

**PUBLIC UTILITIES COMMISSION**21 S. Fruit St., Suite 10
Concord, N.H. 03301-2429

Rules Related to Utility Pole Attachments: Puc 1300

Summary of Comments on Initial Proposal with Responses
October 4, 2022**Introduction**

RSA 541-A:12 conditions the establishment and filing of the text of a final rulemaking proposal on a quorum of the members of the agency “fully considering public comment.” As an aid to the members of the Commission in establishing and filing the final text for the re-adoption of the Puc 1300 rules, relating to Utility Pole Attachments, this document summarizes comments received in response to the initial proposal, and identifies either recommended changes to the proposed rules in response to the comments or explains the reason(s) why changes are not recommended. To provide a foundation for the comments and responses, brief explanations of the purpose of the rules and of the rulemaking process are also provided.

On March 7, 2022, the Commission met and adopted an initial proposal for re-adoption of the Puc 1300 rules with amendments. As explained at that meeting, the existing Puc 1300 rule set contains two substantive parts – 1303 relating to access standards and 1304 relating to dispute resolution. In collaboration with the New Hampshire Department of Energy, the initial proposal was drafted to remove the access standards provisions from part Puc 1303, which the Department of Energy will propose to adopt as its own rule set. The Puc 1300 initial proposal contains housekeeping revisions to the remainder of the parts to clarify the purpose, provides updated definitions, and provides appropriate cross references to the rules proposed to be adopted by the Department of Energy.

On April 7, 2022, the Commission filed a rulemaking notice form and an initial proposal for rulemaking with the Office of Legislative Services. That notice form was published in the rulemaking register on April 14, 2022 as Notice No. 2022-55. A public comment hearing was held on June 10, 2022, and written comments were accepted through June 21, 2022.

By the June 21, 2022 comment deadline, the Commission received comments from the New Hampshire Electric Cooperative, Inc. (NHEC); Unitil Energy Systems, Inc. (Unitil), Liberty Utilities (Granite State Electric) Corp., d/b/a Liberty (Liberty); the New England Cable and Telecommunications Association, Inc. (NECTA); Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource); and Crown Castle Fiber, LLC (Crown Castle). In addition, comments from counsel to the Office of Legislative Services were received on September 12, 2022.

All filings, including a transcript of the June 10, 2022 public comment hearing and all written comments, are posted on the Commission’s website at: <https://www.puc.nh.gov/Regulatory/Docketbk/2022/22-023.html>.

Summary of Comments

In comments made either at the public comment hearing, in writing, or both, pole owning entities (Eversource, Unitil, Liberty, and the NHEC) made no substantive comments on or objections to the initial proposal for readoption of Puc 1300. Each of these entities, however, responded in writing to the comments and recommendations made by NECTA and Crown Castle at the June 10, 2022 public comment hearing.

NECTA commented that the Commission should adopt the Federal Communications Commission (FCC) cable rate formula for all attachments, and in so doing eliminate other more subjective criteria that appears in the current and proposed rules including:

- 1) relevant federal, state, or local laws, rules, and decisions;
- 2) the impact on competitive alternatives;
- 3) the potential impacts on the pole owner and its customers;
- 4) the potential impacts on deployment of broadband services; and
- 5) any other interests of the subscribers and users of the services offered via the attachments or consumers of any pole owner providing such attachments.

According to NECTA, there is no longer any need to differentiate between cable attachments and competitive telecommunications and other attachments, therefore a single formula should be used. In support of its argument for a single formula based on the FCC's cable rate formula, NECTA argued that a single, objective standard would provide uniformity, certainty, and clarity regarding the determination of just and reasonable pole attachment rates.

Several pole owning entities responded to NECTA's recommendation for a single rate formula.

- Unitil took no position on the proposal for a single rate formula applicable to all attachments in New Hampshire. Unitil stated that as far as it is aware, the only difference in the formulae used by the Commission are that one requires the Commission to consider certain FCC regulations regarding the allocation of unused space on the pole, and one does not. Unitil stated that in both instances the rules do not dictate a particular calculation, but provide only a set of considerations for the Commission to review in determining just and reasonable pole attachment rates.
- Eversource commented that the Commission should reject the proposals of NECTA and Crown Castle in this rulemaking because the proposals exceed the authorized scope of the proposed rulemaking. On the merits of the above recommendation, Eversource commented that the recommendation ignores the fact that adoption of the FCC cable rate formula for pole attachment rates will adversely shift costs to electric distribution customers, and that the impacts to electric distribution customers must be considered before pole attachment formulas and/or rates are adjusted.
- NHEC strongly urged the Commission to reject the above suggestions in the context of this rulemaking process because they had not been adequately vetted or discussed during the informal rulemaking process that occurred in late 2021 and are not universally supported by the entities participating in this rulemaking.

