STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DRM 08-004

Utility Pole Attachments – Rulemaking

COMMENTS OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Public Service Company of New Hampshire ("PSNH"), by its undersigned attorney, respectfully submits the following comments regarding the proposed Readoption with Amendment of existing Interim Rule Puc 1300, Utility Pole Attachments, as set forth in New Hampshire Public Utilities Commission ("Commission") Rulemaking Notice Form filed with the Office of Legislative Services on May 12, 2009, and in accordance with the Commission's Order of Notice in this Docket dated May 15, 2009:

PSNH is generally supportive of the proposed amendments to Interim Rule Puc 1300. As PSNH stated at the public hearing in this Docket held on June 18, 2009, PSNH believes the proposed new utility pole attachment rules reflect in many respects a reasonable accommodation of the varied and often conflicting pole attachment issues identified by the various interested parties during the prior collaborative work sessions sponsored by Commission Staff. As proposed, the new rules should serve to foster a reasonable and fair regulatory framework in which pole attachment matters and disputes will be addressed.

A. Commission Authority Under RSA 374:34-a

PSNH does, however, continue to have a broader concern with the apparent scope of the proposed rules as they relate to what PSNH believes is limited Commission

jurisdictional authority over pole attachment matters under RSA 374:34-a.[1] Specifically, PSNH notes that the Commission's regulatory authority over pole attachment matters, as delegated to it by the New Hampshire Legislature in RSA 374:34-a, is constrained by language in that enabling law which grants the Commission the power to regulate and enforce rates, charges, terms and conditions for pole attachments "with regard to the types of attachments regulated under 47 U.S.C. section 224." RSA 374:34-a, II. A consistent and similar reference appears in RSA 374:34-a, VI, which mandates that a pole owner provide nondiscriminatory access to its poles "for the types of attachments regulated under this subdivision." Thus, the Legislature was explicit in RSA 374:34-a in defining, and limiting, both the Commission's regulatory power and a pole owner's nondiscriminatory access obligation, to the "types of attachments" which are referenced in the federal law.

The direct reference to the federal statute, 47 U.S.C. § 224, in paragraph II of RSA 374:34-a (and by direct implication in paragraph VI) is to what is commonly known and referred to as the Federal Pole Attachment Act (hereinafter sometimes referred to as the "Act"). The Act establishes the peremptory jurisdictional authority of the Federal Communications Commission ("FCC") to regulate the rates, terms and conditions for pole attachments, and access to poles, ducts, conduits and rights-of-way for pole attachments, except in those states which certify to the FCC that they do so in accordance with the certification requirements of the Act. Of significance to the limited wording employed in RSA 374:34-a, the Act and the FCC's pole attachment regulatory authority under the Act only apply to the types of pole attachments of two categories of pole attaching entities - cable television systems and telecommunications carriers.

[1] This is a concern which PSNH has consistently raised both with respect the Commission's existing interim rules, and in the work sessions leading to the proposed new amended rules.

Under the Act, the regulatory authority of the FCC extends to "pole attachments", which are defined to mean "any attachment by a cable television system or provider of telecommunications service." 47 U.S.C. §§ 224(a)(4) and 224(b)(1). The nondiscriminatory access provision of the Act likewise requires a utility to provide access only to "a cable television system or any telecommunications carrier." 47 U.S.C. § 224(f)(1).[2] Other potential attaching parties, such as individuals, private businesses or municipalities, which are not also cable television system operators or telecommunications carriers, are not entitled to federal access rights under the Act, and their attachments are not the "types of attachments" regulated under the Act.

PSNH maintains that the Commission's proposed pole attachment rules must be consistent with the Commission's limited regulatory authority over pole attachments as expressed in RSA 374:34-a by reference to the Federal Pole Attachment Act. It is axiomatic that the Commission has only the powers and authority delegated to it by the Legislature. *See Appeal of Public Service Co. of N.H.,* 122 N.H. 1062, 1066 (1982). Expansion of the Commission's jurisdictional authority over pole attachments beyond that granted by RSA 374:34-a may not be legally accomplished.

Accordingly, PSNH believes that the proposed definition of the term "Attaching entity" in proposed Rule Puc 1302.01[3] is too broad. In light of the adoption of the use of this term in numerous other provisions of the proposed rules, the present definition of an "Attaching entity" would effectively allow a broader applicability of the rules to pole attachments beyond the scope of the Commission's regulatory authority. As presently

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[2] For purposes of the Act, a "telecommunications carrier" means "any provider of telecommunications services", 47 U.S.C. § 153(49),but expressly does not include an incumbent local exchange carrier, 47 U.S.C. § 224(a)(5). A New Hampshire CLEC would be a provider of telecommunications services and therefore considered a telecommunications carrier.

