STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

PUC 1300 Rules re Utility Pole Attachments	)))	DRM 08-004

COMMENTS OF NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION ON INITIAL PROPOSAL FOR FINAL ATTACHMENT RULES

The New England Cable and Telecommunications Association, Inc. ("NECTA") respectfully submits the following comments on the May 12, 2009 Initial Proposal for the PUC 1300 Rules governing utility pole attachments in New Hampshire ("Initial Proposal"). The Public Utilities Commission ("PUC" or "Commission") submitted the Initial Proposal to the Administrative Rules Division of the Office of Legislative Services along with the Rulemaking Notice Form ("Notice Form") and other supporting materials. These comments incorporate and supplement the statement of William D. Durand, NECTA's Executive Vice President and Chief Counsel, at the June 18, 2009 public hearing.

The Initial Proposal is fundamentally flawed in that it fails to take steps to reduce the nationally high pole attachment rates in New Hampshire that are impeding broadband deployment and competition in rural areas. As noted by Mr. Durand during the public hearing, pole attachment rates should not increase by nearly 300% merely because one crosses the border from Massachusetts into New Hampshire. Retaining the status quo should not be an option for New Hampshire, with its significant rural areas that remain unserved with broadband

facilities.[1] In establishing an "appropriate" rate methodology,[2] the Commission should follow the lead of all certified states that have considered revisions to state attachment rate methodologies and decline to incorporate the federal telecommunications rate for use in New Hampshire. Additionally, in two important respects, the Initial Proposal fails to meet the Commission's goal of creating "more clarity and predictability for pole owners and attaching entities with respect to the attachment and maintenance of such facilities on utility poles."[3]

Accordingly, NECTA recommends that the final Rules (1) adopt only the FCC's cable rate formula rather than the current FCC formulae that include both a cable rate and a much higher telecommunications rate, (2) improve the pole attachment process by deleting the requirement that attachers prove a lack of voluntariness in signing attachment agreements before bringing disputes to the Commission, and (3) eliminate the burdensome and anti-competitive requirement that operators furnish pre-construction notices of undertaking network upgrades using so-called "overlashing" of fiber to existing strand. NECTA also recommends other changes to the Initial Proposal that would improve the functioning of the proposed Rules.

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1 According to a recent study by the New Hampshire Department of Resources and Economic Development and The Telecommunications Advisory Board, only 58% of New Hampshire households are passed by high speed broadband lines. See State of New Hampshire Broadband Action Plan, (June 30, 2008), p. 23, available at http://www.nheconomy.com/uploads/Final-Report-082808.pdf.

2 See note 5 infra (quoting text of 2007 Amendment to RSA 374).

3 Notice Form, p. 1.

ARGUMENT

I. THE FINAL PUC 1300 RULES SHOULD ONLY ADOPT THE FCC CABLE RATE FORMULA.

Pursuant to the 2007 amendments to RSA 374, the Commission adopted interim rules in place for two years that were required to be "consistent with the regulations adopted by the [FCC] under 47 U.S.C. § 224, including the formulae used to calculate maximum just and reasonable rates."[4] Thereafter, the Commission was free to adopt "appropriate" permanent rate methodologies that did not follow existing FCC rate formulas.[5]

Instead of charting a new direction in setting pole attachment rates to meet the needs of New Hampshire residents and businesses, Rule 1304.05(a)(3) in the Initial Proposal requires the Commission to continue to rely on the current rate formulas and standards in the FCC rules at 1.1409(c) – (f), thereby incorporating both the cable rate rule at (e)(1) and the telecommunications rate rule at (e)(2). This decision to maintain the status quo on attachment rates is

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[4] The pertinent text of the Amendments to RSA 374 read as follows: The public utilities commission shall expeditiously adopt interim rules and then final rules to carry out the provisions of RSA 374:34-a. For a period of at least 2 years after the effective date of this act, the rules shall be consistent with the regulations adopted by the Federal Communications Commission under 47 U.S.C. § 224, including the formulae used to determine maximum just and reasonable rates. The public utilities commission may incorporate into its rules, by reference, applicable regulations of the Federal Communications Commission. (Emphasis added).

