

CHAPTER 340

SB 123 – FINAL VERSION

04/05/07 1184s

07Jun2007... 1894h

06/27/07 2208eba

2007 SESSION

07-1284

06/03

SENATE BILL ***123***

AN ACT relative to pole attachments.

SPONSORS: Sen. Fuller Clark, Dist 24; Sen. Burling, Dist 5; Rep. Kaen, Straf 7; Rep. Cali-Pitts, Rock 16

COMMITTEE: Energy, Environment and Economic Development

ANALYSIS

This bill authorizes the public utilities commission to regulate pole attachments.

This bill is a request of the public utilities commission.

Explanation: Matter added to current law appears in ***bold italics***.

Matter removed from current law appears [~~in brackets and struck through.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

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07-1284

06/03

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Seven

An ACT relative to pole attachments.

Be it Enacted by the Senate and House of Representatives in General Court convened:

340:1 New Subdivision; Pole Attachments. Amend [RSA 374](#) by inserting after section 34 the following new subdivision:

Pole Attachments

374:34-a Pole Attachments.

I In this subdivision, a "pole" means 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](#).

II. Whenever a pole owner is unable to reach agreement with a party seeking pole attachments, the commission shall regulate and enforce rates, charges, terms, and conditions for such pole attachments, with regard to the types of attachments regulated under 47 U.S.C. section 224, to provide that such rates, charges, terms, and conditions are just and reasonable. This authority shall include but not be limited to the state regulatory authority referenced in 47 U.S.C. section 224(c).

III. The commission shall adopt rules under [RSA 541-A](#) to carry out the provisions of this section, including appropriate formula or formulae for apportioning costs.

IV. In exercising its authority under this subdivision, the commission shall consider the interests of the subscribers and users of the services offered via such attachments, as well as the interests of the consumers of any pole owner providing such attachments.

V. Nothing in this subdivision shall prevent parties from entering into pole attachment agreements voluntarily, without commission approval.

VI. Any pole owner shall provide nondiscriminatory access to its poles for the types of attachments regulated under this subdivision. A pole owner may deny access to its poles on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

VII. The commission shall have the authority to hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments.

340:2 Adoption of Rules. The public utilities commission shall expeditiously adopt interim rules and then final rules to carry out the provisions of [RSA 374:34-a](#). For a period of at least 2 years after the

DT 22-047
Attachment 1 to
Petitioners' Supplemental Objection to
Consolidated's Motion to Dismiss

effective date of this act, the rules shall be consistent with the regulations adopted by the Federal Communications Commission under 47 U.S.C. section 224, including the formulae used to determine maximum just and reasonable rates. The public utilities commission may incorporate into its rules, by reference, applicable regulations of the Federal Communications Commission. Notwithstanding [RSA 541-A:19, X](#), the interim rules may be effective for up to 2 years. Once the interim rules are adopted, pole attachments shall become subject to [RSA 374:34-a](#) and the rules of the public utilities commission.

340:3 Effective Date. This act shall take effect upon its passage.

Approved: July 16, 2007

Effective: July 16, 2007

THE STATE OF NEW HAMPSHIRE



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Debra A. Howland

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

January 18, 2008

Re: Docket No. DRM 07-119 (interim rules)
Docket No. DRM 08-004 (regular rules)
N.H. Code of Administrative Rules Chapter Puc 1300
Utility Pole Attachments

To Interested Persons:

Please be advised that, following approval by the Joint Legislative Committee on Administrative Rules (JLCAR), the Commission on January 11, 2008 adopted the attached interim rules governing utility pole attachments. The Legislature directed the Commission to promulgate these rules in 2007 N.H. Laws 340:1, codified as RSA 374:34-a. A copy of the interim rules is attached.

The interim rules will become effective on the day after their filing with the Office of Legislative Services, Division of Administrative Rules. As required by 47 U.S.C. § 224(c) and Puc 1305.01, our agency will promptly notify the Federal Communications Commission that the New Hampshire PUC has assumed jurisdiction over these matters.

The Commission will next move toward promulgation of regular (as distinct from interim) rules concerning pole attachments. To that end, please be advised that pursuant to RSA 541-A:11, VIII the Commission has opened Docket No. DRM 08-004 and is seeking public comment on the pole attachment rules prior to adopting an initial proposal for regular rules. The deadline for submitting such comments is March 5, 2008. Notice of this comment opportunity is being published in the New Hampshire Rulemaking Register.

To assist interested persons in preparing their comments, the Staff of the Commission will conduct an informal technical session on February 27, 2008 at 10:00 a.m. At the technical session, there will be an opportunity for general discussion of how the interim rules should be revised for promulgation as regular rules, particularly in light of the testimony presented to the JLCAR.

Persons with questions about the foregoing should contact the Commission's general counsel, Donald Kreis, at 271.6006 or donald.kreis@puc.nh.gov.

Sincerely,

A handwritten signature in cursive script that reads "Debra A. Howland".

Debra A. Howland
Executive Director and Secretary

Encl.

APPENDIX II-A

**REQUEST FOR ADVANCE PUBLIC COMMENT ON SUBJECT
MATTER OF POSSIBLE RULEMAKING**

| | Rule Number | <u>Puc 1300</u> (If applicable) |
|---|---|---|
| <p>1. Agency Name & Address:</p> <p>New Hampshire Public Utilities Commission 21 South Fruit Street, Suite 10 Concord, New Hampshire 03301</p> | <p>2. RSA Authority:</p> <p>3. Federal Authority:</p> <p>4. Type of Action:</p> <p style="padding-left: 20px;">Adoption _____</p> <p style="padding-left: 20px;">Amendment _____</p> <p style="padding-left: 20px;">Repeal _____</p> <p style="padding-left: 20px;">Readoption _____</p> <p style="padding-left: 20px;">Readoption w/amendment <u> X </u></p> | <p>RSA 374:34-a</p> <p>47 U.S.C. § 224(c)</p> |
| <p>5. Short Title: Utility Pole Attachments</p> | | |

IN ACCORDANCE WITH RSA 541-A:11, VIII THIS AGENCY IS SOLICITING PUBLIC COMMENT ON A SUBJECT MATTER OF POSSIBLE RULEMAKING UNDER ACTIVE CONSIDERATION PRIOR TO FORMALLY PROPOSING RULES IN THE RULEMAKING PROCESS. WHERE, WHEN, AND HOW PERSONS MAY PROVIDE COMMENT ARE INDICATED BELOW.

6. (a) Summary of the subject matter, or summary of the rule if drafted, and the effect on those regulated:

Section 224 of the federal Telecommunications Act, 47 U.S.C. § 224, authorizes states to assume jurisdiction over disputes between the owners of utility poles and persons attaching or seeking to attach facilities to those poles. The Legislature authorized the New Hampshire Public Utilities Commission (PUC) to assume such jurisdiction, thereby regulating and enforcing the rates, charges, terms and conditions for such attachments, in 2007 N.H. Laws Ch. 340, codified as RSA 374:34-a. Interim rules, Chapter Puc 1300, recently went into effect and, thus, disputes over utility pole attachments in New Hampshire are now properly brought before the PUC as opposed to the Federal Communications Commission. The PUC is now beginning the process of drafting regular rules.

6. (b) Brief description of the groups affected:

Public utilities that own or co-own utility poles; persons with facilities attached to such poles; and persons seeking such attachments.

APPENDIX II-A (Continued)

**REQUEST FOR ADVANCE PUBLIC COMMENT ON SUBJECT
MATTER OF POSSIBLE RULEMAKING - Page 2**

7. Contact person for copies, questions, and receipt of comment including requests to accommodate persons with disabilities:

| | | | |
|----------|--|----------|-------------------------|
| Name: | Donald M. Kreis | Title: | General Counsel |
| Address: | NH Public Utilities Commission 21 South Fruit Street, Suite 10 Concord, New Hampshire 03301 | Phone #: | 603.271.2431 |
| | | Fax#: | 603.271.3878 |
| | | E-mail: | rules@puc.nh.gov |

TTY/TDD Access: Relay NH 1-800-735-2964 or dial 711 (in NH)

8. Deadline for submission of comment in writing or, if practicable for the agency, in the electronic format specified: **March 5, 2008**

Fax

E-mail

Other format (specify):

9. Public hearing scheduled for: **None scheduled. However, Commission Staff will conduct a technical session to meet with interested persons about the Puc 1300 rules on February 27, 2008 at 10:00 a.m.**

Date and Time: **February 27, 2008; 10:00 a.m.**

Place: **21 South Fruit Street, Suite 10; Concord, New Hampshire 03301**

Adopted Interim Rule 1/11/08

Adopt Puc 1300 to read as follows:

CHAPTER Puc 1300 UTILITY POLE ATTACHMENTS

Statutory Authority: RSA 374:34-a

PART Puc 1301 PURPOSE AND APPLICABILITY

Puc 1301.01 Purpose. The purpose of Puc 1300, pursuant to the mandate of RSA 374:34-a, is to provide for the resolution of disputes involving the rates, charges, terms and conditions for pole attachments.

Puc 1301.02 Applicability. Puc 1300 shall apply to

(a) Public utilities within the meaning of RSA 362, including rural electric cooperatives for which a certificate of deregulation is on file pursuant to RSA 301:57, that own, in whole or in part, any pole used for wire communications or electric distribution.

(b) Other persons with facilities attached to such poles, or seeking to attach facilities to such poles.

PART Puc 1302 DEFINITIONS

Puc 1302.01 "Commission" means the New Hampshire public utilities commission.

Puc 1302.02 "FCC" means the federal communications commission.

Puc 1302.03 "Pole" means "pole" as defined in RSA 374:34-a, 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."

PART Puc 1303 ACCESS TO POLES

Puc 1303.01 Access Standard. The owner or owners of a pole shall provide access to such pole on terms that are just, reasonable and nondiscriminatory. Notwithstanding this obligation, the owner or owners of a pole may deny a request for attachment to such pole when there is insufficient capacity on the pole or for reasons of safety, reliability and generally applicable engineering purposes.

Puc 1303.02 Owner Obligation to Negotiate. The owner or owners of a pole shall, upon the request of a person seeking a pole attachment, negotiate in good faith with respect to the terms and conditions for such attachment.

Puc 1303.03 Requestor Obligation to Negotiate. A person seeking a pole attachment shall contact the owner or owners of the pole and make a reasonable effort to negotiate an agreement for such attachment.

Puc 1303.04 Voluntary Agreements. Any pole attachment agreement entered into voluntarily under this part shall be presumed to be just, reasonable and nondiscriminatory. The commission shall not alter the terms of any such agreement.

PART Puc 1304 DISPUTE RESOLUTION

Puc 1304.01 Lack of Agreement. A person unable to reach agreement with the owner or owners of a pole or poles subject to this chapter may petition the commission pursuant to Part Puc 203 for an order establishing the rates, charges, terms and conditions for the pole attachment or attachments. Such a petition shall include the information required for complaints to the FCC made pursuant to the terms of 47 CFR § 1.1404(d) through (m) in effect on July 16, 2007.

Puc 1304.02 Dispute Following Agreement or Order. A party to a voluntary pole attachment agreement entered into pursuant to this chapter, or a party subject to an order of the commission establishing rates, charges, terms or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order.

Puc 1304.03 Procedure. Upon receipt of a petition pursuant to this part, the commission shall conduct adjudicative proceedings pursuant to Puc 203 for the purpose of considering and ruling on the petition. The commission shall issue its order resolving the complaint within 180 days of the receipt of a complete petition under this part.

Puc 1304.04 FCC Standard Applicable. In determining just and reasonable rates under this chapter, the commission shall apply the standards and formulae adopted by the FCC in 47 CFR § 1.1409(c) through (f) in effect on July 16, 2007.

Puc 1304.05 Remedies. When the commission determines just and reasonable rates under this Part that differ from the rates paid by the petitioner, the commission shall order a payment or refund, as appropriate. Such refund or payment shall be the difference between the amount actually paid and the amount that would have been paid under the rates established by the commission, plus interest, as of the date of the petition.

PART Puc 1305 CERTIFICATION TO FCC

Puc 1305.01 Certification. Within 10 days of the effective date of these rules, the commission shall certify to the FCC that the commission regulates the rates, terms and

conditions for pole attachments in a manner sufficient to supersede FCC jurisdiction pursuant to 47 U.S.C. § 224 in effect on July 17, 2007 or any successor federal statute.

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Docket #: 07-119 Printed: January 29, 2008

FILING INSTRUCTIONS: PURSUANT TO N.H. ADMIN RULE PUC 203.02(a),

WITH THE EXCEPTION OF DISCOVERY, FILE 7 COPIES (INCLUDING COVER LETTER) TO:

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PURSUANT TO N.H. ADMIN RULE 203.09 (d), FILE DISCOVERY

DIRECTLY WITH THE FOLLOWING STAFF

RATHER THAN WITH THE EXECUTIVE DIRECTOR

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BULK MATERIALS:

Upon request, Staff may waive receipt of some of its multiple copies of bulk materials filed as data responses. Staff cannot waive other parties' right to receive bulk materials.

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December 3, 2008

Debra A. Howland
Executive Director
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21 South Fruit Street, Suite 10
Concord, NH 03301

Re: DRM 08-004, Pole Attachment Rulemaking

Dear Ms. Howland:

A technical session was held in the above-captioned docket on Friday, November 21, 2008. This letter serves as Staff's report on that session, as well as a status report of the rulemaking process in this docket.

The Commission promulgated interim rules governing attachments to utility poles on January 11, 2008. Those rules will expire in January 2010. The Commission invited public comment on the interim rules and opened Docket No. DRM 08-004 to facilitate the development of regular rules. Eight parties submitted comments on the interim rules on March 5, 2008. A proposed draft of regular rules governing pole attachments was circulated to the service lists for DRM 08-004 (pole attachment final rulemaking) and DM 05-172 (generic investigation into utility poles) on June 16, 2008; parties submitted additional comments to Staff on June 25, 2008. All comments received have been posted on the Commission website. A third, revised draft of the proposed regular rules was circulated on October 31, 2008. A technical session was held on November 21, 2008, to provide parties a further opportunity to comment on the draft rules prior to submission for Commission approval of an initial proposal.

Participants in the November 21, 2008 technical session included representatives from PSNH; Unitol; National Grid; New Hampshire Electric Cooperative; FairPoint Communications; New Hampshire Telephone Association; TDS Telecom; Granite State Telephone; segTEL; New England Cable & Telecommunications Association; New Hampshire Local Government Center; New Hampshire Municipal Association; the town of Hanover and, jointly represented through counsel, the towns of Exeter, Hanover, Keene, Portsmouth, Newmarket, Salem, Seabrook, Raymond, and Stratham; the cities of Concord, Manchester, and Keene; the fire departments of Concord, Manchester, Nashua,



DRM 08-004 Pole Attachment Rulemaking
Staff Report on Technical Session
Page 2

Keene, Claremont, and Peterborough; the New Hampshire Department of Transportation; the New Hampshire Department of Justice; and Commission Staff.

One final set of comments – not to reiterate previously submitted comments – is due on Friday, December 5, 2008. Staff plans to review those comments, make revisions as appropriate, and submit draft proposed regular rules to the Commission in January 2009. Participants in the technical session have been apprised that they will have a further opportunity to present their positions at hearing before the Commission and that they may be invited to submit comments following the hearing.

Sincerely,



Lynn Fabrizio
Staff Attorney

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DRM 08-004 (Regular PUC
1300 Rules re Utility Pole Attachments)

**COMMENTS OF
THE NEW ENGLAND CABLE & TELECOMMUNICATIONS ASSOCIATION**

The New England Cable and Telecommunications Association, Inc. (“NECTA”) hereby submits comments on the proposed “regular” (as distinct from interim) rules concerning pole attachments (hereinafter “proposed Rules”).

NECTA generally supports the intent of the proposed Rules to maintain the status quo for cable system pole attachments and to create a stable regulatory environment. However, NECTA has concerns with three aspects of the Rules that could frustrate that intention.

First, proposed rule 1303.04 presumes that the terms of any agreement entered into “voluntarily” under the Rules are just, reasonable and nondiscriminatory, and will not be set aside.¹ Unfortunately, pole attachment contracts often include overreaching terms with no available marketplace substitute. As expressed by the Federal Communications Commission (FCC), “[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,” such rates, terms and conditions “cannot be held reasonable simply because they have been agreed to by a cable company.”² In upholding the FCC’s so called “sign and sue” rule against pole owner challenges,

¹ Puc 1303.04 Voluntary Agreements. Any pole attachment agreement entered into voluntarily under this part shall be presumed to be just, reasonable and nondiscriminatory. The commission shall not alter the terms of any such agreement.

² *Selkirk Comm., Inc. v. Florida Power & Light*, 8 FCC Rcd 387 ¶ 17 (rel. Jan. 14, 1993).

the Eleventh Circuit observed “‘sign and sue’ is likely to arise only in a situation in which the attacher has agreed, for one reason or another, to pay a rate above the statutory maximum or otherwise relinquish a valuable right to which it is entitled under the Pole Attachments [sic] Act and the [FCC’s] Rules. If the rates and conditions to which the attacher later objects are within the statutory framework, then the utility has nothing to fear from the attacher’s complaint.”³

The rates, terms, and conditions of pole attachment contracts are regulated because of the monopoly position of pole owners. As the Supreme Court has consistently recognized: “In most instances underground installation of the necessary cables is impossible or impracticable. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of ... cables.”⁴ “Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents.”⁵ Control over the essential support structures required for the construction and operation of cable systems allows pole owners to impose unjust contract terms on attaching parties who have nowhere else to go.

NECTA agrees that negotiation over terms in advance of a complaint is highly desirable, as is the practice at the FCC, and is proposed in the Rules. But unless the Commission serves as the ultimate recourse for contracts—even contracts signed under the pressure of getting systems or line extensions or upgrades built on time—the purpose of the Act will be undermined through adhesion contracts. Moreover, allowing attaching entities to protest onerous terms and

³ *Southern Co. Serv. Inc. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002).

⁴ *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987).

⁵ *National Cable & Telecommunications Association v. Gulf Power Company*, 534 U.S. 327 (2002).

conditions after having signed an agreement creates an impetus for utilities to negotiate in good faith before they are presented to a regulatory body, and thereby reduces the incidences of disputes arising under the agreements.⁶

The Commission, like the FCC, is required to assure that pole attachment rates, terms, and conditions are just and reasonable. The FCC concluded early on that it would be “powerless to act in accordance with its mandate” if it were precluded from granting relief from existing contracts, and its decision to allow attachers to sign an agreement and subsequently file a complaint was affirmed in court.⁷ Likewise, in order to preserve the Commission as a forum comparable to the FCC, the terms of pole agreements should not enjoy a presumption of reasonableness, nor be excluded from Commission jurisdiction.

Second, the proposed Rules do not explicitly include key features of current FCC rules, such as the availability of temporary relief (TROs) and other provisions relating to obtaining physical access to poles.⁸ The Commission should either adopt counterparts to FCC rules on these points, or refer attaching parties to other available Commission procedures which would assure equivalent relief.

While the 2007 amendments to RSA 374 (specifically 340:2⁹ of Senate Bill 123) require

⁶ See *Amendment of the Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC 4387 ¶ 77 (1987).

⁷ *First Report and Order*, 68 FCC 2d 1585, 1591 (1978); *Monongahela Power Company v. Federal Communications Commission*, 655 F.2d 1254 (D.C. Cir. 1981); *Southern Co. Serv., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002) (upholding, *inter alia*, the FCC's “sign and sue” rule); *RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Co.*, 17 FCC Rcd 25238, 25240-41 (Enf. Bur. 2002) (“An attacher may file a complaint pursuant to the Pole Attachment Act challenging the terms of an agreement after the contractual agreement has been executed. Indeed, a pole attachment agreement that includes a clause waiving statutory rights to file a complaint with the Commission is per se unreasonable.”) (footnote omitted); *see also* 47 C.F.R. §1.1404(c) (complaints may be filed asserting that a rate, term or condition for a pole attachment is unjust or unreasonable).

⁸ 47 C.F.R. §§1.1403(b), (c), (d); 1.1415; 1.1410(a),(b).

⁹ 340:2 Adoption of Rules. The public utilities commission shall expeditiously adopt interim rules and then final rules to carry out the provisions of RSA 374:34-a. For a period of at least 2 years after the effective date of this act,

the Commission to adopt rules consistent with the regulations adopted by the FCC under 47 U.S.C. § 224, including the formulae used to determine maximum just and reasonable rates which currently include both the FCC “cable” formula and the FCC “telecom” formula,¹⁰ it should be noted that the PUC is free to follow the neighboring states of Massachusetts, Connecticut and a host of other jurisdictions that have rejected a telecom rate. In addition, adoption of the telecom formula is not compelled by New Hampshire law, and has been soundly rejected by many other State PSCs as contrary to State interests in broadband deployment.¹¹ Moreover, the telecom rate is under proposal for revision at the FCC.¹²

the rules shall be consistent with the regulations adopted by the Federal Communications Commission under 47 U.S.C. § 224, including the formulae used to determine maximum just and reasonable rates. The public utilities commission may incorporate into its rules, by reference, applicable regulations of the Federal Communications Commission. Notwithstanding RSA 541-A:19, X, the interim rules may be effective for up to 2 years. Once the interim rules are adopted, pole attachments shall become subject to RSA 374:34-a and the rules of the public utilities commission.

¹⁰ Puc 1304.04 FCC Standard Applicable. In determining just and reasonable rates under this chapter, the commission shall apply the standards and formulae adopted by the FCC in 47 CFR § 1.1409(c) through (f) in effect on July 16, 2007.

¹¹ California noted that “there is generally no difference in the physical connection to the poles or conduits attributable to the particular service involved ... By applying a consistent rate for use of cable attachments, including provision of telecommunications services ... promotes the incentive for facilities-based local exchange competition through the expansion of existing cable services.” *See Order Instituting Rulemaking on the Commission’s Own Motion Into Competition for Local Exchange Service*, R. 95-04-043, I. 95-04-044, Decision 98-10-058 (Cal. PUC, Oct. 22, 1998). New York held that the telecom formula “would undermine efforts to encourage facilities-based competition and to attract business to New York.” *Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation’s Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Companies*, Order Directing Utilities to Cancel Tariffs, Cases 01-E-0026, *et al.* at p.4 (NY PSC January 15, 2002). The Vermont Public Service Board believed that the reduction in pole attachment costs to cable companies would “lead to cable services becoming available in some additional low-density rural areas. . . . [Thus creating] even more value for Vermonters as cable TV companies are increasingly offering high-speed Internet service to new customers.” Policy Paper and Comment Summary on PSB Rule 3.700, at 6, available at <http://www.state.vt.us/psb/rules/proposed/3700/PolicyComments3700.pdf>. The Regulatory Commission of Alaska issued new pole regulations adopting the FCC cable formula for both cable and telecommunications attachments, concluding that “the CATV formula . . . provides the right balance given the significant power and control of the pole owner over its facilities;” and “that changing the formula to increase the revenues to the pole owner may inadvertently increase overall costs to consumers.” *In the Matter of the Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint Use Regulations Adopted Under 3 AAC 52.900 – 3 AAC 52.940*, Order Adopting Regulations, p. 3-5 (Alaska PSC, Oct. 2, 2002).

¹² Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking, WC Docket No. 07-245 (Released November 20, 2007).

NECTA commends the PUC for its leadership role in facilitating just and fair rates terms and conditions for pole attachments in New Hampshire that will encourage investment and widespread broadband deployment in New Hampshire.

