STATE OF NEW HAMPSHIRE
Before the

DEPARTMENT OF ENERGY	**PUBLIC UTILITIES COMMISSION**
RUL 22-001	**DRM 22-023**
UTILITY POLE ATTACHMENT RULES	**UTILITY POLE ATTACHMENT RULES READOPTION AND AMENDMENT**

Comments of Crown Castle Fiber LLC

Crown Castle Fiber LLC ("Crown Castle") commends the Department of Energy ("Department") for its efforts to bring New Hampshire into the company of over thirty other states, including neighboring Maine and Vermont, that have adopted and are enjoying the advantages of one-touch make-ready ("OTMR") processes established by the Federal Communications Commission ("FCC") or modeled on the FCC rules. However, the Department should go beyond the narrow, legislatively-mandated implementation of OTMR. Likewise, the Public Utilities Commission ("Commission") should do more than reconfigure its rules to reflect the Commission/Department reorganization. Both agencies have an opportunity to encourage and facilitate the deployment of telecommunications facilities in New Hampshire by adopting additional reforms like those implemented by the FCC and several other states.

I. Summary.

The Department's proposal, with one exception, capably implements the Legislature's mandate in SB 88 to "adopt rules . . . implementing the provisions of One Touch Make Ready (OTMR) as adopted by the Federal Communications Commission in 47 CFR 1.1411(j)." While

the Department's proposal is a good first step, both the Department and the Commission should do more. To further enhance the speed and ease with which providers can deploy broadband in New Hampshire, the Department and Commission should consider and adopt additional changes to their rules.

Beyond OTMR, the Department should implement further reforms, including:

- Impose a time frame for all make-ready work in the electrical space.
    - Make the current deadline for wireless attachments above the communications space applicable to all electrical space work.
- Tighten make-ready time frames in the communications space to 30 days rather than 60 days.
- Clarify that not all make-ready on a pole with wireless facilities attached is deemed "complex."
- Expand the self-help remedy to include work anywhere on the pole.
- Facilitate more extensive use of contractors.
- Reduce restrictions on the use of boxing and extension arms.

Among the further reforms the Commission should implement are:

- Adopt an expedited dispute resolution process.
- Clarify the extent to which pole replacement costs should be borne by new attachers.

The Commission and the Department should not view their respective rulemakings narrowly. Instead, each should take the opportunity to enact additional reforms contained in or modeled on the FCC rules. Doing so will allow New Hampshire to enjoy the benefits of those reforms in parity with the majority of other states. Failure to do so will result in New Hampshire being left behind other states, including two adjacent states, in the ability to attract broadband investment to serve the needs of its citizens.

In the hope of assisting the Department and Commission, Crown Castle is submitting a redlined markup of the proposed En 1300 rules (Attachment 1) and proposed amendments to the Puc 1300 rules (Attachment 2) reflecting Crown Castle's proposals for reform.

II. Background.

A. Crown Castle.

Crown Castle is at the forefront of our nation's communications revolution, deploying fiber optic and wireless infrastructure that will serve as the backbone for next-generation communications. Crown Castle has more than twenty-five years of experience building and operating network infrastructure. With more than 40,000 towers, 115,000 small wireless facilities constructed or under contract, and more than 80,000 route miles of fiber, Crown Castle is the country's largest independent owner and operator of shared infrastructure. From its more than 100 offices around the nation, Crown Castle partners with wireless carriers, technology companies, municipalities, and utilities to design and deliver unique end-to-end infrastructure solutions that bring new innovations, opportunities, and possibilities to people and businesses around the country.

As an owner, operator, and/or manager of a wide range of telecommunications assets, Crown Castle interacts daily with state and local jurisdictions and utilities regarding a variety of deployment issues, including permitting and regulatory issues related to towers, small wireless facilities, and fiber. In its efforts to site tens of thousands of small wireless facilities and fiber optic lines across the country, Crown Castle regularly engages with investor-owned utilities and other pole owners in New Hampshire and other states to gain access to existing utility poles, streetlights, and other infrastructure for the deployment of telecommunications facilities. Accordingly, Crown Castle has gained extensive experience and expertise that allow it to identify

issues that frequently arise in the context of deploying communications facilities and to offer solutions that will usher positive deployment outcomes in New Hampshire.

B. The Importance of Broadband Deployment.

The past several years have shown that broadband is a critical tool necessary to participate in today's society. Broadband is critical infrastructure for education, healthcare, commerce, entertainment, and employment. Indeed, broadband has been instrumental in mitigating the effects of a global pandemic.[1] The fourth quarter of 2020 saw a 51% increase of broadband traffic over the same quarter the year before, with an increase in upstream usage of 63%.[2] Unfortunately, the benefits of broadband have not been available to all. The Brookings Institution recently reported, "When schools switched to distance learning in March 2020, around 15 million students [in the United States] found themselves without broadband internet, worsening a 'homework gap' between school age children with and without high-speed internet at home."[3] Conversely, broadband access can "improve health and life outcomes, offering access to remote healthcare providers, online social networks, and educational opportunities."[4]

In short, broadband access is a primary factor to ensure full participation in today's society and economy. To meet the increased demand for connectivity, particularly in residential areas where demand has not been met, and to foster competition in the provision of this critical service, it is imperative to create conditions to facilitate construction of broadband infrastructure.

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[1] Paul Katz and Juan Jung, The Economic Impact of Broadband and digitization through the COVID-19 Pandemic, Econometric Modeling, ITU Publications (June 2021).

[2] O'Shea, D. (April 1, 2021). Pandemic Drove Upstream Broadband Traffic Boom: OpenVault. Fierce Telecom. https://www.fiercetelecom.com/telecom/pandemic-drove-upstream-broadband-traffic-boom-openvault.

[3] Campbell, S., Ruiz Castro, J., and Wessel, D. (2021, August 18, updated November 9). The Benefits and Costs of Broadband Expansion. Brookings. https://www.brookings.edu/blog/up-front/2021/08/18/the-benefits-and-costs-of-broadband-expansion.

