STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

No. DRM 08-004
Proposed PUC Rule 1300 "Utility Pole Attachments"

COMMENTS OF LOCAL GOVERNMENT CENTER

The Local Government Center supports the efforts of the Public Utilities Commission to timely adopt rules to implement the authority granted by RSA 374:34-a. We originally commented that the language proposed in the "Circulation draft of final rules, 6-10-08" would be likely to result in the entry of negative comments by staff of the Division of Administrative Rules, and upon consideration by the Joint Legislative Committee on Administrative Rules in the Final Proposal stage, the likely result would be the entry of a Final Objection to the proposal in accordance with RSA 541-A:13, IV (a)-(d). We have reviewed the updated Draft language as proposed by staff through November 3, 2008. Our comment remains the same, and we believe that this proposed draft would also result in the entry of a Final Objection by the Joint Legislative Committee on Administrative Rules. Therefore, we continue to believe that there is significant work to be done upon the text before an official rulemaking proceeding is commenced.

In preparing these comments, we have been somewhat hindered by not knowing which documents or comments staff used in preparing the November 3, 2008 draft. In the spirit of, and in compliance with the requirements of the Right to Know Law, RSA 91-A, we request that all of this information be provided so that participants in this proceeding may have full access to the information that influenced staff in the creation of these proposed rules.

I. The proposed rules use a definition for "attaching entity" which is beyond the scope of the statutory authority granted to the Commission by RSA 374:34-a.

The express language of RSA 374:34-a, II limits the jurisdiction of the commission to "...the types of attachments regulated under 47 U.S.C. Section 224,...". Pursuant to 47 U.S.C. section 224 (a)(4), the term "pole attachment" is defined as "...any attachment by a cable television system or provider of telecommunication service to a pole, duct, conduit, or right of way owned or controlled by a utility.

Therefore, the jurisdiction of the commission does not include facilities "of any type", and the persons or entities covered by the rule should be limited to cable television systems and providers of telecommunications services. The proposed rules should not be made applicable to all other persons who may seek to attach facilities to poles. We are unclear about to whom or to what entity the Commission or staff might seek to extend the concepts set forth in these rules, but it is clear that the scope of the covered entities described in the rule is well beyond the scope of covered entities described in statute.

pursuant to RSA 371 would be required to acquire these rights, and the powers to acquire these rights may not be available to serve a proposed attachment of a provider that is not a public utility.

Proposed Rule Puc 1303.01 Access Standard does not accurately set forth the reasons why a pole owner either could or must deny a request for an attachment. If the easement interest owned by the pole owner does not expressly include a right to grant access *to the land upon which the pole sits* (emphasis added) to additional persons, the pole owner may be legally unable to grant a request for such an attachment. The remedy for the prospective attacher is to negotiate with the landowner for the right to access the land. If and only if the landowner grants additional rights to that prospective attacher, in the form of an easement or license to access such real property, will the pole owner be obligated to review the proposed attachment under these rules and determine if there is capacity on the pole to permit a safe installation of the new equipment.

Even if the landowner is willing to convey such additional rights, he or she could not grant such additional rights if the proposed attachment proved to be contrary to the terms of local zoning ordinances, conditions of approval received from local land use boards, or contrary to the terms of condominium declarations, property owner association restrictions, or private restrictive covenants that touch and concern the land and run to the benefit of other real property owners. Further, such additional attachments if granted may prove to violate covenants contained in mortgages or other security interests. If such mortgagees refuse to subordinate or release their security interests, the public utilities commission has no statutory authority to require these holders to alter their contractual and security relationships to the affected landowner. Thus, a proposed rule which purports to compel a utility to allow the placement of an attachment on all poles, regardless of the legal right of the attacher to access the land upon which the pole sits, could have a substantial economic impact upon the utility, the landowner, and the attacher as the legal rights and duties of each at specific locations are litigated.

With respect to land upon which a public way has been created pursuant to RSA 229:1, we make no comment as to the authority of the State of New Hampshire to regulate pole sets and related equipment additions upon Class I, II, III, or III-a highways, as the licensing authority on these ways is granted to the Commissioner of Transportation by RSA 231:161, I(c). With respect to municipal rights of way, the right granted to the pole owners is merely a license. The quality and quantity of the right is less than private landowners grant to the pole owners, and the Supreme Court has affirmed the principle that this license is able to be amended at any time at the will of the municipality subject only to the requirement that the amendment serve the public good.