NECTA also commented that the rules should be amended to require pole owning entities to provide pole attachers with additional information to help ascertain whether pole attachers are billing just and reasonable pole attachment rates. Such information would include outside plant records, detailed accounting of the types of equipment and associated units in FERC account 364, and actual records on pole height. According to NECTA, access to this information is necessary to enable attachers to compare actual data against presumptions used in calculating pole rates to determine whether those presumptions can be rebutted.

Several pole owning entities responded to NECTA's recommendation that the Commission should require pole owners to undertake expanded record keeping pertaining to their pole plant and make those records available upon request to current or prospective attachers:

- Unitil opposed NECTA's above request. Unitil stated that it already keeps significant and adequate records of its pole plant in New Hampshire and objects to a requirement that it be required to expand its record keeping activities solely for the benefit of attachers. Unitil stated that, to the extent NECTA or its members have concerns about the records or information of a particular pole owner, such concerns appear best addressed to that pole owner, rather than being used to create expanded responsibilities for all pole owners. Unitil also noted that certain pole owners are seeking, or may seek, to sell their pole assets, and argued that an acquiring pole owner should not be held responsible for enhanced record keeping to address the assets of a divesting pole owner.
- Liberty opposed NECTA's above request, commenting that it is not appropriate for the rules to require such enhanced record keeping and disclosures of pole owner records. Liberty stated that the rate setting mechanism is sufficiently transparent, and that it would be an undue burden to require pole owners to make such information readily available to all attachers.
- Eversource commented that the Commission should reject the proposals by NECTA and Crown Castle in this rulemaking because the proposals far exceed the authorized scope of the proposed rulemaking. On the merits of the above recommendation, Eversource commented that it does not object to the concept of reasonable record keeping requirements, but it takes no position on this proposal absent specific proposed language, and that additional specificity regarding maintenance and access to records, if warranted, would be necessary.
- NHEC strongly urged the Commission to reject the above suggestions in the context of this rulemaking process because they had not been adequately vetted or discussed during the informal rulemaking process that occurred in late 2021 and are not universally supported by the entities participating in this rulemaking.

NECTA also identified that the citation to the FCC's pole attachment rate formulae contained in the current and proposed rules is outdated, and provided that FCC's current pole attachment rate formulae are found at 47 CFR § 1.1406(d).

Crown Castle proposed two changes. First, it proposed that a 60-day deadline for the Commission to render a decision on complaints that do not involve allegations of unjust or unreasonable rates should be added to Puc 1303.05. In support of this proposal, Crown Castle stated that prolonged disputes are costly for attachers and can delay the provision of services, such as deploying broadband to unserved communities. Crown Castle also noted that an adjudication process that takes over six months is not a meaningful remedy to a failure meet a 30 to 60-day make-ready timeframe or refusal to accept more than a limited number of poles per application.

Second, Crown Castle proposed a new subsection at Puc 1303.06 (c), relating to pole replacement costs. Crown Castle's proposal would prohibit a pole owner from charging full replacement costs to new attachers when the new attacher is not the sole cause of the need for a pole's replacement. Crown Castle proposed that, rather than the full cost of replacement, costs should be based on the difference between the actual cost of a pole that can accommodate the new attachment and the cost of replacing the existing pole, plus the reasonable net book value of the replaced assets. In support of its proposal, Crown Castle argued that policy favors: 1) a rule that prevents utilities from avoiding responsibility for pole replacement costs by postponing pole replacements until new

attachment requests are submitted; and 2) a rule that acknowledges that other entities besides the new attacher benefit from new pole infrastructure, therefore costs should be shared equitably among attachers and owners.

Several pole owning entities responded to Crown Castle's recommendations related to dispute resolution and cost allocation for replacing poles.

- NHEC strongly urged the Commission to reject these suggestions in the context of this rulemaking process because they were not adequately vetted or discussed during the informal rulemaking process that occurred in late 2021 and are not universally supported by the entities participating in this rulemaking. On the merits of Crown Castle's recommendations, NHEC argued that the cost causer should continue to be responsible for pole replacement costs. In support of its position, NHEC stated that determining the remaining useful life of a pole, existing asset values, or shared costs for new plant would be an overly complicated process with too many possible scenarios. NHEC also argued that due to the anticipated number of pole attachment applications a pole owner is likely to experience in the coming years, the Commission should aim to simplify make-ready, not complicate the process.
- Eversource commented that the Commission should reject the proposals by NECTA and Crown Castle in these rulemakings because the proposals far exceed the authorized scope of the proposed rulemakings.

Finally, counsel to the Office of Legislative Services made two comments:

First, the use of the term "Department" in Puc 1301.01 should be changed to "department of energy."