[4] *Id.*

Adopting OTMR procedures is one way to facilitate broadband deployment. But the Department and Commission should not stop there, and instead should adopt further measures to bring this important resource to the people of the Granite State.

C. The Majority of States Already Enjoy the Additional Reforms Crown Castle Advocates Here.

The FCC significantly reformed its pole attachment rules in August 2018. *In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Dkt. No. 17-84, Third Report and Order and Declaratory Ruling, FCC 18-111, 33 FCC Rcd 7705 (Aug. 3, 2018) ("FCC OTMR Order").[5] Among the improvements adopted by the FCC were OTMR, expansion of the self-help remedy to make-ready outside the communications space, and expanded use of contractors. The FCC rules are directly applicable in twenty-seven states throughout the country, including, in New England, Rhode Island. *States That Have Certified That They Regulate Pole Attachments,* WC Docket No. 10-101, Public Notice, DA 20-302 (March 19, 2020).[6] In August 2020, the United States Court of Appeals for the Ninth Circuit upheld the August 2018 rules in their entirety. *City of Portland v. United States*, 969 F.3d 1020, 1049-53 (9th Cir. 2020).[7]

In other states that have assumed jurisdiction over pole attachments as has New Hampshire, there is a recent trend toward adopting pole attachment rules modeled on the FCC's 2018 rules, including OTMR procedures and self-help outside the communications space. Among other advantages, the trend toward largely uniform adoption of the FCC rules helps provide regulatory

[5] https://docs.fcc.gov/public/attachments/FCC-18-111A1_Rcd.pdf.

[6] https://ecfsapi.fcc.gov/file/031903600081/DA-20-302A1_Rcd.pdf. States that have not adopted their own regulations are subject to the FCC's rules.

[7] *City of Portland v. US*, 969 F. 3d 1020 - Court of Appeals, 9th Circuit 2020 - Google Scholar.

consistency for providers deploying broadband facilities across state lines. In January 2020, the Vermont Public Utility Commission amended its rules to adopt OTMR and self-help provisions similar to the FCC's. *See* VT Rule 3.708 Amendments.[8] Similarly, the West Virginia Public Service Commission assumed jurisdiction by adopting rules, effective February 2, 2020, very similar, if not identical, to the FCC's.[9] Pennsylvania also assumed jurisdiction and adopted rules, effective March 18, 2020, incorporating by reference the entirety of the FCC rules.[10] New Hampshire's neighbor to the east, Maine, adopted rules largely based on the FCC rules effective April 2021.[11] And, just last month, Connecticut adopted various reforms based on the FCC rules, including OTMR and make-ready timelines resembling the FCC's.[12] Adding these five states, including three in New England, to the twenty-seven where the FCC rules directly apply means that just under two-thirds of the states employ FCC-like OTMR, timelines, and self-help procedures.

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[8] *Petition of Vermont Department of Public Service for Rulemaking to Amend Public Utility Commission Rule 3.708*, Case No. 19-0252, Adopted Rule 3.700, Pole Attachments (Jan. 24, 2020) (https://epuc.vermont.gov/?q=downloadfile/396153/138010) ("VT Rules").

[9] http://apps.sos.wv.gov/adlaw/csr/readfile.aspx?DocId=52879&Format=PDF

[10] *Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission*, Dkt. No. L-2018-3002672, Final Rulemaking Order (Aug. 29, 2019) (http://www.puc.pa.gov/pcdocs/1634454.docx). Because Pennsylvania incorporated the FCC rules by reference, in these comments, a separate citation to the Pennsylvania rules often will not be provided.

[11] *Amendments to Chapter 880 of the Commission's Rules – Attachments to Joint Use Utility Poles; Determination and Allocation of Costs; Procedure*, Docket No. 2020-00281, Order Amending Rule and Statement of Factual and Policy Basis (Apr. 8, 2021) (https://mpuc-cms.maine.gov/CQM.Public.WebUI/MatterManagement/MatterFilingItem.aspx?FilingSeq=110171&CaseNumber=2020-00281). The Chapter 880 rules, effective as of April 26, 2021, are available at https://www.maine.gov/sos/cec/rules/65/407/407c880.docx.

[12] *PURA Investigation of Developments in the Third-Party Pole Attachment Process – Make-Ready*, Docket No. 19-01-52RE01, Decision (May 11, 2022) ("CT Order"), http://www.dpuc.state.ct.us/dockcurr.nsf/8e6fc37a54110e3e852576190052b64d/4d4b047910a0304d8525883f0055a9cb/$FILE/190152RE01-051122.pdf.

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In considering what rules to adopt, the Department and the Commission should be mindful that nationwide, significant investment is flowing into building the superior fiber networks society needs. If New Hampshire adopts rules that are less favorable to the deployment of fiber networks than other states, it will deter investment from flowing into the state. If it is slower, more complicated, and more expensive to build here, New Hampshire may be passed over for broadband investment. Conversely, if it is easier, quicker, and cheaper to deploy networks here, the state will attract investment. Thirty-two states are operating under the FCC pole attachment rules or equivalents. The FCC rules are the state of the art for facilitating deployment of new networks and are the standard against which investors will assess the attractiveness of investing in New Hampshire. The Department and Commission should adopt rules that make it at least as desirable to invest here as in those FCC states. Crown Castle respectfully urges the Commission and Department to join these thirty-two other states and adopt similar reforms, as set forth below.

D. The Question of "Controversy."

At an earlier stage of the Department's pre-rulemaking inquiry, certain stakeholders suggested going no further than narrow adoption of the OTMR process, lest there be "controversy." It is hard to understand how rules and procedures largely applicable in two-thirds of the states could be controversial. Such widespread adoption makes the rules mainstream. Stakeholders that operate in different states or regions would welcome the efficiency and predictability that such uniformity brings. The FCC rules are not controversial. At this point they are conventional.

