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AUG 18 2009

August 18, 2009

Scott F. Eaton, Director
Administrative Rules Division
Office of Legislative Services
State House Annex, Room 219
25 Capitol Street
Concord, New Hampshire 03301

CONDITIONAL APPROVAL

~~RESPONSE TO~~

Request

2009-79

Re: Request for Conditional Approval
Notice Number 2009-79
Puc 1300, Utility Pole Attachments, Readoption with Amendment
NHPUC Docket No. DRM 08-004

Dear Mr. Eaton:

As you know, the New Hampshire Public Utilities Commission (Commission) approved a Final Proposal for Puc 1300, Utility Pole Attachments, Readoption with Amendment, on July 16, 2009. Since that time, the Commission has received and reviewed the annotations of Staff of the Joint Legislative Committee on Administrative Rules (Committee). The Committee Staff's annotations included approximately 14 comments both editorial and substantive in nature.

Commission Staff has carefully reviewed all comments and has resolved the majority of the issues raised. In addition, Commission Staff has corrected a number of typographical errors. The resulting revisions are shown in the attached document, for which we request the Committee's conditional approval.

Unresolved issues fall into categories where Committee Staff believes that certain words used in the rules are unclear, such as the following legal standards for certain actions that may be taken or required under the rules:

- "in the public interest" as in "to ensure rates, charges, terms and conditions for pole attachments that are just, reasonable and in the public interest" [see Puc 1301.01 and Puc 1304.05];

- "just, reasonable and nondiscriminatory" as in "access to such pole on terms that are just, reasonable and nondiscriminatory" [see Puc 1303.01];

Comments remaining
from Final Proposal are
on p. 1, 2, + 5.

- “generally applicable engineering purposes” [see Puc 1301.01]; and
- “extraordinary circumstances” [see Puc 1303.04].

Commission Staff notes that the standards highlighted above are intended to reflect the Commission’s general authority under RSA 374:3 to regulate the plants owned, operated or controlled by all public utilities so far as necessary to carry into effect the provisions of its statutory authority, including its mandate to regulate pole attachments under RSA 374:34-a.

A “public interest” standard, as proposed in these rules, is consistent with the legislative intent of RSA 374:34-a and the regulatory history of public utility law in New Hampshire. The terms “in the public interest” and “in the public good” appear throughout the public utility statutes, ensuring the Commission’s role as an arbiter of utility and ratepayer interests. *See, e.g.*, RSAs 365:19 (independent investigations); 374:30 (transfer or lease of utility franchises, works or systems); 369:1 (authority to issue securities); 374:33 (acquisition of stocks); and 378:27 (temporary rates).

The “non-discriminatory” and “generally applicable engineering purposes” standards with respect to access to poles are derived from the federal statute that governs pole attachments and provides the States authority to assert jurisdiction over such attachments. [See 47 U.S.C. section 224(f)].

The “absent extraordinary circumstances” caveat is intended to reflect the legal principle of *force majeure* which could prevent a party from compliance with the rule through no fault of its own. Commission Staff believes that such circumstances would require a case-by-case review and should not be limited at this time by a more granular rule.

Committee Staff also requested that the phrase “just and reasonable rates” in Puc 1304.06(a) be modified to read “maximum just and reasonable rates” to reflect related federal regulations. [See also Puc 1304.07.] Commission Staff notes that the federal regulations provide more generally for “just and reasonable rates” [*see, e.g.*, 47 CFR §§ 1.1401, 1.1409(c)], while the formulae outlined in 47 CFR § 1.1409 are designed to set a maximum rate that may be levied on cable television providers and competitive telecommunications providers. The intent of the Commission’s proposed rules is to provide the tools required to ensure “just and reasonable” rates, not to set a maximum rate; thus, the federal formulae may be taken into consideration in determining whether a rate is “just and reasonable.”

Committee Staff also commented that references in Puc 1303.07, Puc 1303.10 and Puc 1303.11 to the National Electrical Code as adopted in RSA 155-A:1,IV are supported by a citation to the 2008 Electrical Code in the Incorporation by Reference Statement (IBS) and do not match the RSA citation. Commission Staff agrees that the date in the IBS was

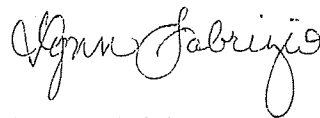
NHPUC Request for Conditional Approval
Puc 1300, Utility Pole Attachments

incorrect and, moreover, that because the RSA cites the Code, an IBS is not necessary. We have therefore removed the IBS. Commission Staff notes that the citation in RSA 155-A:1, IV is incorrect and should read "National Electrical Code," rather than "National Electric Code."