Second, counsel to the Office of Legislative Services made a comment on a potential need for legislation, stating:

This proposal implements SB 88, 2021 which made changes impacting broadband to included the requirement that rules be adopted to implement One Touch Make Ready. Also, the Budget bill, HB 2, 2021, established the [Department] of Energy and transferred all functions, powers, and duties of the [Commission] to the [Department of Energy]. See RSA 12-P:11 which replaces the authority of the [Commission] with the authority of the [Department] of Energy.... The [Commission] under RSA 363:1 is an independent agency administratively attached to the [Department] of Energy with powers and duties being held by the [Commission] chair pursuant to RSA 21-G:9.... OLS staff is unable to tell where the rulemaking authority of the new Commissioner of the [Department] of Energy begins and which [Commission] rulemaking authority is retained by the Chair of the [Commission]. RSA 374:34-a may need to be amended to clearly specify rulemaking authority pursuant to RSA 541-A and the jurisdictional divide between the two agencies. The [Department] of Energy's proposal for En 1300 addresses the application requirements for One Touch Make Ready, and this proposal contains the dispute resolution requirements for when there is a dispute between the pole owner and the attaching entity. The [Department of Energy] states that the [Commission] has broad authority under RSA 365:8, I(1) [sic] to adopt rules relative to procedures necessary for the proper administration of the title, which includes RSA 374:34-a, and includes the ability to hear and resolve complaints concerning voluntary agreements or any denial of [access] to pole attachments....

In filing the En 1300 final proposal for rulemaking, the Department of Energy responded to a substantially similar comment from the Office of Legislative Services, stating that:

... the division of responsibility between the Department and the [Commission] that would be effected by adoption of the En 1300 rules and concurrent amendment of the Puc 1300 rules would result in an appropriate regulatory framework that is consistent with the legislature's intent. While the Department has express rulemaking authority under RSA 374:34-a, the [Commission] retains broad authority under RSA 365:8, I(1) [sic] to adopt rules relative to "procedures necessary to provide for the proper administration of and to further the purposes of this title." The reference to "this title" should be understood to include the provisions of RSA 374:34-a that authorize the [Commission] to regulate and enforce rates, charges, terms, and conditions for pole attachments (paragraph II) and to "hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments" (paragraph VII). That is the basis for the [Commission's] retention of current Part Puc 1304, which covers dispute resolution and related pole attachment fee rate setting through an amended version of its Puc 1300 rules, while the Department's rules address other aspects of the utility pole attachment process....

See Department of Energy cover letter to final proposal for rulemaking dated September 28, 2022, Rulemaking Notice No. 2022-53.

Recommendations

In general, the scope of this rulemaking process should be limited to the issues raised in the published rulemaking notice. The Commission's rulemaking notice provided that:

[p]roposed amendments include the repeal [of] an existing part of the rules relating to access standards, which the New Hampshire Department of Energy intends to adopt as part of a new proposed rule set (En 1300) in a rulemaking proceeding that will occur contemporaneously with this proposed action. Proposed amendments also include edits, updates, clarifying changes, and cross references to the New Hampshire Department of Energy's proposed rule set.

See Rulemaking Notice Form at 1. As such, NECTA and Crown Castle's proposals for substantive amendments should be addressed according to their merits in a separate rulemaking proceeding.

With respect to NECTA's comment that the citation to the FCC's ratemaking formulae in the initial proposal of Puc 1303.06(5) is outdated, a review of the FCC approved formulae located at 47 C.F.R § 1.1409 (effective March 2016 through December 2017) and at 47 C.F.R § 1.1406 (effective February 2019 to present) reveals that although the text of the FCC's process for consideration of complaints has changed between these versions, the formulae it uses to determine maximum pole attachment rates for the different service providers remained the same in both FCC code versions. As such, it is reasonable to update the citation as recommended to cite to that portion of the currently effective code of federal regulations that contains the relevant formulae.

Item #1: Amend Puc 1303.06 (5) as follows:

(5) The formulae adopted by the FCC in 47 C.F.R. ~~§1.1409(b) through (g) in effect on October 1, 2017~~ **§1.1406(d) in effect on October 1, 2022**; and

With respect to counsel for the Office of Legislative Service's recommended change to in Puc 1301.01, this is a minor, non-substantive change that should be adopted.

Item #2: Amend in Puc 1301.01 as follows:

Puc 1301.01 Purpose. The purpose of Puc 1300, pursuant to the mandate of RSA 374:34-a, is to ensure rates, charges, terms, and conditions for pole attachments that are nondiscriminatory, just, and reasonable. Nothing in this rule shall be construed to supersede, overrule, or replace any other law, rule, or regulation, including municipal and state authority over public highways pursuant to RSA 231:159, et seq. Rules regarding the process and timelines for pole attachment applications and agreements and related surveys, inspections, and make-ready work are set forth in chapter En 1300 adopted by the ~~Department~~**department of energy**.

Finally, with respect to the comment from counsel to the Office of Legislative Services regarding the potential need for statutory change, the Department of Energy's legal analysis above is consistent with the Commission's interpretation of the legal authorities relating to pole attachment regulation in New Hampshire.