

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION
DOCKET NO. DRM 08-004
UTILITY POLE ATTACHMENTS N.H. CODE OF ADMINISTRATIVE RULES CHAPTER
PUC 1300

COMMENTS ON PROPOSED RULES

COMMENTS OF DONAHUE, TUCKER & CIANDELLA, PLLC
ON BEHALF OF MUNICIPAL CLIENTS

In response to the New Hampshire Public Utilities Commission (“Commission”) notice of rule making recommending a re-adoption of the interim rules promulgated with amendment, Donahue, Tucker & Ciandella, PLLC, (“DTC”) submits the following comments on behalf of our municipal clients:

Introduction.

1. DTC represents approximately 50 municipal entities in the State of New Hampshire as either general or special counsel. As part of our general counsel representations and many of our special counsel representations, we have represented municipalities on matters pertaining to utilities, telecommunications and management of the public rights of way.

2. A number of our municipal clients have asked us to represent their interests before the Commission in the Pole Docket, DM 05-172, and the Verizon-FairPoint Merger Docket, DT 07-011. We continue to represent the towns of Hanover, Newmarket, Seabrook, Raymond, and Salem in the instant rule making proceeding. In addition, we have been engaged in discussions for several years sponsored by the New Hampshire Municipal Association with utility pole owners and municipal representatives regarding use of space set aside on poles for governmental uses.

3. On behalf of our municipal clients, DTC recommends language in the proposed rules that explicitly recognizes the statutory authority under RSA 231:159, et seq., of municipalities for licensing of poles and facilities in the public rights of way, and the right, pursuant to RSA 374:34-a, V, for municipalities to enter into independent voluntary agreements for attachments to poles for governmental purposes, in space set aside for governmental purposes. These bases of authority are discreet from and outside the Commission process under the rules which are the object of these comments. We also recommend retaining Puc 1303.9, as drafted.

The Rules Should Recognize that Municipalities have Jurisdiction Over Installation of Poles and Other Equipment in Public Rights of Way.

4. The proposed final rules recognize the authority of municipalities and the state over poles and other facilities located in the public highways in Puc 1301.01.¹ Municipalities have had the right to manage and control the public rights of ways since the very beginnings of our state. Municipal control over the placement of poles and other facilities in the right of way pursuant to RSA 231:159 et seq. has been the law since 1881. Distinct from this statutory and common law authority, the Commission regulates utility equipment generally pursuant to its general authority over utilities, RSA 374:3, and now has specific authority over pole attachments pursuant to RSA 374:34-a. This authority on the part of the PUC does not in any way replace or modify the existing authority of municipalities to manage the public rights of way with regard to licensing poles and facilities. Nor does it change the rights of municipalities to require, based on a finding of public good, that pole owners set aside space on the poles for governmental purposes

¹ For state-maintained highways, the State of New Hampshire manages the right of ways. All of the comments contained herein will pertain to municipal rights of way, or class IV, V and VI highways. See RSA 229:5.

as a condition of granting the licenses.² We are pleased that this section of the rule as drafted explicitly recognizes existing jurisdiction over the public rights of way pursuant to the pole license statute in RSA 231:159 et seq., but we believe that this joint jurisdiction should be explicit. The reasons are more fully laid out below.

5. Pursuant to RSA 231:159 through 182, it is the Board of Selectmen (or other governmental body having jurisdiction over the issuance of permits or licenses) that grants a license for erection or installation of “poles, structures, conduits, cables or wires in, under or across any such highway...” RSA 231:161, I. For convenience, the phrase “Board of Selectmen” will be used here. The process for obtaining such a license involves a petition:

“The Petitioner may petition such Selectmen to grant a license for such poles, structures, conduits, cables or wires. If the public good requires, the Selectmen shall grant a license for erecting and installing or maintaining the poles, structures, conduits, cables or wires described in the petition.”

RSA 231:161, IV. Such licenses are prerequisites to any pole owner or attacher installing its facilities in the public rights of way.

6. The reasons for the Board of Selectmen to be the licensing authority for any poles or conduits and attachments (cables or wires) placed in the public rights of way are many fold. First, the municipalities own the public rights of way on which the poles, conduits, structures, cables and wires are installed. See Verizon New England, Inc. v. City of Rochester, 151 N.H. 263, 268 (2004) (“Whatever interest the city or state possesses in the rights of way, those interests are “owned” for purposes of determining whether non-governmental entities that use or occupy those interests in the rights of way must pay properly assessed real estate taxes.”