III. One Touch Make-Ready.

The Department's adoption of the FCC's OTMR provision pursuant to SB 88's requirement will be a significant enhancement to the process for expanding broadband availability to New Hampshire's citizens. Crown Castle supports it with one caveat.

As the FCC described, "OTMR speeds broadband deployment by better aligning incentives than the current multi-party process. It puts the parties most interested in efficient broadband deployment—new attachers—in a position to control the survey and make-ready processes." FCC OTMR Order ¶ 22. The Ninth Circuit, in affirming the FCC OTMR rules, stated, "In adopting the One-Touch Make-Ready Order, the FCC intended to make it faster and cheaper for broadband providers to attach to already-existing utility poles." *City of Portland*, 969 F.3d at 1049-50.

Because it is a more efficient and cost-effective process, Crown Castle expects that it will utilize OTMR as a matter of course. The FCC concurs that OTMR will become, when applicable, the routine make-ready method: "[B]ecause this option will apply to the substantial majority of pole attachment projects, it will speed broadband deployment." FCC OTMR Order ¶ 17.

There is an inadvertent flaw in the Department's proposal, however. The proposed definition of "complex make-ready" — which is ineligible for OTMR pursuant to proposed En 1303.13 — is as follows:

> "Complex make-ready" means transfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communications attachment or relocation of existing wireless attachments. Any and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers, are considered complex.

Proposed En 1302.05. The second sentence, particularly the phrase "any and all wireless activities," is ambiguous and complicating. Make-ready work should not automatically be considered complex whenever a pole has wireless equipment attached. For example, a backhaul

cable from a pole-mounted antenna is no different than a cable carrying land-based telecommunications traffic. To automatically classify the wireless backhaul cable as complex will discourage wireless facilities and discriminate on the basis of technology, with no countervailing benefit in terms of safety and reliability. Make-ready work on a pole containing a wireless facility should only be deemed complex if it actually requires relocation of the wireless antennas and associated transmitters. That restriction is already set forth at the end of the first sentence. The second sentence creates ambiguity and confusion.

Crown Castle suggests that some additional clarifying language would reduce the ambiguity and result in a more workable definition. The Connecticut Public Utilities Regulatory Authority (PURA) recently considered this precise issue and added language at the end of the definition to clarify when wireless work is considered complex (additions in bold italics):

> "Complex make-ready" means transfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communications attachment or relocation of existing wireless attachments. Any and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers, are considered complex. ***A utility pole that has wireless facilities does not automatically classify any make-ready work done on that pole as meeting the above definition of "complex make-ready." Wireless attacher's work on its wireline backhaul facilities may be no different than wireline work done by other attachers, and where appropriate, may be considered simple make-ready work according to that definition.***

CT Order, Appx. A, p. 1, § 6.

Crown Castle submits that the PURA modification is a sensible clarification that balances encouraging OTMR and self-help with preserving the interests of safety and reliability associated with truly "complex" work. Crown Castle respectfully urges the Department to adopt the PURA's clarifying language. See Crown Castle's suggested revision to proposed En 1302.05.

IV. Additional FCC Reforms the Department Should Adopt.

The Department should not be content with merely complying with the narrow mandate of SB 88 to adopt 47 C.F.R. § 1.1411(j). SB 88 does not set the outer limits of permissible reform. The Department can and should do more by adopting additional reforms that have been present in the FCC rules since 2018, which two-thirds of the states around the country enjoy. These include enhanced use of contractors, tightening and clarification of make-ready timelines, and expansion of the self-help remedy to areas outside the communication space. Some of these are necessary for OTMR to achieve its full benefits; others will facilitate fuller and more rapid broadband deployment.

B. Contractors.

1. Additions to Contractor List.

The Department's proposal, identical to existing rules, requires pole owners to maintain "a list of not less than 3 contractors" authorized to perform surveys and make-ready on its poles. Proposed En 1303.12(i). To ensure a sufficient supply of contractors, the rules should permit requesting parties to propose additional qualified contractors for inclusion on the list. The FCC, West Virginia, Pennsylvania, Maine, and Connecticut rules contain this sensible requirement. 47 C.F.R. § 1.1412(a); WV Rule 11.1; Maine Rules § 2(A)(10)(c); CT Order, Appx. B, p. 9, § C(1).[13] As the FCC explained, "We adopt this requirement so that a utility that maintains a list does not have the ability to prevent deployment progress, which would be contrary to our goal in adopting OTMR." FCC OTMR Order ¶ 38.

[13] Vermont takes a slightly different approach. It requires both pole owners and attachers to file lists of contractors with the Commission and Public Service Department. Generally, contractors must be chosen from those lists. VT Rule 3.708(K)(1)-(3).

To ensure that safety and quality of work are not compromised, the rules also should prescribe certain minimum qualifications that contractors must possess for inclusion on the list. These include agreement to abide by applicable rules, regulations, and safety guidelines and maintain adequate insurance. All of the FCC, Vermont, West Virginia, Pennsylvania, Maine, and Connecticut regulations impose these minimum requirements upon contractors permitted to perform make-ready work. 47 C.F.R. § 1.1412(a); VT Rule 3.708(K)(5); WV Rule 11.3.1; Maine Rules § 2(A)(10)(f); CT Order, Appx. B, p. 9-10, § C(2). As the FCC explained, "These requirements collectively will materially reduce safety and reliability risks, as well as delays in the completion of pole attachments, by allowing one qualified contractor to perform all necessary make-ready work instead of having multiple contractors make multiple trips to the pole to perform this work." FCC OTMR Order ¶ 39.

Crown Castle's recommended language to effectuate the addition of contractors to the list, which reflects the FCC rule in 47 C.F.R. § 1.1412(a), is contained in a new sentence added to proposed En 1303.12(i). New provisions governing contractor qualifications, like those in the enacted FCC, Vermont, West Virginia, Pennsylvania, Maine, and Connecticut rules, are contained in a new proposed section 1303.12(j).