Respectfully submitted,

**NEW ENGLAND CABLE AND
TELECOMMUNICATIONS ASSOCIATION INC.,**

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March 5, 2008

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

Docket No. DRM 08-004

Public Comment on Subject Matter of Possible Rulemaking Regarding Pole Attachment Rules

**COMMENTS OF NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC
d/b/a FAIRPOINT COMMUNICATIONS**

On November 21, 2008 the New Hampshire Public Utilities Commission (the "Commission") staff held a Technician Session for public comment on proposed regular rules to replace the interim pole attachment rules adopted January 11, 2008. Following the meeting, the Commission staff solicited further comment and language for these proposed regular rules. Pursuant to that solicitation, Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") submits the following comments:

1. FairPoint is the utility owner and operator of thousands of poles in the State of New Hampshire. FairPoint, in coordination with its joint owners, annually authorizes and administers thousands of attachments to its poles by the cable companies, telecommunications companies and others.

2. The Commission staff made clear that its solicitation pertained only for new comments and the parties were not to recite comments previously filed with the Commission in the above-referenced docket. FairPoint will not reiterate prior comments made by it or its predecessor, Verizon New England Inc; however, FairPoint hereby adopts and incorporates all such comments by reference.

3. These regular pole attachment rules are proposed in response to RSA 374:34-a, which provides that the Commission shall regulate and enforce rates, charges, terms and conditions of pole attachments only in such instances when a pole owner and party seeking an

attachment are unable to reach agreement. In order that proposed Rule PUC § 1300 is consistent with RSA 374:34-a, FairPoint proposes that the language of PUC 1301.01 be amended to read as follows:

“Purpose. The purpose of PUC 1300, pursuant to the mandate of RSA 374:34-a, is to provide rates, charges terms and conditions for pole attachments that are just reasonable and in the public interest, whenever a pole owner is unable to reach an agreement with a party seeking pole attachments.”

4. In defining the applicability of the rules, the jurisdiction granted by the New Hampshire legislature must be considered. By its express terms, the statute defines and limits the Commission’s pole attachment regulatory authority “with regard to the type of attachments regulated under 47 U.S.C. § 224.” RSA 374:34-a, II. FCC regulation of pole attachments under the Federal Pole Attachment Act (47 U.S.C. § 224) applies to attachments by cable television system operators and by telecommunications carriers providing telecommunication services. FCC pole attachment regulation does not cover attachment by other entities, such as ILECs, municipalities, and private business owners, which are neither cable operators nor telecommunications carriers.

5. The staff’s proposed rules do not recognize this clearly expressed statutory limitation upon the Commission’s regulatory authority. Proposed Rule 1301.02 expands the applicability of these rules to anyone who may seek to attach any facilities to such poles. In order for the Commission’s pole attachment rules to reflect the authority granted by the legislature, FairPoint proposes the following language:

“§ 1301.02 Applicability. PUC § 1300 shall apply to:
(a) Pole Attachments as defined in 47 U.S.C. § 224.”

6. To facilitate a better understanding of the rules, the Definitions section of the Commission staff’s proposed rules should include a definition of pole attachments. FairPoint

proposes that the Commission cite the definition in 47 U.S.C. § 224(a)(4) which is also used in 47 CFR 1.1402(b). Similarly, the definition of “attaching entity” used in CFR 1.1402 (m) would be appropriate to use in the PUC’s proposed rules.

7. Proposed Rule PUC § 1303.01, regarding access to poles, mandates that a pole owner provide access to a pole that is just, reasonable, and nondiscriminatory. This requirement, taken in conjunction with the existing § 1301.02 *Applicability* of the proposed rules, effectively requires pole owners to provide access to any person or entity for any type of attachment. This creates a result that the Commission could not have intended. FairPoint proposes the following alternative language for the first sentence in §1303.01:

“PUC § 1303.01 Access Standard. The owner or owners of a pole shall provide access to such pole for pole attachments (as defined in 47 U.S.C. § 224) on terms that are just, reasonable, and nondiscriminatory.

8. Proposed Rule PUC §1303.03 creates an obligation on the part of a party seeking to attach to make a reasonable effort to negotiate an agreement while proposed Rule PUC § 1303.02 creates an obligation on the part of the pole owner to negotiate in good faith. FairPoint proposes the pole owner and a qualified party seeking to become an attaching entity have the same obligation to negotiate.

9. Since these Proposed rules are to apply to situations in which an agreement between the parties is not in place, §§ 1303.02-03 set standards to insure that the parties are interacting appropriately. However, the next section of the rule addresses criteria applying to an application of a license to attach to poles without addressing how the needed understandings between an owner and attaching entity generally included in a pole attachment agreement under which licenses are granted are to be accomplished. Prior to granting any licenses, the

parties to the license must address commitments in areas, for example carrying appropriate insurance..

10. Once those areas of understanding are defined, proposed rule PUC § 1303.04 *Request for Access and Response Requirements* is appropriate to consider. The text of this section must be amended to recognize a utility's requirements that a completed application and a survey fee must be received before the utility will perform a survey to see if an attachment is possible. FairPoint proposes the following alternative proposed language:

“PUC § 1303.04 Request for Access and Response Requirement. An application for access to a utility's poles shall be in writing. Absent extraordinary circumstances, a survey for an application not exceeding 200 poles shall be completed and the results communicated to the applicant seeking to attach within 45 days of receiving a completed application and survey fee.

11. Concerning the “Notification” section of the proposed rule, FairPoint suggests that proposed Rule PUC § 1303.06(a)(1) read, “Removing their facilities” instead of “Removing any of the facilities.” This suggested change makes clear that it is the duty of the pole owner to notify a person attached to the pole that the owner is removing such person's facilities. The current proposed language would place an undue burden on a pole owner, forcing them to notify any person attached to a pole anytime any facilities on that pole are moved.

12. FairPoint proposes removing proposed Rule PUC § 1303.06(2). FairPoint has very strict requirements under the Telecommunications Act to notify affected parties whenever service to a facility is terminated.

13. FairPoint does not object to changes suggested at the Technical Conference which would alter Proposed Rule PUC § 1303.06(a)(3) to read, “Increasing any annual or recurring fees applicable to the pole attachment.”

14. Proposed Rule PUC § 1303.06(b) as currently written would allow for any entity currently attached to simply notify a pole owner of a change in purpose of the existing attachment facilities. This would inappropriately allow an entity currently attached for a noncommercial purpose to simply notify an owner that it wished to use those facilities for commercial purposes without first obtaining certification as a CLEC. FairPoint proposes the following language:

“§ 1303.06 (b) An attaching entity seeking to change the purpose for which existing Pole Attachments (as defined in 47 USC §244) are used shall provide written notice to pole owners 60 days prior to making such a change.”

15. The safety of technicians, the general public, the facilities on poles and the poles themselves is critical. FairPoint recognizes the National Electric Code as the minimum safety standards that should be employed for pole attachments; however, since FairPoint also employs the stricter industry-wide safety standards set forth in the Telcordia Blue Book, § 1303.07 (a) of the proposed rules should be amended to read as follows:

“PUC § 1303.07 Installation and Maintenance.
(a) All attachments shall be installed and maintained in accordance with the National Electric Safety Code, 2007 edition; the National Electric Code as adopted by RSA 155-A:1,IV; and the SR-1421 *Blue Book – Manual of Construction Practices, Issue 4*, Telcordia Technologies, Inc. (2007).”

16. FairPoint proposes changes in the proposed rules regarding how attachments be placed. The following alternative language with respect to § 1303.09, “Location of Attachments” is appropriate:

“PUC § 1303.09 Location of Attachments. Attachments shall be located in accordance with the standards identified in § 1303.07. Installation of new attachments may require owner(s) and /or existing attachers to move their facilities. In that case, the attaching entity seeking to add a new attachment to the pole shall be required to pay make- ready cost of the owner(s) and existing attachers required to move their facilities to accommodate the new attaching entity. A

pole owner with facilities located in the telecommunications space on a pole may retain the placement of its facilities as the lowest on the telecommunications space for the prevention of harm to its facilities and safety of its agents.

For many years prior to the advent of CATV service and before the vast open competitive market for telecommunication providers FairPoint's predecessor's practices were to place their cables at the top of the telecommunications space. Given all of the factors that affect sag, placing the cable as high on the pole as possible insures that FairPoint's cables would maintain sufficient ground clearance under any varying weather conditions from heavy ice loads to 100 degree temperatures. Placing cable as high as possible also ensures adequate clearances even if unforeseen factors, that FairPoint has no control over, were to transpire. For example rebuilding road conditions or widening intersections can change the contour of the land and grade levels and thus affecting clearance. FairPoint needs to be the lowest attachment on the pole. In order for an entity to attach below FairPoint's heavier copper cables they would need to place their attachment 3-4 feet below FairPoint's attachment on the pole in order to insure adequate clearance at midspan. This would take up valuable space on the pole that could be used for subsequent attachers. FairPoint has very old attachments that are placed higher on the pole because that was the safest way to do business. FairPoint, with safety as its main concern has to maintain a consistent height of its attachment all the way down the line and therefore may have set a new pole but is unable to lower the attachment because of the neighboring poles. FairPoint charges the entity seeking to attach to the pole, the "cost causer," the full cost of moving existing FairPoint facilities. FairPoint locates its facilities lowest on the pole because it is the safest way of doing business. They also need to be on the lowest point because they need to be accessed far more frequently than other attachments on the pole. Keeping FairPoint

facilities consistently at the lowest position on the pole avoids crisscrosses and minimizes unnecessary risks to facilities. FairPoint opposes any rule that allows for attaching entities to place their facilities below FairPoint's on the pole and does not believe that FairPoint should bare the cost of rearranging their attachments.

17. Boxing of poles by attachments is addressed in proposed Rule PUC § 1303.10. This practice, which is only used in rare circumstances, makes work more dangerous and far more difficult for all attachers on the pole. In the event of damage to the pole or an emergency, changing the pole is made far more difficult. Boxing is used by FairPoint in very limited circumstances and never to avoid make ready work or pole replacement. Boxing is only used in the exceptional circumstances where the pole was set in a location where boxing was the only option or if there was an emergency. Proposed Rule PUC § 1303.10 "Boxing of Poles" should be deleted in its entirety.

18. Extension arms, addressed in proposed Rule PUC § 1303.11, are also used only in exceptional circumstances. They are used for clearing obstacles or improving alignment. They are never used to make space, since the space required to place them requires the same pole space as any attachments they may hold. Extension arms create an unnecessary safety risk they are just another obstacle for the men and women who need to work on the poles. That is why FairPoint uses them only in the most limited circumstances and why proposed Rule PUC § 1303.11 should be removed in its entirety.

19. As an alternative to proposed Rules PUC §§ 1303.10 and 1303.11, FairPoint proposes the following language:

"In completing make-ready work, a Pole owning utility shall pursue reasonable least-cost alternatives currently relied upon by the utility."

20. Considering the timeframes required for the completion of make-ready work,, a 90-day make-ready timeframe is impossible for a pole owner to guarantee since it may take the coordination of many entities attached to many poles to provide the space needed for a new attacher to add its facilities to the poles for which it seeks a license. FairPoint's current process provides that it will make every reasonable effort to complete make ready work within 180 days of receiving payment for the make ready work. FairPoint is able to conform to a shorter timeframe in a situation where only FairPoint is required to move its own facilities and the work involves a relatively small number of poles. Since FairPoint is required to provide adequate notification (the proposed rule requires 60 days) to an entity that is attached to a pole to move their facilities and the company may have to coordinate the movement of possibly many entities attached to many poles this time frame is just too short. Also during emergencies or in an instance of a high volume of requests these timeframes are just too short. PUC § 1303.12 should be amended to take into consideration the concerns listed above. FairPoint proposes the following language:

“PUC § 1303.12 Make-Ready Timeframes. Pole owners shall make every reasonable effort to complete make-ready work within 180 days, except in a circumstance where the make-ready work involves 6 or fewer poles and FairPoint is the only entity required to complete make-ready work, in which case FairPoint will make every reasonable effort to complete the make-ready work in 90 days.”

21. In the section of the proposed rules addressing dispute resolution, § 1304.01, *Lack of Agreement* as written, allows any entities that may seek to attach to a pole to petition the Commission when they are unable to reach agreement with the pole owner. This language could result in a private third party attacher which provides neither cable television service nor telecommunications service to petition the Commission for intervention for authority to attach

to a pole.. FairPoint proposes substituting “an entity seeking a Pole Attachment (as defined in 47 U.S.C. § 224)” for “attaching entity” in proposed rule PUC § 1304.01.

22. FairPoint Communications is concerned that proposed rule PUC § 1304.03 *Unauthorized Attachments* may be construed as requiring a utility to go before the Commission before it can notify, remove and bill an entity that has not been authorized to attach to a utility’s poles. FairPoint proposes the following alternative language:

“PUC § 1304.03 Unauthorized Attachment. A pole owner may, but is not obligated to, petition the Commission pursuant to PUC § 203 for an order directing the removal and/or payment for facilities that are attached to a pole without authorization.”

23. FairPoint Communications is also concerned with the language in PUC § 1304.07, this appears to leave open the issue of how far back the PUC will go in issuing a refund. It also is unclear if it will attempt to void an existing contract despite the fact that RSA 374:34-a makes clear these rules shall apply in the absence of an agreement between the parties. This section seems to raise more questions than it answers.

In accordance with all the suggested amendments and additions to the proposed rules listed above FairPoint has attached the proposed Rules with FairPoint’s suggested language changes in blackline format as Attachment 1.

Respectfully submitted,

FairPoint Communications



Kevin Shea

Attachment #1

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Adopted Final Rule [DATE]

Amend Puc 1300 to read as follows:

CHAPTER Puc 1300 UTILITY POLE ATTACHMENTS

Statutory Authority: RSA 374:3; RSA 374:34-a

PART Puc 1301 PURPOSE AND APPLICABILITY

Puc 1301.01 Purpose. The purpose of Puc 1300, pursuant to the mandate of RSA 374:34-a, is to provide ~~for~~ rates, charges, terms and conditions for pole attachments that are just, reasonable and in the public interest, whenever a pole owner is unable to reach an agreement with a party seeking pole attachments.

Puc 1301.02 Applicability. Puc 1300 shall apply to:

~~(a) Public utilities within the meaning of RSA 362, including rural electric cooperatives for which a certificate of deregulation is on file with the commission pursuant to RSA 301:57, that own, in whole or in part, any pole used for wire communications or electric distribution.~~

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~~(b) Other persons with facilities attached to such poles, or seeking to attach facilities to such poles.~~

Comment [A1]: This language allows ANYONE to attach to utility poles

(a) Pole Attachments as defined in 47 U.S.C. §224.

PART Puc 1302 DEFINITIONS

~~Puc 1302.01 "Attaching entity" means a natural person or an entity that has attached or seeks to attach a facility of any type to a pole, including but not limited to telecommunications providers, cable television service providers, incumbent local exchange carriers, competitive local exchange carriers, electric utilities, and governmental entities, as defined 47 C.F.R. 1.1402(m).~~

Puc 1302.02 "Commission" means the New Hampshire public utilities commission.

Puc 1302.03 "FCC" means the federal communications commission.

Puc 1302.04 "Pole" means "pole" as defined in RSA 374:34-a, 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.”

Puc 1302.05 “Pole Attachments” means “pole attachments” as defined in 47 U.S.C. §224(a)(4), namely “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit or right-of-way owner or controlled by a utility.”

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Puc 1302.065 “Prime rate” means the rate reported in the Wall Street Journal on the first business day of the month preceding the beginning of each calendar quarter, or the average of the rates so reported on that day.

Puc 1302.076 “Utility” means a public utility as defined in RSA 362:2, including a rural electric cooperative for which a certificate of deregulation is on file with the commission pursuant to RSA 301:57.

PART Puc 1303 ACCESS TO POLES

Puc 1303.01 Access Standard. The owner or owners of a pole shall provide access to such pole for pole attachments, on terms that are just, reasonable and nondiscriminatory. Notwithstanding this obligation, the owner or owners of a pole may deny a request for attachment to such pole when there is insufficient capacity on the pole or for reasons of safety, reliability or generally applicable engineering purposes.

Comment [A2]: Conflicts with trying to limit the number of non-CLECs

Puc 1303.02 Owner Obligation to Negotiate. The owner or owners of a pole shall, upon the request of a person seeking a pole attachment, negotiate in good faith with respect to the terms and conditions for such attachment.

Puc 1303.03 Requestor Obligation to Negotiate. A person seeking a pole attachment shall contact the owner or owners of the pole and ~~make a reasonable effort to negotiate in good faith with respect to the terms and conditions for an agreement for~~ such attachment.

Puc 1303.04 Request for Access and Response Requirements. ~~Requests An application -for access to a utility’s poles shall be in writing. Absent extraordinary circumstances, a survey for an application not exceeding 200 poles shall be completed and the results if access is not granted within communicated within 45 days of receiving the application and survey fee. a request for access, the owner must confirm the denial in writing by the 45th day. The 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 relate to the grounds in Puc 1303.01 for such denial.~~

Puc 1303.05 Authorization Required. A person seeking to attach facilities to a pole shall obtain authorization from the pole owner prior to attaching such facilities.

Puc 1303.06 Notification.

(a) A pole owner shall provide a person with facilities attached to a pole no less than 60 days' written notice prior to:

(1) Removing ~~their~~any of the facilities,

~~(2) Terminating any service to the facilities;~~

~~(2)(3)~~ Increasing ~~annual or recurring fees~~any rates applicable to the pole attachment, or

~~(3)(4)~~ Modifying the facilities other than as part of routine maintenance or a response to an emergency.

(b) ~~Attaching entities~~ ~~An attaching entity-person~~ seeking to change the purposes for which existing ~~Pole A~~ attachments facilities are used shall provide written notice to pole owners 60 days prior to making such changes.

Puc 1303.07 Installation and Maintenance.

(a) ~~All~~ny attachments shall be installed ~~and maintained~~ in accordance with the National Electrical Safety Code, 2007 edition; ~~and~~ the National Electric Code as adopted by RSA 155-A:1,IV; ~~and the SR-1421 Blue Book-Manual of Construction Practices, Issue 4, Telcordia Technologies, Inc. (2007).~~

(b) Any attachment shall be installed and maintained to prevent interference with service furnished by any other attaching entity.

Puc 1303.08 Labeling of Attachments

Attaching entities shall clearly label their attachments with owner identification.

Puc 1303.09 Location of Attachments

~~No attaching entity shall be denied attachment solely because the only space available for attachment on a pole is below the lowest attached facility. If the owner of the lowest facility chooses to relocate its existing facilities to a lower allowable point of attachment so that the new attaching entity will be above all existing facilities, it shall do so at its own expense. Attachments shall be located in accordance with the standards identified in § 1303.07. Installation of new attachments may require owner(s) and/or existing attachers to move their facilities. In that case, the attaching entity seeking to add a new attachment to the pole shall be required to pay make-ready cost of the~~

owner(s) and existing attachers required to move their facilities to accommodate the new attaching entity. A pole owner with facilities located in the telecommunications space on a pole may retain the placement of its facilities as the lowest on the telecommunications space for the prevention of harm to its facilities and safety of its agents.

Puc 1303.10 Boxing of Poles

~~Pole owners shall permit attaching entities to box poles where boxing may eliminate the need for make-ready work or pole replacement. Such boxing shall be safely accessible by bucket trucks, ladders or emergency equipment and otherwise consistent with the requirements of applicable codes, including the National Electric Safety Code.~~

Puc 1303.11 Use of Extension Arms:

~~Pole owners shall permit limited, reasonable use of extension arms by attaching entities. Such use shall be permitted for purposes of clearing obstacles, improving alignment, or providing space that would not otherwise be available without a replacement pole. Use of extension arms shall be consistent with the requirements of applicable codes.~~

1303.10 Least Cost Alternatives. In completing make-ready work, a Pole owning utility shall pursue reasonable least cost alternatives, including space-saving techniques currently relied upon by the utility.

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Puc 1303.1142 Make-Ready Timeframes.

~~Pole owners shall complete make every reasonable effort to complete -make-ready work within 18090 days, except in a circumstance where the make-ready work involves 6 or fewer poles and FairPoint is the only entity required to move, in which case FairPoint will make every reasonable effort to complete make-ready work in 90 days, where the work includes limited or no pole replacements. If pole replacement is required, pole owners shall complete make-ready work within 180 days.~~

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PART Puc 1304 DISPUTE RESOLUTION

Puc 1304.01 Lack of Agreement. An entity seeking a Pole Attachment that is attaching entity unable to reach agreement with the owner or owners of a pole or poles subject to this chapter may petition the commission pursuant to Puc 203 for an order establishing the rates, charges, terms and conditions for the pole attachment or attachments. Such a petition shall include the information required for complaints to the

FCC made pursuant to the terms of 47 CFR § 1.1404(d) through (m) in effect on July 16, 2007.

Puc 1304.02 Dispute Following Agreement or Order. A party to a pole attachment agreement or a party subject to an order of the commission establishing rates, charges, terms or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order.

Puc 1304.03 Unauthorized Attachments. A pole owner may, but is not obligated to, petition the Commission pursuant to Puc 203 for an order directing the removal of and /or payment for facilities that are attached to a pole without authorization pursuant to this chapter.

Puc 1304.04 Procedure. Upon receipt of a petition pursuant to this part, the commission shall conduct an adjudicative proceeding pursuant to Puc 203 to consider and rule on the petition. Where the public interest so requires, the commission may order that rates, charges, terms or conditions for pole attachments be modified.

Puc 1304.05 Rate Review Standards.

(a) In determining just and reasonable rates for the attachments of competitive local exchange carriers and cable television service providers to poles owned by incumbent local exchange carriers under this chapter, the commission shall consider:

- (1) The interests of the subscribers and users of the services offered via such attachments;
- (2) The interests of the consumers of any pole owner providing such attachments; and
- (3) The formulae adopted by the FCC in 47 CFR § 1.1409(c) through (f) in effect on July 16, 2007.

(b) In determining just and reasonable rates for all other attachments under this chapter, the commission shall consider:

- (1) The interests of the subscribers and users of the services offered via such attachments; and
- (2) The interests of the consumers of any pole owner providing such attachments.

(c) For petitions filed on or before July 15, 2009, the Commission shall use the formulae referenced in (a)(3) above to determine just and reasonable rates under this chapter with respect to attachments of competitive local exchange carriers and cable television service providers.

Puc 1304.06 Burden of Proof.

(a) A pole attachment agreement entered into voluntarily under this part shall be presumed to be just, reasonable and nondiscriminatory for purposes of adjudication before the commission. An attaching entity filing a petition under this part shall have the burden of proving that an agreement entered into voluntarily is not just, reasonable and nondiscriminatory.

(b) A signed pole attachment agreement shall be presumed to have been entered into voluntarily. An attaching entity may rebut the presumption of voluntariness by demonstrating that signing the agreement, regardless of its terms, was reasonably necessary to avoid significant delay or business interruption.

(c) When the presumption of voluntariness has been successfully rebutted pursuant to (b) above, the burden of proving that the agreement is just, reasonable and nondiscriminatory shall shift to the pole owner.

Puc 1304.07 Remedies. When the commission determines just and reasonable rates under this part that differ from the rates paid by the petitioner, the commission shall order a payment or refund, as appropriate. Such refund or payment shall be the difference between the amount actually paid and the amount that would have been paid under the rates established by the commission, plus interest, as of the date of the petition.

Puc 1304.08 Interest. Refunds or payments ordered under Puc 1304.07 shall accrue simple annual interest at a rate equal to the prime rate.

+

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May 12, 2009

Scott F. Eaton, Director
Administrative Rules Division
Office of Legislative Services
State House Annex, Room 219
25 Capitol Street
Concord, New Hampshire 03301

Re: Puc 1300 – Utility Pole Attachments
PUC Docket: DRM 08-004

Dear Mr. Eaton:

Enclosed please find documents to be filed with your office regarding the above-referenced docket:

- 1) Appendix II-C, Rulemaking Notice Form;
- 2) Fiscal Impact Statement – FIS 09:074 (2 copies);
- 3) Puc 1300 - Initial Proposal – Annotated Text (Showing Changes from Current Interim Rules) (2 copies).
- 4) Puc 1300 - Initial Proposal – Fixed Text
- 5) Cross Reference Table of Applicable Statutes (2 copies);

Please include the Rulemaking Notice Form in the next available Rulemaking Register.

