

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.,**

/s/ William D. Durand
William D. Durand
NEW ENGLAND CABLE AND
TELECOMMUNICATIONS ASSOCIATION, INC.
Ten Forbes Road Suite 440W
Braintree, MA 02184
(781) 843-3418
Wdurand@necta.info

/s/ Maria Browne
Maria Browne
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
Telephone: (202) 973-4281
mariabrowne@dwt.com

/s/ Robert J. Munnely, Jr.
Robert J. Munnely, Jr.
Murtha Cullina LLP
99 High Street
20th Floor
Boston, Massachusetts 02110-2320
Telephone: (617) 457-4000
rmunnely@murthalaw.com

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