² For purposes of this discussion in these comments, governmental use of space on poles refers only to use of such space for governmental purposes. For purposes of these comments, the governmental uses on the poles do not include commercial uses of this space by municipalities as telecommunication providers.

(internal quotations omitted). Second, the Board of Selectmen are responsible for the management and control of the rights of way. RSA 231:2.

7. RSA 231:159-182 provides a comprehensive statutory scheme for Towns to manage poles and facilities in the public ways. As noted above, the Selectmen shall grant a license “if the public good requires.” RSA 231:161, I. In addition, the Board of Selectmen may amend such licenses for poles and other equipment installed in the public rights of way after notice and a hearing, “whenever the public good requires.” RSA 231:163. The location of poles and structures as well as underground conduits and cables must be made so that such equipment does not interfere with the safe or convenient use for public travel of the right of way. RSA 231:168. The Selectmen may order any unlicensed poles or structures or conduits or cables removed. RSA 231:173. The Selectmen may notify the owners of such poles and equipment of the need to remove them on 10 days’ notice for any purpose. RSA 231:177. Finally, the statute provides for temporary removal when required. RSA 231:182.

8. This broad authority on the part of the Selectmen covers not only safety matters with regard to the placement of the facilities in the public rights of way, but also the terms of the license, including the requirement to pay real property taxes pursuant to RSA 72:23, I (b). See New England Telephone & Telegraph Company v. City of Rochester, 144 N.H. 118, 120-121 (1999). (permitting taxation of use of the public right of way by telephone company).

9. Municipalities have also historically maintained facilities themselves on the poles, for governmental purposes, such as alarm wire and other emergency management communications networks. Some of these arrangements are pursuant to specific language in licenses issued by municipalities, setting aside space on the pole for governmental purposes. Some such licenses are one hundred years old or more. In other areas, the set-aside of space on poles for

governmental purposes has been a practice of the pole owners, understood as a condition of the license, even if not reflected in the written terms of each pole license issued. See, for example, the intercompany operating procedures of joint pole owners attached to our written comments submitted March 5, 2008 in response to the request for advance public comment on these rules.

10. Pursuant to their authority under RSA 231:159 et seq., a number of representatives of municipalities, with the assistance of the New Hampshire Municipal Association, have been engaged in a dialogue for several years now with pole owners regarding codifying the set aside of space on poles for governmental purposes, in some cases reflected in pole licenses and in others in practice. This set-aside is grounded on the authority of municipalities to issue licenses for poles and facilities in the public right of way and to amend them where the public good so requires. The Commission should do nothing which would nullify the product of this collaborative negotiation.

11. That municipalities may condition the grant of a license on the set aside of space for municipalities for governmental use, based on state law, is recognized by federal law. This recognition appears in the Federal Communications Commission's ("FCC") Order interpreting the Federal Pole Attachment Act Amendment of 1996, codified at 47 U.S.C. § 224, on which, in large part, RSA 374:34-a is based. The FCC, in Order No. 01-170, "Consolidated Partial Order on Reconsideration," dated May 22, 2001, notes as follows: "Municipal set asides are also capacity, but may be made available for the use of the local government as a condition in a franchise, license, right of way, or other agreement." (Id. at p. 93) (footnote omitted).

The Rules Should Reflect the Emphasis on Voluntary Agreements in the Statute.

12. RSA 374:34-a encourages voluntary agreements between pole owners and those seeking to make attachments to poles. RSA 374:34-a provides at V: "Nothing in this subdivision

shall prevent parties from entering into pole attachment agreements voluntarily, without Commission approval.” This section recognizes the independent jurisdiction of the Boards of Selectmen of municipalities throughout the state to enter into agreements with pole owners through the statutory license process for set asides, on poles located in the public right of way, for governmental purposes. This provides additional statutory authority for the work of the group of municipal and utility representatives who have been meeting regularly for at least four years under the auspices of the New Hampshire Municipal Association in an attempt to resolve terms for universal amendments to pole licenses, model petitions for pole licenses to be located in the public rights of way, and a standard pole attachment agreement for municipalities attaching to utility poles for governmental purposes. As noted above, this work should be encouraged through specific endorsements of voluntary agreements entered into outside the Commission process, as permitted by RSA 374:34-a,V. Municipalities, like the Commission, are required to act in the public good in licensing poles in the public way and the set aside of space on poles for governmental purposes. The goals of both the Commission and municipalities with regard to utility poles and equipment in the public rights of way are harmonious.

13. If the Commission chooses not to recognize in the rules the independent right of municipalities to enter into voluntary agreements, pursuant to their authority in RSA 231:159, et seq., for attachments to poles for governmental purposes, then municipalities should not be included in the definition of “Attaching entities” in Puc 1302.01.