[3] The proposed revised Puc 1300 Rules submitted with the Rulemaking Notice Form have mistakenly labeled this "1301.01".

drafted, proposed Puc 1302.01 defines an "Attaching entity" to include a natural person or an entity with a statutory or contract right to attach a facility of any type to a pole. PSNH urges the Commission to change the definition of an "Attaching entity" in Puc 1302.01 as follows:

> "Attaching entity" means an entity which is either a cable television system operator or a telecommunications carrier providing telecommunications services, except for an incumbent local exchange carrier.

This definitional change would bring the proposed new pole attachment rules into line with the scope of pole attachment regulatory authority granted the Commission under RSA 374:34-a, namely, the attachments of the types of attaching entities regulated under the Federal Pole Attachment Act. A conforming change would need to be made to proposed Puc 1304..05, Rate Review Standards, to eliminate subsection (b) of that proposed Rule, since the attachments of cable television service providers and CLECs are already referenced in subsection (a), and only the attachments of those entities are properly subject to Commission pole attachment rate regulation.

Arguments which suggest that the Commission's power to regulate pole attachment matters is broader than that specified in RSA 374:34-a are incorrect, in PSNH's view.

First, it has been suggested that the last sentence of RSA 374:34-a, II, indicates an intention by the Legislature that the Commission's regulatory authority not be limited to the types of attachments regulated under 47 U.S.C. § 224. That sentence reads: "This authority shall include but not be limited to the state regulatory authority referenced in 47 U.S.C. section 224(c)." The statutory reference in this sentence to subsection (c) of the Federal Pole Attachment Act refers to the right of a state to extend its regulatory authority over the rates, terms and conditions for pole attachments, and sets forth the requirements that must be in place for a state to properly certify to the

FCC that it is regulating such rates, terms and conditions. PSNH maintains that it is a mistake to interpret this sentence as an expansion of the scope of the Commission's regulatory authority to attachments of persons or entities which do not strictly fall into the categories of either a cable television system operator or a telecommunications carrier providing telecommunications services. Doing so would effectively render meaningless the other wording in RSA 374:34-a, II and VI, defining the Commission's regulatory authority and the pole owner's nondiscriminatory access obligation in terms of the "types of attachments regulated under" the Federal Pole Attachment Act. The last sentence in RSA 374:34-a, II, may actually be read in harmony with this other limited wording of the statute by construing it to evidence the Legislature's intention not to restrict the Commission's authority to state regulation of just the "rates, terms and conditions" for pole attachments contemplated in 47 U.S.C. § 224(c), but to allow for Commission regulation of other pole attachment matters as well, aside from the rates, terms or conditions of attachment. This could include such other matters as, for example, special safety requirements, attachment construction methods to be followed, attachment priorities, allocation of pole space, or the extent of permissible use of boxing or extension arms.

Second, it has been suggested that the Commission's power of general supervision of all public utilities and the plants owned, operated and controlled by them under RSA 374:3 invests the Commission with the authority to regulate pole attachments beyond the types of attachments of cable television system operators and telecommunications carriers expressed in RSA 374:34-a. PSNH believes this argument is misguided for a number of reasons:

(1) Prior to the enactment of RSA 374:34-a, the Commission did not exercise any jurisdictional authority over pole attachment matters under RSA 374:3, and in fact such

authority, at least as to the attachments of cable operators and telecommunications carriers, was pre-empted by the FCC's primary jurisdiction under the Federal Pole Attachment Act.

(2) RSA 374:3 extends the Commission's power to public utility pole owners and their pole plant, but does not necessarily invest the Commission with any authority over the attachments or business of any non-public utility attaching entity, such as a private business. Since pole attachment arrangements invariably involve one and possibly two public utility pole-owning entities, and one attaching party, it is conceivable that a jurisdictional argument predicated on RSA 374:3 would leave the Commission (and the utility pole owners) in the anomalous situation where Commission jurisdiction would arguably exist over only one of the two parties involved in the pole attachment matter or dispute.

(3) RSA 374:3 grants general supervisory authority only, and does not grant expressly or by implication any jurisdiction over pole attachment matters. The New Hampshire Supreme Court, in a case involving the predecessor statute to RSA 374:3 virtually identical in wording to the present statute, held that the statute's grant of general supervisory authority does not constitute a grant of general jurisdiction, but only establishes incidental or ancillary authority to enforce other specific powers granted elsewhere. *See State v. New Hampshire Gas & Electric Co.*, 86 N.H. 16, 31-32 (1932). That specific and limited power is delegated to the Commission by RSA 374:34-a.

