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October 16, 2009

The Honorable Maurice Pilotte  
Vice Chair, Joint Legislative Committee on Administrative Rules  
Office of Legislative Services  
Administrative Rules  
25 Capitol Street, Room 219  
Concord, NH 03301-6312

Re: Response to JLCAR's Preliminary Objection Notice Number 2009-79  
Puc 1300, Utility Pole Attachments, Readoption with Amendment  
NHPUC Docket No. DRM 08-004

Dear Representative Pilotte:

The Joint Legislative Committee on Administrative Rules (JLCAR or Committee) entered a preliminary objection on September 3, 2009, to the Final Proposal for Puc 1300, Utility Pole Attachments, Readoption with Amendment, filed by the New Hampshire Public Utilities Commission (Commission) on July 16, 2009. The Commission has carefully reviewed the annotations of JLCAR Staff, concerns raised by Committee members, and comments submitted to JLCAR by parties to this rulemaking and is pleased to submit responses herein.

A majority of JLCAR Staff's issues were incorporated into the rule filed on August 18, 2009, with the Commission's request for conditional approval. The proposed rule has been further amended in this filing to reflect changes made in response to certain comments by the parties, and are identified as new provisions in the rules submitted today. The Commission's reasons for those changes and for declining certain requested amendments are set forth below. In addition, we have included definitions of key terms at Attachment A and a procedural history of this rulemaking at Attachment B.

**A. JLCAR Committee Staff Comments.** Most of JLCAR Staff comments have been incorporated into the attached preliminary objection response proposal. Unresolved issues involve language that Committee Staff believes is unclear, as follows:

- rates, charges, terms and conditions "in the public interest" [see Puc 1301.01 and Puc 1304.05];
- "just, reasonable and nondiscriminatory" access [see Puc 1303.01];
- "generally applicable engineering purposes" [see Puc 1301.01]; and
- "extraordinary circumstances" [see Puc 1303.04].

**Commission Response.** The provisions noted above mirror the Commission’s statutory authority governing Commission standards of review. Using terms that are consistent with statutory provisions is the clearest course, as these terms have been the subject of years of judicial interpretation, and will be understood in the context of that history. Creating slightly different standards than those contained within a statute or attempting to define concepts that have evolved over the years, in our view, will lead to uncertainty rather than clarity.

Following are examples of statutory provisions that use the phrases of concern:

**“public interest” and “public good”**

- RSA 365:19 (authority to conduct independent investigations)
- RSA 369:1 (authority to issue securities)
- RSA 374:22-e (alteration of territories consistent with the public good)
- RSA 374:22-g (authorize competitive suppliers consistent with the public good)
- RSA 374:30 (transfer or lease of utility franchises)
- RSA 374:33 (acquisition of stock)
- RSA 374:34-a (regulation of pole attachments)
- RSA 378:27 (authority to impose temporary rates)

**“non-discriminatory”**

RSA 374:34-a (pole owner provide non-discriminatory access)

RSA 378:4 (retroactive reduction is rates when no discrimination caused)

**“generally applicable engineering purposes”**

RSA 374:34-a (may deny on basis of generally applicable engineering purposes)

**“just and reasonable”**

RSA 374:1 (service safe and adequate, just and reasonable)

RSA 374:2 (charges for service to be just and reasonable)

RSA 374:3-a (just and reasonable rates)

Committee Staff also requested that the phrase **“just and reasonable rates”** in Puc 1304.06(a) be changed to “maximum just and reasonable rates” to reflect related federal regulations. [See also Puc 1304.07.] The federal regulations, unlike the Commission’s proposed rule, actually set maximum rates in certain situations. The Commission does not intend to set rates, but rather is establishing a framework to evaluate whether the rates proposed by parties are just and reasonable. Adopting the language of the federal regulation at 47 CFR § 1.1409, therefore, would not be appropriate.

Committee Staff found the phrase **“absent extraordinary circumstances”** unclear. The phrase does not appear in RSAs governing the Commission, but is intended to reflect the legal principle of *force majeure* and other events beyond the control of a party which nevertheless result in non-compliance with a provision of the rules. The Commission believes that such circumstances will require a case-by-case review and cannot be defined in a rule.