Puc 1303.09 Should Remain as Proposed, to Promote Public Safety.

14. We note that Puc 1303.09, “Location of Attachments,” is appropriate as drafted. Traditionally, the municipal space set aside is in the top communications location, below the space designated for electrical facilities. The incumbent telephone company generally wishes to

retain the lowest position on the pole, for a number of reasons. At the public hearing on June 18, 2009, Ms. Erin Austin, representing FairPoint, suggested a revision to PUC 1303.09 requiring that new attaching entities locate in the top communications space. This is problematic if that space generally is set aside for emergency management and other governmental uses, pursuant to the public good authority set forth in RSA 231. Requiring that a new attacher go into that space, even if not currently occupied by a municipality, would eliminate space set aside for municipalities in the future. We recommend that the Commission keep the rule as proposed.

Conclusion.

15. In summary, DTC requests on behalf of our municipal clients that the Commission retain the authority to:

- Retain the acknowledgment of the independent jurisdiction of municipalities and, for state highways, the State of New Hampshire, to license all poles and facilities in the public rights of way, and to place conditions on those licenses for the public good.
- Recognize in the Rules the ability of pole owners and municipalities to enter into agreements voluntarily, without Commission approval, pursuant to the above mentioned jurisdiction and RSA 374:34-a, and, if not, to exempt municipalities from the definition of “Attaching entities” in Puc 1302.01.
- Retain Puc 1303.09, as drafted, to protect the space set aside on poles for governmental purposes traditionally in the top communications location.

Respectfully submitted,
DONAHUE, TUCKER & CIANDELLA, PLLC

Date: June 25, 2009

By:



Katherine B. Miller
225 Water St.
Exeter, NH 03833
Tel. 603.778.0686
kmiller@dtclawyers.com
NHBA # 14585

Certificate of Service to the Service List for Docket DRM 08-004
(see attached)

S:\PO-PZ\PUC Pole Investigation\08-004 UtilityPole Attachments\Comments to PUC 06 24 09 draft.doc

CHRISTOPHER J ALLWARDEN
PUBLIC SVC OF NEW HAMPSHIRE
780 NORTH COMMERCIAL ST
PO BOX 330
MANCHESTER NH 03105

ROBERT CIANDELLA
DONAHUE TUCKER & CIANDELLA
225 WATER ST
EXETER NH 03833-0630

WILLIAM D DURAND
NEW ENGLAND CABLE AND TELECOMMUN
10 FORBES RD STE 440W
BRAINTREE MA 02184

JIM BAKAS
NEW HAMPSHIRE ELECTRIC COOPERATIVE
578 TENNEY MTN HWY
PLYMOUTH NH 03264

FREDERICK J COOLBROTH
DEVINE MILLIMET & BRANCH PA
43 N MAIN ST
CONCORD NH 03301

WILLIAM D DURAND
NEW ENGLAND CABLE AND TELECOMMUN
10 FORBES RD STE 440W
BRAINTREE MA 02184

DEAN BENTON
NEW HAMPSHIRE ELECTRIC COOPERATIVE
579 TENNEY MOUNTAIN HIGHWAY
PLYMOUTH NH 03264

LYNMARIE C CUSACK
NEW HAMPSHIRE DEPARTMENT OF JUSTICE
33 CAPITOL STREET
CONCORD NH 03301-6397

GERALD M EATON
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
780 N COMMERCIAL ST
PO BOX 330
MANCHESTER NH 03105-0330

ALEXANDRA E BLACKMORE
NATIONAL GRID
201 JONES RD
WALTHAM MA 02451

MARK W DEAN
ATTORNEY-AT-LAW
344 MORAN RD
HOPKINTON NH 03229

GARY EPLER
UNITIL ENERGY SYSTEMS INC
6 LIBERTY LANE WEST
HAMPTON NH 03842-1720

KURT D BLOMQUIST PE
CITY OF KEENE
350 MARLBORO ST
KEENE NH 03431

SUZANNE DIXON
CITY OF CONCORD
41 GREEN ST
CONCORD NH 03301

GUY FORD
NEW HAMPSHIRE ELECTRIC COOPERATIVE
579 TENNEY MT HWY
PLYMOUTH NH 03264

MARIA BROWNE
DAVIS WRIGHT TREMAINE LLP
1919 PENNSYLVANIA AVE NW STE 200
WASHINGTON DC 20006

KARON DOUGHTY
UNION TELEPHONE
7 CENTRAL ST
PO BOX 577
FARMINGTON NH 03835

JEANNE P GRACE
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
PO BOX 330
MANCHESTER NH 03105

