State of New Hampshire
Before the New Hampshire Public Utilities Commission

DRM 08-004

Proposed Rulemaking (Chapter Puc 1300/Utility Pole Attachments)

COMMENTS ON THE INITIAL PROPOSAL (MAY 1, 2009)

Submitted by

EIGHT INCUMBENT TELEPHONE COMPANY MEMBERS

of the

NEW HAMPSHIRE TELEPHONE ASSOCIATION

June 25, 2009

Submitted on behalf of:

BRETTON WOODS TELEPHONE COMPANY, INC.
DIXVILLE TELEPHONE COMPANY
DUNBARTON TELEPHONE COMPANY, INC.
GRANITE STATE TELEPHONE, INC.
TDS TELECOM/HOLLIS TELEPHONE COMPANY, INC.
TDS TELECOM/KEARSARGE TELEPHONE COMPANY
TDS TELECOM/MERRIMACK COUNTY TELEPHONE
TDS TELECOM/WILTON TELEPHONE COMPANY, INC.

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Proposed Rulemaking (Puc 1300/Utility Pole Attachments) – Regular Rules

COMMENTS OF EIGHT ILEC NHTA MEMBERS

Eight independent New Hampshire incumbent local exchange carriers who are members of the New Hampshire Telephone Association (the "Eight NHTA ILECs" or "NHTA"),[1] by and through the undersigned counsel and pursuant to RSA 541-A:11, I & VIII, offer the following comments to the New Hampshire Public Utilities Commission ("PUC" or "Commission") concerning the PUC's Initial Proposal of Chapter Puc 1300 (Utility Pole Attachments), which was circulated for public comment on May 13, 2009 (the "Initial Proposal").

The NHTA previously submitted comments on March 5, 2008, June 24, 2008 and December 5, 2008, to the Staff's Drafts of Proposed Chapter Puc 1300. The NHTA reaffirms its earlier comments here and incorporates them herein in their entirety. The following Comments are directed at the PUC's Initial Proposal (dated May 1, 2009), as filed with the Administrative Rules Division of the Office of Legislative Services on May 12, 2009.

In addition to these written comments, the NHTA provided oral comments to the PUC at the Public Hearing held on June 18, 2009.

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[1] The Eight NHTA ILECs are: Bretton Woods Telephone Company, Inc.; Dixville Telephone Company; Dunbarton Telephone Company, Inc.; Granite State Telephone, Inc.; TDS Telecom/Hollis Telephone Company, Inc.; TDS Telecom/Kearsarge Telephone Company; TDS Telecom/ Merrimack County Telephone Company; and TDS Telecom/Wilton Telephone Company, Inc.

I. SUMMARY

The NHTA is generally pleased with the changes that the PUC has made to the Proposed Rule as a result of the initial evaluation period conducted by the PUC Staff. As a result, the NHTA supports the Commission's Initial Proposal, with only a few remaining concerns that, if addressed, would significantly improve the Proposed Rule. The NHTA's concerns fall into the following categories: (1) tightening up some of the "Definitions" in the Proposed Rule; (2) clarifying some ambiguous language in the technical provisions to avoid confusion; (3) changing the proposed rule regarding "Location of Attachments" (Rule Puc 1303.09) to allocate the costs of relocating attachments equally between the pole owner and the requesting attacher; and (4) changing the proposed rule regarding "Rate Review Standards" (Rule Puc 1304.05) to create a single rate methodology for all attaching entities, regardless of how the attaching entity may be classified under federal law. These concerns are detailed in the discussion below.

II. NHTA COMMENTS

A. PUC Revisions Supported by NHTA

The NHTA expresses its support for the following provisions that the Commission has adopted in the Initial Proposal after a good deal of review and discussion by the Staff during the informal phase of this rulemaking. The NHTA urges the Commission to keep these provisions in place as the rulemaking proceeds to final adoption of Rule PUC 1300.

1. Purpose (Puc 1301.01)

The NHTA is pleased that the Commission has adopted the second sentence of this section ("Nothing in this Rule shall be construed ....") as a so-called "savings clause" that should resolve several of the statutory issues raised by parties during the earlier phases of this rulemaking conducted by the Staff.