Thank you.

Sincerely,

Thomas B. Getz
Chairman

Enclosures

APPENDIX II-C

RULEMAKING NOTICE FORM

Notice Number _____ Rule Number **Puc 1300**

| | |
|---|---|
| <p>1. Agency Name & Address:</p> <p>Public Utilities Commission 21 South Fruit Street Suite 10 Concord, NH 03301</p> | <p>2. RSA Authority: <u> RSA 374:3, RSA 374:34-a </u></p> <p>3. Federal Authority: <u> 47 U.S.C. § 224(c) </u></p> <p>4. Type of Action:</p> <p>Adoption _____</p> <p>Amendment _____</p> <p>Repeal _____</p> <p>Readoption _____</p> <p>Readoption w/amendment <u> X </u></p> |
|---|---|

5. Short Title: **Puc 1300 – POLE ATTACHMENTS**

6. (a) Summary of what the rule says and the effect of the rule on those regulated:
- Puc 1300, pursuant to the mandate of RSA 374:34-a, provides for regulation of rates, charges, terms and conditions of utility pole attachments that are just, reasonable and in the public interest as regulated by the State Public Utilities Commission rather than the Federal Communications Commission.**
- Section 224 of the Federal Telecommunications Act, 47 U.S.C. § 224, authorizes states to assume jurisdiction over disputes between the owners of utility poles and persons attaching or seeking to attach facilities to those poles. The Legislature authorized the New Hampshire Public Utilities Commission (PUC) to assume jurisdiction, thereby regulating and enforcing the rates, charges, terms and conditions for such attachments, in 2007 N.H. Laws Ch. 340, codified as RSA 374:34-a. Interim rules, Chapter Puc 1300, went into effect and, thus, disputes over utility pole attachments in New Hampshire are now property brought before the NH PUC as opposed to the Federal Communications Commission.**
6. (b) Brief description of the groups affected: **Public utilities that own or co-own utility poles; or facilities attached to such poles and/or that seek such attachments.**

APPENDIX II-C (Continued)

RULEMAKING NOTICE FORM - Page 2

6. (c) Specific section or sections of state statute or federal statute or regulation which the rule is intended to implement:

| Rule | Applicable Statute |
|----------|-----------------------------|
| Puc 1300 | RSA 374:3; RSA 374:34-a,III |

7. Contact person for copies and questions including requests to accommodate persons with disabilities:

Name: **Lynn Fabrizio, Esq.** Title: **Staff Attorney**
Address: **21 South Fruit Street** Phone #: **603-271-6030**
Suite 10 Fax#: **603-271-3878**
Concord, NH 03301 E-mail: **lynn.fabrizio@puc.nh.gov**
TTY/TDD Access: Relay NH 1-800-735-2964 or dial 711 (in NH)

8. Deadline for submission of materials in writing or, if practicable for the agency, in the electronic format specified: **June 25, 2009**

Fax E-mail – Other format (specify):

9. Public hearing scheduled for:

Date and Time: **June 18, 2009 at 9:00 AM**
Place: **Public Utilities Commission**
21 South Fruit Street, Suite 10
Concord, NH 03301

10. Fiscal Impact Statement (Prepared by Legislative Budget Assistant)

FIS # **09:074** dated **May 8, 2009**

11. Statement Relative to Part I, Article 28-a of the N.H. Constitution: **The proposed rules do not modify an existing program or responsibility in any way that violates Part I, Article 28-a.**

LBAO
FIS 09:074
05/08/09

Fiscal Impact Statement for Public Utilities Commission rules governing Utility Pole Attachments.
[Puc 1300]

1. Comparison of the costs of the proposed rule(s) to the existing rule(s):

There is no difference in cost when comparing the proposed rules to the existing rules.

2. Cite the Federal mandate. Identify the impact on state funds:

No federal mandate, no impact on state funds.

3. Cost and benefits of the proposed rule(s):

There are no costs or benefits attributable to the proposed rules

A. To State general or State special funds:

None.

B. To State citizens and political subdivisions:

None.

C. To independently owned businesses:

None.

Readopt with Amendment Chapter Puc 1300, effective 1-17-08 (Document # 9073) to read as follows:

CHAPTER Puc 1300 UTILITY POLE ATTACHMENTS

Statutory Authority: RSA 374:3; RSA 374:34-a

PART Puc 1301 PURPOSE AND APPLICABILITY

Puc 1301.01 Purpose. The purpose of Puc 1300, pursuant to the mandate of RSA 374:34-a, is to ~~provide for the resolution of disputes involving the~~ ensure rates, charges, terms and conditions for pole attachments: are just, reasonable and in the public interest. Nothing in this Rule shall be construed to supersede, overrule, or replace any other law or regulation, including municipal and state authority over public highways pursuant to RSA 231:159 et seq.

Puc 1301.02 Applicability. Puc 1300 shall apply to

(a) Public utilities within the meaning of RSA 362, including rural electric cooperatives for which a certificate of deregulation is on file pursuant to RSA 301:57, that own, in whole or in part, any pole used for wire communications or electric distribution.

(b) ~~Other persons~~ Attaching entities with facilities attached to such poles, or seeking to attach facilities to such poles.

PART Puc 1302 DEFINITIONS

Puc 1301.01 “Attaching entity” means a natural person or an entity with a statutory or contract right to attach a facility of any type to a pole, including but not limited to telecommunications providers, cable television service providers, incumbent local exchange carriers, competitive local exchange carriers, electric utilities, and governmental entities.

Puc 1301.02 “Boxing” means the placement of lines or cables on both the road side and the field side of a pole.

Puc 1302.01~~3~~ “Commission” means the New Hampshire public utilities commission.

Puc 1302.04 “Extension arm(s)” means a bracket attached to a utility pole to provide support for cables or wires at a distance from the pole.

Puc 1302.05 “Facility” means the lines and cables and accompanying appurtenances attached to a utility pole for the transmission of electric, telecommunications, or digital information services.

Puc 1302.026 “FCC” means the federal communications commission.

Puc 1302.07 “Make-ready work” means the movement of cables and other facilities or the replacement of an existing pole with a taller pole to allow for additional attachments.

Puc 1302.038 “Pole” means “pole” as defined in RSA 374:34-a, 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.”

Puc 1302.09 “Prime rate” means the rate reported in the *Wall Street Journal* on the first business day of the month preceding the beginning of each calendar quarter, or the average of the rates so reported on that day.

Puc 1302.10 “Utility” means a public utility as defined in RSA 362:2, including a rural electric cooperative for which a certificate of deregulation is on file with the commission pursuant to RSA 301:57.

PART Puc 1303 ACCESS TO POLES

Puc 1303.01 Access Standard. The owner or owners of a pole shall provide attaching entities access to such pole on terms that are just, reasonable and nondiscriminatory. Notwithstanding this obligation, the owner or owners of a pole may deny a request for attachment to such pole when there is insufficient capacity on the pole or for reasons of safety, reliability and generally applicable engineering purposes.

Puc 1303.02 Owner Obligation to Negotiate. The owner or owners of a pole shall, upon the request of a person ~~seeking a~~ entitled to access under these rules seeking a pole attachment, negotiate in good faith with respect to the terms and conditions for such attachment.

Puc 1303.03 Requestor Obligation to Negotiate. A person ~~seeking a~~ entitled to access under these rules seeking a pole attachment shall contact the owner or owners of the pole and make a reasonable effort to negotiate in good faith an agreement for such attachment.

~~Puc 1303.04 Voluntary Agreements. Any pole attachment agreement entered into voluntarily under this part shall be presumed to be just, reasonable and nondiscriminatory. The commission shall not alter the terms of any such agreement.~~

Puc 1303.04 Request for Access and Response Requirements. Requests made under these rules and pursuant to a pole attachment agreement for access to a utility’s poles shall be in writing. Absent extraordinary circumstances, a survey for an application

not exceeding 200 poles shall be completed and the results communicated to the applicant seeking to attach within 45 days of receiving a completed application and survey fee. If permission for access is not granted within 45 calendar days of receiving a complete request for access, the owner must confirm the denial in writing by the 45th day. The 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 relate to the grounds in Puc 1303.01 for such denial.

Puc 1303.05 Authorization Required. A person seeking to attach facilities to a pole shall obtain authorization from the pole owner or owners prior to attaching such facilities.

Puc 1303.06 Notification.

(a) A pole owner shall provide a person with facilities attached to a pole no less than 60 days' written notice prior to:

- (1) Removing any of that person's facilities,
- (2) Increasing any annual or recurring fees or rates applicable to the pole attachment, or
- (3) Modifying the facilities other than as part of routine maintenance or response to an emergency.

(b) Attaching entities shall provide written notice to pole owner or owners no less than 60 days prior to:

- (1) Modifying an existing attachment other than as part of routine maintenance or response to an emergency;
- (2) Increasing the pole loading of an existing attachment; or
- (3) Changing the purpose for which an existing attachment is used.

Separate and additional attachments are subject to pole attachment application and licensing processes.

Puc 1303.07 Installation and Maintenance.

(a) All attachments shall be installed in accordance with the National Electrical Safety Code, 2007 edition, the National Electric Code as adopted by RSA 155-A:1,IV, and the SR-1421 *Blue Book – Manual of Construction Practices, Issue 4*, Telecordia Technologies, Inc. (2007), and in accordance with such other applicable standards and requirements specified in the pole attachment agreement.

(b) Any attachment shall be installed and maintained to prevent interference with service furnished by the utility pole owner or owners and any other attaching entity.

Puc 1303.08 Labeling of Attachments.

Attaching entities shall clearly label their attachments with owner identification.

Puc 1303.09 Location of Attachments

No attaching entity shall be denied attachment solely because the only space available for attachment on a pole is below the lowest attached facility. If the owner of the lowest facility chooses to relocate its existing facilities to a lower allowable point of attachment so that the new attaching entity will be above all existing facilities, it shall do so at its own expense.

Puc 1303.10 Boxing of Poles

Pole owners may restrict the practice of boxing poles consistent with the restrictions it places on its own practice of boxing poles as defined in the company's written methods and procedures. Such boxing shall be safely accessible by bucket trucks, ladders or emergency equipment and otherwise consistent with the requirements of applicable codes, including the National Electric Safety Code.

Puc 1303.11 Use of Extension Arms.

Pole owners shall allow limited, reasonable use of extension arms by attaching entities for purposes of clearing obstacles or improving alignment of attachment facilities. Under no circumstances may extension arms be used to avoid tree trimming requirements. Any use of extension arms shall be consistent with the requirements of applicable codes, including the National Electric Safety Code.

Puc 1303.12 Make-Ready Timeframes.

Unless otherwise agreed by parties to a pole attachment agreement, pole owners shall complete make-ready work within 180 days after any required pre-payments of any make-ready estimates provided to the attaching entity by the pole owner or owners. Unless otherwise agreed by the parties to a pole attachment agreement, make-ready work shall be deemed to include all work, including but not limited to rearrangement and/or transfer of existing facilities, replacement of a pole or any other changes required to accommodate the attachment of the facilities of the party requesting attachment to the pole.

PART Puc 1304 DISPUTE RESOLUTION

Puc 1304.01 Lack of Agreement. A person ~~unable-requesting a pole attachment and entitled to access under these rules and unable, under demonstrable exhaustion of reasonable good faith negotiation efforts,~~ to reach agreement with the owner or owners of a pole or poles subject to this chapter, may petition the commission pursuant to Part Puc 203 for an order establishing the rates, charges, terms and conditions for the pole attachment or attachments. Such a petition shall include the information required for complaints to the FCC made pursuant to the terms of 47 CFR § 1.1404(d) through (m) in effect on July 16, 2007.

Puc 1304.02 Dispute Following Agreement or Order. A party to a ~~voluntary~~ pole attachment agreement entered into ~~pursuant to this chapter on or after July 17, 2007,~~ or a party subject to an order of the commission establishing rates, charges, terms or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order.

~~Puc 1304.03 Procedure. Upon receipt of a petition pursuant to this part, the commission shall conduct adjudicative proceedings pursuant to Puc 203 for the purpose of considering and ruling on the petition. The commission shall issue its order resolving the complaint within 180 days of the receipt of a complete petition under this part.~~

~~Puc 1304.04 FCC Standard Applicable. In determining just and reasonable rates under this chapter, the commission shall apply the standards and formulae adopted by the FCC in 47 CFR § 1.1409(e) through (f) in effect on July 16, 2007.~~

~~Puc 1304.05 Remedies. When the commission determines just and reasonable rates under this Part that differ from the rates paid by the petitioner, the commission shall order a payment or refund, as appropriate. Such refund or payment shall be the difference between the amount actually paid and the amount that would have been paid under the rates established by the commission, plus interest, as of the date of the petition.~~

~~Puc 1304.03 Unauthorized Attachments. A pole owner may, but is not obligated to petition the commission pursuant to Puc 203 for an order directing the removal of facilities that are attached to a pole without authorization pursuant to this chapter.~~

~~Puc 1304.04 Procedure. Upon receipt of a petition pursuant to this part, the commission shall conduct an adjudicative proceeding pursuant to Puc 203 to consider and rule on the petition. Where the public interest so requires, the commission may order that rates, charges, terms or conditions for pole attachments be modified.~~

Puc 1304.05 Rate Review Standards.

(a) In determining just and reasonable rates for the attachments of competitive local exchange carriers and cable television service providers to poles owned by incumbent local exchange carriers or electric utilities under this chapter, the commission shall consider:

(1) The interests of the subscribers and users of the services offered via such attachments;

(2) The interests of the consumers of any pole owner providing such attachments; and

(3) The formulae adopted by the FCC in 47 CFR § 1.1409(c) through (f) in effect on July 16, 2007.

(b) In determining just and reasonable rates for all other attachments under this chapter, the commission shall consider:

(1) The interests of the subscribers and users of the services offered via such attachments; and

(2) The interests of the consumers of any pole owner providing such attachments.

Puc 1304.06 Burden of Proof.

(a) A pole attachment agreement entered into voluntarily under this part shall be presumed to be just, reasonable and nondiscriminatory for purposes of adjudication before the commission. An attaching entity filing a petition under this part shall have the burden of proving that an agreement entered into voluntarily is not just, reasonable and nondiscriminatory.

(b) A pole attachment agreement signed prior to July 17, 2007, shall be presumed to have been entered into voluntarily. An attaching entity may rebut the presumption of voluntariness by demonstrating that signing the agreement, regardless of its terms, was reasonably necessary to avoid significant delay in deployment of facilities.

(c) When the presumption of voluntariness has been successfully rebutted pursuant to (b) above, the burden of proving that the agreement is just, reasonable and nondiscriminatory shall shift to the pole owner.

Puc 1304.07 Remedies. When the commission determines just and reasonable rates under this part that differ from the rates paid by the petitioner, the commission shall order a payment or refund, as appropriate. Such refund or payment shall be the difference between the amount actually paid and the amount that would have been paid under the rates established by the commission, plus interest, as of the date of the petition.

Puc 1304.08 Interest. Refunds or payments ordered under Puc 1304.07 shall accrue simple annual interest at a rate equal to the prime rate.

~~PART Puc 1305 CERTIFICATION TO FCC~~

~~Puc 1305.01 Certification. Within 10 days of the effective date of these rules, the commission shall certify to the FCC that the commission regulates the rates, terms and conditions for pole attachments in a manner sufficient to supersede FCC jurisdiction pursuant to 47 U.S.C. § 224 in effect on July 17, 2007 or any successor federal statute.~~

Appendix

| Rule | Applicable Statute |
|----------|-------------------------|
| Puc 1300 | RSA 374:3; RSA 374:34-a |

Readopt with Amendment Chapter Puc 1300, effective 1-17-08 (Document # 9073) to read as follows:

CHAPTER Puc 1300 UTILITY POLE ATTACHMENTS

Statutory Authority: RSA 374:3; RSA 374:34-a

PART Puc 1301 PURPOSE AND APPLICABILITY

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 are just, reasonable and in the public interest. Nothing in this Rule shall be construed to supersede, overrule, or replace any other law or regulation, including municipal and state authority over public highways pursuant to RSA 231:159 et seq.

Puc 1301.02 Applicability. Puc 1300 shall apply to

(a) Public utilities within the meaning of RSA 362, including rural electric cooperatives for which a certificate of deregulation is on file pursuant to RSA 301:57, that own, in whole or in part, any pole used for wire communications or electric distribution.

(b) Attaching entities with facilities attached to such poles, or seeking to attach facilities to such poles.

PART Puc 1302 DEFINITIONS

Puc 1301.01 “Attaching entity” means a natural person or an entity with a statutory or contract right to attach a facility of any type to a pole, including but not limited to telecommunications providers, cable television service providers, incumbent local exchange carriers, competitive local exchange carriers, electric utilities, and governmental entities.

Puc 1301.02 “Boxing” means the placement of lines or cables on both the road side and the field side of a pole.

Puc 1302.03 “Commission” means the New Hampshire public utilities commission.

Puc 1302.04 “Extension arm(s)” means a bracket attached to a utility pole to provide support for cables or wires at a distance from the pole.

Puc 1302.05 “Facility” means the lines and cables and accompanying appurtenances attached to a utility pole for the transmission of electric, telecommunications, or digital information services.

Puc 1302.06 “FCC” means the federal communications commission.

Puc 1302.07 “Make-ready work” means the movement of cables and other facilities or the replacement of an existing pole with a taller pole to allow for additional attachments.

Puc 1302.08 “Pole” means “pole” as defined in RSA 374:34-a, 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.”

Puc 1302.09 “Prime rate” means the rate reported in the *Wall Street Journal* on the first business day of the month preceding the beginning of each calendar quarter, or the average of the rates so reported on that day.

Puc 1302.10 “Utility” means a public utility as defined in RSA 362:2, including a rural electric cooperative for which a certificate of deregulation is on file with the commission pursuant to RSA 301:57.

PART Puc 1303 ACCESS TO POLES

Puc 1303.01 Access Standard. The owner or owners of a pole shall provide attaching entities access to such pole on terms that are just, reasonable and nondiscriminatory. Notwithstanding this obligation, the owner or owners of a pole may deny a request for attachment to such pole when there is insufficient capacity on the pole or for reasons of safety, reliability and generally applicable engineering purposes.

Puc 1303.02 Owner Obligation to Negotiate. The owner or owners of a pole shall, upon the request of a person entitled to access under these rules seeking a pole attachment, negotiate in good faith with respect to the terms and conditions for such attachment.

Puc 1303.03 Requestor Obligation to Negotiate. A person entitled to access under these rules seeking a pole attachment shall contact the owner or owners of the pole and make a reasonable effort to negotiate in good faith an agreement for such attachment.

Puc 1303.04 Request for Access and Response Requirements. Requests made under these rules and pursuant to a pole attachment agreement for access to a utility's poles shall be in writing. Absent extraordinary circumstances, a survey for an application not exceeding 200 poles shall be completed and the results communicated to the applicant seeking to attach within 45 days of receiving a completed application and survey fee. If permission for access is not granted within 45 calendar days of receiving a complete request for access, the owner must confirm the denial in writing by the 45th day. The 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 relate to the grounds in Puc 1303.01 for such denial.

Puc 1303.05 Authorization Required. A person seeking to attach facilities to a pole shall obtain authorization from the pole owner or owners prior to attaching such facilities.

Puc 1303.06 Notification.

(a) A pole owner shall provide a person with facilities attached to a pole no less than 60 days' written notice prior to:

- (1) Removing any of that person's facilities,
- (2) Increasing any annual or recurring fees or rates applicable to the pole attachment, or
- (3) Modifying the facilities other than as part of routine maintenance or response to an emergency.

(b) Attaching entities shall provide written notice to pole owner or owners no less than 60 days prior to:

- (1) Modifying an existing attachment other than as part of routine maintenance or response to an emergency;
- (2) Increasing the pole loading of an existing attachment; or
- (3) Changing the purpose for which an existing attachment is used.

Separate and additional attachments are subject to pole attachment application and licensing processes.

Puc 1303.07 Installation and Maintenance.

(a) All attachments shall be installed in accordance with the National Electrical Safety Code, 2007 edition, the National Electric Code as adopted by RSA 155-A:1,IV, and the SR-1421 *Blue Book – Manual of Construction Practices, Issue 4*, Telecordia Technologies, Inc. (2007), and in accordance with such other applicable standards and requirements specified in the pole attachment agreement.

(b) Any attachment shall be installed and maintained to prevent interference with service furnished by the utility pole owner or owners and any other attaching entity.

Puc 1303.08 Labeling of Attachments.

Attaching entities shall clearly label their attachments with owner identification.

Puc 1303.09 Location of Attachments

No attaching entity shall be denied attachment solely because the only space available for attachment on a pole is below the lowest attached facility. If the owner of the lowest facility chooses to relocate its existing facilities to a lower allowable point of attachment so that the new attaching entity will be above all existing facilities, it shall do so at its own expense.

Puc 1303.10 Boxing of Poles

Pole owners may restrict the practice of boxing poles consistent with the restrictions it places on its own practice of boxing poles as defined in the company's written methods and procedures. Such boxing shall be safely accessible by bucket trucks, ladders or emergency equipment and otherwise consistent with the requirements of applicable codes, including the National Electric Safety Code.

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Puc 1303.12 Make-Ready Timeframes.

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PART Puc 1304 DISPUTE RESOLUTION

Puc 1304.01 Lack of Agreement. A person requesting a pole attachment and entitled to access under these rules and unable, under demonstrable exhaustion of reasonable good faith negotiation efforts, to reach agreement with the owner or owners of a pole or poles subject to this chapter, may petition the commission pursuant to Part Puc 203 for an order establishing the rates, charges, terms and conditions for the pole attachment or attachments. Such a petition shall include the information required for complaints to the FCC made pursuant to the terms of 47 CFR § 1.1404(d) through (m) in effect on July 16, 2007.

Puc 1304.02 Dispute Following Agreement or Order. A party to a pole attachment agreement entered into on or after July 17, 2007, or a party subject to an order of the commission establishing rates, charges, terms or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order.

Puc 1304.03 Unauthorized Attachments. A pole owner may, but is not obligated to petition the commission pursuant to Puc 203 for an order directing the removal of facilities that are attached to a pole without authorization pursuant to this chapter.

Puc 1304.04 Procedure. Upon receipt of a petition pursuant to this part, the commission shall conduct an adjudicative proceeding pursuant to Puc 203 to consider and rule on the petition. Where the public interest so requires, the commission may order that rates, charges, terms or conditions for pole attachments be modified.

Puc 1304.05 Rate Review Standards.

(a) In determining just and reasonable rates for the attachments of competitive local exchange carriers and cable television service providers to poles owned by incumbent local exchange carriers or electric utilities under this chapter, the commission shall consider:

- (1) The interests of the subscribers and users of the services offered via such attachments;
- (2) The interests of the consumers of any pole owner providing such attachments; and
- (3) The formulae adopted by the FCC in 47 CFR § 1.1409(c) through (f) in effect on July 16, 2007.

(b) In determining just and reasonable rates for all other attachments under this chapter, the commission shall consider:

- (1) The interests of the subscribers and users of the services offered via such attachments; and
- (2) The interests of the consumers of any pole owner providing such attachments.

Puc 1304.06 Burden of Proof.

(a) A pole attachment agreement entered into voluntarily under this part shall be presumed to be just, reasonable and nondiscriminatory for purposes of adjudication before the commission. An attaching entity filing a petition under this part shall have the

burden of proving that an agreement entered into voluntarily is not just, reasonable and nondiscriminatory.

(b) A pole attachment agreement signed prior to July 17, 2007, shall be presumed to have been entered into voluntarily. An attaching entity may rebut the presumption of voluntariness by demonstrating that signing the agreement, regardless of its terms, was reasonably necessary to avoid significant delay in deployment of facilities.

