electric cooperative for which a certificate of deregulation is on file with the commission pursuant to RSA 301:57.”

Puc 1302.05 “Prime rate” means the rate reported in the *Wall Street Journal* on the first business day of the month preceding the beginning of each calendar quarter, or the average of the rates so reported on that day.

Puc 1302.06 “Utility” means a public utility as defined in RSA 362:2, including a rural electric cooperative for which a certificate of deregulation is on file with the commission pursuant to RSA 301:57.

PART Puc 1303 ACCESS TO POLES

Puc 1303.01 Access Standard. The owner or owners of a pole shall provide access to such pole to a cable television system or any telecommunications carrier on terms that are just, reasonable and nondiscriminatory. Notwithstanding this obligation, the owner or owners of a pole may deny a request for attachment to such pole when there is insufficient capacity on the pole or for reasons of safety, reliability or generally applicable engineering purposes. Nothing herein shall require provision of access where such access would not be in compliance with other applicable law.

PSNH Comment: The additional language added to the first sentence is consistent with and follows the access standard set forth by Federal law, 47 USC §224(f), and FCC regulations, 47 CFR §1.1403(a). It is also consistent with the access standard stated in RSA 374:34-a, VI, that a pole owner shall provide nondiscriminatory access to its poles “for the types of attachments regulated under this subdivision”, which under RSA 374:34-a, II, refers to the pole attachments of cable television systems and telecommunications carriers regulated under the Federal Pole Attachment Act, 47 USC §224. The newly added sentence would allow for recognition of those circumstances where providing the requested access would not comply with other applicable law, e.g., private property rights of pole owner not sufficient under applicable state law to permit third party access rights to pole, duct, conduit or right of way; licensing of right to use and occupy public highway not granted by appropriate state or municipal authority under RSA 231:159 et seq..

Puc 1303.02 Owner Obligation to Negotiate. The owner or owners of a pole shall, upon the request of a person entitled to access under these rules and seeking a pole attachment, negotiate in good faith with respect to the terms and conditions for such attachment.

PSNH Comment: Only persons entitled to access under the access standard of 1303.01 are entitled to negotiations with the pole owner or owners for an agreement to attach.

Puc 1303.03 Requestor Obligation to Negotiate. A person entitled to access under these rules and seeking a pole attachment shall contact the owner or owners of the pole and make a reasonable effort to negotiate in good faith an agreement for such attachment.

PSNH Comment: Only persons entitled to access under the access standard of 1303.01 are entitled to negotiate with the pole owner or owners for an agreement to attach. There should be an obligation to negotiate in good faith, reciprocal with the pole owner good faith obligation under 1303.02.

Puc 1303.04 Request for Access and Response Requirements. Requests for access to a utility's poles shall be in writing. If access is not granted within 45 days of receiving a complete request for access meeting the utility's reasonable application

requirements as set forth in the applicable pole attachment agreement, the owner must confirm the denial in writing by the 45th day. The owner'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 the grounds in Puc 1303.01 for such denial.

PSNH Comment: Applications to attach must be complete in accordance with the utility's reasonable application requirements, before the 45 day time period should begin to run. Until completed, an application to attach may not be able to be properly considered by the utility. PSNH's practice is to not consider any specific applications to attach unless and until a pole attachment agreement is entered into with the party requesting attachment. The pole attachment agreement establishes the application requirements, forms and procedures for making application to attach to specific poles.

Puc 1303.05 Authorization Required. A person having any facilities attached to a pole or seeking to attach facilities to a pole shall obtain authorization from the pole owner or owners prior to attaching such facilities.

PSNH Comment: The general principle expressed in this rule that no attachment may be made without prior authorization from the pole owner or owners should be made applicable to both existing attachments found on poles, as well as prospective attachments.

Puc 1303.06 Notification.

(a) Unless otherwise agreed by the parties to a pole attachment agreement, a [A] [DELETE] pole owner shall provide a person with facilities attached to a pole no less than 60 days' written notice prior to:

- (1) Removing any of that person's [the] [DELETE] facilities,
- [(2) Terminating any service to the facilities,] [DELETE]
- (3) Increasing any recurring rates applicable to the pole attachment, or
- (4) Modifying the facilities other than as part of routine maintenance or a response to an emergency.