2. Use of Contractors Not on the List Under Certain Circumstances

Cases may arise where work is delayed because the pole owner's approved contractor list is inadequate or there is no contractor on the list available to do the work in timely manner. In such cases involving simple make-ready (including OTMR), requesting parties should be permitted to use contractors that are not on the list. Under the FCC, West Virginia, Pennsylvania, Maine, and Connecticut rules, use of unlisted but qualified contractors is permitted both for OTMR and simple self-help in the communications space. To ensure safety and reliability of the work,

requesting parties who use unlisted contractors must certify that such contractors meet the same minimum qualifications as for contractors proposed for inclusion on the list. The pole owner may disqualify any contractor not on its list, but may only do so for reasons of safety or reliability. If the owner does so, it must identify at least one available contractor. 47 C.F.R. § 1.1412(b)(1); WV Rule 11.2; Maine Rules § 2(A)(10)(d)-(e); CT Order, CT Order, Appx. B, p. 9, § C(1); *see* FCC OTMR Order ¶¶ 40, 104.

Allowing use of unlisted contractors for OTMR and simple make-ready when the pole owner's list does not produce a contractor who can perform the work in timely manner will prevent any inadequacy in the list from delaying broadband deployment. Accordingly, Crown Castle has proposed additional language reflecting the FCC rule set forth in 47 C.F.R. § 1.1412(b)(1) & (2) for inclusion in new paragraphs (1) and (2) in renumbered En 1303.13(k) (currently En 1303.12(j)).[14]

C. Self-help.

The Department can remove a major obstacle and source of delay to broadband deployment by following the example of the FCC, Vermont, West Virginia, Pennsylvania, and Maine and expanding the self-help remedy to include complex self-help, including in the electrical space. The availability of self-help at any place on the pole will allow requesting parties to get the work done when delays occur, or will provide an incentive for entities who insist on doing the work themselves to get it done on time. Either way, broadband deployment will be expedited and the citizens of New Hampshire will benefit correspondingly.

[14] To be clear, consistent with the FCC rules, Crown Castle's proposed addition would only permit use of unlisted contractors for simple make-ready (including OTMR and simple self-help). For complex make-ready, whether in or outside the communications space, only contractors on the list (including new additions to the list proposed by the requesting party) may be used.

In its OTMR Order, the FCC explained that it originally confined the self-help remedy to the communications space, but changing circumstances necessitated an update to the rule. The FCC noted that without self-help, the only remedy for nonperformance or delay that a new attacher has at its disposal is a complaint. That, however, is an "insufficient tool for encouraging compliance with our deadlines and speeding broadband deployment. We expect the availability of self-help above the communications space will strongly encourage utilities and existing attachers to meet their make-ready deadlines and give new attachers the tools to deploy quickly when they do not." FCC OTMR Order ¶ 98.

The FCC acknowledged that work in the electrical space is different than in the communications space, but noted that its rules included safeguards to ensure the safe and proper performance of make-ready outside the communications space. Such safeguards included maintaining the longer deadlines associated with complex make-ready work, so the self-help remedy would not be triggered prematurely; requiring use only of owner-approved contractors; and the ability of pole owners to do the work themselves (on time) and thereby make use of the self-help remedy unnecessary. *Id.* ¶ 99.

Expansion of the self-help remedy beyond the communications space to all other areas of the pole was one of the rulings in the FCC OTMR Order that was specifically challenged before the United States Court of Appeals. The Court had no trouble upholding the FCC's decision:

> Prior to the One-Touch Make-Ready Order, attachers could hire contractors to perform preparatory work only on the lower portion of a pole. The self-help rule lets the utility-approved contractors prepare the entire pole for attachment. *Id.* [FCC OTMR Order] ¶¶ 97–99. Petitioners argue that this expansion is contrary to Section 224(f)(2) because permitting attachers to hire contractors to work on the upper portion of poles jeopardizes safety. Yet, the rule has a number of provisions designed to mitigate any increased safety risks. For example, the rule gives a utility a ninety-day window to complete the preattachment work itself (thereby circumventing the rule's contractor provisions entirely). *Id.* ¶ 99. The rule also requires new attachers to use a utility-approved contractor to perform the self-help

> work, and it requires the attacher to give the utility advanced notice of when the self-help work will occur so that the utility can be present if it wishes. *Id.* ¶¶ 99–106.
>
> The rule represents a change from earlier rules on what self-help measures an attacher could perform, and the FCC explained that use of approved contractors would improve efficiency. *Id.* ¶ 97. A complaint process in the old self-help rule allowed new attachers to file complaints when a utility was not preparing the pole in a timely fashion. This did not encourage efficiency. It was an "insufficient tool for encouraging [a utility's] compliance with [the FCC's] deadlines." *Id.* ¶ 98. The FCC reasonably views the deployment of new 5G technology to be a matter of "national importance," justifying extension of the self-help rule to promote timely installations. *Id.* ¶ 97. The self-help rule is thus not arbitrary or capricious.

City of Portland v. United States, 969 F.3d at 1051.

West Virginia Rule 10.9.2 and Pennsylvania's adoption of the FCC rules also extend the self-help remedy outside the communications space.

The Vermont PUC regulations enacted in January 2020 also permit self-help outside the communications space. Rule 3.708(L)(2) provides that if the pole owner does not complete "Make-Ready work" within the specified time frame,[15] the new attaching entity may hire a contractor from the approved list to complete the "Make-Ready." Under the Vermont rules, "Make-Ready" is a defined term that includes both Simple and Complex (*i.e.*, work outside the communications space) Make-Ready. VT Rule 3.702(I).

Maine similarly permits self-help "if make ready is not complete within the time period specified in Sections 2(A)(5) through (7) of this Chapter"—which encompass make ready both in the communications space and outside it. Maine Rules § 2(A)(9)(b).