III. The Proposed Rules Fail to Acknowledge the Role of the Municipalities as the Licensing Authority for Installation of Equipment in the Municipal Right of Way.

Since 1881, it has been the public policy of this state to allow the erection of utility facilities within the public highway right of way. See RSA 231:160 and 160-a. These comments are limited to facilities located in the Class IV, V, or VI highways, since those classes of highways are regulated by the municipalities. See RSA 229:5 and RSA 236:1. The placement of

Our Supreme Court as recently as the end of 2007 acknowledged that not all occupants of the public right of way have been issued municipal licenses in accordance with RSA 231:161. The court noted in the case of Verizon New England, Inc. v. City of Rochester, No. 2007-091, Slip Opinion dated December 28, 2007, that the telephone and electric company have been issued pole licenses, the gas companies have written consent to occupy pursuant to RSA 231:184, and the cable television company has a franchise agreement. Each of these separate documents was found to constitute an agreement with the municipality to occupy the public right of way, and each of these agreements was found to constitute the basis for the imposition of real property tax upon the occupant of the public way pursuant to RSA 72:23, I(b). As we review the matter in 2008, the taxing methodology is not yet clear, but the right and duty to separately assess and tax each licensed occupant of the right of way has been affirmed by the court.

Therefore, a proposed attacher needs more than the authorization of the pole owner described in proposed rule Puc 1303.05; the attacher also needs a license from the affected municipality. The license is in fact a jurisdictional prerequisite to review of the proposed attachment by the Public Utilities Commission pursuant to RSA 374:34-a, since the Commission has no authority to license or compel the placement of facilities in the public right of way. The proposed rules appear to say that the Public Utilities Commission can compel the location of facilities in the public right of way over the objection of municipal officials. To the extent that the rules could be interpreted in this manner, the rules exceed the statutory authority of the agency, and should not be approved in a rulemaking proceeding.

The proposed rules fail to acknowledge the special needs of both the municipalities and the state to attach unregulated equipment to poles in order to serve the public good. This equipment is not used in the provision of a telecommunications service, it is used for purposes of emergency management and response, public safety communication, and the interconnection of municipal facilities. As owners and managers of the public right of way, governmental entities have the property right and the obligation to erect and utilize such equipment in the direct provision of governmental services. The rules treat governmental entities as though they were competitive telecommunications providers, which they are not. In fact, the rules seek to discriminate against the public and the public safety by failing to recognize that the governmental entities using the right of way to serve and protect citizens have a special relationship with the pole owners which does supersede the interests of mere commercial interests.

IV. The Telecommunications Act of 1996 does not preempt the authority of municipalities and the State of New Hampshire to separately regulate attachers to poles on the basis of public safety and welfare.

The access standard set forth in proposed rule PUC 1303.01 suggests that only a pole owner has the authority to deny access to a licensed pole. This is legally incorrect, and imposes a standard which is beyond the statutory authority of the Commission.

Pursuant to 47 U.S.C. section 253, subsections a through d, the Telecommunications Act of 1996 expressly preserves the right of both states and municipalities to manage and regulate the

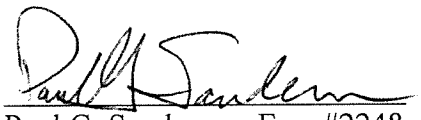
factor in each adjudicative proceeding, and the absence of a license for a particular location should be a prerequisite for the commencement of an adjudicative proceeding under these rules.

The access standard in Puc 1303.01 refers to "generally applicable engineering purposes". This standard is unclear and if reference is made to a code, such code should be incorporated by reference. Attachments must be installed pursuant to Puc 1303.07 to "prevent interference with service". This standard is unclear, and there is no reference to a standard that will be used to measure acceptable levels of "interference". Such standards should be specified, and if reference is made to a code, such code should be incorporated by reference.

The proposed rules refer to PUC 203 for the method of conducting an adjudicative proceeding to deal with the issues raised under RSA 374:34-a. Proposed rules 1304.06 through 1304.08 attempt to change the burden of proof and available remedies. Such provisions should more properly be incorporated as changes to the PUC 203 procedural rules for this type of proceeding, as opposed to being adopted as substantive standards in this section of the rules.

Respectfully submitted,

Dated: November 21, 2008



Paul G. Sanderson, Esq. #2248
Staff Attorney
Local Government Center
25 Triangle Park Drive
Concord, NH 03302