(c) When the presumption of voluntariness has been successfully rebutted pursuant to (b) above, the burden of proving that the agreement is just, reasonable and nondiscriminatory shall shift to the pole owner.

Puc 1304.07 Remedies. When the commission determines just and reasonable rates under this part that differ from the rates paid by the petitioner, the commission shall order a payment or refund, as appropriate. Such refund or payment shall be the difference between the amount actually paid and the amount that would have been paid under the rates established by the commission, plus interest, as of the date of the petition.

Puc 1304.08 Interest. Refunds or payments ordered under Puc 1304.07 shall accrue simple annual interest at a rate equal to the prime rate.

Appendix

| Rule | Applicable Statute |
|----------|-------------------------|
| Puc 1300 | RSA 374:3; RSA 374:34-a |

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

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

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

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

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

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

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

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

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

³ Notice Form, p. 1.

ARGUMENT

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

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

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

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

⁵ The Amendment text read as follows: “...Once the interim rules are adopted, pole attachments shall become subject to RSA 374:34-a and the rules of the public utilities commission.” Section 374:34-a in turn provides that the Commission “... shall regulate and enforce rates, charges, terms, and conditions for such pole attachments... to provide that such rates, charges, terms, and conditions are just and reasonable. This authority shall include but not be limited to the state regulatory authority referenced in 47 U.S.C. section 224(c)” and “shall adopt rules under RSA 541-A to carry out the provisions of this section, including appropriate formula or formulae for apportioning costs.” (Emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

Rule 1304.06 in the Initial Proposal requires an attacher to prove that its signature on a pole agreement was not voluntary. Moreover, it specifically creates a rebuttable presumption of voluntariness for pole agreements entered into prior to the effective date of the legislation in July 2007.¹¹ These provisions should be deleted from the Initial Proposal as being unreasonable, contrary to decades of practice and likely to commence fact-intensive disputes that will

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

¹¹ See 1304.06(b).

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

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

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

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

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

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

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

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

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

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

IV. OTHER TERMS AND CONDITIONS ISSUES.

A. Makeready Deadlines Should Be Shortened

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

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

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

B. The 200 Pole Application Limit Is Too Restrictive

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

C. Process for Unauthorized Attachments Should be Clarified

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

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

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

CONCLUSION

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

Respectfully submitted,

NEW ENGLAND CABLE AND
TELECOMMUNICATIONS ASSOCIATION,
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Dated: June 25, 2009



June 25, 2009

BY HAND-DELIVERY

Debra A. Howland, Executive Director and Secretary
New Hampshire Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301-2429

RE: Docket No. DRM 08-004 Utility Pole Attachment Rules

Dear Director Howland:

Please accept this letter as the comments of Unitil Energy Systems, Inc. ("UES"), on the proposed Readoption with Amendment of Interim Rule Puc 1300, Utility Pole Attachments, as set forth in New Hampshire Public Utilities Commission ("Commission") Rulemaking Notice Form filed with the Office of Legislative Services on May 12, 2009.

UES' s primary area of concern regarding the proposed rules relates to the broad applicability of the proposed rules. UES agrees with the comments submitted on this point by Public Service Company of New Hampshire and Granite State Electric Company d/b/a National Grid: The scope of the proposal exceeds the statutory authority granted to the Commission pursuant to RSA 374:34-a, which limits the types of attachments to be regulated as those regulated under 47 U.S.C. section 224. As Section 224 defines a "pole attachment" as any attachment by a cable television system or provider of telecommunications service to pole, duct, conduit, or right-of-way owned or controlled by a utility, the Commission's authority to regulate pole attachments is, accordingly, limited to these same attachments.

By incorporating the proposed definition of "Attaching Entity" in Puc 1302.01 with the Applicability section (Puc 1301.02(b)), however, the rules would purport to regulate the pole attachments of any natural person or entity with a statutory or contract right to attach a facility to any type of a pole. UES submits that this would expand the reach of the Commission beyond the authority granted to it in RSA 374:34-a.

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UES recommends, therefore, that the definition of "Attaching Entity" be revised such that the entities covered by the rule are consistent with and limited to those regulated under 47 U.S.C. Section 224: a cable television system or a provider of telecommunications services.

The second area of concern for UES is with respect to the Dispute Resolution section, specifically Puc 1304.02, which appears to limit the pole attachment agreements subject to the Commission's review to those entered into on or after July 17, 2007. UES submits that there is no "vintage" limitation on the attachment agreements which are subject to the Commission's review authority in the enabling legislation. RSA 374:34-a, VII is broad in its scope, providing that:

The commission shall have the authority to hear and resolve complaints concerning the rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments.

This section provides the Commission the authority to resolve disputes concerning voluntary agreements without restriction as to the date such agreement was entered into. The proposed limitation of review to only those agreements entered into after July 17, 2007 would also be in conflict with a later provision in the proposed rules, Puc 1304.06(b) which provides that "A pole attachment agreement signed prior to July 17, 2007, shall be presumed to have been entered into voluntarily."

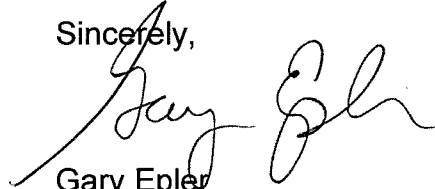
Accordingly, UES recommends that Puc 1304.02 be revised as follows:

Puc 1304.02 Dispute Following Agreement or Order. A party to a voluntary pole attachment agreement, ~~entered into pursuant to this chapter on or after July 17, 2007,~~ or a party subject to an order of the commission establishing rates, charges, terms or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order.

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UES has no further comments on the proposed rules, other than to note its appreciation for the work of the Commission Staff and other interested parties during the course of this docket.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary Epler", written over the word "Sincerely,".

Gary Epler
Attorney for Unitil Energy Systems, Inc.

cc: Service List

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DRM 08-004

Utility Pole Attachments – Rulemaking

COMMENTS OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

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

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

A. Commission Authority Under RSA 374:34-a

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

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

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

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

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

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

Accordingly, PSNH believes that the proposed definition of the term “Attaching entity” in proposed Rule Puc 1302.01³ is too broad. In light of the adoption of the use of this term in numerous other provisions of the proposed rules, the present definition of an “Attaching entity” would effectively allow a broader applicability of the rules to pole attachments beyond the scope of the Commission’s regulatory authority. As presently

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

³ The proposed revised Puc 1300 Rules submitted with the Rulemaking Notice Form have mistakenly labeled this “1301.01”.

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

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

This definitional change would bring the proposed new pole attachment rules into line with the scope of pole attachment regulatory authority granted the Commission under RSA 374:34-a, namely, the attachments of the types of attaching entities regulated under the Federal Pole Attachment Act. A conforming change would need to be made to proposed Puc 1304.05, Rate Review Standards, to eliminate subsection (b) of that proposed Rule, since the attachments of cable television service providers and CLECs are already referenced in subsection (a), and only the attachments of those entities are properly subject to Commission pole attachment rate regulation.

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Access Standard

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

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

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

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

C. Notification

Proposed Rule Puc 1303.06(a) requires a pole owner to provide no less than 60 days prior notice to "a person with facilities attached to a pole" before removing those facilities, increasing any applicable rates, or modifying the facilities. On its face, the wording of this rule could apply to both authorized and unauthorized attachments.

Proposed Rule Puc 1303.05 establishes the generally applicable rule that prior authorization from the pole owner must be obtained to attach facilities to a pole. Thus, unauthorized attachments do not and should not enjoy any protection under the Commission's pole attachment rules. To the extent proposed Puc 1303.06(a) could

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

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

D. Voluntary Pole Attachment Agreements

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

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

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

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

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

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

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

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

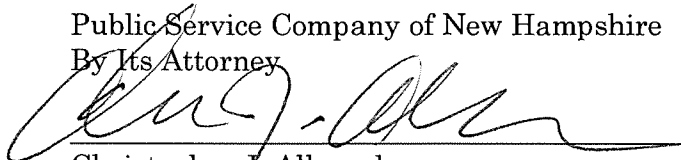
Conclusion

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

Respectfully submitted,

Public Service Company of New Hampshire
By Its Attorney

Date: 6/25, 2009.



Christopher J. Allwarden
Senior Counsel, Legal Department
PSNH Energy Park
780 North Commercial Street
Manchester, NH 03101
603-634-2459

THE STATE OF NEW HAMPSHIRE



PUBLIC UTILITIES COMMISSION

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Thomas B. GetzCOMMISSIONER
Clifton C. BelowEXECUTIVE DIRECTOR
AND SECRETARY
Debra A. Howland

July 17, 2009

Scott F. Eaton, Director
Administrative Rules Division
Office of Legislative Services
State House Annex, Room 219
25 Capitol Street
Concord, New Hampshire 03301

Re: Notice No. 2009-79
Puc 1300, Utility Pole Attachments
Commission Docket No. 08-004
Final Proposal

Dear Mr. Eaton:

On May 1, 2009, the Commission voted pursuant to RSA 541-A to initiate a Readoption with Amendment to Puc 1300, regarding Utility Pole Attachments. A rulemaking notice form required by RSA 541-A:6 was filed with the Office of Legislative Services on May 12, 2009. The notice scheduled the public hearing on the proposed Readoption with Amendment for June 18, 2009.

The hearing was held as scheduled, and comments were received from the parties involved. Those comments were incorporated into the Rules. On July 16, 2009, the Commission held a public hearing, pursuant to RSA 91-A:2, III, and voted to approve that document as the Final Proposal for the Readoption with Amendment of Puc 1300.

The Commission asks that the JLCAR consider this proposal for Approval.

As required by the Rulemaking Manual, you will find enclosed two copies of the following:

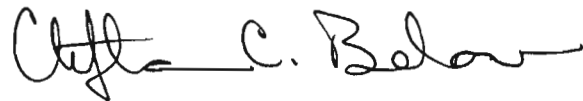
- A completed Appendix II-G, Cover Sheet for Final Proposal;
- A copy of the full text of the statutory rulemaking authority for the rule;

DRM 08-004
Puc 1300, Utility Pole Attachments
Final Proposal

- The established text of the final proposed rule as the “Final Proposal—Fixed Text”;
- The established text of the final proposed rule as the “Final Proposal—Annotated Text”;
- The cross reference table relative to implementation of statutes; and
- Applicable Incorporation by Reference Statements - 3.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Clifton C. Below". The signature is written in a cursive style with a horizontal line extending from the end.

Clifton C. Below
Commissioner

Enclosures

APPENDIX II-G

COVER SHEET FOR FINAL PROPOSAL

Notice Number 2009-79

Rule Number Puc 1300

1. Agency Name & Address:

**NH Public Utilities Commission
21 S. Fruit St Suite 10
Concord NH 03301-2429**

2. RSA Authority:

RSA 374:34-a, III

3. Federal Authority:

4. Type of Action:

- Adoption
 Amendment
 Repeal
 Readoption
 Readoption w/amendment

5. Short Title: **UTILITY POLE ATTACHMENTS**

6. Contact person for copies and questions:

Name: **Lynn Fabrizio, Esq.**
Address: **NH Public Utilities Commission
21 South Fruit Street, Suite 10
Concord NH 03301-2429**

Title: **Staff Attorney**
Phone #: **603-271-2431**

7. Yes No Agency requests Committee legal counsel review and delayed Committee review pursuant to RSA 541-A:12, I-a

8. The rulemaking notice appeared in the Rulemaking Register on November 14, 2008

**SEE THE INSTRUCTIONS--PLEASE SUBMIT 2 COPIES OF THIS COVER SHEET
AND 2 COPIES OF THE FOLLOWING:
(and numbered correspondingly)**

9. The "Final Proposal-Fixed Text," including the cross-reference table required by RSA 541-A:3-a, II as an appendix.

10. The full text of the RSA passage granting rulemaking authority.

11. Yes N/A Incorporation by Reference Statement(s) because this rule incorporates a document by reference for which an Incorporation by Reference Statement is required pursuant to RSA 541-A:12, III.

12. Yes N/A The "Final Proposal-Annotated Text," indicating how the proposed rule was changed because the text of the rule changed from the Initial Proposal pursuant to RSA 541-A:12, II(e).

13. Yes N/A The amended fiscal impact statement because the change to the text of the Initial Proposal affects the original fiscal impact statement (FIS) pursuant to RSA 541-A:5, VI.

APPENDIX II-G

COVER SHEET FOR FINAL PROPOSAL

Notice Number 2009-79 Rule Number Puc 1300

| | |
|--|---|
| 1. Agency Name & Address: NH Public Utilities Commission 21 S. Fruit St Suite 10 Concord NH 03301-2429 | 2. RSA Authority: <u>RSA 374:34-a, III</u> 3. Federal Authority: _____ 4. Type of Action: <input type="checkbox"/> Adoption <input type="checkbox"/> Amendment <input type="checkbox"/> Repeal <input type="checkbox"/> Readoption <input checked="" type="checkbox"/> Readoption w/amendment |
|--|---|

5. Short Title: **UTILITY POLE ATTACHMENTS**

6. Contact person for copies and questions:

| | | | |
|----------|---|----------|-----------------------|
| Name: | Lynn Fabrizio, Esq. | Title: | Staff Attorney |
| Address: | NH Public Utilities Commission 21 South Fruit Street, Suite 10 Concord NH 03301-2429 | Phone #: | 603-271-2431 |

7. Yes No Agency requests Committee legal counsel review and delayed Committee review pursuant to RSA 541-A:12, I-a

8. The rulemaking notice appeared in the Rulemaking Register on November 14, 2008

**SEE THE INSTRUCTIONS--PLEASE SUBMIT 2 COPIES OF THIS COVER SHEET
AND 2 COPIES OF THE FOLLOWING:
(and numbered correspondingly)**

9. The "Final Proposal-Fixed Text," including the cross-reference table required by RSA 541-A:3-a, II as an appendix.

10. The full text of the RSA passage granting rulemaking authority.

11. Yes N/A Incorporation by Reference Statement(s) because this rule incorporates a document by reference for which an Incorporation by Reference Statement is required pursuant to RSA 541-A:12, III.

12. Yes N/A The "Final Proposal-Annotated Text," indicating how the proposed rule was changed because the text of the rule changed from the Initial Proposal pursuant to RSA 541-A:12, II(e).

13. Yes N/A The amended fiscal impact statement because the change to the text of the Initial Proposal affects the original fiscal impact statement (FIS) pursuant to RSA 541-A:5, VI.

**TITLE XXXIV
PUBLIC UTILITIES**

**CHAPTER 374
GENERAL REGULATIONS**

Pole Attachments

Section 374:34-a

374:34-a Pole Attachments -

I. In this subdivision, a "'pole'" means 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.

II. Whenever a pole owner is unable to reach agreement with a party seeking pole attachments, the commission shall regulate and enforce rates, charges, terms, and conditions for such pole attachments, with regard to the types of attachments regulated under 47 U.S.C. section 224, to provide that such rates, charges, terms, and conditions are just and reasonable. This authority shall include but not be limited to the state regulatory authority referenced in 47 U.S.C. section 224(c).

III. The commission shall adopt rules under RSA 541-A to carry out the provisions of this section, including appropriate formula or formulae for apportioning costs.

IV. In exercising its authority under this subdivision, the commission shall consider the interests of the subscribers and users of the services offered via such attachments, as well as the interests of the consumers of any pole owner providing such attachments.

V. Nothing in this subdivision shall prevent parties from entering into pole attachment agreements voluntarily, without commission approval.

VI. Any pole owner shall provide nondiscriminatory access to its poles for the types of attachments regulated under this subdivision. A pole owner may deny access to its poles on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

VII. The commission shall have the authority to hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments.

Source. 2007, 340:1, eff. July 16, 2007.

**TITLE XXXIV
PUBLIC UTILITIES**

**CHAPTER 374
GENERAL REGULATIONS**

Pole Attachments

Section 374:34-a

374:34-a Pole Attachments -

I. In this subdivision, a "'pole'" means 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.

II. Whenever a pole owner is unable to reach agreement with a party seeking pole attachments, the commission shall regulate and enforce rates, charges, terms, and conditions for such pole attachments, with regard to the types of attachments regulated under 47 U.S.C. section 224, to provide that such rates, charges, terms, and conditions are just and reasonable. This authority shall include but not be limited to the state regulatory authority referenced in 47 U.S.C. section 224(c).

III. The commission shall adopt rules under RSA 541-A to carry out the provisions of this section, including appropriate formula or formulae for apportioning costs.

IV. In exercising its authority under this subdivision, the commission shall consider the interests of the subscribers and users of the services offered via such attachments, as well as the interests of the consumers of any pole owner providing such attachments.

V. Nothing in this subdivision shall prevent parties from entering into pole attachment agreements voluntarily, without commission approval.

VI. Any pole owner shall provide nondiscriminatory access to its poles for the types of attachments regulated under this subdivision. A pole owner may deny access to its poles on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

VII. The commission shall have the authority to hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments.

Source. 2007, 340:1, eff. July 16, 2007.

Readopt with Amendment Chapter Puc 1300, effective 1-17-08 (Document # 9073) to read as follows:

CHAPTER Puc 1300 UTILITY POLE ATTACHMENTS

Statutory Authority: RSA 374:3; RSA 374:34-a

PART Puc 1301 PURPOSE AND APPLICABILITY

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 just, reasonable and in the public interest. 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.

Puc 1301.02 Applicability. Puc 1300 shall apply to:

(a) Public utilities within the meaning of RSA 362, including rural electric cooperatives for which a certificate of deregulation is on file pursuant to RSA 301:57, 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.

PART Puc 1302 DEFINITIONS

Puc 1302.01 “Attaching entity” means a natural person or an entity with a statutory or contract right to attach a facility of any type to a pole, including but not limited to telecommunications providers, cable television service providers, incumbent local exchange carriers, competitive local exchange carriers, electric utilities, and governmental entities.

Puc 1302.02 “Boxing” means the placement of lines or cables on both the road side and the field side of a pole.

Puc 1302.03 “Commission” means the New Hampshire public utilities commission.

Puc 1302.04 “Extension arm(s)” means a bracket attached to a utility pole to provide support for cables or wires at a distance from the pole.

Puc 1302.05 “Facility” means the lines and cables and accompanying appurtenances attached to a utility pole for the transmission of electricity, information, telecommunications, or video programming for the public.

Puc 1302.06 “Federal Communications Commission (FCC)” means the U.S. government agency established by the Communications Act of 1934 and charged with regulating interstate and international communications by radio, television, wire, satellite and cable.

Puc 1302.07 “Make-ready work” means all work, including but not limited to rearrangement and/or transfer of existing facilities, replacement of a pole or any other changes required to accommodate the attachment of the facilities of the party requesting attachment to the pole.

Puc 1302.08 “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.”

Puc 1302.09 “Prime rate” means the rate reported in the *Wall Street Journal* on the first business day of the month preceding the beginning of each calendar quarter, or the average of the rates so reported on that day.

Puc 1302.10 “Utility” means a “public utility” as defined in RSA 362:2, including a rural electric cooperative for which a certificate of deregulation is on file with the commission pursuant to RSA 301:57.

PART Puc 1303 ACCESS TO POLES

Puc 1303.01 Access Standard. The owner or owners of a pole shall provide attaching entities access to such pole on terms that are just, reasonable and nondiscriminatory. Notwithstanding this obligation, the owner or owners of a pole may deny a request for attachment to such pole when there is insufficient capacity on the pole or for reasons of safety, reliability or generally applicable engineering purposes. Nothing herein shall require the owner or owners of a pole to provide access where such access would violate other applicable laws, rules or regulations.

Puc 1303.02 Owner Obligation to Negotiate. The owner or owners of a pole shall, upon the request of a person entitled to access under these rules seeking a pole attachment, negotiate in good faith with respect to the terms and conditions for such attachment.

Puc 1303.03 Requestor Obligation to Negotiate. A person entitled to access under these rules seeking a pole attachment shall contact the owner or owners of the pole and negotiate in good faith an agreement for such attachment.

Puc 1303.04 Request for Access and Response Requirements. Requests made under these rules and pursuant to a pole attachment agreement for access to a utility's poles shall be in writing. Absent extraordinary circumstances, a survey for an application

not exceeding 200 poles shall be completed and the results communicated to the applicant seeking to attach within 45 days of receiving a completed application and survey fee. If permission for access is not granted within 45 calendar days of receiving a complete request for access, the owner shall confirm the denial in writing by the 45th day. The 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 relate to the grounds in Puc 1303.01 for such denial.

Puc 1303.05 Authorization Required. A person seeking to attach facilities to a pole shall obtain authorization from the pole owner or owners prior to attaching such facilities.

Puc 1303.06 Notification.

(a) A pole owner shall provide an attaching entity no less than 60 days' written notice prior to:

- (1) Removing any of that person's facilities,
- (2) Increasing any annual or recurring fees or rates applicable to the pole attachment, or
- (3) Modifying the facilities other than as part of routine maintenance or response to an emergency.

(b) Attaching entities shall provide written notice to a pole owner or owners no less than 60 days prior to:

- (1) Modifying an existing attachment other than as part of routine maintenance or response to an emergency, or to install a customer drop line;
- (2) Increasing the load, or weight, on a pole by adding to an existing attachment; or
- (3) Changing the purpose for which an existing attachment is used.

Separate and additional attachments are subject to pole attachment application and licensing processes.

Puc 1303.07 Installation and Maintenance.

(a) All attachments shall be installed in accordance with the National Electrical Safety Code, 2007 edition, the National Electrical Code as adopted in RSA 155-A:1,IV, and the SR-1421 *Blue Book – Manual of Construction Practices, Issue 4*, Telcordia

Technologies, Inc. (2007), and in accordance with such other applicable standards and requirements specified in the pole attachment agreement.

(b) Any attachment shall be installed and maintained to prevent interference with service furnished by the utility pole owner or owners and any other attaching entity.

(c) Where a pole or existing attachment must be brought into compliance with applicable standards and codes before a new attachment can be added, the cost of bringing that pole or existing attachment into compliance shall not be shifted to the entity seeking to add a new attachment.

Puc 1303.08 Labeling of Attachments.

Attaching entities shall clearly label their attachments with owner identification.

Puc 1303.09 Location of Attachments

No attaching entity shall be denied attachment solely because the only space available for attachment on a pole is below the lowest attached facility. If the owner of the lowest facility chooses to relocate its existing facilities to a lower allowable point of attachment so that a new attachment will be located above that owner's existing facilities, that owner shall bear 60 percent of the cost of relocation. The new attaching entity shall bear the remaining 40 percent of the cost of relocation, except where Puc 1303.07(c) applies.

Puc 1303.10 Boxing of Poles

Pole owners may restrict the practice of boxing poles consistent with the restrictions it places on its own practice of boxing poles as defined in the company's written methods and procedures. Such boxing shall be safely accessible by bucket trucks, ladders or emergency equipment and otherwise consistent with the requirements of applicable codes, including the National Electrical Safety Code.

Puc 1303.11 Use of Extension Arms.

Pole owners shall allow limited, reasonable use of extension arms by attaching entities for purposes of clearing obstacles or improving alignment of attachment facilities. Under no circumstances may extension arms be used to avoid tree trimming requirements. Any use of extension arms shall be consistent with the requirements of applicable codes, including the National Electrical Safety Code.

Puc 1303.12 Make-Ready Timeframes.

Unless otherwise agreed by parties to a pole attachment agreement, pole owners shall complete make-ready work within 150 days after any required pre-payments are rendered for any make-ready estimates provided to the attaching entity by the pole owner

or owners. Where make-ready work requires 10 poles or less and no pole replacements, the work shall be completed within 45 days after any required pre-payments for estimates are rendered.

PART Puc 1304 DISPUTE RESOLUTION

Puc 1304.01 Voluntary Agreements. A pole attachment agreement submitted to the commission for adjudication shall be deemed a voluntary agreement pursuant to RSA 374:34-a, VII. A party filing a petition under this part shall have the burden of proving that an agreement is not just, reasonable and nondiscriminatory.