Crown Castle has proposed language to amend En 1303.12(c)(2) and 1303.12(h) to include make-ready outside the communications space within the scope of the self-help remedy. First,

[15] Vermont imposes a uniform, 60-day deadline (extendable for large projects) for both simple and complex make-ready. Rule 3.708(D).

Crown Castle proposes amending En 1303.12(h) in two places to specify that the self-help remedy may be invoked for noncompliance with the time periods in En 1303.12(c)(1) ***and*** (2)—that is, all make-ready including work outside the communications space. In addition, the restriction of self-help availability to a requesting party requesting attachment "in the communications space" should be deleted.

In addition, as described below, Crown Castle proposes to amend En 1303.12(c)(2) and 1303.12(d) to make clear that the notice requirement and time frames for make ready in that section include ***all*** make ready outside the communications space, not just for wireless attachments. Also, Crown Castle proposes to add a new subsection mirroring En 1303.12(c)(1)(g), requiring that the make-ready notice issued by the pole owner state that the requesting party may perform the work if the make-ready is not completed on time.

D. Make-Ready Timelines.

1. In the Communications Space.

Proposed En 1303.12(c)(1)(c) contains a requirement that make-ready work in the communications space shall be completed within 60 days, extendable in the case of larger orders. The Department should tighten that time frame to 30 days (75 for larger orders).

Thirty days is the standard in the FCC rules, in neighboring Maine, and in Connecticut. 47 C.F.R. § 1.1411(e)(1)(2); Maine Rules, § 2(A)(5)(a)(ii); CT Order, Appx. B, P. 6, § B(3)(i)(B). New Hampshire should not disadvantage itself vis-à-vis other states by subjecting its citizens to longer make-ready timelines. The Department should revise En 1303.12(c)(1)(c) to require a 30-day deadline (75 for larger orders) for make-ready in the communications space.

2. Outside the Communications Space.

The Department's proposed rules regarding make-ready work outside the communications space only provide a timeline for work involving wireless attachments. En 1303.12(c)(2). For other work, including pole replacements,[16] the rules are silent. This significant gap in the rule impedes the progress of broadband deployment in New Hampshire. The pole owner is under no deadline to complete or ensure the completion of make-ready outside the communications space and Crown Castle often experiences undue delay in completing this work and building its networks. Second, the lack of a deadline for make-ready completion means there is no trigger for any self-help remedy.

The consequences for New Hampshire are serious. As noted previously, the Department should be acting to facilitate expansion of broadband networks to improve the economic, health, educational, and social opportunities for its citizens. The Department also should foster broadband investment and reduce disincentives for such investment.

Thus, the Department should take this opportunity to remove this roadblock. The FCC rules, as well as those of Vermont and Maine, impose a deadline on the pole owner to complete make-ready, or ensure that existing attachers complete it, within set time frames. 47 C.F.R. § 1.1411(5)(2); Vermont Rule 3.708(D); Maine Rules § 2(A)(5)(b). New Hampshire risks falling behind if it does not impose similar deadlines, including a deadline that triggers the new attacher's self-help remedy.

To remedy this deficiency, Crown Castle recommends removing the restrictions in En 1303.12(c)(2) and 1302.12(d) limiting those provisions to wireless attachments, thereby making

[16] Pole replacements are a component of make-ready under En 1302.08: "'Make-ready' means all work, including but not limited to . . . replacement of a pole . . . ."

the provision applicable to all work outside the communications space. This will establish specific deadlines of 90 days (or 135 for larger orders) and permit the attacher to utilize the self-help remedy if work remains incomplete after that time. In addition, as noted above, the Department should include under 1303.12(c)(2) a provision mirroring 1303.12(c)(1)(g), giving notice that if work outside the communications space is not completed within the deadlines, the new attacher may invoke self-help to get it done.

E. Other Improvements Based on the FCC Rules the Department Should Implement.

Crown Castle suggests a few more improvements that further incorporate existing FCC rules.

Contents of Make-Ready Application. Proposed En 1303.04(a) requires that an attachment application provide the information necessary under the pole owner's procedures. But there is no requirement that the pole owner specify in advance what information is necessary. This potentially leads to a game of "hide the ball" with shifting standards for application review.

Crown Castle urges adoption of qualifying language that requires the pole owner to state up front exactly what information is required. The FCC rules impose such a requirement on the pole owner by requiring the owner to specify the necessary information in documents publicly available at the time the application is submitted. 47 C.F.R. § 1.1411(c)(1). Crown Castle has proposed language adopted from the FCC rule under En 1303.04(a). Including such a requirement will increase transparency and lessen delays resulting from disputes over what information was or should have been included in the application.

Crown Castle notes that similar language requiring the owner to specify in advance what information the application must contain appears in the FCC's OTMR provisions governing applications as well as in the Department's proposal adopting those OTMR provision. 47 C.F.R.

§ 1.1411(j)(1)(ii); En 1303.13(b). It makes sense for the Department's rules to impose parallel requirements on owners in the non-OTMR context as well.

Application Review for Completeness. The Department should include a review-for-completeness process for non-OTMR make ready like that proposed for its OTMR process.

Under the FCC rules, the pole owner reviews the attachment application for completeness before reviewing it on the merits. If the owner finds an application incomplete, it must notify the applicant of deficiencies. The applicant then responds, addressing only the identified deficiencies. Specified timelines govern each step. Failure of the owner to respond within the specified timeline results in the application being deemed complete. *See* 47 C.F.R. § 1.1411(c)(1). That process protects both parties by ensuring that the right information is in the owner's possession, but within reasonable time frames.

Crown Castle proposes that the Department adopt a similar procedure. Suggested language is included in our redline as proposed En 1303.04(a)(1) & (2).

As above, this review-for-completeness process is included in the OTMR portion of the Department's proposal. Proposed En 1303.13(b); *see* 47 C.F.R. §§ 1.1411(j)(1)(ii)(A) & (B). There is no reason not to include a similar process, modeled, as is the OTMR example, on the FCC rules, in the non-OTMR application process as well.