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 (IBRS) and do not match the RSA citation. The Commission agrees that the date in the IBRS was incorrect and, moreover, that because the RSA cites the Code, an IBRS is not necessary. We have therefore removed the IBRS. We also note that the citation in RSA 155-A:1, IV is incorrect and should read “National Electrical Code,” rather than “National Electric Code.”

**B. Scope of PUC Jurisdiction under the Statute & Rules.** (LGC, DTC, FairPoint, segTEL)

Several parties contend that the proposed rule exceeds the jurisdiction granted the Commission under RSA 374:34-a. FairPoint Communications, Inc. (FairPoint) and segTEL argue that RSA 374:34-a limits the Commission’s jurisdiction to cable television and competitive local exchange telecommunications providers, as set forth in 47 U.S.C. section 224, the pole attachment provision of the federal Telecommunications Act of 1996.

**Commission Response.** The long history of the shared jurisdiction over pole attachments between state and federal authorities helps to put our proposed rule into context. Initially, pole attachments were governed exclusively by local and state governments. Through the Communications Act of 1934, Congress gave the Federal Communications Commission (FCC) jurisdiction to establish rules governing pole attachments rates, terms and conditions, but limited the FCC’s jurisdictional reach to those states without regulatory authority of their own over such matters. States that certify to the FCC that they regulate the matters addressed in federal regulations are given authority to exercise such powers, in addition to all other authority they may have under state law. Upon the enactment of RSA 374:34-a, New Hampshire certified to the FCC that it has the authority to regulate utility poles and their attachments. As a result, in accordance with federal law, RSA 374:34-a and Puc 1300 establish the Commission’s jurisdiction over the rates, terms and conditions of utility pole attachments and any disputes concerning pole attachments that may arise under that statute and those rules. Thus, the Commission is directed to ensure that pole attachment rates are just and reasonable, and that access to utility poles for the purpose of attaching facilities is provided in a nondiscriminatory manner.

Throughout this rulemaking, there has been debate over the interpretation of RSA 374:34-a, 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) (emphasis added).

The phrase “types of attachments regulated under 47 U.S.C. section 224” has been interpreted by some to give the Commission authority over attachments by cable television providers and competitive local exchange telecommunications carriers but no others; attachments by any other entities are outside the Commission’s jurisdiction, in their view.

We believe such a reading of RSA 374:34-a, II is incorrect and would amount to no PUC regulation over attachments of electric utilities, incumbent telephone utilities (a result that hardly could have been intended) or municipalities. The Commission’s authority to impose safety standards, which includes allowable weight, required space between lines, emergency management signaling and



required electrical safety standards, would be limited to attachments by cable television and competitive local exchange carriers. We believe RSA 374:34-a,II can only be read as giving the Commission the authority identified in 47 U.S.C. section 224(c) *in addition to* the authority the Commission has under state law. RSA 374:34-a, in fact, makes that clear, by stating that the Commission's authority "shall include *but not be limited to* the state regulatory authority referenced in 47 U.S.C. section 224(c)."

RSA 374:3 sets forth the PUC's "Extent of Power" – "The public utilities commission shall have the *general supervision of all public utilities and the plants owned, operated or controlled by the same* so far as necessary to carry into effect the provisions of this title." The referenced title extends from RSA 362 to RSA 384, most of an RSA volume. RSA 374:1 provides that "[e]very public utility shall furnish such service and *facilities as shall be reasonably safe and adequate* and in all other respects just and reasonable." (emphasis added). The poles and conduits owned by the public utilities that we regulate and that are the main subject of the proposed rule are part of the plant and facilities owned, operated or controlled and furnished by public utilities. We have the authority and duty to supervise the safety and adequacy of the poles and conduits covered by the proposed rule and that necessarily includes the safety and conditions of attachments thereto. Additional discussion of the definition of "plant" in this context is provided in Attachment A.