Puc 1304.02 Lack of Agreement. A pole attachment and entitled to access under these rules and unable, through good faith negotiation, to reach agreement with the owner or owners of a pole or poles subject to this chapter, may petition the commission pursuant to Puc 203 for an order directing the removal of facilities that are attached to a pole without authorization pursuant to this chapter.

Puc 1304.03 Dispute Following Agreement or Order. A party to a pole attachment agreement, or a party subject to an order of the commission establishing rates, charges, terms or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order.

Puc 1304.04 Unauthorized Attachments. A pole owner may, but is not obligated to, petition the commission pursuant to Puc 203 for an order directing the removal of facilities that are attached to a pole without authorization pursuant to this chapter.

Puc 1304.05 Procedure. Upon receipt of a petition pursuant to this part, the commission shall conduct an adjudicative proceeding pursuant to Puc 203 to consider and rule on the petition. Where the public interest so requires, the commission may order that rates, charges, terms or conditions for pole attachments be modified.

Puc 1304.06 Rate Review Standards.

(a) In determining just and reasonable rates for the attachments of competitive local exchange carriers and cable television service providers to poles owned by incumbent local exchange carriers or electric utilities under this chapter, the commission shall consider:

- (1) The interests of the subscribers and users of the services offered via such attachments;
- (2) The interests of the consumers of any pole owner providing such attachments; and

(3) The formulae adopted by the FCC in 47 CFR § 1.1409(c) through (f) in effect on July 16, 2007.

(b) In determining just and reasonable rates for all other attachments under this chapter, the commission shall consider:

(1) The interests of the subscribers and users of the services offered via such attachments; and

(2) The interests of the consumers of any pole owner providing such attachments.

Puc 1304.07 Remedies. When the commission determines just and reasonable rates under this part that differ from the rates paid by the petitioner, the commission shall order a payment or refund, as appropriate. Such refund or payment shall be the difference between the amount actually paid and the amount that would have been paid under the rates established by the commission, plus interest, as of the date of the petition.

Puc 1304.08 Interest. Refunds or payments ordered under Puc 1304.07 shall accrue simple annual interest at a rate equal to the prime rate.

Appendix

| Rule | Applicable Statute |
|----------|-------------------------|
| Puc 1300 | RSA 374:3; RSA 374:34-a |

Readopt with Amendment Chapter Puc 1300, effective 1-17-08 (Document # 9073) to read as follows:

CHAPTER Puc 1300 UTILITY POLE ATTACHMENTS

Statutory Authority: RSA 374:3; RSA 374:34-a

PART Puc 1301 PURPOSE AND APPLICABILITY

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 just, reasonable and in the public interest. 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.

Puc 1301.02 Applicability. Puc 1300 shall apply to:

(a) Public utilities within the meaning of RSA 362, including rural electric cooperatives for which a certificate of deregulation is on file pursuant to RSA 301:57, 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.

PART Puc 1302 DEFINITIONS

Puc 1302.01 “Attaching entity” means a natural person or an entity with a statutory or contract right to attach a facility of any type to a pole, including but not limited to telecommunications providers, cable television service providers, incumbent local exchange carriers, competitive local exchange carriers, electric utilities, and governmental entities.

Puc 1302.02 “Boxing” means the placement of lines or cables on both the road side and the field side of a pole.

Puc 1302.03 “Commission” means the New Hampshire public utilities commission.

Puc 1302.04 “Extension arm(s)” means a bracket attached to a utility pole to provide support for cables or wires at a distance from the pole.

Puc 1302.05 “Facility” means the lines and cables and accompanying appurtenances attached to a utility pole for the transmission of electricity, information, telecommunications, or video programming for the public.

Puc 1302.06 “Federal Communications Commission (FCC)” means the U.S. government agency established by the Communications Act of 1934 and charged with regulating interstate and international communications by radio, television, wire, satellite and cable.

Puc 1302.07 “Make-ready work” means all work, including but not limited to rearrangement and/or transfer of existing facilities, replacement of a pole or any other changes required to accommodate the attachment of the facilities of the party requesting attachment to the pole.

Puc 1302.08 “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.”

Puc 1302.09 “Prime rate” means the rate reported in the *Wall Street Journal* on the first business day of the month preceding the beginning of each calendar quarter, or the average of the rates so reported on that day.

Puc 1302.10 “Utility” means a “public utility” as defined in RSA 362:2, including a rural electric cooperative for which a certificate of deregulation is on file with the commission pursuant to RSA 301:57.

PART Puc 1303 ACCESS TO POLES

Puc 1303.01 Access Standard. The owner or owners of a pole shall provide attaching entities access to such pole on terms that are just, reasonable and nondiscriminatory. Notwithstanding this obligation, the owner or owners of a pole may deny a request for attachment to such pole when there is insufficient capacity on the pole or for reasons of safety, reliability or generally applicable engineering purposes. Nothing herein shall require the owner or owners of a pole to provide access where such access would violate other applicable laws, rules or regulations.

Puc 1303.02 Owner Obligation to Negotiate. The owner or owners of a pole shall, upon the request of a person entitled to access under these rules seeking a pole attachment, negotiate in good faith with respect to the terms and conditions for such attachment.

Puc 1303.03 Requestor Obligation to Negotiate. A person entitled to access under these rules seeking a pole attachment shall contact the owner or owners of the pole and negotiate in good faith an agreement for such attachment.

Puc 1303.04 Request for Access and Response Requirements. Requests made under these rules and pursuant to a pole attachment agreement for access to a utility's poles shall be in writing. Absent extraordinary circumstances, a survey for an application

not exceeding 200 poles shall be completed and the results communicated to the applicant seeking to attach within 45 days of receiving a completed application and survey fee. If permission for access is not granted within 45 calendar days of receiving a complete request for access, the owner shall confirm the denial in writing by the 45th day. The 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 relate to the grounds in Puc 1303.01 for such denial.

Puc 1303.05 Authorization Required. A person seeking to attach facilities to a pole shall obtain authorization from the pole owner or owners prior to attaching such facilities.

Puc 1303.06 Notification.

(a) A pole owner shall provide an attaching entity no less than 60 days' written notice prior to:

- (1) Removing any of that person's facilities,
- (2) Increasing any annual or recurring fees or rates applicable to the pole attachment, or
- (3) Modifying the facilities other than as part of routine maintenance or response to an emergency.

(b) Attaching entities shall provide written notice to a pole owner or owners no less than 60 days prior to:

- (1) Modifying an existing attachment other than as part of routine maintenance or response to an emergency, or to install a customer drop line;
- (2) Increasing the load, or weight, on a pole by adding to an existing attachment; or
- (3) Changing the purpose for which an existing attachment is used.

Separate and additional attachments are subject to pole attachment application and licensing processes.

Puc 1303.07 Installation and Maintenance.

(a) All attachments shall be installed in accordance with the National Electrical Safety Code, 2007 edition, the National Electrical Code as adopted in RSA 155-A:1,IV, and the SR-1421 *Blue Book – Manual of Construction Practices, Issue 4*, Telcordia

Technologies, Inc. (2007), and in accordance with such other applicable standards and requirements specified in the pole attachment agreement.

(b) Any attachment shall be installed and maintained to prevent interference with service furnished by the utility pole owner or owners and any other attaching entity.

(c) Where a pole or existing attachment must be brought into compliance with applicable standards and codes before a new attachment can be added, the cost of bringing that pole or existing attachment into compliance shall not be shifted to the entity seeking to add a new attachment.

Puc 1303.08 Labeling of Attachments.

Attaching entities shall clearly label their attachments with owner identification.

Puc 1303.09 Location of Attachments

No attaching entity shall be denied attachment solely because the only space available for attachment on a pole is below the lowest attached facility. If the owner of the lowest facility chooses to relocate its existing facilities to a lower allowable point of attachment so that a new attachment will be located above that owner's existing facilities, that owner shall bear 60 percent of the cost of relocation. The new attaching entity shall bear the remaining 40 percent of the cost of relocation, except where Puc 1303.07(c) applies.

Puc 1303.10 Boxing of Poles

Pole owners may restrict the practice of boxing poles consistent with the restrictions it places on its own practice of boxing poles as defined in the company's written methods and procedures. Such boxing shall be safely accessible by bucket trucks, ladders or emergency equipment and otherwise consistent with the requirements of applicable codes, including the National Electrical Safety Code.

Puc 1303.11 Use of Extension Arms.

Pole owners shall allow limited, reasonable use of extension arms by attaching entities for purposes of clearing obstacles or improving alignment of attachment facilities. Under no circumstances may extension arms be used to avoid tree trimming requirements. Any use of extension arms shall be consistent with the requirements of applicable codes, including the National Electrical Safety Code.

Puc 1303.12 Make-Ready Timeframes.

Unless otherwise agreed by parties to a pole attachment agreement, pole owners shall complete make-ready work within 150 days after any required pre-payments are rendered for any make-ready estimates provided to the attaching entity by the pole owner

or owners. Where make-ready work requires 10 poles or less and no pole replacements, the work shall be completed within 45 days after any required pre-payments for estimates are rendered.

PART Puc 1304 DISPUTE RESOLUTION

Puc 1304.01 Voluntary Agreements. A pole attachment agreement submitted to the commission for adjudication shall be deemed a voluntary agreement pursuant to RSA 374:34-a, VII. A party filing a petition under this part shall have the burden of proving that an agreement is not just, reasonable and nondiscriminatory.

Puc 1304.02 Lack of Agreement. A pole attachment and entitled to access under these rules and unable, through good faith negotiation, to reach agreement with the owner or owners of a pole or poles subject to this chapter, may petition the commission pursuant to Puc 203 for an order directing the removal of facilities that are attached to a pole without authorization pursuant to this chapter.

Puc 1304.03 Dispute Following Agreement or Order. A party to a pole attachment agreement, or a party subject to an order of the commission establishing rates, charges, terms or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order.

Puc 1304.04 Unauthorized Attachments. A pole owner may, but is not obligated to, petition the commission pursuant to Puc 203 for an order directing the removal of facilities that are attached to a pole without authorization pursuant to this chapter.

Puc 1304.05 Procedure. Upon receipt of a petition pursuant to this part, the commission shall conduct an adjudicative proceeding pursuant to Puc 203 to consider and rule on the petition. Where the public interest so requires, the commission may order that rates, charges, terms or conditions for pole attachments be modified.

Puc 1304.06 Rate Review Standards.

(a) In determining just and reasonable rates for the attachments of competitive local exchange carriers and cable television service providers to poles owned by incumbent local exchange carriers or electric utilities under this chapter, the commission shall consider:

- (1) The interests of the subscribers and users of the services offered via such attachments;
- (2) The interests of the consumers of any pole owner providing such attachments; and

(3) The formulae adopted by the FCC in 47 CFR § 1.1409(c) through (f) in effect on July 16, 2007.

(b) In determining just and reasonable rates for all other attachments under this chapter, the commission shall consider:

(1) The interests of the subscribers and users of the services offered via such attachments; and

(2) The interests of the consumers of any pole owner providing such attachments.

Puc 1304.07 Remedies. When the commission determines just and reasonable rates under this part that differ from the rates paid by the petitioner, the commission shall order a payment or refund, as appropriate. Such refund or payment shall be the difference between the amount actually paid and the amount that would have been paid under the rates established by the commission, plus interest, as of the date of the petition.

Puc 1304.08 Interest. Refunds or payments ordered under Puc 1304.07 shall accrue simple annual interest at a rate equal to the prime rate.

Appendix

| Rule | Applicable Statute |
|----------|-------------------------|
| | |
| Puc 1300 | RSA 374:3; RSA 374:34-a |

Readopt with Amendment Chapter Puc 1300, effective 1-17-08 (Document # 9073) to read as follows:

CHAPTER Puc 1300 UTILITY POLE ATTACHMENTS

Statutory Authority: RSA 374:3; RSA 374:34-a

PART Puc 1301 PURPOSE AND APPLICABILITY

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 just, reasonable and in the public interest. Nothing in this ~~rule~~**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.

Puc 1301.02 Applicability. Puc 1300 shall apply to:

(a) Public utilities within the meaning of RSA 362, including rural electric cooperatives for which a certificate of deregulation is on file pursuant to RSA 301:57, 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.

PART Puc 1302 DEFINITIONS

Puc ~~1302~~**1301**.01 “Attaching entity” means a natural person or an entity with a statutory or contract right to attach a facility of any type to a pole, including but not limited to telecommunications providers, cable television service providers, incumbent local exchange carriers, competitive local exchange carriers, electric utilities, and governmental entities.

Puc ~~1302~~**1301**.02 “Boxing” means the placement of lines or cables on both the road side and the field side of a pole.

Puc 1302.03 “Commission” means the New Hampshire public utilities commission.

Puc 1302.04 “Extension arm(s)” means a bracket attached to a utility pole to provide support for cables or wires at a distance from the pole.

Puc 1302.05 “Facility” means the lines and cables and accompanying appurtenances attached to a utility pole for the transmission of electricity, ~~information~~, telecommunications, or ~~video programming for the public~~**digital information services**.

Puc 1302.06 “Federal Communications Commission (FCC)” means the U.S. government agency established by the Communications Act of 1934 and charged with regulating interstate and international federal communications by radio, television, wire, satellite and cable commission.

Puc 1302.07 “Make-ready work” means all work, including but not limited to rearrangement and/or transfer of existing facilities, replacement of a pole or any other changes required to accommodate the attachment of the facilities of the party requesting attachment to the pole.

~~—Puc 1302.07 “Make-ready work” means the movement of cables and other facilities or the replacement of an existing pole with a taller pole to allow for additional attachments.~~

Puc 1302.08 “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.”

Puc 1302.09 “Prime rate” means the rate reported in the *Wall Street Journal* on the first business day of the month preceding the beginning of each calendar quarter, or the average of the rates so reported on that day.

Puc 1302.10 “Utility” means a “public utility” as defined in RSA 362:2, including a rural electric cooperative for which a certificate of deregulation is on file with the commission pursuant to RSA 301:57.

PART Puc 1303 ACCESS TO POLES

Puc 1303.01 Access Standard. The owner or owners of a pole shall provide attaching entities access to such pole on terms that are just, reasonable and nondiscriminatory. Notwithstanding this obligation, the owner or owners of a pole may deny a request for attachment to such pole when there is insufficient capacity on the pole or for reasons of safety, reliability ~~or~~ generally applicable engineering purposes. Nothing herein shall require the owner or owners of a pole to provide access where such access would violate other applicable laws, rules or regulations.

Puc 1303.02 Owner Obligation to Negotiate. The owner or owners of a pole shall, upon the request of a person entitled to access under these rules seeking a pole attachment, negotiate in good faith with respect to the terms and conditions for such attachment.

Puc 1303.03 Requestor Obligation to Negotiate. A person entitled to access under these rules seeking a pole attachment shall contact the owner or owners of the pole and ~~make a reasonable effort to~~ negotiate in good faith an agreement for such attachment.

Puc 1303.04 Request for Access and Response Requirements. Requests made under these rules and pursuant to a pole attachment agreement for access to a utility's poles shall be in writing. Absent extraordinary circumstances, a survey for an application not exceeding 200 poles shall be completed and the results communicated to the applicant seeking to attach within 45 days of receiving a completed application and survey fee. If permission for access is not granted within 45 calendar days of receiving a complete request for access, the owner ~~shall~~**must** confirm the denial in writing by the 45th day. The 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 relate to the grounds in Puc 1303.01 for such denial.

Puc 1303.05 Authorization Required. A person seeking to attach facilities to a pole shall obtain authorization from the pole owner or owners prior to attaching such facilities.

Puc 1303.06 Notification.

(a) A pole owner shall provide ~~an attaching entity a person with facilities attached to a pole~~ no less than 60 days' written notice prior to:

- (1) Removing any of that person's facilities,
- (2) Increasing any annual or recurring fees or rates applicable to the pole attachment, or
- (3) Modifying the facilities other than as part of routine maintenance or response to an emergency.

(b) Attaching entities shall provide written notice to ~~a~~ pole owner or owners no less than 60 days prior to:

- (1) Modifying an existing attachment other than as part of routine maintenance or response to an emergency, ~~or to install a customer drop line~~;
- (2) Increasing the ~~load, or weight, on a pole by adding to loading of~~ an existing attachment; or
- (3) Changing the purpose for which an existing attachment is used.

Separate and additional attachments are subject to pole attachment application and licensing processes.

Puc 1303.07 Installation and Maintenance.

(a) All attachments shall be installed in accordance with the National Electrical Safety Code, 2007 edition, the National Electrical Code as adopted ~~in~~by RSA 155-A:1,IV, and the SR-1421 *Blue Book – Manual of Construction Practices, Issue 4*, ~~TelcordiaTelecordia~~ Technologies, Inc. (2007), and in accordance with such other applicable standards and requirements specified in the pole attachment agreement.

(b) Any attachment shall be installed and maintained to prevent interference with service furnished by the utility pole owner or owners and any other attaching entity.

(c) Where a pole or existing attachment must be brought into compliance with applicable standards and codes before a new attachment can be added, the cost of bringing that pole or existing attachment into compliance shall not be shifted to the entity seeking to add a new attachment.

Puc 1303.08 Labeling of Attachments.

Attaching entities shall clearly label their attachments with owner identification.

Puc 1303.09 Location of Attachments

No attaching entity shall be denied attachment solely because the only space available for attachment on a pole is below the lowest attached facility. If the owner of the lowest facility chooses to relocate its existing facilities to a lower allowable point of attachment so that ~~a new attachment the new attaching entity~~ will be ~~located~~ above ~~that owner's~~ existing facilities, ~~that owner~~ shall ~~bear 60 percent of the cost of relocation.~~ The new attaching entity shall bear the remaining 40 percent of the cost of relocation, except where Puc 1303.07(c) applies do so at its own expense.

Puc 1303.10 Boxing of Poles

Pole owners may restrict the practice of boxing poles consistent with the restrictions it places on its own practice of boxing poles as defined in the company's written methods and procedures. Such boxing shall be safely accessible by bucket trucks, ladders or emergency equipment and otherwise consistent with the requirements of applicable codes, including the National Electrical Safety Code.

Puc 1303.11 Use of Extension Arms.

Pole owners shall allow limited, reasonable use of extension arms by attaching entities for purposes of clearing obstacles or improving alignment of attachment facilities. Under no circumstances may extension arms be used to avoid tree trimming requirements. Any use of extension arms shall be consistent with the requirements of applicable codes, including the National Electrical Safety Code.

Puc 1303.12 Make-Ready Timeframes.

Unless otherwise agreed by parties to a pole attachment agreement, pole owners shall complete make-ready work within ~~150~~¹⁸⁰ days after any required pre-payments ~~are rendered for~~ any make-ready estimates provided to the attaching entity by the pole owner or owners. ~~Where make-ready work requires 10 poles or less and no pole replacements, the work shall be completed within 45 days after any required pre-payments for estimates are rendered.~~ ~~Unless otherwise agreed by the parties to a pole attachment agreement, make-ready work shall be deemed to include all work, including but not limited to rearrangement and/or transfer of existing facilities, replacement of a pole or any other changes required to accommodate the attachment of the facilities of the party requesting attachment to the pole.~~

PART Puc 1304 DISPUTE RESOLUTION

Puc 1304.01 Voluntary Agreements. ~~A pole attachment agreement submitted to the commission for adjudication shall be deemed a voluntary agreement pursuant to RSA 374:34-a, VII. A party filing a petition under this part shall have the burden of proving that an agreement is not just, reasonable and nondiscriminatory.~~ ~~Lack of Agreement.~~ ~~A person requesting a pole attachment and entitled to access under these rules and unable, under demonstrable exhaustion of reasonable good faith negotiation efforts, to reach agreement with the owner or owners of a pole or poles subject to this chapter, may petition the commission pursuant to Part Puc 203 for an order establishing the rates, charges, terms and conditions for the pole attachment or attachments. Such a petition shall include the information required for complaints to the FCC made pursuant to the terms of 47 CFR § 1.1404(d) through (m) in effect on July 16, 2007.~~

~~———— Puc 1304.02 Dispute Following Agreement or Order. A party to a pole attachment agreement entered into on or after July 17, 2007, or a party subject to an order of the commission establishing rates, charges, terms or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order.~~

~~Puc 1304.02 Lack of Agreement.~~ ~~Puc 1304.03 Unauthorized Attachments.~~ ~~A person requesting a pole attachment and entitled to access under these rules and unable, through good faith negotiation, to reach agreement with the owner or owners of a pole or poles subject to this chapter, may petition the commission pursuant to Puc 203 for an order establishing the rates, charges, terms and conditions for the pole attachment or attachments. Such a petition shall include the information required for complaints to the FCC made directing the removal of facilities that are attached to a pole without authorization pursuant to the terms of 47 CFR § 1.1404(d) through (m) in effect on July 16, 2007.~~ ~~this chapter.~~

~~Puc 1304.03 Dispute Following Agreement or Order. A party to a pole attachment agreement, or a party subject to an order of the commission establishing rates, charges, terms or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order.~~⁰⁴

~~Procedure. Upon receipt of a petition pursuant to this part, the commission shall conduct an adjudicative proceeding pursuant to Puc 203 to consider and rule on the petition. Where the public interest so requires, the commission may order that rates, charges, terms or conditions for pole attachments be modified.~~

Puc 1304.04 Unauthorized Attachments. A pole owner may, but is not obligated to, petition the commission pursuant to Puc 203 for an order directing the removal of facilities that are attached to a pole without authorization pursuant to this chapter.

Puc 1304.05 Procedure. Upon receipt of a petition pursuant to this part, the commission shall conduct an adjudicative proceeding pursuant to Puc 203 to consider and rule on the petition. Where the public interest so requires, the commission may order that rates, charges, terms or conditions for pole attachments be modified.

Puc 1304.06 Rate Review Standards.

(a) In determining just and reasonable rates for the attachments of competitive local exchange carriers and cable television service providers to poles owned by incumbent local exchange carriers or electric utilities under this chapter, the commission shall consider:

- (1) The interests of the subscribers and users of the services offered via such attachments;
- (2) The interests of the consumers of any pole owner providing such attachments; and
- (3) The formulae adopted by the FCC in 47 CFR § 1.1409(c) through (f) in effect on July 16, 2007.

(b) In determining just and reasonable rates for all other attachments under this chapter, the commission shall consider:

- (1) The interests of the subscribers and users of the services offered via such attachments; and
- (2) The interests of the consumers of any pole owner providing such attachments.

~~Puc 1304.06 Burden of Proof.~~

~~(a) A pole attachment agreement entered into voluntarily under this part shall be presumed to be just, reasonable and nondiscriminatory for purposes of adjudication before the commission. An attaching entity filing a petition under this part shall have the burden of proving that an agreement entered into voluntarily is not just, reasonable and nondiscriminatory.~~

~~(b) A pole attachment agreement signed prior to July 17, 2007, shall be presumed to have been entered into voluntarily. An attaching entity may rebut the presumption of voluntariness by demonstrating that signing the agreement, regardless of its terms, was reasonably necessary to avoid significant delay in deployment of facilities.~~

~~(c) When the presumption of voluntariness has been successfully rebutted pursuant to (b) above, the burden of proving that the agreement is just, reasonable and nondiscriminatory shall shift to the pole owner.~~

Puc 1304.07 Remedies. When the commission determines just and reasonable rates under this part that differ from the rates paid by the petitioner, the commission shall order a payment or refund, as appropriate. Such refund or payment shall be the difference between the amount actually paid and the amount that would have been paid under the rates established by the commission, plus interest, as of the date of the petition.

Puc 1304.08 Interest. Refunds or payments ordered under Puc 1304.07 shall accrue simple annual interest at a rate equal to the prime rate.