PAUL F CAVANAUGH
CITY OF CONCORD
41 GREEN ST
CONCORD NH 03301

ROBERT E DUNN JR
DEVINE MILLIMET & BRANCH PA
43 NORTH MAIN ST
CONCORD NH 03301

MEREDITH A HATFIELD
OFFICE OF CONSUMER ADVOCATE
21 SOUTH FRUIT ST STE 18
CONCORD NH 03301

Docket #: 08-004-1 Printed: June 25, 2009

FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:

DEBRA A HOWLAND
EXEC DIRECTOR & SECRETARY
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429

- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.

- c) Serve a written copy on each person on the service list not able to receive electronic mail.

ROBERT T HYBSCH
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
780 NORTH COMMERCIAL ST
PO BOX 330
MANCHESTER NH 03105-0330

KATHERINE B MILLER
DONAHUE TUCKER & CIANDELLA PLLC
225 WATER STREET
PO BOX 630
EXETER NH 03833-0630

CHRIS RAND
GRANITE STATE TELEPHONE
600 SOUTHSTARK HIGHWAY PO BOX 87
WEARE NH 03281

JEREMY L KATZ
SEGTEL INC
PO BOX 610
LEBANON NH 03766

ALEXANDER W MOORE
VERIZON COMMUNICATIONS INC
185 FRANKLIN ST 13TH FLR
BOSTON MA 02110-1585

MICHAEL C REED
TDS TELECOMMUNICATIONS CORPORATE
24 DEPOT SQUARE UNIT 2
NORTHFIELD VT 05663-6721

RANDY KNEPPER
NEW HAMPSHIRE PUBLIC UTILITIES COMPANY
21 SOUTH FRUIT ST STE 10
CONCORD NH 03301

KATH MULLHOLAND
SEGTEL INC
PO BOX 610
LEBANON NH 03766

PAUL SANDERSON
NEW HAMPSHIRE LOCAL GOVERNMENT COUNCIL
PO BOX 617
CONCORD NH 03302-0614

SERGE LAPRISE
VERIZON
100 GAY STREET
MANCHESTER NH 03103

JOHN NESTOR III
FAIRPOINT COMMUNICATIONS INC
900 ELM ST STE 1927
MANCHESTER NH 03101-2008

CHUCK SCHMIDT
TRANSPORTATION DEPT OF
JO MORTON BLDG
CONCORD NH 03302-0483

VERONICA M MAHANGER MACPHEE
MAHANGER CONSULTING ASSOCIATES
21 HEATHER LANE
SPARTA NJ 07871

SUSAN OLSEN
NEW HAMPSHIRE LOCAL GOVERNMENT COUNCIL
PO BOX 617
CONCORD NH 03302-0617

KEVIN M SHEA
FAIRPOINT COMMUNICATIONS INC
900 ELM STREET
19TH FLOOR
MANCHESTER NH 03101

DEBRA A MARTONE
MERRIMACK COUNTY TELEPHONE COMPANY
PO BOX 337
11 KEARSARGE AVE
CONTOOCCOOK NH 03229-0337

PAUL J PHILLIPS
PRIMMER PIPER EGGLESTON & CRAMER PC
421 SUMMER ST
PO BOX 159
ST JOHNSBURY VT 05819-0159

ALAN M SHOER
ADLER POLLOCK & SHEEHAN PC
ONE CITIZEN'S PLAZA 8TH FLR
PROVIDENCE RI 02903-1345

MARLA B MATTHEWS
GALLAGHER CALLAHAN & GARTRELL PC
214 N MAIN ST
CONCORD NH 03301

MEABH PURCELL
DEWEY & LEBOEUF LLP
260 FRANKLIN ST
BOSTON MA 02110-3173

WILLIAM STAFFORD
GRANITE STATE TELEPHONE
600 SOUTH STARK HWY
PO BOX 87
WEARE NH 03281

SCOTT WADE
UNITIL ENERGY SYSTEMS INC
6 LIBERTY LANE WEST
HAMPTON NH 03842

MAURA WESTON
M WESTON & ASSOCIATES
P.O. Box 990
Concord, NH 03302

SUZANNE WOODLAND
CITY OF PORTSMOUTH
1 JUNKINS AVENUE
PORTSMOUTH NH 03801

PURSUANT TO N.H. ADMIN RULE PUC 203.09 (d), FILE DISCOVERY

DIRECTLY WITH THE FOLLOWING STAFF

RATHER THAN WITH THE EXECUTIVE DIRECTOR

LIBRARIAN - DISCOVERY
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429

BULK MATERIALS:

Upon request, Staff may waive receipt of some of its multiple copies of bulk materials filed as data responses. Staff cannot waive other parties' right to receive bulk materials.