[5] The Amendment text read as follows: "...Once the interim rules are adopted, pole attachments shall become subject to RSA 374:34-a and the rules of the public utilities commission." Section 374:34-a in turn provides that the Commission "... shall regulate and enforce rates, charges, terms, and conditions for such pole attachments... 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)" and "shall adopt rules under RSA 541-A to carry out the provisions of this section, including appropriate formula or formulae for apportioning costs." (Emphasis added).

unwise and contrary to the public interest for several reasons. Accordingly, NECTA recommends instead that the final Rule adopted in this proceeding incorporate only the FCC cable rate in 1.1409(e)(1).[6]

First, as noted above, adoption of both the FCC cable and telecommunications formulae is not compelled by the 2007 amendments. The Commission is free to adopt "appropriate" rules so long as they produce "just and reasonable rates." If the legislature had intended for the adoption of state-certified rules to incorporate the current federal rate rules on a permanent basis, it would have said so. NECTA supported the 2007 amendments on the assumption that the Commission would view its broad state-level authority as a mandate for changing the status quo – which has led to one of the highest attachment rates in the country and associated impediments to expansion of advanced services in rural areas – rather than settling for the same rate rules on a permanent basis. Cable operators serving rural areas already face significant challenges due to having fewer customers to bear the high fixed costs associated with deploying cable, voice and Internet services and virtually all potential customers already receiving video service from a satellite provider. High pole rates exacerbate these already-significant economic impediments to maintaining and expanding advanced services to rural customers; the Commission should reduce them through adoption of the FCC cable rate.

Second, incorporation of the FCC's telecom rate has been soundly rejected by all of the State utility commissions that have considered changes to

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[6] The Initial Proposal would be amended to delete (c), (d) and (f) (which do not deal with pole rates) and (e)(2) (which sets out the FCC telecommunications rate).

rate formulas in certified states.[7] The cost-based FCC cable rate has been adopted by itself, or in closely modified form, in many states (including Connecticut and Massachusetts)[8] and has been upheld on multiple occasions as affording sufficient compensation to pole owning utilities.[9] Setting pole attachment rates at or very close to the FCC cable rate is a critical step in eliminating possible economic barriers to deployment of broadband plant and the associated expansion of advanced services to consumers and businesses. In

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7 The most recent case is Connecticut, which in 2005 rejected a utility request for a declaratory ruling to adopt the FCC telecommunications rate in the state. Petition of United Illuminating Company for Declaratory Ruling Regarding Availability of Cable Tariff Rate for Cable Pole Attachments By Cable Systems Providing Telecommunications Services and Internet Access, Docket No. 05-06-01, Decision (December 14, 2005). This ruling follows similar rulings in Alaska (adopting cable rate for all attachments); Vermont (substantially reducing its cable rate formula); New York (adopting cable rate for all attachments); and California (same). See Comments of the New England Cable and Telecommunications Association, Docket No. DRM 08-004 (March 5, 2008), p. 5 n. 11 (citing cases). Additional states declining to adopt the FCC telecommunications formula include Kentucky and Oregon. See Ballard Rural Tel. Coop. Corp., Inc., v. Jackson Purchase Energy Corp., No. 2004-00036, 2007 WL 2331036, at *3-*4 (Ky. P.S.C. 2007) (rejecting higher rate for telecommunications attachments and holding that "attachments made by these parties should be treated the same as those made by the parties' CATV customers and that the approved CATV methodology should be used by these parties" to calculate the rental rate); In the Matters of Rulemaking to Amend and Adopt Rules in OAR 860, Order No. 07-137, 2007 WL 1198592, at *8 (Or. P.U.C. 2007) (rejecting FCC telecommunications rate, and adopting single modified cable rate for all attachments, on grounds that the Oregon legislature had not adopted the telecommunications rate and that "the cable formula has been found to fairly compensate pole owners for use of space on the pole").

8 See Application of the Southern New England Telephone Company to Amend its Rates and Rate Structures, Docket No. 92-09-19, 1993 Conn. PUC LEXIS 5 at 387 (1993) (establishing SNET's maximum pole rate for CATV operators based on a modified version of the FCC pole rental formula) ("SNET Rate Order"); Complaint and Request for Hearing of Cablevision of Boston Co., et al. Seeking Relief from Alleged Unlawful and Unreasonable Pole Attachment Fees, Terms and Conditions Imposed on Complainants by Boston Edison Co., DPU/DTE 97-82 (1998), p. 18.

9 See, e.g., Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments, Report and Order, 13 FCC Rcd 6777, 6793 (1998) (holding that the cable rate is a "just and reasonable" rate for commingled cable and Internet services and would "encourage cable operators to make Internet services available to their customers and" and therefore would serve the public interest") aff'd sub nom *National Cable & Telecommunications Ass'n* v. *Gulf Power Co.*, 534 U.S. 327 (2002).

contrast, to our knowledge, no certified state has voluntarily adopted the FCC rules in total as proposed in the Initial Proposal.

Finally, the FCC itself has recognized concerns associated with the present bi-furcated rate structure and has opened a docket to consider a blended attachment rate.[10] With the overall FCC rate structure currently up in the air, it makes little sense to adopt the existing FCC formulae for permanent use in New Hampshire at this time.

