

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Docket No. DRM 17-139

Rulemaking – N.H. Code Admin. Rules Puc 1300
Utility Pole Attachment Rules Readoption With Amendments

COMMENTS OF NEW ENGLAND CABLE AND
TELECOMMUNICATIONS ASSOCIATION, INC. (“NECTA”)
ON DRAFT FINAL PROPOSAL

NOW COMES New England Cable and Telecommunications Association, Inc. (“NECTA”)¹ and respectfully submits the following comments on the Draft Final Proposal for Readoption with Amendments of the New Hampshire Public Utilities Commission’s (“Commission’s”) Utility Pole Attachments Rules (Puc 1300) dated March 15, 2018 (“Draft Final Proposal”).

1. Definition of Pole and Applicability of Rules to VoIP and IP-Enabled Service Providers- Puc 1302.10

NECTA agrees with the definition of “pole” set forth in Puc 1302.10 of the Draft Final Proposal, and with the wording of Puc 1301.02(b) of the Draft Final Proposal regarding the extent to which the rules apply to providers of VoIP and IP-Enabled Service providers. NECTA respectfully urges the Commission to incorporate these revisions to the Initial Rules Proposal into the Final Proposal.

¹ NECTA is a non-profit corporation and trade association that represents the interests of most community antenna television (“cable”) operations in the New England states.

2. **Overlashing- Puc 1302.09, 1303.06(b)(2) and 1303.07(d)**

The Draft Final Proposal contains new and substantive provisions regarding overlashing², *i.e.*, Puc 1302.09, 1303.06(b)(2) and 1303.07(d). These provisions did not appear in either Staff's Draft Initial Rules Proposal or the Commission's Initial Rules Proposal, nor were they even mentioned in Staff's Memorandum regarding the Draft Final Proposal to the Commissioners and Executive Director Howland dated March 15, 2018 ("Staff Memorandum"). Because the Commission's existing pole attachment rules do not contain overlashing provisions, and none of the New Hampshire pole owners have expressed concerns about overlashing, the changes were unexpected. In fact, CenturyLink was the only party to submit written comments regarding this issue. *See CenturyLink's Initial Comments on Proposed Pole Attachment Rules* (Feb. 2, 2018), pp. 12-13. CenturyLink's Initial Comments included a definition of the term "overlash" and suggested a provision that would expressly allow overlashing with 10 days' *post-installation* written notice to pole owners.

NECTA strongly objects to the 60-day advanced notice provisions of proposed rule Puc 1303.06 (b)(2), which varies widely from CenturyLink's suggested 10-day post-overlash notice. Indeed, the language in the Draft Final Proposal would require attaching entities to provide written notice to pole owners not less than 60 days prior to "[i]ncreasing the load or weight on a pole by installing an overlash or otherwise adding to an existing attachment, other than as part of routine maintenance, in response to an emergency, or to install a customer drop line...". NECTA urges the Commission not to adopt this provision, as it is far out of step with not only Federal Communications Commission's ("FCC's") policy, but any other state policy on

² "Overlashing" is a construction method that allows an attaching entity to utilize its existing suspension strand and cable to place an additional cable for its own use. *See CenturyLink's Initial Comments on Proposed Pole Attachment Rules* (Feb. 2, 2018), p. 13.

overlapping, and would have an extremely detrimental effect on broadband deployment. Should the Commission address overlapping at all, it should instead adopt language in the Final Proposal consistent with CenturyLink's proposal allowing *post-overlap notice* to pole owners. The reasons for NECTA's position are as follows:

First, requiring a 60-day advance notice of overlapping is inappropriately excessive as it is *longer than the standard 45-day processing timeline* under the Commission's existing rules for *new pole attachments*. See N.H. Code Admin. R. Puc 1303.04 (eff. 12-12-09). Moreover, because an overlap is not a new attachment and is completed by an attaching entity on *its own* existing attached facilities, see Draft Final Proposal Puc 1303.07(d) and Puc 1302.09, there is no need for any prior notice provision, as recognized by the FCC, the D.C. Circuit Court of Appeals, and the Maine Public Utilities Commission just this year.³

Second, allowing attaching entities generally to engage in overlapping without prior approval from or prior notice to pole owners is consistent with pro-competitive and long-standing FCC precedent. See *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103 ¶ 75 (2001) (stating that "[w]e affirm our policy that neither the host attaching entity nor the third party overlayer must obtain additional approval from or consent of the utility for overlapping other than the approval obtained for the host attachment"). This decision was upheld by a unanimous panel of the D.C. Circuit Court of Appeals which stated that "[o]verlayers are not required to give prior notice to utilities before overlapping." *Southern Co. Servs. v. FCC*, 313 F. 3d 574, 582 (D.C. Cir. 2002). In the ensuing years, these rulings have enabled attaching

