Orr&Reno

Susan S. Geiger
sgeiger@orr-reno.com
Direct Dial 603.223.9154
Direct Fax 603.223.9054
Admitted in NH and MA

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Via Electronic Mail and Hand Delivery
Ms. Debra A. Howland, Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301

Re: DRM 17- 139, Rulemaking – N.H. Code Admin. Rules Puc 1300 Utility Pole Attachment Rules Readoption and Amendment

Dear Ms. Howland:

New England Cable and Telecommunications Association, Inc. ("NECTA") submits the following comments on the New Hampshire Public Utilities Commission's ("the Commission's) Initial Proposal for readoption with amendments of Chapter Puc 1300, Utility Pole Attachment Rules.

1. No Substantive Rules Changes Should be Made Until The FCC's Pole Attachment Rulemaking is Finalized.

NECTA believes that the existing statutory, regulatory and contractual scheme under which pole owners and attachers are currently operating has worked well, and therefore no substantive changes to the rules are needed at this time. Furthermore, because the Federal Communications Commission ("FCC") is currently undertaking a review of pole attachment issues in WC Docket No. 17-84, NECTA believes it would be inappropriate and potentially counter-productive to promulgate substantive rule changes in New Hampshire before the FCC has concluded its work in this area. This is particularly true with respect to any revisions to make-ready processes which are the subject of extensive comments at the FCC. While NECTA does not oppose the adoption of minor, non-substantive rule amendments, NECTA opposes substantive rule changes at this time.

2. The Proposed Rules Should Not Be Adopted Because They Impermissibly Expand the Scope of the Commission's Statutory Authority.

a. The Definition of "Pole" Must Be Consistent with the Statutory Definition.

NECTA opposes any rule changes that would expand the scope of the Commission's regulatory authority over pole attachments beyond that established in RSA 374:34-a. In particular, NECTA opposes, on legal grounds, the proposed change to the definition of "pole" reflected in the Initial Rules Proposal at Puc 1302.09. The amended definition is legally flawed because it differs from the statutory definition of pole contained in RSA 374:34-a, I. It is noteworthy that the current definition of "pole" contained in existing rule Puc 1302.08 expressly references and correctly quotes the statutory definition of that term:

> "'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.'"

The Initial Rules Proposal, however, eliminates the reference to RSA 374:34-a, I and adds to the end of the existing definition the following words which do not appear in the statute: "or is owned in whole or in part by a provider of 'VoIP service' or 'IP- enabled service,' as such terms are defined in RSA 362:7, I." NECTA opposes the new language because the addition of this phrase to the statutory definition of pole is improper as a matter of law.

It is well established that in adopting rules, state boards and agencies "may not add to, detract from, or in any way modify statutory law." *Kimball v. New Hampshire Board of Accountancy,* 118 N.H. 567, 568 (1978); *see also Appeal of New Hampshire Department of Transportation,* 152 N.H. 565, 571 (2005) (although rulemaking authority allows agencies to fill in the details to effectuate a statutory purpose, administrative agencies cannot contravene a statute). The clear language of the statutory definition of pole confines the term's meaning to poles, etc. that are "**owned in whole or in part by a public utility...**" RSA 374:34-a, I. (Emphasis added.) Proposed rule Puc 1302.09 would change the statutory definition to add language that modifies the statute which the rule is intended to implement.[1] More specifically, the rule would define "pole" to include facilities owned by providers of VoIP and IP-enabled services – entities that are not public utilities.[2] Because the proposed rule adds language to the statutory definition of pole, thereby modifying it, the proposed rule is ultra vires and therefore invalid. *See Bach v. New Hampshire Department of Safety,* 169 N.H. 87 (2016).

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[1] New Hampshire Rulemaking Register Notice Number 2017-163 (Dec. 7, 2017) regarding the instant rulemaking indicates that the state statutes which the rules are intended to implement are RSAs 374:3 (which concerns the Commission's general supervisory authority over "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") and 374:34-a (which concerns pole attachments).

[2] "[A] provider of VoIP service or IP-enabled service is not a public utility under RSA 362:2..."

b. The New Definition of Pole Impermissibly Expands the Commission's Authority Over VoIP and IP-Enabled Service Providers.