No Denial for Preexisting Violations. Crown Castle suggests that the Department include a specific provision that the grounds for denying an application may not include preexisting violations not caused by the requesting applicant. New applicants should not be penalized for the failure of the pole owner or existing attachers to maintain facilities that comply with rules and standards. The FCC rules contain such an explicit prohibition in § 1.1411(c)(2). Crown Castle's

redline includes suggested language in a new subsection En 1303.04(d) that is copied verbatim from this FCC rule.

V. The Department Should Amend Certain of its Rules Governing Construction Techniques.

To facilitate more rapid and widespread deployment of broadband networks, the Department should liberalize use of boxing and extension arms. The Department also should eliminate the unnecessary imposition of extra costs on a new attacher when an existing attacher wants, for its own purposes, to maintain the lowest position on the pole.

A. Boxing and Extension Arms.

The Department's proposed En 1303.10, based on the existing rule, severely restricts a sensible, time-tested tool to reduce the costs of building broadband networks. Field-side attachments, or "boxing," where an attachment utilizes available space on the entire length of the field-side of the pole line, as opposed to "weaving," where the same attachment line weaves between the road-side of one pole in a pole line and then on the field-side of another pole line in the same pole line, has been a long recognized regulatory position and industry standard that facilitates the deployment of advanced broadband efficiently, and in a National Electrical Safety Code ("NESC") compliant manner.

Boxing is permitted by the NESC, and the practice is set forth in the BellCore Blue Book (i.e., the standards used by ILECs for their attachments in the communications space on a pole). Boxing makes use of diagonal measurement to achieve the recommended 12-inch separation between facilities. *See* NESC Rule 235H(1). Boxing is especially attractive because poles often have numerous existing facilities on the street side of the pole, but few if any on the field side. Because available NESC-compliant space can be used on the field side, boxing dramatically

reduces or eliminates the amount of work required to make space for new attachments ("make-ready work"). This creates a "greenfield" opportunity on the field side. Importantly, by effectively doubling the useable communications space on a given pole, boxing dramatically reduces the need for costly pole replacements.

Nearby states have taken strong steps to promote the pro-competition and pro-broadband policy of boxing. For example, Maine's rules state: "A prohibition on boxing poles (i.e., placing cables on both the road side and the field side of a pole) which can be safely accessed by emergency equipment and bucket trucks or ladders provided that such technique complies with the requirements of applicable codes" is presumptively unreasonable. Maine Rules, § 2(B)(1).

Similarly, use of extension arms may allow the placement of facilities on poles that otherwise would have to be replaced at much greater cost. Any asserted safety concerns should be alleviated by the general requirement that all attachments must be compliant with the NESC, Blue Book, and other applicable codes and regulations. En 1303.07(a).

Accordingly, Crown Castle has suggested amendments to proposed En 1303.10 and 1303.11 reflecting the Maine rules that make prohibitions on the use of boxing and extension arms presumptively unreasonable, and require the owner to overcome the presumption only by clear and convincing evidence that unique circumstances exist.

B. Lowest Pole Position.

Proposed En 1303.09(b), based on an existing rule, requires that when the only space to accommodate a new attacher is the lowest position on the pole, and the lowest existing attacher "chooses" to relocate its facilities downward to maintain the lowest position, the new attacher must pay 40% of the cost of such relocation.

The anticompetitive effects of this rule are obvious. The only entity likely to invoke this provision is the incumbent LEC. The ILEC is in actual or potential competition with new broadband providers, and the existing provision allows the ILEC to capriciously "choose" to relocate its facilities. Driving up new entrants' costs serves incumbents' interests without any corresponding increase in safety or reliability.

Crown Castle has proposed changes to proposed En 1303.09(b) that eliminate the requirement that new attachers pay for the ILEC's preference to relocate its facilities downward. In addition, to prevent such relocation from being used to delay a new entrant's deployment, Crown Castle also proposes to add language specifying that such relocation is part of make-ready and must be done within the same time frames as other make-ready under proposed En 1303.12(c).

C. "Blanket Bans" on Pole Attachment Position.

In Crown Castle's experience, pole owners often impose ad hoc, unilateral bans on the attachment of particular equipment to utility poles or attachment to particular sectors of a pole without providing clear safety or engineering rationale. The Department's existing rules require the pole owner to produce pole-specific evidence when denying a particular attachment: "The pole owner's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information represent grounds for denial as specified in En 1303.01." En 1303.04(c). The FCC rule is essentially the same: "The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards." 47 C.F.R. § 1.1403(b).

Despite that clear and unambiguous mandate, Crown Castle has found that, in practice, utilities still deny attachment applications based on categorical prohibitions. For example, certain utilities ban attachment of equipment in the "unusable" space of their poles, but themselves attach facilities in the same "unusable" space. Others restrict where antennas may be placed on the pole, which policies will undoubtedly impact the deployment of next generation 5G antennas. Crown Castle has encountered utilities that ban antenna attachments in certain segments of the communications space on a blanket basis, rather than addressing any antenna-related issues on a pole-by-pole basis. Because certain pole owners and attachers offer competing services, restrictions of this nature should be scrutinized closely due to the potential for anticompetitive practices and the ability to saddle certain classes of attachers with additional, unnecessary costs.

Crucially, there is no justifiable safety rationale for blanket prohibitions. While the NESC may impose additional requirements to address regional specific concerns (e.g., ice loading in colder regions), the NESC contains no blanket prohibitions on attaching to any specific type of pole or in any particular location.

The FCC, which has had a similar rule in place requiring that utilities provide a pole-specific justification for denial for many years, nonetheless saw fit to issue an order in 2020 reaffirming that such "blanket bans" on attachments to any portion of a utility pole are impermissible under the provision of its rules that a "denial of access . . . be specific" to a particular request. *See In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Declaratory Ruling, DA 20-796, 35 FCC Rcd. 7936, ¶ 3 (2020)[17] (citing 47 C.F.R. § 1.1403(b)).