**C. Entities to which the Rules Apply.** LGC and DTC assert that the rules should not extend to municipalities that do not provide commercial telecommunications services.

**Commission Response.** The Commission's rules define "attaching entities" as including, but not limited to, telecommunications providers, cable TV service providers, incumbent local exchange carriers, competitive local exchange carriers, electric utilities, and governmental entities (*i.e.*, municipalities). The FCC definition is similar: an "attaching entity" includes "cable system operators, telecommunications carriers, incumbent and other local exchange carriers, utilities, governmental entities and other entities with a physical attachment to the pole, duct, conduit or right of way." 47 CFR 1.1402(m).

The proposed rules require attaching entities to adhere to certain notice, safety, and good-faith negotiation requirements. To remove references to "governmental entities" from the definition of "attaching entities" subject to these rules, as LGC and DTC propose, would be to remove any enforceable requirement that municipalities adhere to certain notice, safety, and good-faith negotiation provisions with respect to placing attachments on poles. The Commission considers it a statutory duty to ensure that all poles and attachments are installed and maintained in full compliance with applicable safety codes and requirements, which include the right of pole owners who are responsible for the operation and maintenance of poles to be notified of facilities that are attached to those poles.

**D. Facilities to which the Rules Apply.** LGC found the definition of "facility" to be unclear. Based on a September 11, 2009 meeting with LGC representatives, we have amended the proposed language of Puc 1302.05 to include "or for public safety purposes".

**E. Cost Sharing Provisions.** FairPoint argues that the cost-sharing provisions of Puc 1303.09 result in an unconstitutional taking and violation of due process.

**Commission Response.** Incumbent local exchange carriers (ILECs) such as FairPoint typically attach at the lowest permissible point on a pole in accordance with safety standards, given the sag factor of heavier telecom lines. However, ILEC attachments have historically been placed at some point above the lowest permissible point before other carriers needed space on the poles. This might have occurred, for example, where an ILEC wished to create a straighter line over uneven terrain, or for ease of access and maintenance.

FairPoint has testified that, for reasons unrelated to safety concerns, its attachments are not always located at the lowest legal and feasible point on a pole. FairPoint argues that requiring it to shoulder 60% of the cost to move its facilities lower on a pole to make room for a new attachment and comply with safety standards and practices constitutes a taking under the law in violation of due process. FairPoint does not cite any authority to support its position.

FairPoint's aim is to maintain a consistent height of its attachments all the way down the line, and reserving the lowest feasible position on a pole permits them to do that. However, FairPoint and its predecessors have often placed their attachments at a location higher than the lowest permissible position, given the lack of competition for space on poles in years past. As a result, in many cases the only available space for a new entity seeking attachment is below FairPoint's lines. FairPoint and other incumbent telephone companies would like to charge new attachers 100% of the cost to move their lines to make space available. Several parties argued those costs should be borne in whole or in part by the incumbent telephone company.

The Commission believes the proposed rules, which establish a 60/40 cost sharing, are a fair and balanced result reflecting the competing positions advanced in this proceeding. Our initial proposal placed 100% of the cost burden on the incumbent telephone companies such as FairPoint. In response to comments, we amended the original provision to require the entity seeking a new attachment to bear 40% of those costs. In addition, of course, the pole owner will recover operational and maintenance costs for its utility poles and wires through attachment fees that will recur for the duration of an attachment agreement. Furthermore, in the event an incumbent telephone company's facilities cannot be lowered to make room for new attachers due to safety and engineering concerns, the request to attach may be denied.

**F. Provisions regarding "boxing" and "extension arms."** At the JLCAR hearing, FairPoint recommended deleting the provisions allowing limited use of "boxing" and "extension arms" found at Puc 1303.10 and 1303.11.

**Commission Response.** The Commission disagrees. Pole owners expressed concern that the use of boxing and extension arms creates unnecessary safety risks and should be allowed in extremely limited circumstances. Would-be attachers, on the other hand, pointed out that the pole owners themselves use boxing and extension arms at times, and that these practices are occasionally the only cost-effective way to attach to utility poles, given existing attachments and the location on the poles of those attachments.