(4) Even if RSA 374:3 were to be accepted as vesting the Commission with general jurisdictional authority over pole attachment matters involving utility pole plant, that authority must, in the event of conflict, yield to the more specific and later enactment of pole attachment jurisdictional authority granted by RSA 374:34-a. Construing RSA 374:3 as vesting the Commission with the authority to regulate types of

pole attachments other than those of cable operators or telecommunications carriers regulated under 47 U.S.C. § 224 places it in direct conflict with the limited jurisdictional authority granted to the Commission under RSA 374:34-a. As the New Hampshire Supreme Court has instructed, the rules of statutory construction require that when a conflict exists between two statutes, the later enacted statute will control, particularly where the later statute deals with the subject matter in a specific way, as opposed to more general treatment in the earlier statute. *See Bel Air Assocs. v. N.H. Department of Health & Human Services,* 154 N.H. 228, 233-234 (2006). That is precisely the case here, and RSA 374:34-a must control the Commission's interpretation of its pole attachment jurisdiction, and its rules implementing the proper exercise of that jurisdiction.

PSNH stated at the June 18 public hearing that PSNH does not support a pole attachment regulatory scheme which extends to all persons or entities which may wish to attach facilities of any type to PSNH's poles. Available pole space is limited. RSA 374:34-a, IV, mandates that in exercising its pole attachment regulatory authority, 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." PSNH submits that the interests of the customers of cable system operators, telecommunications carriers, and pole owning incumbent utilities, are not served by extending pole attachment rights and remedies to individuals, private business entities or other potential attachers whose facilities do not serve a broader public interest. If the pole attachment rules allow for private parties to attach to and occupy the limited communications space on a pole, this could potentially increase the make-ready cost impacts on other attaching entities legally entitled to access having to pay for changes to existing pole plant to accommodate their attachment request.

These increased costs may, in turn, pose an added cost factor to cable system operators and telecommunication service providers in the expansion of their networks, and may ultimately discourage the expansion of broadband services throughout New Hampshire. Clearly, this would not be in the public interest.

Municipal attachments for governmental, non-commercial purposes are generally supported by PSNH. PSNH has historically accommodated municipal police and fire signaling attachments to its poles for public safety purposes. As mentioned at the public hearing, PSNH, along with other New Hampshire incumbent pole owning utilities (Unitil, National Grid, and FairPoint) have been engaged for several years in a joint effort with the New Hampshire Municipal Association to develop a mutually acceptable standardized pole attachment agreement which will allow for municipal pole attachments to public utility poles for governmental, non-commercial purposes. That process is nearing completion, and the parties involved expect that a proposed standard form of pole attachment agreement will shortly be available for circulation to and use by the municipalities throughout the State.

B. Access Standard

The access standard set forth in proposed Rule Puc 1303.01 properly allows for a pole owner to deny an access request based on insufficient capacity, or for reasons of safety, reliability or generally applicable engineering purposes. This standard is consistent with provisions of the Federal Pole Attachment Act (*see* 47 U.S.C. §224(f)(2)) and with RSA 374:34-a, VI. However, this rule as proposed does not acknowledge the existence of other impediments to granting access which may be present as a result of other legally applicable requirements or restrictions pursuant to applicable law. As an example, a utility pole owner confronted with a request for access to poles situated in a private property right-of-way pursuant to private property easements may not be legally

entitled, as a matter of state law, to allow the access request without violating the terms of the easement or its permissible scope of use. This is precisely the issue which PSNH is now litigating in a pending docket before the Commission involving an attachment request by a New Hampshire CLEC.[4] In another context, it is conceivable that a legal inability to grant an access request may exist as a result of a failure or refusal by the appropriate state or municipal licensing authority to grant the right to use or occupy the public highway for the proposed attachment under the New Hampshire pole licensing laws, RSA 231:159 et seq.. PSNH accordingly recommends and requests that the following sentence be added to the end of the present text of proposed Rule Puc 1303.01:

> Nothing herein shall require the owner or owners of a pole to provide access to such pole where such access would not be in compliance with or would violate other applicable law.

PSNH believes that this additional wording would allow for recognition of those circumstances where the pole owner's provision of the requested pole attachment access would or could conflict with other applicable legal requirements or prohibitions.

C. Notification

Proposed Rule Puc 1303.06(a) requires a pole owner to provide no less than 60 days prior notice to "a person with facilities attached to a pole" before removing those facilities, increasing any applicable rates, or modifying the facilities. On its face, the wording of this rule could apply to both authorized and unauthorized attachments. Proposed Rule Puc 1303.05 establishes the generally applicable rule that prior authorization from the pole owner must be obtained to attach facilities to a pole. Thus, unauthorized attachments do not and should not enjoy any protection under the Commission's pole attachment rules. To the extent proposed Puc 1303.06(a) could

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[4] See the filings and legal arguments made by the parties in Commission Docket No. DT 08-146 segTEL, Inc. – Request for Arbitration Regarding Access to Utility Poles.

potentially be read to extend its 60 day prior notice protection to any unauthorized attachments, it should be changed. That change can be accomplished by inserting the word "authorized" prior to the word "facilities" in the first line of 1303.06(a).[5]