[17] https://docs.fcc.gov/public/attachments/DA-20-796A1.pdf.

To ensure that there is no question that blanket bans are impermissible, the Department should make a prohibition on such blanket bans explicit in its rules. The Department also should explicitly require that any denial must state the precise concerns regarding the particular attachment(s) and the particular pole(s) at issue. *See id.*, ¶ 8. To effectuate this, Crown Castle has proposed additional language based on paragraphs 3 and 8 of the FCC Declaratory Ruling for inclusion in En 1303.04(c).

VI. Incorporation of Rules into Agreements.

The Department's proposed and existing rules favor agreements between owners and attachers. *See* En 1303.02-.03. While agreements facilitate the day-to-day interactions between owners and attachers, they can impede change, including adopting the kind of reforms the Department contemplates here. Some existing pole agreements are old and may contain provisions that do not reflect current national and state policies. Negotiating new agreements to incorporate policy changes involves significant transaction costs. As the FCC has recognized, bargaining power between owners and attachers is unequal.[18]

The Department should consider how the changes adopted in this rulemaking (and other changes in law, regulation, and policy) should be incorporated into the relationship between owners and attachers. En 1303.02 and current regulations provide that pole owners "shall negotiate in good faith with respect to the terms and conditions of attachment." Further, SB 88 contains an express mandate that parties implement timelines established by Department rules for negotiating and implementing pole attachments:

[18] *See FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987); *Selkirk Communications, Inc. v. Florida Power & Light Co.*, 8 FCC Rcd. 387, 389 (Jan. 14, 1993) (stating that "[d]ue to the inherently superior bargaining position of the utility over the cable operator in negotiating the rates, terms and conditions for pole attachments, pole attachment rates cannot be held reasonable simply because they have been agreed to by a cable company").

> In entering into pole attachment agreements, all parties shall abide by the timelines established by the department in rules adopted pursuant to RSA 541-A, for negotiating and implementing pole attachments. The failure of any party to do so may be considered a lack of good faith negotiation, unless each party agrees to following alternate timelines.

SB 88, Part II, § 1, amending RSA 374:34-a, V.

Thus, the will of the Legislature is that the Department rules should be incorporated into pole attachment agreements by default; failure to do so is not negotiating in good faith. The pole owner's obligation to negotiate terms and conditions necessarily includes the owner's ensuring compliance with all effective regulations and incorporating them into existing and future agreements. If pole owners are not required to promptly and efficiently modify the many existing agreements to incorporate rule changes, this rulemaking effort will be of little use. The existing language in the rules to this point may be sufficient, but it remains somewhat vague.

To further clarify the existing rules and reduce the potential for future dispute, the Department should specify that the pole owner's duty to negotiate the terms and conditions of attachment includes, by default, incorporation of current Department regulations including OTMR and whatever else results from this and any future rulemaking. While parties may be willing to agree to something else, in the absence of free agreement *by both parties*, the Department's rules should apply.

In addition, SB 88 expressly authorizes the Department to specify "timelines . . . for negotiating and implementing pole attachments." The Department, therefore, may and should specify both (1) deadlines for amending agreements to incorporate Department-specified rules and timelines and (2) timelines for performing OTMR, other make-ready activities, and otherwise implementing the attachment process itself. Because of the clear legislative mandate, Crown

Castle believes that incorporating rule amendments into agreements should be straightforward. The task can and should be accomplished within thirty days after a request by either party.

Crown Castle has suggested revisions to En 1303.02 and 1303.03 designed to accomplish these goals.

VII. The Commission Should Adopt an Expedited Timeline for Resolution of Pole Attachment Disputes.

Time is the critical factor in allowing attachers to serve new customers. Yet, delays are still too common. One of the most important streamlining actions the Commission can take is to establish a standard, reasonable timeline for dispute resolution by the Commission. Even if the Department and Commission adopt numerous substantive rules intended to support the deployment of broadband, without a procedure for prompt and meaningful recourse, such rules will not help attaching parties overcome utility behavior.

The Commission's current proposal states only that disputes will be resolved under the regular adjudicatory procedures in Puc 203. Proposed Puc 1303.03(c). The Puc 203 procedures are open-ended, with no specific deadline or even a target timeline for a decision.

Unfortunately, disputes are inevitable in any process. Prolonged disputes are costly for attachers and can delay the provision of service to consumers. An adjudication process that takes six, nine, twelve, or more months is not a meaningful avenue to cure, for example, a pole owner's failure to perform within a 30 to 60-day make-ready timeframe or its refusal to accept more than a limited number of poles per application. If disputes are not resolved quickly, the resulting delays can be costly and impede the deployment of broadband. Without an efficient enforcement mechanism, pole owners and other attachers can sidestep the rules with impunity, creating prolonged delays.

An efficient dispute resolution process is a necessary component of streamlining the pole attachment process. Accordingly, the Commission should adopt an accelerated timeline for resolving disputes related to pole attachment applications and associated make-ready work.[19]

There is ample precedent for a reasonable but short time frame to resolve pole attachment disputes. New Hampshire's neighbor, Maine, has adopted a procedure under which the Commission's "Rapid Response Team" considers the dispute under a deadline of seven business days for decision. Maine Chapter 880 Rules, § 8 & Appendix A. Given that pole attachment disputes may stop projects in their tracks, a decision timetable like Maine's has the greatest potential to maintain the smooth flow of projects and the most rapid deployment of broadband networks to consumers.

Vermont also has implemented an expedited procedure with a time limit of 30 days for the resolution of pole attachment complaints. VT PUC Rule 3.710(A).