In addition to the fact that the new definition of "pole" is inconsistent with the statutory definition, NECTA opposes the new definition because it has the effect of impermissibly expanding the Commission's regulatory authority over VoIP and IP-enabled service providers. RSA 374:34-a, I clearly states that the term "pole" as used in that statute means any "pole, duct, conduit, or right-of-way that is use for wire communications or electricity distribution **and is owned in whole or in part by a public utility...**" (emphasis added). Because VoIP and IP-enabled service providers are not public utilities, *see* RSA 362:7, II, their poles, ducts, conduits or rights-of-way are not "poles" within the meaning of RSA 374:34-I and therefore are not subject to those subsections of RSA 374:34-a which expressly apply to "pole" owners. However, by expanding the definition of "pole" to include facilities owned by VoIP and IP-enabled service providers, the rules would subject those providers' poles, ducts, conduits or rights-of-way to the same requirements as those owned by a public utility. For example, VoIP and IP-enabled service providers would be subject to the same access requirements as public utility pole owners. *See* Puc 1303.01. In addition, VoIP and IP-enabled service providers could also be subjected to a Commission proceeding regarding rates, charges, terms and conditions of attachments if would-be attachers are unable to reach agreements with VoIP and IP-enabled service providers. *See* Puc 1304.02. Such a result is impermissible under the express provisions of RSA 374:34-a, II which limit the Commission's authority to regulate and enforce rates, charges, terms and conditions for pole attachments to situations where a "**pole** owner is unable to reach agreement with a party seeking pole attachments." (Emphasis added.) Again, because the term "pole" as used in RSA 374:34-a, I is limited to facilities owned by a public utility, the proposed rules cannot expand the Commission's authority to include, for example, establishing rates, terms and conditions for a VoIP or IP-enabled service provider's poles, ducts, conduits, etc.

NECTA recognizes that the Commission does possess some pole attachment authority under RSA 374:34-a, VIII over *private* entities that are not public utilities (*e.g.,* VoIP and IP-enabled service providers). However, that authority is limited to the regulation of "safety, vegetation management, emergency response, and storm restoration requirements for poles, conduits, ducts, pipes, pole attachments, wires, cables, and related plant and equipment of ...private entities located within public rights-of-way and on, over, or under state lands and water bodies." RSA 374:34-a, VIII. Thus, to the extent that the proposed amendments to the Commission's 1300 rules expand the Commission's authority over private entities beyond the limited authority stated in RSA 374:34-a, VIII, the proposed amendments are invalid.

c. Proposed Rule Puc 1301.02 (b) Impermissibly Expands the Applicability of the 1300 Rules to VoIP and IP-Enabled Service Providers' Poles.

The Commission's existing 1300 rules apply to two types of entities: a) "public utilities" within the meaning of RSA 362:7 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. N.H. Admin. R. Puc 1301.02. Proposed rule Puc 1301.02(b) adds a third category: "[o]wners of poles in whole or in part that are providers of 'VoIP service' or 'IP-enabled service,' as such terms are defined in RSA 362:7, I." For the reasons discussed above, NECTA submits that proposed rule Puc 1302.02 (b) should not be adopted as it improperly expands the Commission's pole attachment authority beyond that stated in RSA 374:34-a.

As noted previously, RSA 374:34-a, VIII expressly limits the Commission's regulatory authority over private entities/non-public utilities to the regulation of safety, vegetation management, emergency response and storm restoration requirements for poles, conduits, ducts, pipes, pole attachments, wires, cables, and related plant and equipment of private entities located within public rights-of-way and on, over, or under state lands and water bodies. Therefore, to the extent that the rules are intended to apply to entities other than public utilities and attaching entities (as that term is defined in Puc 1302.01), the rules must reflect the very limited authority expressed in RSA 374:34-a, VIII.

d. Nothing in RSA 362:7, II or RSA 362:7, III changes the foregoing analysis.