D. Voluntary Pole Attachment Agreements

RSA 374:34-a evidences the Legislature's preference for the regulation of pole attachments by agreements voluntarily entered into between pole owners and attaching entities. RSA 374:34-a, II, delegates to the Commission the authority to regulate and enforce rates, charges, terms and conditions for pole attachments "whenever a pole owner is unable to reach agreement with a party seeking pole attachments." RSA 374:34-a, V, makes clear that nothing in the statute "shall prevent parties from entering into pole attachment agreements voluntarily, without commission approval." Based on these provisions of the statute, PSNH believes that the Commission's final rules implementing the statute should encourage the negotiation and conclusion of such agreements, and should protect such agreements, and the expectations of the parties to those agreements, once they are entered into.

To an extent, the proposed rules do strive to achieve this by mandating the obligation of both the pole owner and the attaching entity to negotiate an attachment agreement in good faith (proposed Rules Puc 1303.02 and 1303.03), and by offering the remedy of Commission involvement should the parties be unable to reach such an agreement (proposed Rule Puc 1304.01). PSNH does, however, have a concern with the manner in which the proposed rules treat the subject of the voluntary nature of such agreements once entered into.

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[5] PSNH also advocates that the word "person", as used in this section to describe the attaching party, be changed to "attaching entity" consistent with the definition of that term as used to identify the parties entitled to attachment rights under the proposed rules.

PSNH believes that all pole attachment agreements, once entered into, should be conclusively presumed to have been entered into voluntarily. It is repugnant to the principles of good faith dealing and freedom of contract that an attaching entity may sign such an agreement, and then be permitted to later challenge or avoid its terms by asserting that it had to sign for business reasons. This is precisely the notion supported by proposed Rule Puc 1304.06(b), which allows for the presumption of a voluntary agreement to be rebutted by an attaching entity's demonstration that the signing of the agreement was "reasonably necessary to avoid significant delay in deployment of facilities."[6] CLECs such as segTEL, and NECTA on behalf of cable system providers, have claimed that a "sign and sue" policy supported by the FCC merits such a rebuttable presumption, a policy supposedly predicated on the superior bargaining power of incumbent utility pole owners, and a predilection on the part of such pole owners to fail or refuse to negotiate the rates, terms and conditions of attachment in good faith with an intent to resist and delay third party attachment access. According to these attaching entities, pole attachment agreements are "contracts of adhesion", with the attaching party have no choice but to enter into such agreements in order to obtain access.

PSNH strongly disagrees with this premise. In fact, PSNH believes that all utility pole owners under the Commission's jurisdiction in New Hampshire recognize and acknowledge their legal obligation to afford nondiscriminatory attachment access to their poles to cable television system operators and telecommunications carriers entitled to access. However, it is the very essence of the requirement of nondiscriminatory access which necessitates that utility pole owners not discriminate among attaching entities

[6] Proposed Rule Puc 1304.06(b) would also appear to limit the presumption of a voluntary agreement to pole attachment agreements signed prior to July 17, 2007 (the effective dated of RSA 374:34-a), but PSNH sees no reason why all pole attachment agreements entered into after that date should not also be presumed to have been entered into voluntarily.

with respects to the rates, terms and conditions of such access. Thus, to comply with the nondiscriminatory access requirement and to avoid more favorable or different treatment being afforded to one attaching entity over another, utility pole owners will of necessity resist efforts to separately negotiate the rates and material terms and conditions of attachment in a pole attachment agreement. The "safe harbor" for utility pole owners is the treatment in the same way of all attaching entities legally entitled to access, in a nondiscriminatory manner. That typically means a pole attachment agreement with standard terms and conditions will be the preferred method of proceeding, as far as utility pole owners are concerned. It is fundamentally unfair to portray these agreements as involuntary, when it actuality such agreements are the product of a realistic assessment by both parties of their needs and obligations in the context of a legally mandated pole attachment access environment.

PSNH accordingly recommends that proposed Rule Puc 1304.06(b) be modified to provide that all pole attachment agreements entered into be conclusively presumed to have been entered into voluntarily by both parties, and that proposed Rule Puc 1304.06(c), relating to rebuttal of the presumption and shifting of the burden of proof be deleted in its entirety.

Conclusion

In conclusion, PSNH wishes to again acknowledge and commend the efforts of the Commission Staff in formulating the final proposed rules, and thanks the Commission for the opportunity to provide these additional comments. PSNH recommends to the Commission the changes to the proposed rules summarized above, in an effort to better align the Commission's rules with the scope of the Commission's regulatory authority under RSA 374:34-a, and to enhance the pole attachment regulatory environment in New Hampshire.

Respectfully submitted,

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Date: 6/25, 2009.

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