The Commission has concluded that making changes to the rules in the few unresolved areas that remain would compromise the purpose of the rules and requests that the Committee give the enclosed draft conditional approval at its meeting on August 20, 2009.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Lynn Fabrizio".

Lynn Fabrizio
Staff Attorney

Copies to Members of the Joint Legislative Committee on Administrative Rules

Unclear. The phrase “in the public interest” does not appear in RSA 374:34-a.

Readopt with Amendment Chapter Puc 1300, effective 1-17-08 (Document # 9073) 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 ensure rates, charges, terms and conditions for pole attachments that are just, reasonable and in the public interest. Nothing in this rule shall be construed to supersede, overrule, or replace any other law, rule or regulation, including municipal and state authority over public highways pursuant to RSA 231:159 et seq.

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 pursuant to RSA 301:57, that own, in whole or in part, any pole used for wire communications or electric distribution; and

(b) Attaching entities with facilities attached to such poles, or seeking to attach facilities to such poles.

PART Puc 1302 DEFINITIONS

Puc 1302.01 “Attaching entity” means a natural person or an entity with a statutory or contract right 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.

Puc 1302.02 “Boxing” means the placement of lines or cables on both the road side and the field side of a pole.

Puc 1302.03 “Commission” means the New Hampshire public utilities commission.

Puc 1302.04 “Extension arm(s)” means a bracket attached to a utility pole to provide support for cables or wires at a distance from the pole.

Puc 1302.05 “Facility” means the lines and cables and accompanying appurtenances attached to a utility pole for the transmission of electricity, information, telecommunications, or video programming for the public.

Puc 1302.06 “Federal Communications Commission (FCC)” means the U.S. government agency established by the Communications Act of 1934 and charged with regulating interstate and international communications by radio, television, wire, satellite and cable.

Puc 1302.07 “Make-ready work” means 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.

Puc 1302.08 “Pole” means “pole” as defined in RSA 374:34-a, I, 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 1302.09 “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 1302.10 “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

It is unclear what criteria determine if access is available on terms that are just, reasonable, and discriminatory.

Puc 1303.01 Access Standard. The owner or owners of a pole shall provide attaching entities access to such pole 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 the owner or owners of a pole to provide access where such access would violate other applicable laws, rules or regulations.

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 seeking a pole attachment, negotiate in good faith with respect to the terms and conditions for such attachment.

Statutory phrase from RSA 374:34-a, VI. Unclear what it means in practice.

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

Puc 1303.04 Request for Access and Response Requirements. Requests made under these rules and pursuant to a pole attachment agreement for access to a utility's poles shall be in writing. Absent extraordinary circumstances, a survey for an application

Unclear what these are. What criteria govern their determination?

not exceeding 200 poles shall be completed and the results communicated to the applicant seeking to attach within 45 days of receiving a completed application and survey fee. If permission for access is not granted within 45 calendar days of receiving a complete request for access, the owner shall 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.

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

Puc 1303.06 Notification.

(a) A pole owner shall provide an attaching entity no less than 60 days' written notice prior to:

- (1) Removing any of that person's facilities;
- (2) Increasing any annual or recurring fees or rates applicable to the pole attachment; or
- (3) Modifying the facilities other than as part of routine maintenance or in response to an emergency.

(b) Attaching entities shall provide written notice to a pole owner or owners no less than 60 days prior to:

- (1) Modifying an existing attachment other than as part of routine maintenance or in response to an emergency, or to install a customer drop line;
- (2) Increasing the load, or weight, on a pole by adding to an existing attachment; or
- (3) Changing the purpose for which an existing attachment is used.

Separate and additional attachments are subject to pole attachment application and licensing processes.

Puc 1303.07 Installation and Maintenance.

(a) All attachments shall be installed in accordance with the National Electrical Safety Code, 2007 edition, the National Electrical Code as adopted in RSA 155-A:1,IV, and the SR-1421 *Blue Book – Manual of Construction Procedures*, Issue 4,

Telcordia Technologies, Inc. (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.