Commission Staff has asked that NECTA's written comments address NECTA's interpretation of RSAs 362:7, II and III, and "the apparent legislative intent evidenced thereby..." *See* Electronic mail message from David Wiesner to Susan Geiger (Jan. 29, 2018) (attached). At the outset, NECTA notes that the Commission's Order or Notice issued December 8, 2017 in DRM 17-139 indicates that the Puc 1300 rules "were adopted pursuant to the statutory mandate of RSA 374:34-a", and that the Order of Notice neither cites nor references RSA 362:7. Similarly, New Hampshire Rulemaking Register Notice Number 2017-163 (Dec. 7, 2017) indicates that the state statutes which the new 1300 rules are intended to implement are RSAs 374:3 (concerning the Commission's general supervisory authority over "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") and 374:34-a (concerning pole attachments); RSA 362:7 is not mentioned in the rulemaking notice. In addition, nothing in RSA 362:7 purports to grant rulemaking authority to the Commission. Accordingly, the Commission cannot invoke RSA 362:7 as authority for readopting its 1300 "Utility Pole Attachment Rules."

The provisions of RSA 362:7 which Staff has designated in the attached e-mail as being "most relevant" are highlighted below:

II. Except as set forth in paragraph III, notwithstanding any other provision of law to the contrary, no department, agency, commission, or political subdivision of the state, shall enact, adopt, or enforce, either directly or indirectly, any law, rule, regulation, ordinance, standard, order, or other provision having the force or effect of law that regulates or has the effect of regulating the market entry, market exit, transfer of control, rates, terms, or conditions of any VoIP service or IP enabled service or any provider of VoIP service or IP-enabled service. VoIP services and IP-enabled services are not public utility services and a provider of VoIP service or IP-enabled service is not a public utility under RSA 362:2, or an excepted local exchange carrier under RSA 362:7, I(c) and shall not be regulated as a public utility in any manner other than as set forth in paragraph III.

III. The prohibitions of paragraph II shall not be construed to:

(a) Affect or limit the application or enforcement of criminal or other laws that apply generally to the conduct of business in the state, including, without limitation, consumer protection, or unfair or deceptive trade practice protections;

(b) Affect, mandate, or prohibit the assessment of taxes or nondiscriminatory 911 fees, telecommunications relay service fees, or other fees of general applicability;

(c) Modify or affect the rights or obligations of any telecommunications carrier, or any duties or powers of the public utilities commission, under 47 U.S.C. section 251 or 47 U.S.C. section 252, as applicable;

(d) Affect the authority of the state or its political subdivisions, as applicable, to manage the use of public rights-of-way, including, but not limited to, any requirement for the joint use of poles or other structures in such rights-of-way;

(e) Affect or limit the application or enforcement of RSA 371:17 through RSA 371:24, RSA 374:2-a, RSA 374:28-a, RSA 374:34-a, RSA 374:48 through RSA 374:56, RSA 374:59, RSA 378:44 through RSA 378:48, or RSA 374:30, II;

NECTA's interpretation of the highlighted provisions above, as well as its understanding of the legislature's intent evidenced thereby, is derived from the statute as written, giving the words used their plain and ordinary meaning. This approach is consistent with that used by the New Hampshire Supreme Court. *See Bank of New York Mellon v. Dowgiert,* 169 N.H. 200, 204 (2016). When interpreting statutes, the New Hampshire Supreme Court discerns the legislature's intent from the words of the statute considered as a whole, first examining the language found in the statute, and when possible, ascribing the plain and ordinary meanings to the words used.

Bank of New York Mellon, supra. The Court interprets "legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id.* The Court also interprets statutory provisions in the context of the overall statutory scheme, and absent an ambiguity, the Court will not look beyond the language of the statute to discern legislative intent. *Id.* (Citations omitted.) In addition, the Court ordinarily will "'give effect to all words in a statute and presume that the legislature did not enact superfluous or redundant words.'" *Appeal of Marti,* 169 N.H. 185, 191 (2016) *quoting Winnacunnet Coop. Sch. Dist. v. Town of Seabrook,* 148 N.H. 519, 525-26 (2002).