(b) Attaching entities seeking to change the purposes for which existing attachment facilities are used shall provide written notice to pole owners 60 days prior to making such changes.

PSNH Comment: As notification provisions covering such matters are typically included in PSNH's pole attachment agreements, this rule should be subject to any other agreements the parties may have reached with respect to these issues. Subdivision (2) should be deleted because this rule applies to the facilities of the attaching party, not the

service facilities of the pole owner or owners. The change to subdivision (3) clarifies that this applies to recurring rates charged to the attaching party, such as the annual pole attachment rates.

Puc 1303.07 Installation and Maintenance.

(a) Any attachment shall be installed at a minimum in accordance with the National Electrical Safety Code, 2007 edition, and the National Electric Code as adopted by RSA 155-A:1, IV, and the Telcordia Blue Book Manual of Construction Procedures, Issue 4, December 2007, and in accordance with such other applicable standards and requirements specified in the pole attachment agreement.

(b) Any attachment shall be installed and maintained to prevent interference with service furnished by the utility pole owner or owners and any other attaching entity.

PSNH Comment: Installation of attachments in accordance with applicable codes is a minimum requirement, and should not exclude other requirements that may be applicable under the terms of a pole attachment agreement or otherwise. At the technical session held on November 21, 2008, both attaching entities and pole owners were in agreement that the provisions of the Telcordia Blue Book, which specifically addresses construction practices and procedures relative to the attachment of communication facilities to utility poles, is also applicable. The revision to subdivision (b) clarifies that the pole owners, whose service facilities exist on the poles in the first instance, are equally entitled to protection from interference with their service facilities.

Puc 1303.08 Labeling of Attachments.

Attaching entities shall clearly label their attachments with owner identification.

Puc 1303.09 Location of Attachments.

No attaching entity shall be denied attachment solely because the only space available for attachment on a pole is below the lowest attached facility. If the owner of the lowest facility chooses to relocate its existing facilities to a lower allowable point of attachment so that the new attaching entity will be above all existing facilities, it shall do so at its own expense.

PSNH Comment: As this relates to issues associated with occupancy of the communications space on a pole, PSNH offers no revision to this rule. PSNH notes that at the technical session on November 21, 2008, FairPoint Communications expressed concern with certain aspects of this rule, and PSNH defers to FairPoint's considerations based on its pole ownership interest.

Puc 1303.10 Boxing of Poles.

[Pole owners shall permit attaching entities to box poles where boxing may eliminate the need for make-ready work or pole replacement. Such boxing shall be safely accessible by bucket trucks, ladders or emergency equipment and otherwise consistent with the requirements of applicable codes, including the National Electric Safety Code.]
[DELETE]

PSNH Comment: PSNH requests deletion of any rule which authorizes boxing of the attachments of attaching entities. PSNH does not generally support the boxing of poles. PSNH's opposition is based on reasons of utility lineworker safety, as well as reliability and restoration of service, particularly in storm or emergency situations where the repair or replacement of a pole which is "boxed" with a third party attacker's wire or cable interferes with PSNH's obligations to provide safe and reliable electric service to its customers at all times. Furthermore, the authorization of boxing to eliminate make ready work or pole replacement elevates the priority of the attaching entity over the incumbent utility's service obligations, and would likely result in a completely unacceptable proliferation of boxed pole situations throughout the incumbent utility's system.

Puc 1303.11 Use of Extension Arms.

Pole owners shall permit limited, reasonable use of extension arms by attaching entities. Such use shall be permitted only for purposes of clearing obstacles, or improving alignment[, or providing space that would not otherwise be available without a replacement pole]. [DELETE] Use of extension arms shall be consistent with the requirements of applicable codes.