³ See *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103 ¶¶ 75, 82 (2001) and *Southern Co. Servs. v. FCC*, 313 F. 3d 574, 582 (D.C. Cir. 2002); see also 65-407 C.M.R. Ch. 880, § 2(A)(1).

entities like NECTA's members to make significant upgrades and expansions to their infrastructure and to deploy advanced competitive services to new customers in an efficient and cost-effective manner, without negative impact on pole networks. Indeed, as the FCC has recognized, "overlashing reduces construction disruption and associated expenses which would otherwise be incurred by ... installing new poles and separate attachments." *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, *supra*, at ¶ 75. Accordingly, overlashing should be allowed to continue *without* the requirement of prior notice to pole owners, consistent with the FCC's and D.C. Circuit Court's rulings, and the existing practice in New Hampshire.

Third, the Maine Public Utilities Commission recently adopted comprehensive pole attachment rules, including with respect to overlashing. The Maine overlash rule requires post-overlash notice; an attacher is allowed to overlash but must thereafter provide written notice to the pole owner within 10 days. *See* 65-407 C.M.R. Ch. 880, §2(A)(1).⁴ It is noteworthy that New Hampshire pole owners have not raised any concerns about overlashing or requested that the pole attachment rules include overlash notice provisions. However, should the Commission determine that any notice to pole owners is appropriate, NECTA believes that the Commission should adopt the same post-overlash notice provision adopted by the Maine Commission, and as referenced by CenturyLink.

Fourth, because overlashing typically consists of lightweight fiber optic cable, it adds *de minimus* load/weight to poles. Attachers are already required by pole agreements and applicable

⁴ This rule, in pertinent part, provides as follows: "...a joint-use entity...need not submit a request to overlash to existing facilities, so long as the joint-use entity provides written notice of the overlash within 10 days after making it. The pole owner then has 30 days in which to inspect the overlash and determine compliance." 65-407 C.M.R. Ch. 880, § 2(A)(1).

regulations to abide by applicable safety codes.⁵ Existing and proposed rule Puc 1303.07(b) also require that attachments be installed and maintained to prevent interference with service furnished by the utility pole owner(s) and any other attaching entity. The additional opportunity for pole owners to inspect overlashing post-installation ensures that any load or weight issues that arise can be promptly addressed. This type of overlashing regime has facilitated the deployment of advanced communications services for decades, consistent with applicable construction standards.

Lastly, as a matter of fundamental fairness, requiring 60 days advance notice of overlashing to pole owners would unfairly disadvantage attaching entities as they would be forced to disclose to their competitors (*e.g.*, pole owning telecommunications utilities) competitively sensitive commercial information (*i.e.*, timing and location of new customer and facility installations) far in advance of what should be required. This disclosure requirement, coupled with a 60-day delay for the attacher to complete the overlash, as well as the fact that the pole owner/competitor would not be required to provide itself with the same notice, would clearly put the attaching entities at a competitive disadvantage.

For all of these reasons, NECTA urges the Commission not to adopt a rule requiring 60 days advance notice of overlashing. Instead, the Commission should adopt a 10-day post-overlash notice, as adopted by the Maine Public Utilities Commission and consistent with the FCC's policies. In light of these considerations, NECTA respectfully suggests that the Commission modify Puc 1303.06(b)(2) as indicated below in order to require advance notice to a pole owner *only* when an attaching entity is increasing the load or weight on a pole by adding to

⁵ See N.H. Admin. R. Puc 1303.07 (a) (eff. 12-12-09) which requires that all attachments 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 SF-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.

an existing attachment *other than* by overlashing, or as part of routine maintenance, responding to an emergency, or installing a customer drop line.

NECTA'S Proposed Revisions to Draft Final Proposal

NECTA respectfully requests that proposed rule Puc 1303.06(b)(2) contained in the Draft Final Proposal be revised as follows:

(2) Increasing the load or weight on a pole by ~~installing an overlash or otherwise~~ adding to an existing attachment, other than: as part of routine maintenance, **by installing an overlash**, ~~or~~ in response to an emergency, or ~~to~~ **by installing** a customer drop line; or

NECTA also supports including a provision in the rules recognizing that overlash is not an attachment⁶ and therefore allowing an attaching entity to overlash provided that written notice is given to the pole owner within 10 days after the overlash. In addition, NECTA supports a rule, similar to Maine's, providing that the pole owner has 30 days to inspect the overlash and determine compliance. Accordingly, NECTA respectfully suggests that proposed rule Puc 1303.07(d) contained in the Draft Final Proposal be revised as follows:

(d) An overlash shall not be deemed an attachment and an attaching entity shall have the right to install an overlash ~~subject to the notification provisions of Puc 1303.06(b)~~ **so long as written notice of the installation is provided to the pole owner(s) within 10 days after the installation. The pole owner may inspect the overlash within 30 days of the notice to determine compliance.**

⁶ The Draft Final Proposal includes a definition of overlash in rule Puc 1303.07 (d), similar to what was suggested by CenturyLink, and recognizes that an overlash is not an attachment and that an attaching entity shall have the right to install an overlash subject to the notification provisions of Puc 1303.06(b). NECTA does not object to the proposed overlash definition contained in the Draft Final Proposal as long as proposed rule Puc 1303.07(d) states that an overlash shall not be deemed an attachment, and notice, if required, should be given 10 days post-overlashing.

3. Posting of Pole Agreements- Puc 1303.05

Although no party requested it, the Draft Final Proposal adds a new provision to Puc 1303.05 requiring pole owners to post on their public websites all pole agreements with attaching entities, with identifying information regarding the attaching entity redacted.⁷ The Staff Memorandum states “greater transparency through availability of pole attachment agreements would serve to ensure nondiscriminatory access to poles on terms and conditions that are just and reasonable.”⁸ NECTA believes that this “posting” proposal is unnecessary and should not be adopted. As explained below, a vehicle already exists for accessing pole attachment agreements. Moreover, widespread disclosure of pole attachment agreements could result in the improper disclosure of proprietary attacher information. It is essential that attachers maintain the confidentiality of agreement terms and conditions that are commercially sensitive or proprietary.

New Hampshire’s pole attachment statute recognizes that parties typically enter into pole agreements voluntarily⁹ and negotiate terms and conditions that are tailored to the unique needs of a specific attacher. Such terms often relate to attachments that provide a variety of competitive communications services (*e.g.* broadband and commercial services) and will include individually negotiated trade-offs depending on the priorities of and services offered by that attacher. Unlike the above-described competitively sensitive information, the key provisions of any attacher relationship (*i.e.*, attachment rate formulae, application processing, and make-ready timelines and obligations) are already addressed by existing Commission rules and the pending proposed amendments. While all attachers can negotiate with pole owners on these issues, if

⁷ Given the relatively small number of attachers in New Hampshire, this redaction requirement provides little practical protection.

⁸ Staff Memorandum at 4.

⁹ See RSA 374:34-a,V.

they are unable to reach agreement, they can petition the Commission to resolve disputes.¹⁰ However, they do not need access to all of their competitors' pole attachment agreements in order to pursue complaints regarding these issues. In the event that a complaining party believes that it needs access to a pole owner's attachment agreements to pursue its complaint in an adjudicative proceeding before the Commission, the complaining party can issue a data request for that information. *See* N.H. Code Admin. R. Puc 203.09 (a) and (b). As noted above, because the Commission's discovery rules already provide a mechanism for complainants to seek the disclosure of other pole agreements entered by a pole owner in a dispute brought to the Commission, the proposed posting rule is unnecessary.

Moreover, the existing discovery process provides a more appropriate mechanism to protect the confidentiality interests of other attachers while providing the complainant with reasonable access to relevant information necessary for the adjudication of a complaint. For example, the Commission is authorized to issue protective orders to protect confidential information,¹¹ and before any voluntarily negotiated attachment agreement is publicly disclosed, the attaching parties should have the opportunity to seek protection where warranted.¹²

Because existing rules properly balance the interests of all attachers and pole owners, the proposed requirement for pole owners to publicly post all pole agreements should not be adopted.

¹⁰ *See* RSA 374:34-a, VII.

¹¹ *See* N.H. Code Admin. R. Puc 203.08(a).

¹² Such protection is appropriate in the pole agreement context. For example, in a recent FCC decision involving the pole agreement between a power company pole owner and an incumbent local exchange carrier ("ILEC") attacher, numerous confidential provisions in the underlying pole agreement were redacted from the FCC's publicly released order. *See Verizon v. Virginia Electric Power*, 37 FCC Rcd. 3750 (2017).

4. Make-Ready Work Timelines- Puc 1303.12

NECTA generally supports the proposed adoption of the FCC's make-ready work timelines. As explained in the Staff Memorandum, the FCC's timelines "'are shorter and more segmented [than] the Commission's timelines, will reduce the time to market equation of attachers and, ...reduce the opportunity for disputes and uncertainty.'"¹³ However, the Draft Final Proposal language regarding the FCC make-ready work timelines proposes to delete one provision of the existing rules and the Initial Rules Proposal that promotes the above-stated interests, and that NECTA believes should be preserved.