The proposed rule limits the use of boxing and extension arms, subject to compliance with safety standards. We believe the inclusion of these provisions strikes an appropriate balance and is in the



best interest of all parties, as it provides a framework that will discourage the unauthorized or indiscriminate use of such practices, while providing recourse as needed.

**G. Concerns raised by segTEL.** segTEL made numerous suggestions, several of which have been incorporated in the draft submitted herewith. These changes include: (a) tightening the provision that authorization be obtained prior to attaching facilities to a pole by requiring authorization to be made or denied within 45 days, and (b) tightening response provisions for make-ready work. Puc 1303.05, and 1303.12. We also agree with segTEL that the reference to the Telcordia Blue Book Manual of Construction Procedures is inappropriate, as it is not an industry-wide standard, but a standard specific to FairPoint and other former Bell Telephone companies. Puc 1303.07 as proposed herein deletes the reference to the Telcordia Blue Book.

Further arguments by segTEL, not adopted by the Commission, include:

- (1) federal law preempts RSA 231:159 *et seq.*;
- (2) prepayment of estimated survey and make-ready costs is unreasonable;
- (3) time is of the essence in allowing attachments on existing poles and therefore timeframes set forth in the rules should be shortened;
- (4) the rules should not permit the removal of unauthorized attachments at all; and
- (5) pole attachment agreements that pre-date RSA 374:34-a should be presumed to be contracts of adhesion.

**Commission Response.** With respect to the federal preemption assertion, the Commission believes that the authority granted municipalities under RSA 231:159 *et seq.* is not altered by this rule. With respect to prepayments, timeframes, and the removal of unauthorized attachments, the Commission believes that the rule balances the competing interests of competitor providers such as segTEL and pole owners. Regarding segTEL's assertion that pole attachment agreements that pre-date RSA 374:34-a should be presumed to be contracts of adhesion, we find no persuasive basis to reach such a conclusion. To the extent that a party to a pre-existing attachment agreement believes an agreement to be onerous, unfair or unreasonable, it can seek dispute resolution from the Commission.

**H. New England Cable and Telecommunications Association (NECTA).** NECTA argues that Puc 1304.06, Rate Review Standards, should adopt a single rate based on the Federal Communications Commission's cable rate for attachments, and that the 60-day advance notice requirement for performing pole-related work, including upgrading of cable facilities using fiber over-lashing, is too long.

**Commission Response.** The Commission took NECTA's arguments into consideration in the underlying rulemaking proceeding. Puc 1304.05(a) does not mandate any particular rate setting methodology, though it instructs the Commission to consider an FCC rate setting formula that employs a 2-tiered pricing system, as well as the interests of the subscribers, users and consumers of the services provided via pole attachments. We believe the proposed rule fairly balances the competing interests. Further, we do not believe that shortening the notice requirement of Puc 1303.06 to less than 60 days is in the public interest.

**I. Fibertech Networks, LLC (Fibertech).** Fibertech supports the Commission's actions to support the original make-ready time frames, but suggests that the timeframes should be shortened in future iterations of the rules. Given the nature of Fibertech's comments, the Commission did not amend the proposed rule.

**J. New Hampshire Local Government Center (LGC).** LGC makes the following arguments in its various submissions to JLCAR, including its September 3 PowerPoint presentation:

- (1) The purpose statement in Puc 1301.01 violates the Administrative Rules Manual by requiring compliance with "other law."
- (2) The rules exceed the Commission's statutory authority by including governmental entities in the definition of "attaching entity" in Puc 1302.01.
- (3) The definition of "attaching entity" set forth in Puc 1302.01 should not include governmental entities unless such entities are also telecommunications service providers.
- (4) The rules fail to consider private property rights of pole owners and owners of land on which a pole is set and should not apply to poles placed pursuant to private agreement with landowners.
- (5) The access standard set forth in Puc 1303.01 does not completely set forth potential reasons for denial of an attachment request.
- (6) The rules fail to explicitly acknowledge the role of municipalities as the licensing authority for installation of equipment in a municipal right of way.
- (7) The proposed rules for dispute resolution should be placed within the Commission's PUC 200 rules; moreover, they fail to provide municipalities adequate notice and opportunity to be heard, violate RSA 541-A:39, violate the requirement that proposed attachments serve the public good, and violate the requirement that a license be obtained prior to commencing a proceeding.