2. Applicability (Puc 1301.02)

The NHTA supports the Commission's decision to limit applicability of these Rules to "Attaching entities" with pre-existing legal rights to attach to utility poles. As NHTA observed in its earlier Comments during the preliminary Staff phases of this rulemaking, the NHTA believes the PUC has ample authority, under the general regulatory jurisdiction of RSA 347:3, to define the universe of "Attaching entities" with the legal right to seek attachment to poles in New Hampshire.[2]

3. Party obligations (Puc 1303.02 & 1303.03)

The NHTA supports the Commission's decision to make both the pole owner and the requesting attacher subject to the same obligation to negotiate in good faith.

4. Space-enhancing techniques (Puc 1303.10 & 1303.11)

The PUC has adopted provisions that would authorize the use of "boxing" and "extension arms" under certain conditions. As explained in NHTA's December 5, 2008 comments to the previous Staff Proposal, the NHTA prefers to eliminate the specific references to "boxing" and "extensions arms" and to include instead a general requirement that pole owners use "least cost alternatives" when considering make-ready methods. Language requiring the use of "least cost alternatives" would follow the lead of the Vermont Public Service Board's analogous pole-attachment rule (PSB Rule 3.708(F)) and would create greater flexibility than the specific methods referenced in Puc 1303.10 and 13003.11.

Nonetheless, as the NHTA recommended in its December 5, 2008 Comments, the PUC in the current Final Proposal has proposed limiting language on the authority of pole owners to employ "boxing" and "extension arms" for the attachments of attaching entities. In the case of "boxing" (Rule Puc 1303.10), the PUC has codified the pole owner's discretion to restrict the use of that technique ("Pole owners *may restrict the practice of boxing poles* ...."). In the case of

[2] *See* NHTA's June 25, 2008 Comments, at 2-3; NHTA's March 5, 2008 Comments, at 9-11.

extension arms, the Commission has adopted language requiring pole owners to use that technique in certain circumstances ("Pole owners *shall allow* limited, reasonable use of extensions arms...."), but the PUC has also deleted earlier language that would have required the use of extension arms solely for space considerations. The NHTA supports the revisions that the PUC has made to the earlier Staff Drafts.

At the public hearing conducted by the PUC on June 18th, representatives for some attaching entities argued that the Commission should restore the language from the earlier Staff Proposal that mirrored language from the Maine Public Utilities Commissions 2006 order in the *Oxford Networks* case.[3] The NHTA reiterates its position, first set out in their December 5, 2008 Comments, that the Commission should not simply adopt a ruling from a 2-party case in Maine and that has not even been generally applied in the State of Maine. The *Oxford Networks* Order represented a significant departure from industry practice in Maine, such that the Maine PUC established close monitoring conditions on the implementation of that Order in the exchanges served by Oxford Networks. The New Hampshire PUC has not taken any evidence about the operation of the *Oxford Networks Order* in Maine or about the suitability of adopting that Order generally in New Hampshire.

In NHTA's view, the New Hampshire PUC has reached a suitable middle ground, in the Final Proposal, between recognizing the availability of certain space-saving techniques on utility poles while recognizing that pole owners are in the best position to oversee and authorize the use of those techniques on their poles. The Commission has already taken substantial comments on the significance and limitations reflected in the *Oxford Networks Order* and need not revisit that Order for purposes of this rulemaking.

5. Make-Ready Timeframes (Puc 1303.12)

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[3] *In re: Oxford Networks vs. Verizon New England, Inc.*, Docket No. 2005-486, Order (Maine Puc. Utils. Comm'n, Oct. 26, 2006) (the "*Oxford Networks* Order"). See particularly *id.*, Section C2, at 12-14 ("Lowest Pole Position"), Section C3, at 14-17 ("Boxing of Poles") and Section C4, at 17-18 ("Extensions Arms").

The NHTA supports the simplified 180-day timeframe that the PUC has proposed for the completion of all make-ready work.

B. Suggested Improvements to "Definitions" (Part Puc 1302)

1. "Facility" (Puc 1302.05)

The Commission has proposed the following definition of "Facility" in Rule Puc 1302.05:

> 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*. (Emphasis added.)

The NHTA notes that facilities for transmitting cable television services are not expressly included in the above definition, even though the Rulemaking Notice Form that accompanies the Initial Proposal clearly states: "The proposed revisions codify specific issues and procedures related to the attachment of electric, telecommunications, and *cable facilities* to utility poles ...." (Emphasis added.) There is no explanation for the omission of cable television signals from the definition of "Facility" in Puc 1302.05. The NHTA respectfully suggests that the PUC add the term "cable television" after the word "telecommunications" in Puc 1302.05.