PSNH Comment: PSNH does not support the use of extension arms or brackets to accommodate the attachments of attaching entities, except for the limited purposes of use in the communications space on the pole to clear an obstacle or improve alignment. This is a practice which is apparently presently used by FairPoint but only in these very limited circumstances. PSNH supports this use only because such use should be very infrequent. Extension arms present an additional obstacle and potential hazard to lineworker safety, and should not be permitted except in those rare situations where prudent line construction needs may override the risk of the added safety hazard.

Puc 1303.12 Make-Ready Timeframes.

Unless otherwise agreed by the parties to a pole attachment agreement, Pole owners shall complete make-ready work within [90 days where the work includes limited or no pole replacements. If pole replacement is required, pole owners shall complete make-ready work within] [DELETE] 180 days after any required pre-payments of any make ready estimates provided to the attaching entity by the pole owners. Unless otherwise agreed by the parties to a pole attachment agreement, make-ready work shall be deemed to include all work, including but not limited to rearrangement and/or transfer of existing facilities, replacement of a pole or any other changes required to

accommodate the attachment of the facilities of the party requesting attachment to the pole.

PSNH Comment: PSNH's pole attachment agreements generally specify that make ready work, if required, shall be completed within 180 days after payment of the make ready estimate is received, except for reasons beyond PSNH's control. As proposed, the rule establishes a 90 day time limit to complete make ready work, where no or only limited pole replacements are needed, but the pole owners at the technical session on November 21, 2008 expressed their concerns that such a 90 day period may be difficult or impossible to meet depending, for example, on what make ready work is in fact required, the need for tree trimming work, or the number of poles that would amount to only "limited" pole replacements. This rule should serve as default requirement for completion of make ready work within 180 days only where the parties to a pole attachment agreement have not otherwise agreed on this subject. A default definition of make-ready work, based on the definition of that term presently used in PSNH's pole attachment agreements, is added.

PART Puc 1304 DISPUTE RESOLUTION

Puc 1304.01 Lack of Agreement. [An attaching entity] ~~[DELETE]~~ A person requesting a pole attachment and entitled to access under these rules and unable, after demonstrable exhaustion of reasonable, good faith negotiation efforts, to reach agreement with the owner or owners of a pole or poles subject to this chapter may petition the commission pursuant to Puc 203 for an order establishing the rates, charges, terms and conditions for the pole attachment or attachments. Such petition shall include the information required for complaints to the FCC made pursuant to the terms of 47 CFR § 1.1404(d) through (m) in effect on July 16, 2007.

PSNH Comment: The use of the term "an attaching entity" in this rule implies that a party with an attachment to the pole without agreement with the pole owner or owners (and therefore without authorization) may be able to petition for an order under this provision. Only parties who have not attached, and who are entitled to access under the access standard of these rules and to negotiation with the pole owner or owners for an agreement to attach, should be permitted to petition the PUC under this rule. Consistent with the obligation of the party requesting attachment under 1303.03 to engage in good faith and reasonable negotiation efforts to obtain an attachment agreement, the right to petition the PUC under this rule should only be available after demonstrating exhaustion of such efforts.

Puc 1304.02 Dispute Following Agreement or Order. A party to a pole attachment agreement entered into on or after July 16, 2007 or a party subject to an order of the commission establishing rates, charges, terms or conditions for pole attachments may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order.

PSNH Comment: This additional language is consistent with the State of New Hampshire's assumption of jurisdiction over pole attachments, effective as of July 16, 2007, under RSA 374:34-a. Please see PSNH's further comments under 1304.06 below.

[Puc 1304.03 Unauthorized Attachments. A pole owner may petition the commission pursuant to Puc 203 for an order directing the removal of facilities that are attached to a pole without authorization pursuant to this chapter.] [DELETE]

PSNH Comment: A rule permitting a pole owner to petition the PUC for an order directing the removal of unauthorized attachments would appear to be unnecessary. 1303.05 establishes the general principle that no pole attachment is permitted without prior authorization of the pole owner or owners. In cases where an attachment to an actual pole (whether located in a public highway or on private property), or within a duct or conduit, has been made without prior authorization or permission, it would constitute a trespass upon the private property of the utility owner, and may be removed at will by the utility owner without need of a PUC order. Treatment of the unauthorized attachments of a party to an existing pole attachment agreement with the pole owner or owners will typically be covered by specific provisions of the agreement, and the remedies afforded to the pole owner or owners under those provisions may be contractually enforced without need of a PUC order.