### **Commission Response.**

(1): Regarding the purpose statement, Puc 1301.01, the proposed rule does not "require compliance" with any laws that fall outside the scope of Commission jurisdiction. The provision simply states that "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.*" The Commission, in fact, added this language to address the LGC's request that the Puc rule explicitly recognize the municipal licensing statutes cited. The better course would be to delete the phrase "including...RSA 231:159 *et seq.*", as we believe agency rules should not codify statutes unrelated to our authority to regulate utilities and their plant, including poles and pole attachments. To address the LGC's concerns, however, we are prepared to leave the provision as drafted.

(2) and (3): Regarding the LGC's assertion that "attaching entities" should not apply to municipalities, we respectfully disagree. As noted in the discussion of scope and jurisdiction at sections B and C above, we believe our authority extends to attachments on all public utility poles and utility plant, including attachments by municipalities. We also disagree that the applicability of this rule should be limited to municipalities that are also telecommunications service providers. As noted above, our jurisdiction is based on our statutory mandate to ensure



safe and reliable service and facilities. That role includes enforcement of applicable safety codes and related measures that ensure utility plant and facilities are safely operated and managed. We believe that, for public safety reasons, municipalities should not be permitted to attach facilities to utility poles without adherence to certain minimum notice and safety requirements, as established in this rule.

(4): The LGC asserts that the Commission has no authority to adjudicate disputes that concern poles and attachments located on private property under private easement. We find no basis to conclude that the Superior Court is the only venue in which landowner disputes may be adjudicated; in fact, the Commission has long provided a forum for disputes of private landowners who take issue with utility easements and facilities located on their property.

(5): Regarding the LGC's claim that the access standard set forth in Puc 1303.01 does not completely set forth potential reasons for denial of an attachment request, we disagree. The proposed rule provided that "[n]othing herein shall require the owner or owners of a pole to provide access where such access would violate other applicable laws, rules or regulations" which seems to have been the type of situation about which the LGC is concerned. To the extent that this language was not clear enough, we have proposed amending Puc 1303.01, to provide that a pole owner may deny an attachment if it does not possess the authority to allow the attachment, which arguably might include situations where a pole owner would violate the terms of an otherwise lawful and valid municipal license or other law, rule or regulation or where they do not possess the necessary property rights to lawfully allow the proposed attachment.

(6) Regarding the LGC's request that municipal licensing laws be codified within this rule or that compliance with such laws by attaching entities be a precondition to a public utility's authorization for access to poles pursuant to PUC rules, we do not believe an agency rule should address the authority of municipalities under other statutes where the legislature has not granted the PUC any jurisdiction or enforcement authority over such statutes.

(7): Regarding the LGC assertion that the Commission may respond to a petition for dispute resolution with something other than an adjudicative process, the language of the rule itself resolves the issue. Puc 1304.03 clearly states that a pole owner may "petition the commission pursuant to Puc 203 ... ." Puc 1304.05 states that in response to a petition the Commission shall conduct "an adjudicative proceeding pursuant to Puc 203..." Puc 203, which is titled "Adjudicative Proceedings," spells out the standards for adjudicated matters before the Commission. Regarding the request that the rules state that the Commission shall notify municipalities in the case of petitions for dispute resolution, it is clear that when RSA 541-A:39 requires such notice, the Commission is bound to provide it. Though we do not believe it is necessary to identify every statute or rule that governs an agency, our objection response amendment to the proposed rule now includes a reference to RSA 541-A:39 as requested.

Regarding the claim that the rules would violate the requirement that proposed attachments serve the public good, the Commission finds no basis to agree. The purpose language of Puc 1301.01 makes clear that the rules are intended to result in "rates, charges, terms and conditions for pole attachments that are just, reasonable and *in the public interest*." (emphasis added).