The NHTA is also concerned about the inclusion of the phrase "digital information services" in the above definition. The Proposed Rule does not define the phrase, nor is the phrase defined anywhere in the Commission's Rules or in the New Hampshire Public Utilities Act (Chapter XXXIV of the Revised Statutes Annotated). Without an express definition, the term will likely require interpretation by the Commission over time, probably through one or more adjudicative proceedings, as contemplated in Proposed Rule Part Puc 1304.

The most likely source for the meaning of the term is federal law, particularly since the Commission has invoked its authority under federal law (47 U.S.C. § 224(a)), in part, as the basis for the present rulemaking. The term "information service" is already defined for purposes of federal law:

> The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(2); *see also* 47 C.F.R. § 54.5.

Reliance on the federal definition, however, presents some problems. The Federal Communications Commission has made clear that "information services," as defined in federal law, are not subject to state regulation or even to federal regulation under Title II of the Communications Act of 1934,[4] although the Commission has jurisdiction to regulate "information services" under Title I of the Communications Act.[5] Despite its lack of regulatory jurisdiction, however, the PUC's inclusion of the phrase "digital information services" in Rule Puc 1302.05 would likely be read as adopting the relevant federal decisional law interpreting the phrase "information services" under federal law.

A difficulty with such adoption, however, is that federal law does not distinguish between "digital" and "non-digital" information services. As drafted, the Proposed Rule applies only to the facilities of "*digital* information services," a distinction that will likely produce additional confusion and administrative litigation as the Commission attempts to define the scope of that phrase.

It may be that the Commission intended, through its use of the phrase "digital information services," to encompass the range of services that can be provided over cable television lines, e.g., cable television signals, Internet access services provided over cable modems, and Voice over Internet-Protocol service provisioned as cable telephony. But if so, the Commission's use of "digital information services" is likely to generate substantial confusion and litigation as pole

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[4] *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'm*, 290 F. Supp. 2d 993, 998-99 (D. Minn. 2003), *aff'd*, 394 F.3d 568 (8th Cir. 2004).

[5] *Petition for a declaratory ruling that pulver.com's Free World Dialup is neither telecommunications nor a telecommunications service*, WC Docket No. 03-45, Mem. Opinion and Order (Feb. 19, 2004) ¶ 18, at 13 f.n. 64.

owners and attaching entities seek to determine the scope of the Commission's authority to regulate attachment rates and other attachment terms and conditions for "digital information services."

The NHTA respectfully suggests that the Commission delete the phrase "digital information services" from Proposed Rule Puc 1302.05, because the term introduces ambiguity and confusion into the Rule. As noted previously, the Commission should add the phrase "cable television" as one of the services whose facilities are included in the definition in Puc 1302.05. The NHTA takes no position at this time on any further language that could be added to reflect the inclusion of other cable-based services in the definition.

2. "Make-ready work" (Puc 1302.07)

The Commission has proposed the following definition of "Make-ready work" in Rule 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.

In comments previously filed with the Commission on December 5, 2008, the NHTA had proposed a simpler definition of "make-ready," as follows:

> "Make-ready" means work necessary to make a pole available for attachment of additional facilities.

NHTA prefers the simpler definition rather than the one proposed in Rule Puc 1302.07. First, the NHTA's proposed definition defines "make-ready" by means of a broad term (*work*), rather than the specific terms (*movement* and *replacement*) used in the PUC's Initial Proposal. Make-ready can involve design work, engineering and inspection, as well as overlashing of facilities and other types of construction, in addition to the movement of cables or the replacement of poles. The PUC's definition is therefore too limiting in its scope.

Indeed, the Initial Proposal already includes a broader use of the term "make-ready work" in Rule Puc 1303.12 ("Make-Ready Timeframes"), where the Commission states:

> 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*.

Rule Puc 1303.12 (emphasis added).

The NHTA respectfully urges the Commission to replace the definition of "make-ready work" in Puc 1302.07 with simpler language – similar to both the NHTA's proposed language and to the language used in Rule Puc 1303.12 – that focuses on the *work* that is *necessary* to make a pole available for additional attachments.