Turning to the words found in RSA 362:7, II, it is apparent that the legislature plainly intended that a provider of VoIP or IP-enabled service "is not a public utility under RSA 362:2"... "and shall not be regulated as a public utility in any manner other than as set forth in paragraph III." The next logical question is: in what manner does RSA 362:7, III purport to regulate VoIP and IP-enabled service providers? Paragraph III of RSA 362:7 states that the prohibitions against regulating VoIP and IP-enabled service providers as public utilities shall not be construed to, among other things: "[a]ffect the authority of the state or its political subdivisions, as applicable, to manage the use of public rights-of-way, including, but not limited to, any requirement for the joint use of poles or other structures in such rights-of-way;" or "[a]ffect or limit the application or enforcement of RSA 374:34-a..." RSA 362:7, III (d) and (e).

The question of how RSA 374:34-a should be applied to or enforced against VoIP and IP-enabled service providers has been answered by NECTA above, *i.e.,* those providers are "private entities" within the meaning of RSA 374:34-a, VIII and therefore the Commission's authority to regulate those entities is governed by the terms of that statute which expressly limits the Commission's regulatory authority to issues of safety, vegetation management, emergency response, and storm restoration requirements for poles, conduits, ducts, pipes, pole attachments, wires, cables and related plant and equipment of those private entities that are located within public rights-of-way and on, over, or under state lands and water bodies.

The question arising under RSA 362:7, III (d) is: what is the nature and extent of the state's or its political subdivisions' authority to manage the use of public rights-of-way, including, but not limited to, any requirement for the joint use of poles or other structures in such rights-of-way? In answering this question, it is important to note that subsection (d) of RSA 362:7, III references the authority of the "state" and "political subdivisions," while other subsections of the statute specify duties, power or authority of "the commission." *See* RSA 362:7, III (c) and RSA 362:7, IV. Because all words in the statute must be given meaning, and because we must also presume that the legislature did not enact redundant or superfluous words, *Appeal of Marti, supra,* the words "state" and "political subdivisions" as used in RSA 362:7, III (d) must mean something other than "the Commission." Accordingly, consistent with principles of statutory construction, the provisions of RSA 362:7, III (d) must be construed as *not* applying to the Commission's authority, but rather to the authority of the *state* and its *political subdivisions* to manage the use of public rights-of way and joint pole use in such rights-of-way. That authority is found in the subdivision of Title 20 (Transportation) of the Revised Statutes

Annotated captioned "Lines of Telegraph and Other Companies in Highways." *See* RSAs 231:159 to :182.

RSAs 231:160 and 231:161 specify the authority and process by which the state transportation commissioner and municipal officials may permit and license the installation and maintenance of telecommunications and electric poles, structures, underground conduits and cables, along with their respective attachments and appurtenances in any public highways. RSA 231:160 provides as follows:

> Telegraph, television, telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways and the necessary and proper wires and cables may be supported on such poles and structures or carried across or placed under any such highway by any person, copartnership or corporation as provided in this subdivision and not otherwise.

The state's and municipalities' licensing and permitting authority also includes designating and defining "the maximum and minimum height of structures, the approximate location of such poles and structures and the minimum distance of wires above and of conduits and cable below the surface of the highway, and ... the approximate distance of such poles from the edge of the traveled roadway or of the sidewalk..." RSA 231:161, V. The state and municipalities also have the authority to issue "[j]oint licenses for erecting or installing and maintaining any jointly owned poles, structures, conduits, cables and wires..." RSA 231:169.

To implement the foregoing statutes, the New Hampshire Department of Transportation has adopted a comprehensive Utility Accommodation Manual[3] to regulate the accommodation, location and methods for installing, adjusting, relocating and maintaining utility facilities within highway and railroad rights-of-way. *Utility Accommodation Manual,* NH DOT, Bureau of Highway Design (Feb. 2010), p. 9-10. The manual defines "highway" as "denoting a public way for purposes of vehicular travel including the entire area within the right-of-way." *Id.*, p. 15.

In view of the foregoing, most reasonable interpretation of RSA 362:7, III (d) is that prohibition against the Commission's regulation of VoIP and IP-enabled service providers as public utilities found at RSA 362:7, II does not affect the authority of the New Hampshire Department of Transportation or municipalities under RSA 231:159 *et seq.* to manage the use of public rights-of-way, including the joint pole provisions of RSA 231:169.

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[3] The NH DOT Utility Accommodation Manual may be found at: https://www.nh.gov/dot/org/projectdevelopment/highwaydesign/units/designservices/utility/index.htm.