Finally, regarding the claim that the rules would violate the requirement that a license be obtained prior to commencing a proceeding, we have included language that makes clear that an owner of a pole may deny a request for attachment when it does not have the authority to allow the attachment to take place, which might include instances in which a municipal license has not been obtained pursuant to RSA 231:161. See Puc 1303.01(c).

**K. Donahue, Tucker & Ciandella on behalf of 5 municipalities (DTC).** DTC asserts a number of arguments regarding municipal authority, as follows:

- (1) Definition of Governmental Entities. Municipality representative DTC requested that we limit the applicability of the pole attachment rules to only those governmental entities attaching facilities for commercial purposes. Municipalities maintain that any non-commercial facilities they may wish to attach to utility poles should not be subject to the various provisions of the proposed rules, such as notification requirements, cost-sharing provisions, duty to negotiate, dispute resolution, and burden of proof, among others.
- (2) Reference to Municipal Licensing Statutes. Municipal representatives have been adamant in requesting references to pole licensing statutes in the Commission's pole attachment rules, including a provision that states that all attachments must be properly licensed. In effect, municipalities would like the Commission's rules to codify the statutory licensing requirements set forth in RSA 231:159 *et seq.*
- (3) Reservation of Space. The municipalities also assert that, based on industry practice, certain historic pole license agreements, and statutory licensing authority, they are entitled to reserve space for future attachments on all poles indefinitely and free of charge. Other attaching entities competing for available space oppose the municipalities' position on this issue.

#### **Commission Response.**

- (1) Regarding the claim that the rules only apply to municipalities attaching facilities for commercial purposes, the Commission disagrees. We believe that the overarching purpose of these rules is to establish minimum guidelines for the practice of attaching facilities to utility poles. Certain guidelines are aimed at ensuring that pole owners are not subject to unauthorized attachments, as the pole owners are ultimately responsible for the safety and reliability implications of all attachments. The proposed rules do not mandate rates for non-commercial municipal attachments; all other provisions are designed to ensure public safety and reliability of service, while balancing the interests of pole owners and attachers.
- (2) Regarding municipal authority under RSA 231:159, see the response in Section G and J (6) and (7) above.
- (3) Regarding the claim that municipalities are entitled to reserve space on poles free of charge, we are concerned that, in an era of competitive provision of telecommunications and other services that require attachment to utility poles, which by their nature are limited in space, such an automatic

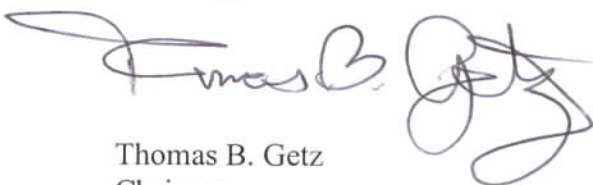
NHPUC Response to Preliminary Objection  
PUC 1300, Utility Pole Attachments

reservation might have a discriminatory impact and might undermine the potential for greater competition in provision of services. Nonetheless, the proposed rule does not categorically preclude reservation of space by municipalities under the terms of a license agreement. Furthermore, the proposed rules do not establish rates for non-commercial municipal attachments.

**L. Conclusion.** After careful review and consideration of all of the bases for preliminary objection by JLCAR, we have made certain amendments to the attached proposed rule. We believe that the resulting rule is fair, just and reasonable, and reflects a balanced result that is in the public interest and in full accordance with our statutory mandate.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Thomas B. Getz", with a large, stylized flourish at the end.

Thomas B. Getz  
Chairman

Cc: Members of the Joint Legislative Committee on Administrative Rules  
Scott Eaton, Staff Director



## ATTACHMENT A

Pursuant to the Committee's request and in the interest of clarifying certain key concepts, we provide definitions of *Pole Attachments*, and *Attaching Entities and Utility Plant*.

A **"pole attachment"** is defined in RSA 374:34-a as *"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"* (emphasis added). The FCC defines it as *"any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."* 47 CFR 1.1402(b).