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Appendix

| Rule | Applicable Statute |
|----------|-------------------------|
| Puc 1300 | RSA 374:3; RSA 374:34-a |

Readopt with Amendment Chapter Puc 1300, effective 1-17-08 (Document # 9073) to read as follows:

CHAPTER Puc 1300 UTILITY POLE ATTACHMENTS

Statutory Authority: RSA 374:3; RSA 374:34-a

PART Puc 1301 PURPOSE AND APPLICABILITY

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 just, reasonable and in the public interest. Nothing in this ~~rule~~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.

Puc 1301.02 Applicability. Puc 1300 shall apply to:

(a) Public utilities within the meaning of RSA 362, including rural electric cooperatives for which a certificate of deregulation is on file pursuant to RSA 301:57, 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.

PART Puc 1302 DEFINITIONS

Puc ~~1302~~1301.01 “Attaching entity” means a natural person or an entity with a statutory or contract right to attach a facility of any type to a pole, including but not limited to telecommunications providers, cable television service providers, incumbent local exchange carriers, competitive local exchange carriers, electric utilities, and governmental entities.

Puc ~~1302~~1301.02 “Boxing” means the placement of lines or cables on both the road side and the field side of a pole.

Puc 1302.03 “Commission” means the New Hampshire public utilities commission.

Puc 1302.04 “Extension arm(s)” means a bracket attached to a utility pole to provide support for cables or wires at a distance from the pole.

Puc 1302.05 “Facility” means the lines and cables and accompanying appurtenances attached to a utility pole for the transmission of electricity, information, telecommunications, or video programming for the public~~digital information services~~.

Puc 1302.06 “Federal Communications Commission (FCC)” means the U.S. government agency established by the Communications Act of 1934 and charged with regulating interstate and international federal communications by radio, television, wire, satellite and cable commission.

Puc 1302.07 “Make-ready work” means all work, including but not limited to rearrangement and/or transfer of existing facilities, replacement of a pole or any other changes required to accommodate the attachment of the facilities of the party requesting attachment to the pole.

~~———Puc 1302.07 “Make-ready work” means the movement of cables and other facilities or the replacement of an existing pole with a taller pole to allow for additional attachments.~~

Puc 1302.08 “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.”

Puc 1302.09 “Prime rate” means the rate reported in the *Wall Street Journal* on the first business day of the month preceding the beginning of each calendar quarter, or the average of the rates so reported on that day.

Puc 1302.10 “Utility” means a “public utility” as defined in RSA 362:2, including a rural electric cooperative for which a certificate of deregulation is on file with the commission pursuant to RSA 301:57.

PART Puc 1303 ACCESS TO POLES

Puc 1303.01 Access Standard. The owner or owners of a pole shall provide attaching entities access to such pole on terms that are just, reasonable and nondiscriminatory. Notwithstanding this obligation, the owner or owners of a pole may deny a request for attachment to such pole when there is insufficient capacity on the pole or for reasons of safety, reliability ~~and~~ generally applicable engineering purposes. Nothing herein shall require the owner or owners of a pole to provide access where such access would violate other applicable laws, rules or regulations.

Puc 1303.02 Owner Obligation to Negotiate. The owner or owners of a pole shall, upon the request of a person entitled to access under these rules seeking a pole attachment, negotiate in good faith with respect to the terms and conditions for such attachment.

Puc 1303.03 Requestor Obligation to Negotiate. A person entitled to access under these rules seeking a pole attachment shall contact the owner or owners of the pole and ~~make a reasonable effort to~~ negotiate in good faith an agreement for such attachment.

Puc 1303.04 Request for Access and Response Requirements. Requests made under these rules and pursuant to a pole attachment agreement for access to a utility's poles shall be in writing. Absent extraordinary circumstances, a survey for an application not exceeding 200 poles shall be completed and the results communicated to the applicant seeking to attach within 45 days of receiving a completed application and survey fee. If permission for access is not granted within 45 calendar days of receiving a complete request for access, the owner ~~shall~~**must** confirm the denial in writing by the 45th day. The 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 relate to the grounds in Puc 1303.01 for such denial.

Puc 1303.05 Authorization Required. A person seeking to attach facilities to a pole shall obtain authorization from the pole owner or owners prior to attaching such facilities.

Puc 1303.06 Notification.

(a) A pole owner shall provide ~~an attaching entity a person with facilities attached to a pole~~ no less than 60 days' written notice prior to:

- (1) Removing any of that person's facilities,
- (2) Increasing any annual or recurring fees or rates applicable to the pole attachment, or
- (3) Modifying the facilities other than as part of routine maintenance or response to an emergency.

(b) Attaching entities shall provide written notice to ~~a~~ pole owner or owners no less than 60 days prior to:

- (1) Modifying an existing attachment other than as part of routine maintenance or response to an emergency, ~~or to install a customer drop line;~~
- (2) Increasing the ~~load, or weight, on a pole by adding to loading of~~ an existing attachment; or
- (3) Changing the purpose for which an existing attachment is used.

Separate and additional attachments are subject to pole attachment application and licensing processes.

Puc 1303.07 Installation and Maintenance.

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(a) All attachments shall be installed in accordance with the National Electrical Safety Code, 2007 edition, the National Electrical Code as adopted ~~in~~by RSA 155-A:1,IV, and the SR-1421 *Blue Book – Manual of Construction Practices, Issue 4*, ~~Telcordia~~~~Telecordia~~ Technologies, Inc. (2007), and in accordance with such other applicable standards and requirements specified in the pole attachment agreement.

(b) Any attachment shall be installed and maintained to prevent interference with service furnished by the utility pole owner or owners and any other attaching entity.

(c) Where a pole or existing attachment must be brought into compliance with applicable standards and codes before a new attachment can be added, the cost of bringing that pole or existing attachment into compliance shall not be shifted to the entity seeking to add a new attachment.

Puc 1303.08 Labeling of Attachments.

Attaching entities shall clearly label their attachments with owner identification.

Puc 1303.09 Location of Attachments

No attaching entity shall be denied attachment solely because the only space available for attachment on a pole is below the lowest attached facility. If the owner of the lowest facility chooses to relocate its existing facilities to a lower allowable point of attachment so that ~~a new attachment the new attaching entity~~ will be located above ~~that owner's~~ existing facilities, ~~that owner~~it shall bear 60 percent of the cost of relocation. The new attaching entity shall bear the remaining 40 percent of the cost of relocation, except where Puc 1303.07(c) applies~~do so at its own expense.~~

Puc 1303.10 Boxing of Poles

Pole owners may restrict the practice of boxing poles consistent with the restrictions it places on its own practice of boxing poles as defined in the company's written methods and procedures. Such boxing shall be safely accessible by bucket trucks, ladders or emergency equipment and otherwise consistent with the requirements of applicable codes, including the National Electrical Safety Code.

Puc 1303.11 Use of Extension Arms.

Pole owners shall allow limited, reasonable use of extension arms by attaching entities for purposes of clearing obstacles or improving alignment of attachment facilities. Under no circumstances may extension arms be used to avoid tree trimming requirements. Any use of extension arms shall be consistent with the requirements of applicable codes, including the National Electrical Safety Code.

Puc 1303.12 Make-Ready Timeframes.

Unless otherwise agreed by parties to a pole attachment agreement, pole owners shall complete make-ready work within ~~150~~~~180~~ days after any required pre-payments are rendered for~~of~~ any make-ready estimates provided to the attaching entity by the pole owner or owners. Where make-ready work requires 10 poles or less and no pole replacements, the work shall be completed within 45 days after any required pre-payments for estimates are rendered. ~~Unless otherwise agreed by the parties to a pole attachment agreement, make-ready work shall be deemed to include all work, including but not limited to rearrangement and/or transfer of existing facilities, replacement of a pole or any other changes required to accommodate the attachment of the facilities of the party requesting attachment to the pole.~~

PART Puc 1304 DISPUTE RESOLUTION

~~Puc 1304.01 Voluntary Agreements. A pole attachment agreement submitted to the commission for adjudication shall be deemed a voluntary agreement pursuant to RSA 374:34-a, VII. A party filing a petition under this part shall have the burden of proving that an agreement is not just, reasonable and nondiscriminatory. Lack of Agreement. A person requesting a pole attachment and entitled to access under these rules and unable, under demonstrable exhaustion of reasonable good faith negotiation efforts, to reach agreement with the owner or owners of a pole or poles subject to this chapter, may petition the commission pursuant to Part Puc 203 for an order establishing the rates, charges, terms and conditions for the pole attachment or attachments. Such a petition shall include the information required for complaints to the FCC made pursuant to the terms of 47 CFR § 1.1404(d) through (m) in effect on July 16, 2007.~~

~~———— Puc 1304.02 Dispute Following Agreement or Order. A party to a pole attachment agreement entered into on or after July 17, 2007, or a party subject to an order of the commission establishing rates, charges, terms or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order.~~

~~Puc 1304.02 Lack of Agreement. Puc 1304.03 Unauthorized Attachments. A person requesting a pole attachment and entitled owner may, but is not obligated to access under these rules and unable, through good faith negotiation, to reach agreement with the owner or owners of a pole or poles subject to this chapter, may petition the commission pursuant to Puc 203 for an order establishing the rates, charges, terms and conditions for the pole attachment or attachments. Such a petition shall include the information required for complaints to the FCC made directing the removal of facilities that are attached to a pole without authorization pursuant to the terms of 47 CFR § 1.1404(d) through (m) in effect on July 16, 2007 this chapter.~~

~~Puc 1304.03 Dispute Following Agreement or Order. A party to a pole attachment agreement, or a party subject to an order of the commission establishing rates, charges, terms or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order. 04~~

~~Procedure. Upon receipt of a petition pursuant to this part, the commission shall conduct an adjudicative proceeding pursuant to Puc 203 to consider and rule on the petition. Where the public interest so requires, the commission may order that rates, charges, terms or conditions for pole attachments be modified.~~

~~Puc 1304.04 Unauthorized Attachments. A pole owner may, but is not obligated to, petition the commission pursuant to Puc 203 for an order directing the removal of facilities that are attached to a pole without authorization pursuant to this chapter.~~

~~Puc 1304.05 Procedure. Upon receipt of a petition pursuant to this part, the commission shall conduct an adjudicative proceeding pursuant to Puc 203 to consider and rule on the petition. Where the public interest so requires, the commission may order that rates, charges, terms or conditions for pole attachments be modified.~~

Puc 1304.06 Rate Review Standards.

(a) In determining just and reasonable rates for the attachments of competitive local exchange carriers and cable television service providers to poles owned by incumbent local exchange carriers or electric utilities under this chapter, the commission shall consider:

- (1) The interests of the subscribers and users of the services offered via such attachments;
- (2) The interests of the consumers of any pole owner providing such attachments; and
- (3) The formulae adopted by the FCC in 47 CFR § 1.1409(c) through (f) in effect on July 16, 2007.

(b) In determining just and reasonable rates for all other attachments under this chapter, the commission shall consider:

- (1) The interests of the subscribers and users of the services offered via such attachments; and
- (2) The interests of the consumers of any pole owner providing such attachments.

~~Puc 1304.06 Burden of Proof.~~

~~(a) A pole attachment agreement entered into voluntarily under this part shall be presumed to be just, reasonable and nondiscriminatory for purposes of adjudication before the commission. An attaching entity filing a petition under this part shall have the burden of proving that an agreement entered into voluntarily is not just, reasonable and nondiscriminatory.~~

Final Proposal – Annotated Text – 7-16-09 7

~~(b) A pole attachment agreement signed prior to July 17, 2007, shall be presumed to have been entered into voluntarily. An attaching entity may rebut the presumption of voluntariness by demonstrating that signing the agreement, regardless of its terms, was reasonably necessary to avoid significant delay in deployment of facilities.~~

~~(c) When the presumption of voluntariness has been successfully rebutted pursuant to (b) above, the burden of proving that the agreement is just, reasonable and nondiscriminatory shall shift to the pole owner.~~

Puc 1304.07 Remedies. When the commission determines just and reasonable rates under this part that differ from the rates paid by the petitioner, the commission shall order a payment or refund, as appropriate. Such refund or payment shall be the difference between the amount actually paid and the amount that would have been paid under the rates established by the commission, plus interest, as of the date of the petition.

Puc 1304.08 Interest. Refunds or payments ordered under Puc 1304.07 shall accrue simple annual interest at a rate equal to the prime rate.

Final Proposal – Annotated Text – 7-16-09 8

Appendix

| Rule | Applicable Statute |
|----------|-------------------------|
| Puc 1300 | RSA 374:3; RSA 374:34-a |

APPENDIX II-H

INCORPORATION BY REFERENCE STATEMENT

****PLEASE LIST THE FOLLOWING:**

1. Name of Agency. **New Hampshire Public Utilities Commission**

2. Person who has reviewed the material to be incorporated into the agency's rules:

| | | | |
|----------|--|----------|----------------------------------|
| Name: | Randy Knepper | Title: | Director, Safety Division |
| Address: | 21 South Fruit Street, Suite 10 Concord, NH 03301 | Phone #: | 603-271-2431 |

3. Specific rule number where the material is incorporated: **Puc 1303.07, 1303.10 and 1303.11**

****PLEASE ATTACH THE FOLLOWING**, numbered to correspond to the number on this sheet (a separate sheet is not required for every item):

4. The complete title of the material which is to be incorporated including the date on which the material became effective (or a document identification number) and the title of the entity that created or promulgated the material.

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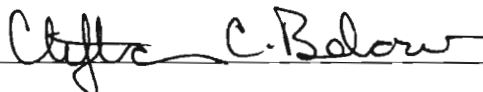
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Date: July 17, 2009

Signature: 

Name: Clifton C. Below

Title: Commissioner

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APPENDIX II-H - INCORPORATION BY REFERENCE STATEMENT
ADDENDUM

PUC 1300, UTILITY POLE ATTACHMENTS
NOTICE NO. 2009-79

Puc 1303.07, 1303.10 and 1303.11

4) The National Electrical Safety Code, 2007 edition, was issued by the Institute of Electrical and Electronic Engineers, Inc. (IEEE), New York, NY in 2007.

5) The PUC did not modify the text of the incorporated material in any way.

6) The National Electrical Safety Code, 2007 edition may be obtained from the Institute of Electrical and Electronic Engineers, Inc. (IEEE), 3 Park Avenue, New York, NY 10016, whose telephone number is 212-419-7900 and internet address is www.ieee.org. The cost of downloading this material as of this date for a non-member of IEEE is \$138.00.

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Concord, NH 03301

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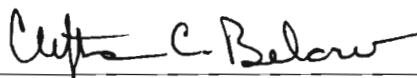
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NOTICE NO. 2009-79

Puc 1303.07

4) The SR-1421 *Blue Book - Manual of Construction Practices, Issue 4*, was issued in November 2007 by Telcordia Technologies, Inc. (2007).

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6) The SR-1421 *Blue Book - Manual of Construction Practices, Issue 4* may be obtained through Telcordia Technologies, Inc., at 1 Telcordia Drive, Piscataway, NJ 08854-4151, whose telephone number is 1-800-521-2673 and whose internet address is www.telcordia.com.

The document is sold only as an enterprise license for use by an entire company and is quoted at a cost of \$2,570.00.

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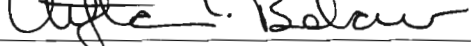
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STATE OF NEW HAMPSHIRE

JOINT LEGISLATIVE COMMITTEE ON ADMINISTRATIVE RULES

ROOM 219

25 CAPITOL STREET

CONCORD, NEW HAMPSHIRE 03301-6312

September 4, 2009

Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301-2429

Re: Final Proposal 2009-79

Dear Commissioners:

At its meeting on September 3, 2009, the Joint Legislative Committee on Administrative Rules (Committee) voted, pursuant to RSA 541-A:13, IV, to enter a preliminary objection to Final Proposal 2009-79 containing rule Puc 1300 from the Public Utilities Commission (Commission) on utility pole attachments. The objection was based on Committee staff comments and public testimony to the Final Proposal, including issues of statutory authority. Public testimony includes written and oral testimony received for the August 20, 2009 and September 3, 2009 Committee meetings.

For your information we have enclosed copies of the Final Proposal, as annotated by Committee staff, all written public testimony, a transcript of the testimony at the August 20, 2009 Committee meeting, and the Commission's request for conditional approval, dated August 18, 2009, as annotated by Committee staff. Please note, however, that the preliminary objection was made to the Final Proposal, not the request for conditional approval. A copy of the transcript of the Committee meeting on September 3, 2009 will be sent to you as soon as it is prepared.

You may respond to the Committee's preliminary objection by amending the final proposed rule to resolve the bases for objection, by withdrawing the rule, or by making no changes. You are required to respond in writing to the Committee's preliminary objection within 45 days of the date on which it was made, which was September 3, 2009. In this instance, the 45th day is October 18, 2009, which is a Sunday. Pursuant to RSA 541-A:16, IV, the deadline will be extended to Monday, October 19, 2009.

After the Committee has received your response, the Committee may take further action ranging from approval of the objection response to voting to support the sponsorship of a joint resolution to address the issues remaining with the proposal. Pursuant to RSA 541-A:13, VII(b), the Committee will have up to 50 days after the end of your response period to take action concerning a joint resolution, although the Committee can take action prior to that date. In this instance the 50th day is December 8, 2009. Please note that there is no deadline by which the

Public Utilities Commission
FP 2009-79
September 4, 2009
Page 2

Committee must act to approve the rules or to enter final objections, and the Committee may do so even after you adopt the rules.

Please be advised that, pursuant to RSA 541-A:14, I, you may not adopt the rules until one of the following has occurred: 1) the expiration of the objection response review period without the Committee having taken action with respect to voting to support the sponsorship of a joint resolution; or 2) the Committee has taken action that is specifically in lieu of voting to support the sponsorship of a joint resolution.

If you have any questions concerning the provisions in RSA 541-A relative to objections, responses, or adoptions, please call me at 271-3680.

Sincerely,



Scott F. Eaton
Administrative Rules Director

Enc.

cc: Lynn Fabrizio, Esq., Staff Attorney
Richard W. Head, Esq., Sr. Asst. A.G., DoJ

CHAIRMAN
Thomas B. Getz

COMMISSIONERS
Clifton C. Below
Amy L. Ignatius

EXECUTIVE DIRECTOR
Debra A. Howland



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

TDD Access: Relay NH
1-800-735-2964

Tel. (603) 271-2431

FAX No. 271-3878

Website:
www.puc.nh.gov

October 16, 2009

The Honorable Maurice Pilotte
Vice Chair, Joint Legislative Committee on Administrative Rules
Office of Legislative Services
Administrative Rules
25 Capitol Street, Room 219
Concord, NH 03301-6312

Re: Response to JLCAR's Preliminary Objection Notice Number 2009-79
Puc 1300, Utility Pole Attachments, Readoption with Amendment
NHPUC Docket No. DRM 08-004

Dear Representative Pilotte:

The Joint Legislative Committee on Administrative Rules (JLCAR or Committee) entered a preliminary objection on September 3, 2009, to the Final Proposal for Puc 1300, Utility Pole Attachments, Readoption with Amendment, filed by the New Hampshire Public Utilities Commission (Commission) on July 16, 2009. The Commission has carefully reviewed the annotations of JLCAR Staff, concerns raised by Committee members, and comments submitted to JLCAR by parties to this rulemaking and is pleased to submit responses herein.

A majority of JLCAR Staff's issues were incorporated into the rule filed on August 18, 2009, with the Commission's request for conditional approval. The proposed rule has been further amended in this filing to reflect changes made in response to certain comments by the parties, and are identified as new provisions in the rules submitted today. The Commission's reasons for those changes and for declining certain requested amendments are set forth below. In addition, we have included definitions of key terms at Attachment A and a procedural history of this rulemaking at Attachment B.

A. JLCAR Committee Staff Comments. Most of JLCAR Staff comments have been incorporated into the attached preliminary objection response proposal. Unresolved issues involve language that Committee Staff believes is unclear, as follows:

- rates, charges, terms and conditions "in the public interest" [see Puc 1301.01 and Puc 1304.05];
- "just, reasonable and nondiscriminatory" access [see Puc 1303.01];
- "generally applicable engineering purposes" [see Puc 1301.01]; and
- "extraordinary circumstances" [see Puc 1303.04].

NHPUC Response to Preliminary Objection
PUC 1300, Utility Pole Attachments

Commission Response. The provisions noted above mirror the Commission's statutory authority governing Commission standards of review. Using terms that are consistent with statutory provisions is the clearest course, as these terms have been the subject of years of judicial interpretation, and will be understood in the context of that history. Creating slightly different standards than those contained within a statute or attempting to define concepts that have evolved over the years, in our view, will lead to uncertainty rather than clarity.

Following are examples of statutory provisions that use the phrases of concern:

"public interest" and "public good"

- RSA 365:19 (authority to conduct independent investigations)
- RSA 369:1 (authority to issue securities)
- RSA 374:22-e (alteration of territories consistent with the public good)
- RSA 374-22-g (authorize competitive suppliers consistent with the public good)
- RSA 374:30 (transfer or lease of utility franchises)
- RSA 374:33 (acquisition of stock)
- RSA 374:34-a (regulation of pole attachments)
- RSA 378:27 (authority to impose temporary rates)

"non-discriminatory"

RSA 374:34-a (pole owner provide non-discriminatory access)

RSA 378:4 (retroactive reduction is rates when no discrimination caused)

"generally applicable engineering purposes"

RSA374:34-a (may deny on basis of generally applicable engineering purposes)

"just and reasonable"

RSA 374:1 (service safe and adequate, just and reasonable)

RSA 374:2 (charges for service to be just and reasonable)

RSA 374:3-a (just and reasonable rates)

Committee Staff also requested that the phrase "**just and reasonable rates**" in Puc 1304.06(a) be changed to "maximum just and reasonable rates" to reflect related federal regulations. [See also Puc 1304.07.] The federal regulations, unlike the Commission's proposed rule, actually set maximum rates in certain situations. The Commission does not intend to set rates, but rather is establishing a framework to evaluate whether the rates proposed by parties are just and reasonable. Adopting the language of the federal regulation at 47 CFR § 1.1409, therefore, would not be appropriate.

Committee Staff found the phrase "**absent extraordinary circumstances**" unclear. The phrase does not appear in RSAs governing the Commission, but is intended to reflect the legal principle of *force majeure* and other events beyond the control of a party which nevertheless result in non-compliance with a provision of the rules. The Commission believes that such circumstances will require a case-by-case review and cannot be defined in a rule.

Committee Staff also commented that references in Puc 1303.07, Puc 1303.10 and Puc 1303.11 to the **National Electrical Code** as adopted in RSA 155-A:1,IV are supported by a citation to the

NHPUC Response to Preliminary Objection
PUC 1300, Utility Pole Attachments

2008 Electrical Code in the Incorporation by Reference Statement (IBRS) and do not match the RSA citation. The Commission agrees that the date in the IBRS was incorrect and, moreover, that because the RSA cites the Code, an IBRS is not necessary. We have therefore removed the IBRS. We also note that the citation in RSA 155-A:1, IV is incorrect and should read "National Electrical Code," rather than "National Electric Code."

B. Scope of PUC Jurisdiction under the Statute & Rules. (LGC, DTC, FairPoint, segTEL)

Several parties contend that the proposed rule exceeds the jurisdiction granted the Commission under RSA 374:34-a. FairPoint Communications, Inc. (FairPoint) and segTEL argue that RSA 374:34-a limits the Commission's jurisdiction to cable television and competitive local exchange telecommunications providers, as set forth in 47 U.S.C. section 224, the pole attachment provision of the federal Telecommunications Act of 1996.