Accordingly, for all of the above reasons, the Commission should amend the Interim Proposal to incorporate only the FCC cable rate in FCC Rule 1.1409(e)(1). If the FCC subsequently approves changes to the FCC rate structure, the Commission can investigate whether the approach adopted should be incorporated within New Hampshire at such time.

II. ATTACHERS SHOULD NOT BE REQUIRED TO PROVE A LACK OF VOLUNTARINESS IN SIGNING ADHESION CONTRACTS.

Rule 1304.06 in the Initial Proposal requires an attacher to prove that its signature on a pole agreement was not voluntary. Moreover, it specifically creates a rebuttable presumption of voluntariness for pole agreements entered into prior to the effective date of the legislation in July 2007.[11] These provisions should be deleted from the Initial Proposal as being unreasonable, contrary to decades of practice and likely to commence fact-intensive disputes that will

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[10] Implementation of Section 224 of the Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, Notice of Proposed Rulemaking; (rel. Nov. 20, 2007).

[11] See 1304.06(b).

interfere with the underlying purposes of predictability and clarity.[12] Instead, the Commission should permit but not require negotiations and afford attachers the right to sign an agreement and sue if a particular rate, term or condition proves to be unworkable or contrary to law in practice – as is done as a matter of practice at the FCC and in most or all states.

Both provisions in the Initial Proposal fail to recognize that pole agreements have been widely understood for decades to be contracts of adhesion that utilities do not consider to be subject to individual party negotiation.[13] There is no voluntariness about it – the attacher either signs the proffered agreement or timely access to the poles is not permitted. Accordingly, the lack of voluntariness requirement either will be meaningless (as the attacher will submit evidence of its good faith inquiry pursuant to proposed Rule 1303.03 and the lack of utility willingness to negotiate) or it will create a burdensome after-the-fact dispute about what the attacher potentially could have done to advocate its concerns with the agreement in discussions with one or both pole owners. Furthermore, it may waste time and resources for all parties because prudent attachers would be forced to identify all potentially problematic provisions in pre-agreement communications with the pole owner or face possible loss of rights later, triggering an apparent obligation on the pole owner to prepare a detailed

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[12] See Notice, p. 1. This could be easily accomplished by changing the current Rule 1304.06(a) – (c) into a new rule that would provide as follows: "The burden of proving that the agreement is just, reasonable and nondiscriminatory is on the pole owner."

[13] As expressed by the FCC, "due to the inherently superior bargaining position of the utility over the cable operator in negotiating the rates, terms and conditions for pole attachments," such rates, terms and conditions "cannot be held reasonable simply because they have been agreed to by a cable company." Selkirk Comm., Inc. **v.** Florida Power & Light, 8 FCC Rcd 387 ¶ 17 (rel. Jan. 14, 1993).

response. It is more efficient for all parties to allow an attacher to sign and reserve rights to challenge only those provisions that actually prove unworkable in practice.

In addition, the voluntariness presumption in Rule 1304.06(b) is especially unsupported and pernicious. In New Hampshire, attachers signed pre-July 2007 agreements with the reasonable expectation that FCC rules then in force would permit them to sign a pole attachment agreement and seek redress from a regulatory body at a later time without restrictions. Presuming voluntariness for such agreements has it exactly backwards. Accordingly, the presumption of voluntariness for the pre-July 17, 2007 agreements is particularly inappropriate and should be deleted.

III. CABLE ATTACHERS SHOULD NOT NEED TO FURNISH PRE-CONSTRUCTION NOTICE OF OVERLASH UPGRADES.

Rule 1303.06(a) of the Initial Proposal would require 60 days advanced notice to the pole owner before an attacher can "modify[] the facilities other than as part of routine maintenance or in response to an emergency" and Rule 1303.06(b) would prevent attachers from "seeking to change the purposes for which existing attachment facilities are used" without the same 60 days advanced notice. Both provisions cause significant problems for cable operators as they commonly upgrade cable facilities to deploy advanced services by means of "overlashing" fiber to existing strand, thereby triggering one or both advance notice provisions. FCC precedent makes clear that overlashing is an important component to deployment of advanced services and that unnecessary

barriers on overlashing, such as this Rule, are strongly disfavored.[14] The proposed advance notice requirement for overlasing should be eliminated entirely or, alternatively, replaced by a provision requiring notice within a reasonable period after construction (such as 60 or 90 days).

This Rule, if enacted, will create potential problems for cable operators using overlashing to deploy fiber in new areas without any countervailing benefits. For example, a 60 day advance notice requirement would limit a cable operator's flexibility of expanding into a new area to take advantage of an unexpected availability of employee or contractor resources. In that circumstance, the notice requirement would harm customers by delaying their ability to access advanced services without any legitimate benefit to the pole owners or the public. Accordingly, Rule 1303.06(b) should be deleted or modified into a post-construction notice provision in order to avoid burdening this cost-effective method for upgrading cable facilities.