Puc 1304.04 Procedure. Upon receipt of a petition pursuant to this part, the commission shall conduct an adjudicative proceeding pursuant to Puc 203 to consider and rule on the petition. Where the public interest so requires, the commission may order that rates, charges, terms or conditions for pole attachments be modified.

Puc 1304.05 Rate Review Standards.

(a) In determining just and reasonable rates for the attachments of competitive local exchange carriers and cable television service providers to poles owned by incumbent local exchange carriers and/or electric utilities under this chapter, the commission shall consider:

- (1) The interests of the subscribers and users of the services offered via such attachments;
- (2) The interests of the consumers of any pole owner providing such attachments; and
- (3) The formulae adopted by the FCC in 47 CFR § 1.1409(c) through (f) in effect on July 16, 2007.

[(b) In determining just and reasonable rates for all other attachments under this chapter, the commission shall consider:

(1) The interests of the subscribers and users of the services offered via such attachments; and

(2) The interests of the consumers of any pole owner providing such attachments.] [DELETE]

(c) For petitions filed on or before July 15, 2009, the Commission shall use the formulae referenced in (a)(3) above to determine just and reasonable rates under this chapter with respect to attachments of competitive local exchange carriers and cable television service providers.

PSNH Comment: The correct reference in subdivision (a) is to poles owned by electric utilities, as well as ILECs. Subdivision (b) should be deleted because the PUC's jurisdiction and regulatory authority under RSA 374:34-a, II, over the rates charged for pole attachments only extends to the types of attachments regulated under the Federal Pole Attachment Act, 47 USC §224 (which includes attachments of CLECs and cable television service providers covered under subdivisions (a) and (c) of this proposed rule). For further reference, please see the comments submitted by PSNH in Docket DRM 08-004 on March 4, 2008.

Puc 1304.06 Burden of Proof.

(a) A pole attachment agreement entered into voluntarily under this part shall be presumed to be just, reasonable and nondiscriminatory for purposes of adjudication before the commission. An attaching entity filing a petition under this part shall have the burden of proving that an agreement entered into voluntarily is not just, reasonable and nondiscriminatory.

(b) A signed pole attachment agreement shall be presumed to have been entered into voluntarily. An attaching entity may rebut the presumption of voluntariness by demonstrating that signing the agreement, regardless of its terms, was reasonably necessary to avoid significant delay or business interruption.

(c) When the presumption of voluntariness has been successfully rebutted pursuant to (b) above, the burden of proving that the agreement is just, reasonable and nondiscriminatory shall shift to the pole owner.

(d) Nothing in these rules shall affect in any way any pole attachment agreement which has been entered into prior to the effective date of RSA 374:34-a (July 16, 2007), and the commission shall not alter the terms or provisions of any such agreement.

PSNH Comment: PSNH proposes the addition of a new subdivision (d) to address the status of existing pole attachment agreements entered into by parties prior to the effective date of the State of New Hampshire's assertion of state jurisdiction over pole attachments under RSA 374:34-a. The prohibition against the PUC altering the terms or provisions of any such agreement is consistent with current interim Puc 1303.04. Such a

provision affords certainty to the status of contractual relations between the parties to such preexisting agreements. Nothing in this provision would preclude a complaint to the FCC, under the FCC's jurisdiction under the Federal Pole Attachment Act (47 USC §224), with regard to any such preexisting agreement.

Puc 1304.07 Remedies. When the commission determines just and reasonable rates under this part that differ from the rates paid by the petitioner, the commission shall order a payment or refund, as appropriate. Such refund or payment shall be the difference between the amount actually paid and the amount that would have been paid under the rates established by the commission, plus interest, as of the date of the petition.

Puc 1304.08 Interest. Refunds or payments ordered under Puc 1304.07 shall accrue simple annual interest at a rate equal to the prime rate.