Commission Response. The long history of the shared jurisdiction over pole attachments between state and federal authorities helps to put our proposed rule into context. Initially, pole attachments were governed exclusively by local and state governments. Through the Communications Act of 1934, Congress gave the Federal Communications Commission (FCC) jurisdiction to establish rules governing pole attachments rates, terms and conditions, but limited the FCC's jurisdictional reach to those states without regulatory authority of their own over such matters. States that certify to the FCC that they regulate the matters addressed in federal regulations are given authority to exercise such powers, in addition to all other authority they may have under state law. Upon the enactment of RSA 374:34-a, New Hampshire certified to the FCC that it has the authority to regulate utility poles and their attachments. As a result, in accordance with federal law, RSA 374:34-a and Puc 1300 establish the Commission's jurisdiction over the rates, terms and conditions of utility pole attachments and any disputes concerning pole attachments that may arise under that statute and those rules. Thus, the Commission is directed to ensure that pole attachment rates are just and reasonable, and that access to utility poles for the purpose of attaching facilities is provided in a nondiscriminatory manner.

Throughout this rulemaking, there has been debate over the interpretation of RSA 374:34-a, II:

Whenever a pole owner is unable to reach agreement with a party seeking pole attachments, the commission shall regulate and enforce rates, charges, terms, and conditions for such pole attachments, *with regard to the types of attachments regulated under 47 U.S.C. section 224*, to provide that such rates, charges, terms and conditions are just and reasonable. This authority shall include but not be limited to the state regulatory authority referenced in 47 U.S.C. section 224(c) (emphasis added).

The phrase "types of attachments regulated under 47 U.S.C. section 224" has been interpreted by some to give the Commission authority over attachments by cable television providers and competitive local exchange telecommunications carriers but no others; attachments by any other entities are outside the Commission's jurisdiction, in their view.

We believe such a reading of RSA 374:34-a, II is incorrect and would amount to no PUC regulation over attachments of electric utilities, incumbent telephone utilities (a result that hardly could have been intended) or municipalities. The Commission's authority to impose safety standards, which includes allowable weight, required space between lines, emergency management signaling and

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required electrical safety standards, would be limited to attachments by cable television and competitive local exchange carriers. We believe RSA 374:34-a,II can only be read as giving the Commission the authority identified in 47 U.S.C. section 224(c) *in addition to* the authority the Commission has under state law. RSA 374:34-a, in fact, makes that clear, by stating that the Commission's authority "shall include *but not be limited to* the state regulatory authority referenced in 47 U.S.C. section 224(c)."

RSA 374:3 sets forth the PUC's "Extent of Power" – "The public utilities commission shall have the *general supervision of all 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." The referenced title extends from RSA 362 to RSA 384, most of an RSA volume. RSA 374:1 provides that "[e]very public utility shall furnish such service and *facilities as shall be reasonably safe and adequate* and in all other respects just and reasonable." (emphasis added). The poles and conduits owned by the public utilities that we regulate and that are the main subject of the proposed rule are part of the plant and facilities owned, operated or controlled and furnished by public utilities. We have the authority and duty to supervise the safety and adequacy of the poles and conduits covered by the proposed rule and that necessarily includes the safety and conditions of attachments thereto. Additional discussion of the definition of "plant" in this context is provided in Attachment A.

C. Entities to which the Rules Apply. LGC and DTC assert that the rules should not extend to municipalities that do not provide commercial telecommunications services.

Commission Response. The Commission's rules define "attaching entities" as including, but not limited to, telecommunications providers, cable TV service providers, incumbent local exchange carriers, competitive local exchange carriers, electric utilities, and governmental entities (*i.e.*, municipalities). The FCC definition is similar: an "attaching entity" includes "cable system operators, telecommunications carriers, incumbent and other local exchange carriers, utilities, governmental entities and other entities with a physical attachment to the pole, duct, conduit or right of way." 47 CFR 1.1402(m).

The proposed rules require attaching entities to adhere to certain notice, safety, and good-faith negotiation requirements. To remove references to "governmental entities" from the definition of "attaching entities" subject to these rules, as LGC and DTC propose, would be to remove any enforceable requirement that municipalities adhere to certain notice, safety, and good-faith negotiation provisions with respect to placing attachments on poles. The Commission considers it a statutory duty to ensure that all poles and attachments are installed and maintained in full compliance with applicable safety codes and requirements, which include the right of pole owners who are responsible for the operation and maintenance of poles to be notified of facilities that are attached to those poles.

D. Facilities to which the Rules Apply. LGC found the definition of "facility" to be unclear. Based on a September 11, 2009 meeting with LGC representatives, we have amended the proposed language of Puc 1302.05 to include "or for public safety purposes".

E. Cost Sharing Provisions. FairPoint argues that the cost-sharing provisions of Puc 1303.09 result in an unconstitutional taking and violation of due process.

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Commission Response. Incumbent local exchange carriers (ILECs) such as FairPoint typically attach at the lowest permissible point on a pole in accordance with safety standards, given the sag factor of heavier telecom lines. However, ILEC attachments have historically been placed at some point above the lowest permissible point before other carriers needed space on the poles. This might have occurred, for example, where an ILEC wished to create a straighter line over uneven terrain, or for ease of access and maintenance.

FairPoint has testified that, for reasons unrelated to safety concerns, its attachments are not always located at the lowest legal and feasible point on a pole. FairPoint argues that requiring it to shoulder 60% of the cost to move its facilities lower on a pole to make room for a new attachment and comply with safety standards and practices constitutes a taking under the law in violation of due process. FairPoint does not cite any authority to support its position.

FairPoint's aim is to maintain a consistent height of its attachments all the way down the line, and reserving the lowest feasible position on a pole permits them to do that. However, FairPoint and its predecessors have often placed their attachments at a location higher than the lowest permissible position, given the lack of competition for space on poles in years past. As a result, in many cases the only available space for a new entity seeking attachment is below FairPoint's lines. FairPoint and other incumbent telephone companies would like to charge new attachers 100% of the cost to move their lines to make space available. Several parties argued those costs should be borne in whole or in part by the incumbent telephone company.

The Commission believes the proposed rules, which establish a 60/40 cost sharing, are a fair and balanced result reflecting the competing positions advanced in this proceeding. Our initial proposal placed 100% of the cost burden on the incumbent telephone companies such as FairPoint. In response to comments, we amended the original provision to require the entity seeking a new attachment to bear 40% of those costs. In addition, of course, the pole owner will recover operational and maintenance costs for its utility poles and wires through attachment fees that will recur for the duration of an attachment agreement. Furthermore, in the event an incumbent telephone company's facilities cannot be lowered to make room for new attachers due to safety and engineering concerns, the request to attach may be denied.

F. Provisions regarding "boxing" and "extension arms." At the JLCAR hearing, FairPoint recommended deleting the provisions allowing limited use of "boxing" and "extension arms" found at Puc 1303.10 and 1303.11.

Commission Response. The Commission disagrees. Pole owners expressed concern that the use of boxing and extension arms creates unnecessary safety risks and should be allowed in extremely limited circumstances. Would-be attachers, on the other hand, pointed out that the pole owners themselves use boxing and extension arms at times, and that these practices are occasionally the only cost-effective way to attach to utility poles, given existing attachments and the location on the poles of those attachments.

The proposed rule limits the use of boxing and extension arms, subject to compliance with safety standards. We believe the inclusion of these provisions strikes an appropriate balance and is in the

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best interest of all parties, as it provides a framework that will discourage the unauthorized or indiscriminate use of such practices, while providing recourse as needed.

G. Concerns raised by segTEL. segTEL made numerous suggestions, several of which have been incorporated in the draft submitted herewith. These changes include: (a) tightening the provision that authorization be obtained prior to attaching facilities to a pole by requiring authorization to be made or denied within 45 days, and (b) tightening response provisions for make-ready work. Puc 1303.05, and 1303.12. We also agree with segTEL that the reference to the Telcordia Blue Book Manual of Construction Procedures is inappropriate, as it is not an industry-wide standard, but a standard specific to FairPoint and other former Bell Telephone companies. Puc 1303.07 as proposed herein deletes the reference to the Telcordia Blue Book.

Further arguments by segTEL, not adopted by the Commission, include:

- (1) federal law preempts RSA 231:159 *et seq.*;
- (2) prepayment of estimated survey and make-ready costs is unreasonable;
- (3) time is of the essence in allowing attachments on existing poles and therefore timeframes set forth in the rules should be shortened;
- (4) the rules should not permit the removal of unauthorized attachments at all; and
- (5) pole attachment agreements that pre-date RSA 374:34-a should be presumed to be contracts of adhesion.

Commission Response. With respect to the federal preemption assertion, the Commission believes that the authority granted municipalities under RSA 231:159 *et seq.* is not altered by this rule. With respect to prepayments, timeframes, and the removal of unauthorized attachments, the Commission believes that the rule balances the competing interests of competitor providers such as segTEL and pole owners. Regarding segTEL's assertion that pole attachment agreements that pre-date RSA 374:34-a should be presumed to be contracts of adhesion, we find no persuasive basis to reach such a conclusion. To the extent that a party to a pre-existing attachment agreement believes an agreement to be onerous, unfair or unreasonable, it can seek dispute resolution from the Commission.

H. New England Cable and Telecommunications Association (NECTA). NECTA argues that Puc 1304.06, Rate Review Standards, should adopt a single rate based on the Federal Communications Commission's cable rate for attachments, and that the 60-day advance notice requirement for performing pole-related work, including upgrading of cable facilities using fiber over-lashing, is too long.

Commission Response. The Commission took NECTA's arguments into consideration in the underlying rulemaking proceeding. Puc 1304.05(a) does not mandate any particular rate setting methodology, though it instructs the Commission to consider an FCC rate setting formula that employs a 2-tiered pricing system, as well as the interests of the subscribers, users and consumers of the services provided via pole attachments. We believe the proposed rule fairly balances the competing interests. Further, we do not believe that shortening the notice requirement of Puc 1303.06 to less than 60 days is in the public interest.

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I. Fibertech Networks, LLC (Fibertech). Fibertech supports the Commission's actions to support the original make-ready time frames, but suggests that the timeframes should be shortened in future iterations of the rules. Given the nature of Fibertech's comments, the Commission did not amend the proposed rule.

J. New Hampshire Local Government Center (LGC). LGC makes the following arguments in its various submissions to JLCAR, including its September 3 PowerPoint presentation:

- (1) The purpose statement in Puc 1301.01 violates the Administrative Rules Manual by requiring compliance with "other law."
- (2) The rules exceed the Commission's statutory authority by including governmental entities in the definition of "attaching entity" in Puc 1302.01.
- (3) The definition of "attaching entity" set forth in Puc 1302.01 should not include governmental entities unless such entities are also telecommunications service providers.
- (4) The rules fail to consider private property rights of pole owners and owners of land on which a pole is set and should not apply to poles placed pursuant to private agreement with landowners.
- (5) The access standard set forth in Puc 1303.01 does not completely set forth potential reasons for denial of an attachment request.
- (6) The rules fail to explicitly acknowledge the role of municipalities as the licensing authority for installation of equipment in a municipal right of way.
- (7) The proposed rules for dispute resolution should be placed within the Commission's PUC 200 rules; moreover, they fail to provide municipalities adequate notice and opportunity to be heard, violate RSA 541-A:39, violate the requirement that proposed attachments serve the public good, and violate the requirement that a license be obtained prior to commencing a proceeding.

Commission Response.

(1): Regarding the purpose statement, Puc 1301.01, the proposed rule does not "require compliance" with any laws that fall outside the scope of Commission jurisdiction. The provision simply states that "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.*" The Commission, in fact, added this language to address the LGC's request that the Puc rule explicitly recognize the municipal licensing statutes cited. The better course would be to delete the phrase "including...RSA 231:159 *et seq.*", as we believe agency rules should not codify statutes unrelated to our authority to regulate utilities and their plant, including poles and pole attachments. To address the LGC's concerns, however, we are prepared to leave the provision as drafted.

(2) and (3): Regarding the LGC's assertion that "attaching entities" should not apply to municipalities, we respectfully disagree. As noted in the discussion of scope and jurisdiction at sections B and C above, we believe our authority extends to attachments on all public utility poles and utility plant, including attachments by municipalities. We also disagree that the applicability of this rule should be limited to municipalities that are also telecommunications service providers. As noted above, our jurisdiction is based on our statutory mandate to ensure

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safe and reliable service and facilities. That role includes enforcement of applicable safety codes and related measures that ensure utility plant and facilities are safely operated and managed. We believe that, for public safety reasons, municipalities should not be permitted to attach facilities to utility poles without adherence to certain minimum notice and safety requirements, as established in this rule.

(4): The LGC asserts that the Commission has no authority to adjudicate disputes that concern poles and attachments located on private property under private easement. We find no basis to conclude that the Superior Court is the only venue in which landowner disputes may be adjudicated; in fact, the Commission has long provided a forum for disputes of private landowners who take issue with utility easements and facilities located on their property.

(5): Regarding the LGC's claim that the access standard set forth in Puc 1303.01 does not completely set forth potential reasons for denial of an attachment request, we disagree. The proposed rule provided that "[n]othing herein shall require the owner or owners of a pole to provide access where such access would violate other applicable laws, rules or regulations" which seems to have been the type of situation about which the LGC is concerned. To the extent that this language was not clear enough, we have proposed amending Puc 1303.01, to provide that a pole owner may deny an attachment if it does not possess the authority to allow the attachment, which arguably might include situations where a pole owner would violate the terms of an otherwise lawful and valid municipal license or other law, rule or regulation or where they do not possess the necessary property rights to lawfully allow the proposed attachment.

(6) Regarding the LGC's request that municipal licensing laws be codified within this rule or that compliance with such laws by attaching entities be a precondition to a public utility's authorization for access to poles pursuant to PUC rules, we do not believe an agency rule should address the authority of municipalities under other statutes where the legislature has not granted the PUC any jurisdiction or enforcement authority over such statutes.

(7): Regarding the LGC assertion that the Commission may respond to a petition for dispute resolution with something other than an adjudicative process, the language of the rule itself resolves the issue. Puc 1304.03 clearly states that a pole owner may "petition the commission pursuant to Puc 203" Puc 1304.05 states that in response to a petition the Commission shall conduct "an adjudicative proceeding pursuant to Puc 203..." Puc 203, which is titled "Adjudicative Proceedings," spells out the standards for adjudicated matters before the Commission. Regarding the request that the rules state that the Commission shall notify municipalities in the case of petitions for dispute resolution, it is clear that when RSA 541-A:39 requires such notice, the Commission is bound to provide it. Though we do not believe it is necessary to identify every statute or rule that governs an agency, our objection response amendment to the proposed rule now includes a reference to RSA 541-A:39 as requested.

Regarding the claim that the rules would violate the requirement that proposed attachments serve the public good, the Commission finds no basis to agree. The purpose language of Puc 1301.01 makes clear that the rules are intended to result in "rates, charges, terms and conditions for pole attachments that are just, reasonable and *in the public interest*." (emphasis added).

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Finally, regarding the claim that the rules would violate the requirement that a license be obtained prior to commencing a proceeding, we have included language that makes clear that an owner of a pole may deny a request for attachment when it does not have the authority to allow the attachment to take place, which might include instances in which a municipal license has not been obtained pursuant to RSA 231:161. See Puc 1303.01(c).

K. Donahue, Tucker & Ciandella on behalf of 5 municipalities (DTC). DTC asserts a number of arguments regarding municipal authority, as follows:

- (1) **Definition of Governmental Entities.** Municipality representative DTC requested that we limit the applicability of the pole attachment rules to only those governmental entities attaching facilities for commercial purposes. Municipalities maintain that any non-commercial facilities they may wish to attach to utility poles should not be subject to the various provisions of the proposed rules, such as notification requirements, cost-sharing provisions, duty to negotiate, dispute resolution, and burden of proof, among others.
- (2) **Reference to Municipal Licensing Statutes.** Municipal representatives have been adamant in requesting references to pole licensing statutes in the Commission's pole attachment rules, including a provision that states that all attachments must be properly licensed. In effect, municipalities would like the Commission's rules to codify the statutory licensing requirements set forth in RSA 231:159 *et seq.*
- (3) **Reservation of Space.** The municipalities also assert that, based on industry practice, certain historic pole license agreements, and statutory licensing authority, they are entitled to reserve space for future attachments on all poles indefinitely and free of charge. Other attaching entities competing for available space oppose the municipalities' position on this issue.

Commission Response.

- (1) Regarding the claim that the rules only apply to municipalities attaching facilities for commercial purposes, the Commission disagrees. We believe that the overarching purpose of these rules is to establish minimum guidelines for the practice of attaching facilities to utility poles. Certain guidelines are aimed at ensuring that pole owners are not subject to unauthorized attachments, as the pole owners are ultimately responsible for the safety and reliability implications of all attachments. The proposed rules do not mandate rates for non-commercial municipal attachments; all other provisions are designed to ensure public safety and reliability of service, while balancing the interests of pole owners and attachers.
- (2) Regarding municipal authority under RSA 231:159, see the response in Section G and J (6) and (7) above.
- (3) Regarding the claim that municipalities are entitled to reserve space on poles free of charge, we are concerned that, in an era of competitive provision of telecommunications and other services that require attachment to utility poles, which by their nature are limited in space, such an automatic

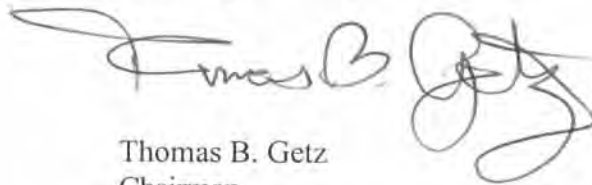
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reservation might have a discriminatory impact and might undermine the potential for greater competition in provision of services. Nonetheless, the proposed rule does not categorically preclude reservation of space by municipalities under the terms of a license agreement. Furthermore, the proposed rules do not establish rates for non-commercial municipal attachments.

L. Conclusion. After careful review and consideration of all of the bases for preliminary objection by JLCAR, we have made certain amendments to the attached proposed rule. We believe that the resulting rule is fair, just and reasonable, and reflects a balanced result that is in the public interest and in full accordance with our statutory mandate.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas B. Getz", with a large, stylized flourish at the end.

Thomas B. Getz
Chairman

Cc: Members of the Joint Legislative Committee on Administrative Rules
Scott Eaton, Staff Director

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ATTACHMENT A

Pursuant to the Committee's request and in the interest of clarifying certain key concepts, we provide definitions of *Pole Attachments, and Attaching Entities and Utility Plant*.

A **“pole attachment”** is defined in RSA 374:34-a as “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*” (emphasis added). The FCC defines it as “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.” 47 CFR 1.1402(b).

The FCC defines an **“attaching entity”** as including “cable system operators, telecommunications carriers, incumbent and other local exchange carriers, utilities, governmental entities and other entities with a physical attachment to the pole, duct, conduit or right of way.” 47 CFR 1.1402(m).

The Commission's rules similarly define “attaching entities” as including, but not limited to, telecom providers, cable TV service providers, ILECs, CLECs, electric utilities, and governmental entities (*i.e.*, municipalities). The rules define “facility” as “the lines and cables and accompanying appurtenances attached to a utility pole for the transmission of electricity, information, telecommunications, or video programming for the public.” Puc 1302.05.

The term **“plant”** in the utility context is not defined in and of itself in the RSAs but falls within the definition of “public utility” under the Commission's statutory mandate and appears in numerous other Commission authorities. RSA 374:3 grants the Commission general supervisory authority “of all public utilities and the plants owned, operated or controlled by the same”.

“Public utility” is defined in RSA 362:2 as including “every corporation, company, association, joint stock association, partnership and person ... owning, operating or managing *any plant or equipment or any part of the same for the conveyance of telephone or telegraph messages or for the manufacture or furnishing of light, heat, sewage disposal, power or water for the public, or in the generation, transmission or sale of electricity* ultimately sold to the public... (emphasis added).

PUC rules set forth certain safety standards requirements that utilities must meet in the construction, installation and maintenance of their “plant, structures and equipment and lines” (*see, e.g.*, Puc 306.01 – electric; Puc 413.01 – incumbent local exchange carriers).

The PUC rules further require utilities to file certain accounting elements, including calculations of rate base components such as “utility plant in service,” and analyses of plant accounts (*see, e.g.*, Puc 308.11 – electric; Puc 429.04 – incumbent local exchange carriers). New Hampshire utilities must comply with federal and state accounting standards as set forth in applicable Uniform Systems of Accounts (*see, e.g.*, Puc 307.04 – electric; Puc 414.01 – incumbent local exchange carriers). Electric companies must comply with the Federal Regulatory Energy Commission and U.S. Department of Energy's “Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to Provisions of the Federal Power Act.” Within that System of Accounts, the Electric Plant Chart of

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Accounts lists “**Poles**, towers and fixtures” under “Distribution **Plant**” (*see* 18 CFR 101.364). Incumbent local exchange carriers must comply with the Uniform System of Accounts for Telecommunications Companies,” under which “Property, **Plant** and Equipment” includes “**Poles**” (*see* Section 403.03(q) of PART Puc 409).

Webster’s New Collegiate Dictionary (1981) defines “**plant**” (in this context) as “the land, buildings, machinery, apparatus, and fixtures employed in carrying on a trade or an industrial business,” “the total facilities available for production or service,” and “the buildings and other physical equipment of an institution.”

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ATTACHMENT B

Procedural Background

Under RSA 374:34-a, the Commission was granted authority to regulate rates, terms and conditions of attachments to utility poles. In accordance with the statute, we adopted interim rules for effect on January 17, 2008. The interim rules expire on January 17, 2010. An Initial Proposal for regular rule Puc 1300 was filed with JLCAR on May 12, 2009; a Final Proposal was filed on July 17, 2009; a Request for Conditional Approval was filed on August 18, 2009.

The underlying initial and final rulemakings included five opportunities for parties to comment on the proposed rule, including a public hearing held on June 18, 2009. (See Attachment C for a summary of comments received.) Two technical sessions were held, in addition to separate meetings held by party request with pole owners, competitive telecommunications carriers, and municipal representatives. Furthermore, on September 11, 2009, Commission representatives met with the Executive Director and staff of the Local Government Center.

Participants in the underlying comment process included representatives from:

- PSNH
- Unitil
- National Grid
- New Hampshire Electric Cooperative
- FairPoint Communications
- New Hampshire Telephone Association (NHTA)
- TDS Telecom
- Granite State Telephone
- segTEL
- New England Cable & Telecommunications Association (NECTA)
- New Hampshire Local Government Center (LGC)/NH Municipal Association
- Town of Hanover and, jointly represented through Donahue, Tucker & Ciandella (DTC) as counsel, the towns of Exeter, Hanover, Keene, Portsmouth, Newmarket, Salem, Seabrook, Raymond, and Stratham
- Cities of Concord, Manchester, and Keene
- Fire Departments of Concord, Manchester, Nashua, Keene, Claremont, and Peterborough
- New Hampshire Department of Transportation
- New Hampshire Department of Justice
- Commission Staff.

In developing its Initial and Final Proposals, the Commission considered all comments, both written and oral. It also considered issues explored in the course of an underlying generic investigation on utility pole practices launched in 2005 (Docket No. DM 05-172), the federal legal framework, and the statutory mandate set forth in RSA 374:34-a.