(c) Where a pole or existing attachment ~~is not in~~ must be brought into compliance with applicable standards and codes ~~and must be brought into compliance~~ before a new attachment can be added, the cost of remediating the pre-existing non-compliance ~~bringing that pole or existing attachment into compliance~~ shall not be shifted to the entity seeking to add a new attachment.

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 a new attachment will be located above that owner's existing facilities, that owner shall bear 60 percent of the cost of relocation. The new attaching entity shall bear the remaining 40 percent of the cost of relocation, except where Puc 1303.07(c) applies.

Edit. The IBS indicates the 2007 edition.

Puc 1303.10 Boxing of Poles. Pole owners may restrict the practice of boxing poles consistent with the restrictions it places on its own practice of boxing poles as defined in the company's written methods and procedures. 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 Electrical Safety Code.

Puc 1303.11 Use of Extension Arms. Pole owners shall allow limited, reasonable use of extension arms by attaching entities for purposes of clearing obstacles or improving alignment of attachment facilities. Under no circumstances may extension arms be used to avoid tree trimming requirements. Any use of extension arms shall be consistent with the requirements of applicable codes, including the National Electrical Safety Code.

Puc 1303.12 Make-Ready Timeframes. Unless otherwise agreed by parties to a pole attachment agreement, pole owners shall complete make-ready work within 150 days after any required pre-payments are rendered for any make-ready estimates provided to the attaching entity by the pole owner or owners. Where make-ready work requires 10 poles or less and no pole replacements, the work shall be completed within 45 days after any required pre-payments for estimates are rendered.

PART Puc 1304 DISPUTE RESOLUTION

Puc 1304.01 Voluntary Agreements. A pole attachment agreement submitted to the commission for adjudication shall be deemed a voluntary agreement pursuant to RSA 374:34-a, VII. A party filing a petition under this part shall have the burden of proving that an agreement is not just, reasonable and nondiscriminatory.

Puc 1304.02 Lack of Agreement. ~~A pole attachment and entitled to access under these rules and unable, through good faith negotiation, 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 directing the removal of facilities that are attached to a pole without authorization pursuant to this chapter.~~ A person requesting a pole attachment and entitled to access under these rules and unable, through good faith negotiation, 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 a 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.

Puc 1304.03 Dispute Following Agreement or Order. A party to a pole attachment agreement, 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.

Puc 1304.04 Unauthorized Attachments. A pole owner may, but is not obligated to, 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.

Puc 1304.05 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 ~~shall~~ order that rates, charges, terms or conditions for pole attachments be modified.

Puc 1304.06 Rate Review Standards.

Unclear what criteria apply in determining this.

(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 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.

Unclear how these factors are applied. By themselves, they do not indicate what criteria are used to set “just and reasonable rates”.

(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.

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.

Appendix

Rule	Applicable Statute
Puc 1300	RSA 374:3; RSA 374:34-a

TITLE XXXIV PUBLIC UTILITIES

CHAPTER 374 GENERAL REGULATIONS

Pole Attachments

Section 374:34-a

374:34-a Pole Attachments. –

I. In this subdivision, a "'pole" means 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.

II. Whenever a pole owner is unable to reach agreement with a party seeking pole attachments, the commission shall regulate and enforce rates, charges, terms, and conditions for such pole attachments, with regard to the types of attachments regulated under 47 U.S.C. section 224, to provide that such rates, charges, terms, and conditions are just and reasonable. This authority shall include but not be limited to the state regulatory authority referenced in 47 U.S.C. section 224(c).

III. The commission shall adopt rules under RSA 541-A to carry out the provisions of this section, including appropriate formula or formulae for apportioning costs.

IV. In exercising its authority under this subdivision, the commission shall consider the interests of the subscribers and users of the services offered via such attachments, as well as the interests of the consumers of any pole owner providing such attachments.

V. Nothing in this subdivision shall prevent parties from entering into pole attachment agreements voluntarily, without commission approval.

VI. Any pole owner shall provide nondiscriminatory access to its poles for the types of attachments regulated under this subdivision. A pole owner may deny access to its poles on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

VII. The commission shall have the authority to hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments.

Source. 2007, 340:1, eff. July 16, 2007.