Section 1303.12 of the Initial Rules Proposal contains the following important provision for an expedited make-ready timetable for "small orders", similar to existing rule Puc 1303.12:

If make ready work involves 10 poles or fewer and no pole replacements, all make ready work shall be completed within 45 days after any required pre-payments for estimates are rendered.

No commenter opposed this existing expedited procedure which protects very small work orders from the normal make-ready timelines that are excessive and anti-competitive. Accordingly, *this provision should not be eliminated* as it provides an important vehicle for efficient facilities deployment and is entirely consistent with the make-ready objectives explained in the Staff Memorandum.

With the exception noted above, NECTA supports the provisions of the Draft Final Rules that reflect the FCC's make-ready work timelines. NECTA agrees with CenturyLink that "...the FCC rules provide a consistent and familiar set of rules across multiple states"¹⁴ and also agrees

¹³ Staff Memorandum at 3.

¹⁴ CenturyLink's Initial Comments on Proposed Pole Attachment Rules (Feb. 2, 2018), p. 7.

with CTIA's observations that "[t]he FCC's pole attachment timelines are widely used, reasonable, and have been effective in promoting network deployment."¹⁵

NECTA participated in a technical session in this docket on April 2, 2018. At that session, Consolidated Communications presented data regarding its make-ready work schedules and expressed concern about its ability to meet the timelines set forth in the Draft Final Proposal. While NECTA appreciates Consolidated's concern that the make-ready timelines in the Draft Final Proposal rules are too short, NECTA does not believe that those concerns outweigh the benefits of adopting the FCC's make-ready timelines. The timelines, like those adopted in Maine, where Consolidated raised the same issue, are reasonable and allow for:

- ☐ 15-day extensions when necessary – *See* proposed Puc 1303.12(b)(1)(d); *see also* 65-407 C.M.R. Ch. 880, §5.a.v.
- ☐ Longer time frames for large orders – *See* proposed Puc 1303.13(d); *see also* 65-407 C.M.R. Ch. 880, §7.
- ☐ Extensions when completion is infeasible due to good and sufficient cause – *See* proposed Puc 1303(e)(2); *see also* 65-407 C.M.R. Ch. 880, §8.

The Draft Final Proposal also allows flexibility for an applicant to have a contractor, chosen from a list compiled by the pole owner, complete the make ready work. *See* proposed Puc 1303.12 (f) – (i); *see also* 65-407 C.M.R. Ch. 880, §10.

While NECTA supports the make-ready timelines in the Draft Final Proposal (other than the elimination of the 45 day timeline for 10 poles or less), NECTA also understands the need for cooperation at the practical level and in the field between the applicant and the pole owner. We note, however, with regard to delays associated with permitting or licensing, make-

¹⁵ *Comments of CTIA* (Feb. 2, 2018), p. 6.

ready timelines should not be significantly different when a pole replacement is needed at the same location because pole replacements generally require only Dig Safe clearance (3 days) and traffic control, not an entirely new permit or license.

NECTA notes that Consolidated Communications is subject to the FCC's make-ready work timelines the FCC-regulated states in which it operates, and in the other certified states that have timelines, including Maine and Vermont. Moreover, these deadlines are not absolute, as the Draft Final Proposal allows a pole owner to deviate from the prescribed make-ready work deadlines under certain circumstances. *See* Draft Final Proposal, Puc 1303.12 (e). Accordingly, Consolidated's concerns do not warrant abandoning the make-ready work timelines reflected in the Draft Final Proposal.

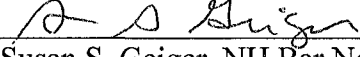
5. Rate Review Standards- Puc 1304.06

NECTA supports updating the existing rules to reflect the FCC's rate formulae rules in effect on October 1, 2017.

6. Conclusion

NECTA appreciates the opportunity to submit these comments on the Draft Final Proposal for Readoption of N.H. Code Admin. Rules Puc 1300 with Amendments, and respectfully requests that the Commission issue a Final Rules Proposal that is consistent with points noted above.

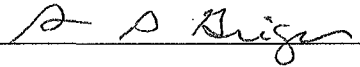
Respectfully submitted,
New England Cable and Telecommunications
Association, Inc.
By its Attorneys,
ORR & RENO, P.A.
45 South Main Street
Concord, N.H. 03302-3550

By: 
Susan S. Geiger, NH Bar No. 925
Phone: (603) 223-9154
Email: sgeiger@orr-reno.com

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Certificate of Service

I hereby certify that on this 5th day of April, 2018 a copy of the foregoing Comments has been either sent by electronic mail or first class mail, postage prepaid, to persons listed on the Service List.


Susan S. Geiger

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