Another approach would be to adopt processes like the FCC's Accelerated Docket, which includes a 60-day review timeline. Disputes that are not resolved within 60 days should be deemed resolved in favor of the new attacher. A 60-day timeline would prevent significant delays and ensure that pole owners comply with the Commission's and Department's rules throughout the application and make-ready process. This timeline would be similar to the FCC's timeline for disputes that impact pole access. In 2017, the FCC adopted a 180-day timeline for reviewing pole attachment complaints involving denial of access, but also created the potential option to place

[19] Disputes over issues such as annual rental rates and other matters that do not involve pole attachment applications, make-ready work, and other specific deployment issues that do not have the potential to halt or delay projects may be suitable for resolution under the normal Puc 203 procedures.

disputes on the "Accelerated Docket."[20] The FCC is now considering taking the additional step of favoring the placement of some pole attachment complaints on the Accelerated Docket.[21]

The majority of pole attachment disputes can be quickly resolved by the Commission, and the establishment of a reasonable timeline could prevent disputes from occurring in the first place as pole owners making illegal demands of communications attachers would no longer have time on their side. In addition, adopting a timeline similar to that of Maine's or Vermont's would mitigate any competitive disadvantage to New Hampshire from an open-ended, indefinite-duration dispute procedure.

VIII. The Commission Should Clarify What Pole Replacement Costs Are to Be Paid by a New Attacher.

When an owner undertakes a pole replacement as part of make-ready, the owner typically seeks to impose some or all of the cost of the pole replacement on that new attacher as part of make-ready. Pole replacement costs can add substantially to the cost of make-ready. The Commission should clarify the scope of the new attacher's responsibility for pole replacement costs.

At a minimum, the Commission should follow the FCC's lead and declare that pole owners may not impose the entire cost of a pole replacement on a requesting attacher when the attacher

[20] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, FCC 17-154, 32 FCC Rcd. 11128, ¶ 10 (2017) (https://docs.fcc.gov/public/attachments/FCC-17-154A1.pdf); 47 C.F.R. § 1.1414; *see also Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, Report and Order, FCC 18-96, 33 FCC Rcd. 7178, ¶ 19 (2018) (extending accelerated docket to pole attachment complaints) (https://docs.fcc.gov/public/attachments/FCC-18-96A1.pdf); 47 C.F.R. § 1.736.

[21] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC 22-20, Second Further Notice of Proposed Rulemaking, ¶ 36 (Mar. 18, 2022) (https://docs.fcc.gov/public/attachments/FCC-22-20A1.pdf).

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was not the sole cause of the pole replacement. *See In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84, Declaratory Ruling, DA 21-78, 36 FCC Rcd 776, ¶ 3 (rel. Jan. 19, 2021).[22] The FCC clarified in its ruling that utilities may not require requesting attachers to pay the entire cost of pole replacements that are not necessitated solely by the new attacher and, thus, may not avoid responsibility for pole replacement costs by postponing pole replacements until new attachment requests are submitted. *Id.,* ¶ 6. The Commission should adopt an equivalent rule.

Further, the Commission should take into account that when a pole is replaced in connection with a new attachment request, others beside the new attacher benefit. In particular, the pole owner obtains a new, undeteriorated pole. Further, the new pole undoubtedly is taller than is necessary solely to accommodate the new attacher. For example, a 35-foot pole would not be replaced with a 36-foot pole to accommodate the one additional foot of space necessitated by the new attacher; the pole unquestionably would be replaced with a 40 or 45-foot pole. The owner potentially benefits from several additional pole rentals and subsequent new attachers receive the benefit of escaping pole replacement costs (and additional make-ready delays). Thus, the Commission should require that pole replacement costs should be shared equitably among attachers and owners.

To accomplish this, the Commission should require that should a requesting third-party attacher precipitate the need for a pole replacement, that new attacher would be responsible only for (i) the difference, if any, between the cost of the replacement utility pole necessary to accommodate the third-party attacher's attachment, and the cost for a new utility pole of the type

[22] https://docs.fcc.gov/public/attachments/DA-21-78A1.pdf.

and height the utility would have installed in the same location in the absence of the attachment, plus (ii) a reasonable estimate of the net book value of the pole and supporting equipment, if any, which has been replaced. Further, if more than one attacher benefits from the replacement, the replacement cost attributable to attachers should be shared proportionately. A variation on such a formula is contained in Section 5(C) of the Maine pole attachment rules.[23] Crown Castle has included in its suggested revisions to the Puc 1300 rules provisions to effectuate these principles.

IX. Conclusion.

The need to remove barriers to the expeditious deployment of broadband infrastructure has never been more acute than at the present time. Incorporation of the FCC OTMR provisions is a good start. But it is only a start; more is needed to ensure New Hampshire captures the next generation of broadband investment. Crown Castle respectfully urges the Commission and the Department to take the additional steps outlined above. Adopting expanded self-help, specific timelines for make-ready outside the communications space and for pole replacements, and other

[23] Maine Section 5(C) states:

> **C. Excess Height**
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> **1. Solely Assigned; Excess Height.** When an existing or a proposed attaching entity requires additional space which is not available on that joint-use utility pole, and the joint-use utility pole must be replaced by a taller joint-use utility pole, the existing or proposed attaching entity causing the need for replacement must pay for (i) the difference between the cost for the taller joint-use utility pole and supporting equipment such as guys and anchors and the cost for a new 35-foot joint-use utility pole and supporting equipment in the same location, plus (ii) a reasonable estimate of the net book value of the joint-use utility pole and supporting equipment, if any, which has been replaced.
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> **2. Mutual Assignment.** When a joint-use utility pole taller than 35 feet is required to provide minimum clearances, or when more space for attachments than is available on a 35-foot joint-use utility pole is required by two or more attaching entities, the cost (i) of the additional height of the excess height joint-use utility pole and supporting equipment and (ii) the reasonable estimate of the net book value of replaced joint-use utility pole and supporting equipment, if any, must be shared equally among the users requiring the replacement.

reforms like those in the FCC regulations, plus an expedited dispute resolution process and clarified rules regarding pole replacement costs will put New Hampshire on equal footing with the majority of American states in facilitating needed broadband expansion and deployment. By so doing, the health, welfare, and prosperity of New Hampshire and its citizens will benefit.

June 21, 2022

Respectfully Submitted,

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