Even assuming, *arguendo*, that the word "state" as used in RSA 362:7, III (d) does include the Commission, that provision grants the Commission no greater authority over VoIP and IP-enabled service providers' poles, etc. than the authority set forth in RSA 374:34-a, VIII. Because that authority is not plenary[4], the Commission may only adopt regulations consistent with the wording of RSA 374:34-a, III, and cannot subject VoIP and IP enabled service providers and other private entities to all of the other pole attachment requirements[5] that apply to public utilities. Inasmuch as the proposed rules would do just that, they are ultra vires and should not be adopted.

3. Expanding the Statutory Definition of "Pole" and the Commission's Statutory Authority Could Nullify the State's Jurisdiction Over Pole Attachments.

The adoption of pole access obligations contrary to state law has ramifications under federal law. Such adoption could nullify New Hampshire's certification to regulate poles and return jurisdiction to the FCC. The federal certification law provides:

> For purposes of this subsection, a State *shall not be considered to regulate* the rates, terms and conditions for pole attachments - (A) unless the State has issued and made effective rules and regulations *implementing the State's regulatory authority* over pole attachments... 47 U.S.C. §224(c)(3)(A) (emphasis added).

Thus, inasmuch as the proposed definition of "pole" would extend pole access obligations beyond the scope of the State's regulatory authority as set forth in RSA 374;34-a, it would jeopardize the Commission's pole jurisdiction under federal law. Accordingly, the proposed change to the definition of "pole" should not be made, nor should proposed rule Puc 1301.02(b) be adopted.

4. Policy Reasons Militate Against Expanding the Definition of "Pole" and the Commission's Regulatory Authority Over VoIP and IP-Enabled Service Providers.

In addition to being improper as a matter of law, policy reasons militate against expanding the definition of pole and applicability of the 1300 rules to impose the same access, rate and other requirements upon competitive providers of VoIP or IP-enabled service as those that apply to public utilities, *i.e.*, the incumbent telecommunications and monopoly electric distribution companies. Such utilities own the vast majority of utility poles in New Hampshire,

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[4] The Commission's authority is "that which is 'expressly granted or fairly implied by statute.'" *Appeal of Public Service Company of New Hampshire,* 130 N.H. 285, 291 (1988).

[5] Moreover, to the extent that RSA 362:7, III (d) preserves existing authority "to manage the use of the public rights-of-way, including but not limited to, any *requirement* for the joint use of poles", the only such "requirement" as it relates to the Commission concerns "poles", which RSA 374:34-a, I. clearly defines as public utility poles.

and pole attachment access obligations have traditionally applied to them because of their virtual monopoly control of pole networks. On the other hand, VoIP and IP-enabled service providers are not public utilities. *See* RSA 362:7, II. They do not enjoy market power over pole resources, and they typically own minimal, if any, infrastructure. Accordingly, VoIP and IP-enabled service providers should not be treated in the same fashion as public utility pole owners.

5. Suggested Revisions to The Proposed Rules

In view of the foregoing, NECTA respectfully suggests that the Initial Rules Proposal be revised as follows:

a. Proposed Rule Puc 1301.02 (b) (which identifies parties to whom the rules apply) should be deleted and replaced with the following language, consistent with the provisions of RSA 374:34-a, VIII:

"public utilities and other private entities whose poles, conduits, ducts, pipes, pole attachments, wires, cables and related plant and equipment are located within public rights-of-way and on, over, or under state lands and water bodies, for the limited purpose of regulating safety, vegetation management, emergency response and storm restoration."

b. Proposed Rule Puc 1302.09 should be changed to reflect the definition of "pole" contained in RSA 374:34-a, I and existing Rule Puc 1302.08, as follows:

"'Pole' means 'pole' as defined in RSA 347:34-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.'"

c. Proposed Rule Puc 1304.06 (b) should be revised to include the word "pole" as follows: "In determining just and reasonable rates for all other **pole** attachments under this chapter, the commission shall consider..."

NECTA appreciates the opportunity to submit these comments and reserves the right to submit additional comments on or before the February 2, 2018 deadline. Please contact me if you have any questions about the above comments. Thank you.

Very truly yours,

Susan S. Geiger

cc: Service List (electronic mail)
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