The FCC defines an **"attaching entity"** as including *"cable system operators, telecommunications carriers, incumbent and other local exchange carriers, utilities, governmental entities and other entities with a physical attachment to the pole, duct, conduit or right of way."* 47 CFR 1.1402(m).

The Commission's rules similarly define *"attaching entities"* as including, but not limited to, telecom providers, cable TV service providers, ILECs, CLECs, electric utilities, and governmental entities (*i.e.*, municipalities). The rules define *"facility"* as *"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 1302.05.

The term **"plant"** in the utility context is not defined in and of itself in the RSAs but falls within the definition of *"public utility"* under the Commission's statutory mandate and appears in numerous other Commission authorities. RSA 374:3 grants the Commission general supervisory authority *"of all public utilities and the plants owned, operated or controlled by the same"*.

*"Public utility"* is defined in RSA 362:2 as including *"every corporation, company, association, joint stock association, partnership and person ... owning, operating or managing any plant or equipment or any part of the same for the conveyance of telephone or telegraph messages or for the manufacture or furnishing of light, heat, sewage disposal, power or water for the public, or in the generation, transmission or sale of electricity ultimately sold to the public..."* (emphasis added).

PUC rules set forth certain safety standards requirements that utilities must meet in the construction, installation and maintenance of their *"plant, structures and equipment and lines"* (*see, e.g.*, Puc 306.01 – electric; Puc 413.01 – incumbent local exchange carriers).

The PUC rules further require utilities to file certain accounting elements, including calculations of rate base components such as *"utility plant in service,"* and analyses of plant accounts (*see, e.g.*, Puc 308.11 – electric; Puc 429.04 – incumbent local exchange carriers). New Hampshire utilities must comply with federal and state accounting standards as set forth in applicable Uniform Systems of Accounts (*see, e.g.*, Puc 307.04 – electric; Puc 414.01 – incumbent local exchange carriers). Electric companies must comply with the Federal Regulatory Energy Commission and U.S. Department of Energy's *"Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to Provisions of the Federal Power Act."* Within that System of Accounts, the Electric Plant Chart of

Accounts lists “**Poles**, towers and fixtures” under “Distribution **Plant**” (*see* 18 CFR 101.364). Incumbent local exchange carriers must comply with the Uniform System of Accounts for Telecommunications Companies,” under which “Property, **Plant** and Equipment” includes “**Poles**” (*see* Section 403.03(q) of PART Puc 409).

Webster’s New Collegiate Dictionary (1981) defines “**plant**” (in this context) as “the land, buildings, machinery, apparatus, and fixtures employed in carrying on a trade or an industrial business,” “the total facilities available for production or service,” and “the buildings and other physical equipment of an institution.”



## **ATTACHMENT B**

### **Procedural Background**

Under RSA 374:34-a, the Commission was granted authority to regulate rates, terms and conditions of attachments to utility poles. In accordance with the statute, we adopted interim rules for effect on January 17, 2008. The interim rules expire on January 17, 2010. An Initial Proposal for regular rule Puc 1300 was filed with JLCAR on May 12, 2009; a Final Proposal was filed on July 17, 2009; a Request for Conditional Approval was filed on August 18, 2009.

The underlying initial and final rulemakings included five opportunities for parties to comment on the proposed rule, including a public hearing held on June 18, 2009. (See Attachment C for a summary of comments received.) Two technical sessions were held, in addition to separate meetings held by party request with pole owners, competitive telecommunications carriers, and municipal representatives. Furthermore, on September 11, 2009, Commission representatives met with the Executive Director and staff of the Local Government Center.

Participants in the underlying comment process included representatives from:

- PSNH
- Unitil
- National Grid
- New Hampshire Electric Cooperative
- FairPoint Communications
- New Hampshire Telephone Association (NHTA)
- TDS Telecom
- Granite State Telephone
- segTEL
- New England Cable & Telecommunications Association (NECTA)
- New Hampshire Local Government Center (LGC)/NH Municipal Association
- Town of Hanover and, jointly represented through Donahue, Tucker & Ciandella (DTC) as counsel, the towns of Exeter, Hanover, Keene, Portsmouth, Newmarket, Salem, Seabrook, Raymond, and Stratham
- Cities of Concord, Manchester, and Keene
- Fire Departments of Concord, Manchester, Nashua, Keene, Claremont, and Peterborough
- New Hampshire Department of Transportation
- New Hampshire Department of Justice
- Commission Staff.