C. Suggested Improvements to Technical Terms

1. Installation and Maintenance (Puc 1303.07(a)

Proposed Rule Puc 1303.07(a) provides as follows:

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

Although the NHTA supports the inclusion of specific construction standards, the NHTA would prefer not to have the Rule specify the dates of specific editions that must be used, since the substitution of later editions would require the Commission to amend the Rule. Instead, the NHTA suggests using the phrase "current edition" or "latest edition" in place of the references to "(2007)". Also, the company name "Telecordia" should read "Telcordia."

2. Lack of Agreement (Puc 1304.01)

Puc 1304.01 provides as follows:

> 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 . . . .

The NHTA is concerned that the use of the word "exhaustion" in Puc 1304.01 introduces a term of art from administrative law into the Commission's adjudication of pole-attachment disputes. The intent of the provision appears to be simply to ensure that parties have thoroughly attempted to resolve their dispute through negotiation prior to commencing an adjudicative action before the Commission. The term "demonstrable exhaustion," however, could be read as requiring a potential petitioner to satisfy a threshold evidentiary standard before its petition can be heard. Such an evidentiary showing could, over time, become a formalistic procedural hurdle that keeps parties from having their disputes promptly heard and resolved by the Commission.

Rather than using a procedural term from administrative law, the NHTA recommends a certification method, as follows:

> 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,~~ *An Attaching Entity, upon certifying to the commission that it is 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 . . . .

The proposed change would reduce the likelihood of an evidentiary contest between the parties and would instead give the Commission the ability, in its discretion, to challenge or accept the petitioner's certification at the commencement of the action. The NHTA believes that adoption of its proposal will result in speedier and more efficient adjudications of pole attachment disputes.

D. Suggested Revisions to Cost and Rate Provisions

1. Location of Attachments (Puc 1303.09)

The Initial Proposal, at Puc 1303.09, provides as follows:

> 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*. (Emphasis added.)

In proposing the foregoing rule, the Commission has accepted its Staff's recommendation, over the NHTA's objection, to make the lowest attacher bear the full cost of repositioning the other facilities to maintain its position on the pole. In comments previously submitted to the Commission on December 5, 2008, the NHTA offered an amendment, modeled on the analogous pole-attachment rule now in force in the State of Vermont,[6] that would obligate the lowest attacher to bear only 50% of the repositioning costs.

Under longstanding utility industry standards, the incumbent local exchange carrier ("ILEC") occupies the lowest position on a pole and maintains that position even when additional entities attach their facilities to the pole. Telephone wires are lighter in weight than power lines and so require less height for line sag between poles. For safety reasons, the ILEC usually attaches its facilities at the lowest available position on the pole, rather than the lowest possible position. This means that when an additional entity wishes to attach a facility to the pole, the ILEC is able to move lower on the pole to create space for the new attacher while

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[6] *See* Vermont Public Service Board Rule 3.708(J):

> "*Lowest Attachment Point.* 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 wishes to relocate its existing facilities to a lower allowable point of attachment so that the new Attaching Entity will be above all existing facilities, *the owner of such existing facilities shall pay one-half of the cost of moving its facilities*."
>
> (Emphasis added.)

maintaining the ILEC's position as lowest attacher. Making the ILEC bear the full cost of this repositioning is unfair, because the ILEC would not have had to move but for the arrival of the additional attacher. But the ILEC should bear the reasonable cost of maintaining its lowest position on the pole.

To balance the respective cost-causations involved in these situations, the Vermont Public Service Board split the repositioning costs evenly between the ILEC and the new attacher. In the words of the Vermont Board:

> [The ILEC] generally wishes to keep its own pole attachments at the lowest actual attachment point on the pole. To accomplish this, [ILECs] must sometimes lower their own cables to allow room for a new attacher. The commenters disagreed about how these costs should be paid. The Final Proposed Rule provides that under these circumstances the costs of lowering the existing lowest attachment will be divided equally between the new attacher and the existing attacher (usually a telephone company). The Board has concluded that before these circumstances can arise, the existing attacher must have originally placed its own facilities higher than is required by safety codes. Accordingly, the original attacher should share in the cost of freeing up space for the new attacher. Likewise, the new attacher is a cause of the relocation, and should pay a portion of that cost. To omit this provision would give telephone companies the right to impose additional and unnecessary costs on new attachers simply by setting their attachments high on new poles. Customarily, the ILEC has been the lowest attacher on a multi-use pole. This is the result of the weight of telephone copper cables and their elasticity. Nothing in the rule requires or suggests a change to this custom.