ATTACHMENT C

COMMENTS OPPORTUNITIES IN PUC 1300 RULEMAKING

COMMENTS RECEIVED PRIOR TO THE COMMENCEMENT OF PUC FORMAL RULEMAKING

- PUC 1300 **Draft** Initial Proposal Circulated to Parties for Comment by 3/5/08
 - **Comments submitted to Staff**
 - PSNH
 - National Grid
 - NECTA
 - Oxford Networks
 - segTEL
 - Verizon
 - Eight ILECs
 - Municipalities (DTC)
- PUC 1300 Draft Initial Proposal Circulated to Parties for Comment by 6/25/08
 - **Comments submitted to Staff**
 - NECTA
 - segTEL
 - NHTA
 - Local Government Center
- PUC 1300 Draft Initial Proposal Circulated to Parties for Comment by 12/5/08
 - **Comments submitted to Staff**
 - FairPoint
 - Municipalities (DTC)
 - National Grid
 - NECTA
 - NH Telephone Association
 - PSNH
 - segTEL
 - City of Keene
 - Local Government Center

AFTER COMMENCEMENT OF FORMAL RULEMAKING ON MAY 1, 2009

- PUC 1300 Rule - Commission Hearing on Initial Proposal for Regular Rules (6/18/09)
 - **Comments submitted formally to the Commission by 6/25/09**
 - Fiber Tech Networks, LLC
 - Fairpoint
 - segTEL
 - National Grid
 - NHTA
 - PSNH
 - NECTA
 - Municipalities (DTC)
 - Unitil
- PUC 1300 Rule – Commission Approval of Final Proposal for Regular Rules (7/16/09)
- **Comments submitted to JLCAR prior to or on JLCAR hearing dates (8/20/09 & 9/3/09)**
 - Fairpoint
 - Local Government Center
 - Municipalities
 - FiberTech
 - NECTA
 - PSNH
 - segTEL

On September 3, 2009, JLCAR voted to enter a preliminary objection to Final Proposal 2009-79 containing rule Puc 1300. On October 1, 2009, Commission Staff sent all parties to the docket a copy of comments received prior to or on the date of the JLCAR hearing (above) and invited additional comments for its preliminary objection response.

- **Comments received subsequent to JLCAR's preliminary objection (10/7/09)**
 - PSNH
 - Local Government Center

Readopt with Amendment Chapter Puc 1300, effective 1-17-08 (Document # 9073) to read as follows:

CHAPTER Puc 1300 UTILITY POLE ATTACHMENTS

Statutory Authority: RSA 374:3; RSA 374:34-a

PART Puc 1301 PURPOSE AND APPLICABILITY

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 just, reasonable and in the public interest. 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.

Puc 1301.02 Applicability. Puc 1300 shall apply to:

(a) Public utilities within the meaning of RSA 362, including rural electric cooperatives for which a certificate of deregulation is on file pursuant to RSA 301:57, 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.

PART Puc 1302 DEFINITIONS

Puc 1302.01 “Attaching entity” means a natural person or an entity with a statutory or contract right to attach a facility of any type to a pole, including but not limited to telecommunications providers, cable television service providers, incumbent local exchange carriers, competitive local exchange carriers, electric utilities, and governmental entities.

Puc 1302.02 “Boxing” means the placement of lines or cables on both the road side and the field side of a pole.

Puc 1302.03 “Commission” means the New Hampshire public utilities commission.

Puc 1302.04 “Extension arm(s)” means a bracket attached to a utility pole to provide support for cables or wires at a distance from the pole.

Puc 1302.05 “Facility” means the lines and cables and accompanying appurtenances attached to a utility pole for the transmission of electricity, information, telecommunications, or video programming for the public or for public safety purposes.

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Puc 1302.06 "Federal Communications Commission (FCC)" means the U.S. government agency established by the Communications Act of 1934 and charged with regulating interstate and international communications by radio, television, wire, satellite and cable.

Puc 1302.07 "Make-ready work" means all work, including but not limited to rearrangement ~~and~~/or transfer of existing facilities, replacement of a pole, or any other changes required to accommodate the attachment of the facilities of the party requesting attachment to the pole.

Puc 1302.08 "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."

Puc 1302.09 "Prime rate" means the rate reported in the *Wall Street Journal* on the first business day of the month preceding the beginning of each calendar quarter, or the average of the rates so reported on that day.

Puc 1302.10 "Utility" means a "public utility" as defined in RSA 362:2, including a rural electric cooperative for which a certificate of deregulation is on file with the commission pursuant to RSA 301:57.

PART Puc 1303 ACCESS TO POLES

Puc 1303.01 Access Standard. The owner or owners of a pole shall provide attaching entities access to such pole on terms that are just, reasonable and nondiscriminatory. Notwithstanding this obligation, the owner or owners of a pole may deny a request for attachment to such pole:

- (a) ~~When~~ when there is insufficient capacity on the pole;
- (b) ~~or~~ for reasons of safety, reliability or generally applicable engineering purposes; or
- (c) ~~W. Nothing herein shall require the owner or owners of a pole to provide access where the pole owner(s) does not possess the authority to allow the proposed attachment. such access would violate other applicable laws, rules or regulations.~~

Puc 1303.02 Owner Obligation to Negotiate. The owner or owners of a pole shall, upon the request of a person entitled to access under these rules seeking a pole attachment, negotiate in good faith with respect to the terms and conditions for such attachment.

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Puc 1303.03 Requestor Obligation to Negotiate. A person entitled to access under these rules seeking a pole attachment shall contact the owner or owners of the pole and negotiate in good faith an agreement for such attachment.

Puc 1303.04 Request for Access and Response Requirements. Requests made under these rules and pursuant to a pole attachment agreement for access to a utility's poles shall be in writing. Absent extraordinary circumstances, a survey for an application not exceeding 200 poles shall be completed and the results communicated to the applicant seeking to attach within 45 days of receiving a completed application and survey fee. Pole owners shall issue authorization of access in writing within 45 days. If permission for access is not granted within 45 calendar days of receiving a complete request for access, the owner shall confirm the denial in writing by the 45th day. The 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 relate to the grounds in Puc 1303.01 for such denial.

Puc 1303.05 Authorization Required. ~~No A~~ person ~~may seeking to~~ attach facilities to a pole ~~without shall obtain~~ authorization in writing from the pole owner or owners prior to attaching such facilities, in accordance with Puc 1303.04.

Puc 1303.06 Notification.

(a) A pole owner shall provide an attaching entity no less than 60 days' written notice prior to:

- (1) ~~Removing any of that person's facilities;~~
- (2) ~~Increasing any annual or recurring fees or rates applicable to the pole attachment;~~ or
- (3) ~~Modifying the facilities other than as part of routine maintenance or~~ in response to an emergency.

(b) Attaching entities shall provide written notice to a pole owner or owners no less than 60 days prior to:

- (1) Materially modifying an existing attachment other than as part of routine maintenance or in response to an emergency, or to install a customer drop line;
- (2) Materially ~~i~~ncreasing the load, or weight, on a pole by adding to an existing attachment; or
- (3) Changing the purpose for which an existing attachment is used.

(c) Separate and additional attachments are subject to pole attachment application and licensing processes.

Puc 1303.07 Installation and Maintenance.

(a) All attachments shall be installed in accordance with the National Electrical Safety Code, 2007 edition, and the National Electrical Code as adopted in RSA 155-A:1,IV, and the ~~SR 1421 Blue Book—Manual of Construction Practices, Issue 4, Teleordia Technologies, Inc. (2007)~~, and in accordance with such other applicable standards and requirements specified in the pole attachment agreement.

(b) Any attachment shall be installed and maintained to prevent interference with service furnished by the utility pole owner or owners and any other attaching entity.

(c) Where a pole or existing attachment ~~is not in~~ ~~must be brought into~~ compliance with applicable standards and codes and must be brought into compliance before a new attachment can be added, the cost of remedying the pre-existing non-compliance bringing that pole or existing attachment into compliance shall not be shifted to the entity seeking to add a new attachment.

Puc 1303.08 Labeling of Attachments. Attaching entities shall clearly label their attachments with owner identification.

Puc 1303.09 Location of Attachments. No attaching entity shall be denied attachment solely because the only space available for attachment on a pole is below the lowest attached facility. If the owner of the lowest facility chooses to relocate its existing facilities to a lower allowable point of attachment so that a new attachment will be located above that owner's existing facilities, that owner shall bear 60 percent of the cost of relocation. The new attaching entity shall bear the remaining 40 percent of the cost of relocation, except where Puc 1303.07(c) applies.

Puc 1303.10 Boxing of Poles. Pole owners may restrict the practice of boxing poles consistent with the restrictions it places on its own practice of boxing poles as defined in the company's written methods and procedures. Such boxing shall be safely accessible by bucket trucks, ladders or emergency equipment and otherwise consistent with the requirements of applicable codes, including the National Electrical Safety Code.

Puc 1303.11 Use of Extension Arms. Pole owners shall allow limited, reasonable use of extension arms by attaching entities for purposes of clearing obstacles or improving alignment of attachment facilities. Under no circumstances may extension arms be used to avoid tree trimming requirements. Any use of extension arms shall be consistent with the requirements of applicable codes, including the National Electrical Safety Code.

Puc 1303.12 Make-Ready Timeframes. Unless otherwise agreed by parties to a pole attachment agreement, pole owners shall complete make-ready work within 150

days after any required ~~pre-payments are rendered for any~~ make-ready estimates are provided to the attaching entity by the pole owner or owners. Where make-ready work requires 10 poles or less and no pole replacements, the work shall be completed within 45 days after any required ~~pre-payments for~~ estimates are provided~~rendered~~.

PART Puc 1304 DISPUTE RESOLUTION

Puc 1304.01 Voluntary Agreements. A pole attachment agreement submitted to the commission for adjudication shall be deemed a voluntary agreement pursuant to RSA 374:34-a, VII. A party filing a petition under this part shall have the burden of proving that an agreement is not just, reasonable and nondiscriminatory.

~~Puc 1304.02 Lack of Agreement. A pole attachment and entitled to access under these rules and unable, through good faith negotiation, to reach agreement with the owner or owners of a pole or poles subject to this chapter, may petition the commission pursuant to Puc 203 for an order directing the removal of facilities that are attached to a pole without authorization pursuant to this chapter. A person requesting a pole attachment and entitled to access under these rules and unable, through good faith negotiation, to reach agreement with the owner or owners of a pole or poles subject to this chapter, may petition the commission pursuant to Puc 203 for an order establishing the rates, charges, terms and conditions for the pole attachment or attachments. Such a petition shall include the information required for complaints to the FCC made pursuant to the terms of 47 CFR § 1.1404(d) through (m) in effect on July 16, 2007.~~

Puc 1304.03 Dispute Following Agreement or Order. A party to a pole attachment agreement, or a party subject to an order of the commission establishing rates, charges, terms or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order.

Puc 1304.04 Unauthorized Attachments. A pole owner may, but is not obligated to, petition the commission pursuant to Puc 203 for an order directing the removal of facilities that are attached to a pole without authorization pursuant to this chapter.

Puc 1304.05 Procedure. Upon receipt of a petition pursuant to this part, the commission shall conduct an adjudicative proceeding pursuant to Puc 203 to consider and rule on the petition, and shall provide notice to affected municipalities when required by RSA 541-A:39. ~~Where the public interest so requires, the commission may shall order that rates, charges, terms or conditions for pole attachments be modified.~~

Puc 1304.06 Rate Review Standards.

(a) In determining just and reasonable rates for the attachments of competitive local exchange carriers and cable television service providers to poles owned by incumbent local exchange carriers or electric utilities under this chapter, the commission shall consider:

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(1) The interests of the subscribers and users of the services offered via such attachments;

(2) The interests of the consumers of any pole owner providing such attachments; and

(3) The formulae adopted by the FCC in 47 CFR § 1.1409(c) through (f) in effect on July 16, 2007.

(b) In determining just and reasonable rates for all other attachments under this chapter, the commission shall consider:

(1) The interests of the subscribers and users of the services offered via such attachments; and

(2) The interests of the consumers of any pole owner providing such attachments.

Puc 1304.07 Remedies. When the commission determines just and reasonable rates under this part that differ from the rates paid by the petitioner, the commission shall order a payment or refund, as appropriate. Such refund or payment shall be the difference between the amount actually paid and the amount that would have been paid under the rates established by the commission, plus interest, as of the date of the petition.

Puc 1304.08 Interest. Refunds or payments ordered under Puc 1304.07 shall accrue simple annual interest at a rate equal to the prime rate.

Appendix

| Rule | Applicable Statute |
|----------|-------------------------|
| Puc 1300 | RSA 374:3; RSA 374:34-a |

THE STATE OF NEW HAMPSHIRE

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December 10, 2009

Carol Holahan, Director
Office of Legislative Services
Room 114, State House
107 North Main Street
Concord, NH 03301-4951

RE: Filing of Adopted Rules
Puc 1300 – Utility Pole Attachments
Final Proposal No. 2009-79
Commission Docket No. DRM 08-004

Dear Ms. Holahan:

The Public Utilities Commission (Commission) pursuant to RSA 541-A:14, III and Chapter 3, section 2.21 of the *New Hampshire Drafting and Procedural Manual for Administrative Rules* (the *Manual*), hereby files with the Director of the Office of Legislative Services in care of the Division of Administrative Rules, the enclosed adopted rules, as referred to in the caption above. The Joint Legislative Committee on Administrative Rules (Committee) voted to approve these rules at its December 3, 2009 meeting. On December 9, 2009, the Commission held a public hearing, pursuant to RSA 91-A:2, III, and voted to adopt Final Proposal 2009-79 as approved by the Committee.

We hereby certify that the material enclosed is a true copy of Puc 1300, Utility Pole Attachments, which was adopted by vote of the Commission.

As required by Chapter 3, section 2.21 of the *Manual*, enclosed for filing are:

- 2 copies of the adopted rules in the format required by Chapter 4 of the *Manual*, including the appendix containing the cross reference table required by RSA 541-A:3-a,II; and
- One copy of a cover letter (this letter) containing the name and address of the agency adopting the rules; identification of the rules by rule number; the date of the rules' adoption; the effective time and date, if other than 12:01 a.m. of the day after filing; identification of any editorial changes made in the adopted rules from the text of the final proposal after Committee

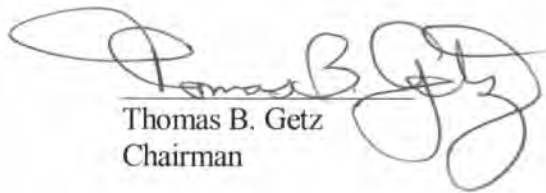
Page 2

review; and signature by a member of the group with rulemaking authority, certifying that the material enclosed is a true copy of the rules adopted by the agency on the date given.

It is the intention of the Commission that the enclosed rules shall become effective at 12:01 a.m. on the day after filing.

Please contact us if you have questions or concerns.

Yours Truly,



Thomas B. Getz
Chairman

CHAPTER Puc 1300 UTILITY POLE ATTACHMENTS

Statutory Authority: RSA 374:3; RSA 374:34-a

PART Puc 1301 PURPOSE AND APPLICABILITY

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 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.

Puc 1301.02 Applicability. Puc 1300 shall apply to:

(a) Public utilities within the meaning of RSA 362, including rural electric cooperatives for which a certificate of deregulation is on file pursuant to RSA 301:57, 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.

PART Puc 1302 DEFINITIONS

Puc 1302.01 "Attaching entity" means a natural person or an entity with a statutory or contract right to attach a facility of any type to a pole, including but not limited to telecommunications providers, cable television service providers, incumbent local exchange carriers, competitive local exchange carriers, electric utilities, and governmental entities.

Puc 1302.02 "Boxing" means the placement of lines or cables on both the road side and the field side of a pole.

Puc 1302.03 "Commission" means the New Hampshire public utilities commission.

Puc 1302.04 "Extension arm(s)" means a bracket attached to a utility pole to provide support for cables or wires at a distance from the pole.

Puc 1302.05 "Facility" means the lines and cables and accompanying appurtenances attached to a utility pole for the transmission of electricity, information, telecommunications, or video programming for the public or for public safety purposes.

Puc 1302.06 "Federal Communications Commission (FCC)" means the U.S. government agency established by the Communications Act of 1934 and charged with

regulating interstate and international communications by radio, television, wire, satellite and cable.

Puc 1302.07 "Make-ready work" means all work, including but not limited to rearrangement or transfer of existing facilities, replacement of a pole, or any other changes required to accommodate the attachment of the facilities of the party requesting attachment to the pole.

Puc 1302.08 "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."

Puc 1302.09 "Prime rate" means the rate reported in the *Wall Street Journal* on the first business day of the month preceding the beginning of each calendar quarter, or the average of the rates so reported on that day.

Puc 1302.10 "Utility" means a "public utility" as defined in RSA 362:2, including a rural electric cooperative for which a certificate of deregulation is on file with the commission pursuant to RSA 301:57.

PART Puc 1303 ACCESS TO POLES

Puc 1303.01 Access Standard. The owner or owners of a pole shall provide attaching entities access to such pole on terms that are just, reasonable and nondiscriminatory. Notwithstanding this obligation, the owner or owners of a pole may deny a request for attachment to such pole:

- (a) When there is insufficient capacity on the pole;
- (b) For reasons of safety, reliability or generally applicable engineering purposes;
or
- (c) Where the pole owner(s) does not possess the authority to allow the proposed attachment.

Puc 1303.02 Owner Obligation to Negotiate. The owner or owners of a pole shall, upon the request of a person entitled to access under these rules seeking a pole attachment, negotiate in good faith with respect to the terms and conditions for such attachment.

Puc 1303.03 Requestor Obligation to Negotiate. A person entitled to access under these rules seeking a pole attachment shall contact the owner or owners of the pole and negotiate in good faith an agreement for such attachment.

Puc 1303.04 Request for Access and Response Requirements. Requests made under these rules and pursuant to a pole attachment agreement for access to a utility's poles shall be in writing. Absent circumstances beyond the pole owner's control, such as *force majeure*, a survey for an application not exceeding 200 poles shall be completed and the results communicated to the applicant seeking to attach within 45 days of receiving a completed application and survey fee. Pole owners shall grant or deny access in writing within 45 days of receiving a complete request for access. The 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 relate to the grounds in Puc 1303.01 for such denial.

Puc 1303.05 Authorization Required. No person may attach facilities to a pole without authorization in writing from the pole owner or owners prior to attaching such facilities, in accordance with Puc 1303.04.

Puc 1303.06 Notification.

(a) A pole owner shall provide an attaching entity no less than 60 days' written notice prior to:

- (1) Removing any of that person's facilities;
- (2) Increasing any annual or recurring fees or rates applicable to the pole attachment; or
- (3) Modifying the facilities other than as part of routine maintenance or in response to an emergency.

(b) Attaching entities shall provide written notice to a pole owner or owners no less than 60 days prior to:

- (1) Modifying an existing attachment other than as part of routine maintenance or in response to an emergency, or to install a customer drop line;
- (2) Increasing the load or weight on a pole by adding to an existing attachment, other than as part of routine maintenance or in response to an emergency, or to install a customer drop line; or
- (3) Changing the purpose for which an existing attachment is used.

(c) Separate and additional attachments are subject to pole attachment application and licensing processes.

Puc 1303.07 Installation and Maintenance.

(a) All attachments shall be installed in accordance with the National Electrical Safety Code, 2007 edition, the National Electrical Code as adopted in RSA 155-A:1, IV, and the SR-1421 *Blue Book – Manual of Construction Procedures, Issue 4, Telcordia Technologies, Inc. (2007)*, and in accordance with such other applicable standards and requirements specified in the pole attachment agreement.

(b) Any attachment shall be installed and maintained to prevent interference with service furnished by the utility pole owner or owners and any other attaching entity.

(c) Where a pole or existing attachment is not in compliance with applicable standards and codes and must be brought into compliance before a new attachment can be added, the cost of bringing that pole or existing attachment into compliance shall not be shifted to the entity seeking to add a new attachment.

Puc 1303.08 Labeling of Attachments. Attaching entities shall clearly label their attachments with owner identification.

Puc 1303.09 Location of Attachments. No attaching entity shall be denied attachment solely because the only space available for attachment on a pole is below the lowest attached facility. If the owner of the lowest facility chooses to relocate its existing facilities to a lower allowable point of attachment so that a new attachment will be located above that owner's existing facilities, that owner shall bear 60 percent of the cost of relocation. The new attaching entity shall bear the remaining 40 percent of the cost of relocation, except where Puc 1303.07(c) applies.

Puc 1303.10 Boxing of Poles. Pole owners may restrict the practice of boxing poles consistent with the restrictions it places on its own practice of boxing poles as defined in the company's written methods and procedures. Such boxing shall be safely accessible by bucket trucks, ladders or emergency equipment and otherwise consistent with the requirements of applicable codes, including the National Electrical Safety Code. Boxing may be permitted only with express, written authorization by the pole owner. Pole owners shall grant or deny permission to use boxing, in writing, within 30 days of receiving a request. An owner's denial of the use of boxing shall be specific, shall include all relevant information supporting its denial, and shall explain how such information supports denial.

Puc 1303.11 Use of Extension Arms. Pole owners shall allow limited, reasonable use of extension arms by attaching entities for purposes of clearing obstacles or improving alignment of attachment facilities. Under no circumstances may extension arms be used to avoid tree trimming requirements. Any use of extension arms shall be consistent with the requirements of applicable codes, including the National Electrical Safety Code. Extension arms may be permitted only with express, written authorization by the pole owner. Pole owners shall grant or deny permission to use extension arms, in writing, within 30 days of receiving a request. An owner's denial of use of extension arms shall be specific, shall include all relevant information supporting its denial, and shall explain how such information supports denial.

Puc 1303.12 Make-Ready Timeframes. Unless otherwise agreed by parties to a pole attachment agreement, pole owners shall complete make-ready work within 150 days after any required pre-payments are rendered for make-ready estimates provided to the attaching entity by the pole owner or owners. Where make-ready work requires 10 poles or less and no pole replacements, the work shall be completed within 45 days after any required pre-payments for estimates are rendered.

PART Puc 1304 DISPUTE RESOLUTION

Puc 1304.01 Voluntary Agreements. A pole attachment agreement submitted to the commission for adjudication shall be deemed a voluntary agreement pursuant to RSA 374:34-a, VII. A party filing a petition under this part shall have the burden of proving that an agreement is not just, reasonable and nondiscriminatory.

Puc 1304.02 Lack of Agreement. A person requesting a pole attachment and entitled to access under these rules and unable, through good faith negotiation, to reach agreement with the owner or owners of a pole or poles subject to this chapter, may petition the commission pursuant to Puc 203 for an order establishing the rates, charges, terms and conditions for the pole attachment or attachments. Such a petition shall include the information required for complaints to the FCC made pursuant to the terms of 47 CFR § 1.1404(d) through (m) in effect on July 16, 2007.

Puc 1304.03 Dispute Following Agreement or Order. A party to a pole attachment agreement, or a party subject to an order of the commission establishing rates, charges, terms or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order.

Puc 1304.04 Unauthorized Attachments. A pole owner may, but is not obligated to, petition the commission pursuant to Puc 203 for an order directing the removal of facilities that are attached to a pole without authorization pursuant to this chapter.

Puc 1304.05 Procedure. Upon receipt of a petition pursuant to this part, the commission shall conduct an adjudicative proceeding pursuant to Puc 203 to consider and rule on the petition, and shall provide notice to affected municipalities to the extent required by RSA 541-A:39.

Puc 1304.06 Rate Review Standards.

(a) In determining just and reasonable rates for the attachments of competitive local exchange carriers and cable television service providers to poles owned by incumbent local exchange carriers or electric utilities under this chapter, the commission shall consider:

- (1) Relevant federal, state or local laws, rules and decisions;

- (2) The impact on competitive alternatives;
- (3) The potential impact on the pole owner and its customers;
- (4) The potential impact on the deployment of broadband services;
- (5) The formulae adopted by the FCC in 47 CFR § 1.1409(c) through (f) in effect on July 16, 2007; and
- (6) Any other interests of the subscribers and users of the services offered via such attachments or consumers of any pole owner providing such attachments, as may be raised.

(b) In determining just and reasonable rates for all other attachments under this chapter, the commission shall consider:

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

Puc 1304.07 Remedies. When the commission determines just and reasonable rates under this part that differ from the rates paid by the petitioner, the commission shall order a payment or refund, as appropriate. Such refund or payment shall be the difference between the amount actually paid and the amount that would have been paid under the rates established by the commission, plus interest, as of the date of the petition.

Puc 1304.08 Interest. Refunds or payments ordered under Puc 1304.07 shall accrue simple annual interest at a rate equal to the prime rate.

Appendix

| Rule | Applicable Statute |
|----------|-------------------------|
| | |
| Puc 1300 | RSA 374:3; RSA 374:34-a |