In developing its Initial and Final Proposals, the Commission considered all comments, both written and oral. It also considered issues explored in the course of an underlying generic investigation on utility pole practices launched in 2005 (Docket No. DM 05-172), the federal legal framework, and the statutory mandate set forth in RSA 374:34-a.

## ATTACHMENT C

### COMMENTS OPPORTUNITIES IN PUC 1300 RULEMAKING

#### COMMENTS RECEIVED PRIOR TO THE COMMENCEMENT OF PUC FORMAL RULEMAKING

- PUC 1300 **Draft** Initial Proposal Circulated to Parties for Comment by 3/5/08
  - **Comments submitted to Staff**
    - PSNH
    - National Grid
    - NECTA
    - Oxford Networks
    - segTEL
    - Verizon
    - Eight ILECs
    - Municipalities (DTC)
- PUC 1300 Draft Initial Proposal Circulated to Parties for Comment by 6/25/08
  - **Comments submitted to Staff**
    - NECTA
    - segTEL
    - NHTA
    - Local Government Center
- PUC 1300 Draft Initial Proposal Circulated to Parties for Comment by 12/5/08
  - **Comments submitted to Staff**
    - FairPoint
    - Municipalities (DTC)
    - National Grid
    - NECTA
    - NH Telephone Association
    - PSNH
    - segTEL
    - City of Keene
    - Local Government Center

#### AFTER COMMENCEMENT OF FORMAL RULEMAKING ON MAY 1, 2009

- PUC 1300 Rule - Commission Hearing on Initial Proposal for Regular Rules (6/18/09)
  - **Comments submitted formally to the Commission by 6/25/09**
    - Fiber Tech Networks, LLC
    - Fairpoint
    - segTEL
    - National Grid
    - NHTA
    - PSNH
    - NECTA
    - Municipalities (DTC)
    - Unitil
- PUC 1300 Rule – Commission Approval of Final Proposal for Regular Rules (7/16/09)
- **Comments submitted to JLCAR prior to or on JLCAR hearing dates (8/20/09 & 9/3/09)**
  - Fairpoint
  - Local Government Center
  - Municipalities
  - FiberTech
  - NECTA
  - PSNH
  - segTEL

On September 3, 2009, JLCAR voted to enter a preliminary objection to Final Proposal 2009-79 containing rule Puc 1300. On October 1, 2009, Commission Staff sent all parties to the docket a copy of comments received prior to or on the date of the JLCAR hearing (above) and invited additional comments for its preliminary objection response.

- **Comments received subsequent to JLCAR's preliminary objection (10/7/09)**
  - PSNH
  - Local Government Center



**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 or for public safety purposes.

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

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:

- (a) ~~When~~ when there is insufficient capacity on the pole;
- (b) ~~or~~ For reasons of safety, reliability or generally applicable engineering purposes; or
- (c) ~~W. Nothing herein shall require the owner or owners of a pole to provide access where the pole owner(s) does not possess the authority to allow the proposed attachment, 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.



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 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. Pole owners shall issue authorization of access in writing within 45 days. 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 45<sup>th</sup> 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. ~~No A-person may seeking to attach~~ facilities to a pole ~~without shall obtain~~ authorization in writing from the pole owner or owners prior to attaching such facilities, in accordance with Puc 1303.04.

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) Materially 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) Materially ~~if~~ 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.

(c) 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, and the National Electrical Code as adopted in RSA 155-A:1,IV, ~~and the SR-1421 Blue Book—Manual of Construction Practices, Issue 4, Teleordia 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 remedying 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.

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 are 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 provided~~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, and shall provide notice to affected municipalities when required by RSA 541-A:39. —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.

(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.

(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