Vermont Public Service Board, "Policy Explanation," Final Adopted Rule 3.700 (June 21, 2001).

Adoption of the PUC's Initial Proposal, which would impose 100% of the repositioning costs on the attaching entity (usually the ILEC) that wishes to maintain its attachment at the lowest available position on the pole, will unfairly penalize the ILEC for a generally accepted industry practice, or else will risk disrupting that longstanding practice for no good reason.

In prior public hearings on the Staff's Proposals in this rulemaking, the Staff explained that a 50%-50% allocation method might be sound policy, but it cannot be implemented in New

Hampshire because the Proposed Rule provides no methodology for determining the respective costs that would need to be allocated. As the NHTA explained in its previous comments, however, pole owners and attaching entities do not require a methodology for calculating the costs of repositioning facilities, since such costs would routinely be agreed upon by the affected parties in the make-ready cost estimate prior to commencement of the work. The Commission could further facilitate this process by limiting the respective obligations to the *actual* costs of the repositioning work.

For this reason, the NHTA has offered the following language to amend Proposed Rule Puc 1303.09:

> 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~~ *the owner of such existing facilities shall pay one-half of the* ***actual*** *cost of moving its facilities*.

The NHTA again requests that the Commission amend Proposed Rule Puc 1303.09 as indicated above.

2. Rate Review Standards (Puc 1304.05)

In Proposed Rule Puc 1304.05(a), the Commission has proposed the following terms:

> (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*, the commission shall consider:
>
> (1) The interests of the subscribers and users of the services offered via such attachment;
>
> (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.

In earlier comments filed on December 5, 2008, the NHTA proposed deleting the word "competitive" (highlighted above) and adding the words "or electric utilities" (also highlighted above). The Commission has adopted the second request and rejected the first. The NHTA intended, by its proposal, to eliminate the FCC's 2-tiered ratemaking process for pole attachments (in which CLEC and CATV attachments are subject to a defined rate formula, while ILEC and electric utility attachments are not), and instead to bring all categories of attaching entities within the same defined rate formula.

The Commission's Initial Proposal goes halfway to achieving the NHTA's goal – by including poles owned by electric utilities in the rate-formula methodology. But NHTA believes the second half of its proposal is also worthy of adoption by the Commission – namely, the deletion of the word "competitive" before "local exchange carriers," which would eliminate the distinction between CLECs and ILECs for purposes of applying the FCC's rate formula and make *all* local exchange carriers subject to the same rate methodology.

The NHTA believes its proposal is consistent with the General Court's intent when it established the 2-year sunset on strict adherence to the FCC's rate methodology. When that sunset occurs on July 16, 2009, the Commission will be authorized under the statute to accept, reject or modify the FCC's rate formulae as the Commission may see fit. In the NHTA's view, the Commission should exercise its discretion, for a Rule taking effect after July 16, 2009, to bring all attaching entities within the same rate formulae. Equal application of the rate formulae will create greater fairness and efficiency in the deployment of facilities on utility poles.

The Eight NHTA ILECs are grateful to the Commission for providing them the opportunity to offer the foregoing Comments to the Initial Proposal of Rule Puc 1300.

DATED at Plymouth, New Hampshire, this 25th day of June, 2009.

Respectfully submitted,

BRETTON WOODS TELEPHONE COMPANY, INC.; DIXVILLE TELEPHONE COMPANY; DUNBARTON TELEPHONE COMPANY, INC.; GRANITE STATE TELEPHONE, INC.; TDS TELECOM/HOLLIS TELEPHONE COMPANY, INC.; TDS TELECOM/KEARSARGE TELEPHONE COMPANY; TDS TELECOM/ MERRIMACK COUNTY TELEPHONE COMPANY; and TDS TELECOM/WILTON TELEPHONE COMPANY, INC.

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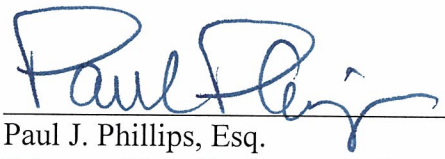
By: 

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