KATE BAILEY
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429

HENRY BERGERON
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429

PRADIP CHATTOPADHYAY
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429

EDWARD DAMON
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429

JENNIFER DUCHARME
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429

LYNN FABRIZIO
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429

JOSIE GAGE
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429

ROBERT HUNT
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429

F ANNE ROSS
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429

AMANDA NOONAN
CONSUMER AFFAIRS DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

Executive.Director@puc.nh.gov	kmiller@dtclawyers.com
alexander.w.moore@verizon.com	lynmarie.cusack@doj.nh.gov
alexandra.blackmore@us.ngrid.com	mahanger@ptd.net
allwacj@nu.com	mariabrowne@dwt.com
ashoer@apslaw.com	matthews@gcgllaw.com
bakasj@nhec.com	mauraweston@comcast.net
bentond@nhec.com	mdean@mdeanlaw.net
bstafford@gstnetworks.com	Meredith.A.Hatfield@oca.nh.gov
crand@gstnetworks.com	mike.reed@tdstelecom.com
cschmidt@dot.state.nh.us	mpurcell@dl.com
debra.martone@tdstelecom.com	pcavanaugh@onconcord.com
eatongm@nu.com	pphillips@ppeclaw.com
epler@unitil.com	randy.knepper@puc.nh.gov
fcoolbroth@devinemillimet.com	rciandella@dtclawyers.com
fordg@nhec.com	rdunn@devinemillimet.com
gracejp@nu.com	sdixon@onconcord.com
hybsert@psnh.com	serge.m.laprise@verizon.com
info@nhlgc.org	smwoodland@ch.cityofportsmouth.com
jeremy@segtel.com	solsen@nhlgc.org
john.f.nestor.iii@fairpoint.com	wade@unitil.com
kath@segtel.com	wdurand@necta.info
kblomquist@ci.keene.nh.us	wdurand@necta.info
kdoughty@utel.com	
kevin.shea@fairpoint.com	

SERVICE LIST - EMAIL ADDRESSES - DISCOVERY MATERIALS

Pursuant to N.H. Admin Rule Puc 203.09 (d) and 203.11 (a) (11) Electronic copies of all discovery shall be served on every person designated for discovery filings on the Commission's official service list. [Discovery shall not be filed as part of a docket filing pursuant to 203.02]

Discovery@puc.nh.gov	josie.gage@puc.nh.gov
alexander.w.moore@verizon.com	kate.bailey@puc.nh.gov
alexandra.blackmore@us.ngrid.com	kath@segstel.com
allwacj@nu.com	kblomquist@ci.keene.nh.us
ashoer@apslaw.com	kdoughty@utel.com
bakasj@nhec.com	kevin.shea@fairpoint.com
bentond@nhec.com	kmiller@dtclawyers.com
bstafford@gstnetworks.com	lynmarie.cusack@doj.nh.gov
crand@gstnetworks.com	lynn.fabrizio@puc.nh.gov
cschmidt@dot.state.nh.us	mahanger@ptd.net
debra.martone@tdstelecom.com	mariabrowne@dwt.com
eatongm@nu.com	matthews@gcgllaw.com
edward.damon@puc.nh.gov	mauraweston@comcast.net
epler@unitil.com	mdean@mdeanlaw.net
f.anne.ross@puc.nh.gov	Meredith.A.Hatfield@oca.nh.gov
fcoolbroth@devinemillimet.com	mike.reed@tdstelecom.com
fordg@nhec.com	mpurcell@dl.com
gracejp@nu.com	pcavanaugh@onconcord.com
henry.bergeron@puc.nh.gov	pphillips@ppeclaw.com
hybscrt@psnh.com	pradip.chattopadhyay@puc.nh.gov
info@nhlgc.org	randy.knepper@puc.nh.gov
jennifer.ducharme@puc.nh.gov	rciandella@dtclawyers.com
jeremy@segstel.com	rdunn@devinemillimet.com
john.f.nestor.iii@fairpoint.com	

robert.hunt@puc.nh.gov
sdixon@onconcord.com
serge.m.laprise@verizon.com
smwoodland@ch.cityofportsmouth.com
solsen@nhlgc.org
wade@unitil.com
wdurand@necta.info
wdurand@necta.info
amanda.noonan@puc.nh.gov