IV. OTHER TERMS AND CONDITIONS ISSUES.

A. Makeready Deadlines Should Be Shortened

Proposed Rule 1303.12 in the Initial Proposal establishes a 180 day deadline for completion of makeready work, irrespective of whether the work involves rearranging of pole facilities or whether a pole replacement is required. This is a substantially longer time period than has been adopted recently in other

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[14] See Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, 13 FCC Rcd 6777, Report and Order, ¶ 62 (1998) (finding that "overlashing is important to implementing the 1996 Act as it facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities...."). In addition, the FCC "has a longstanding policy against unreasonable restrictions on overlashing." Salsgiven Communications, Inc. v. North Pittsburgh Telephone Company, 2007 FCC LEXIS 8845 (FCC Enf. Bur. rel. Nov. 26, 2007).

states and will significantly burden competitors and the consumers that would benefit from new services.[15] This 180 day period should be substantially shortened. NECTA also would support a new 45 day deadline for completion of makeready and approval of attachments relative to a short pole run (ten or fewer poles) with minimal or no makeready. Such runs are useful for extending service to an individual customer and should be handled on an expedited basis.

B. The 200 Pole Application Limit Is Too Restrictive

Proposed Rule 1303.04 sets a 200 pole limit for applications except for extraordinary circumstances. This appears to be too restrictive, as 200 poles is a minimum number for any substantial buildout project. Imposing such an artificially low limit on pole applications would significantly delay completion of customer-benefiting construction projects. The limit should be increased to 500 without change to makeready completion deadlines or with a longer maximum makeready period provided for applications in excess of 200 poles.

C. Process for Unauthorized Attachments Should be Clarified

Proposed Rule 1304.03 provides that a pole owner "may" but is not required to initiate a Commission proceeding to remove an allegedly unauthorized attacher from a pole. NECTA recommends that this "may" be

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[15] The NY PSC requires that all work, from surveys to make-ready to the provision of a final license must be completed in 105 days. See Re Commission Concerning Certain Pole Attachment Issues, Case 03-M-0432, New York Public Service Commission, August 6, 2004 Attachment thereto: Policy Statement). The CT DPUC has determined that a 90-day time interval should be the objective for the pole attachment process (120 days for pole replacements), with a 45-day interval for the estimate process. See Re The State's Public Service Company Utility Pole Make-Ready Procedures -Phase I, Docket No. 07-02-13, Connecticut Department of Public Utility Control, Decision, April 30, 2008. Vermont developed sliding time frames as follows: Makeready work on fewer than 0.5% of owner's poles or attachments shall be completed within 120 days; on 0.5% or more but less than 3% of owner's poles, within 180 days; and on more than 3% of owner's poles or attachments within a time to be negotiated between all the affected owners and attachers. See Re Vermont Electric Cooperative, Inc., Docket No. 6655, Vermont Public Service Board. October 9, 2002, slip copy.

changed to a "must" in order to avoid pole owners engaging in self-help measures and triggering injunction disputes in the courts. Furthermore, the Proposed Rule should provide that removal occur only after notice to the attacher of the allegedly unauthorized attachment and failure to cure within a specific time period.

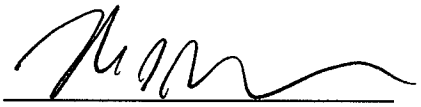
CONCLUSION

NECTA appreciates the opportunity to participate in this important docket. It is NECTA's recommendation that the Commission make changes to key provisions in the Initial Proposal to enhance opportunities for deployment of advanced services in New Hampshire and minimize unnecessary disputes between pole owners and attachers. Accordingly, NECTA requests that the Commission (1) amend Rule 1304.05(a)(3) to adopt only the FCC cable rate, (2) delete the Rule 1304.06 requirements that attachers prove lack of voluntariness when bringing claims under the Rules including the rebuttable presumption of voluntariness for agreements prior to July 2007 in Rule 1304.06, (3) delete or modify Rule 1303.06(b) that imposes a 60 day advance notice requirement on cable operators using overlashing to upgrade their facilities, and (4) make additional changes to avoid unnecessary barriers on attachers and their customers.

Respectfully submitted,

NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION, INC.

By its attorneys,



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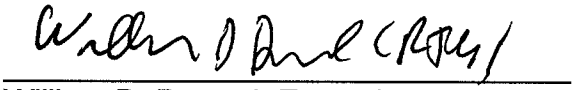

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