

**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