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EXCERPT  
Joint Legislative Committee on Administrative Rules  
September 3, 2009

**8. FP 2009-79 PUBLIC UTILITIES COMMISSION**  
**Utility Pole Attachments**

VICE-CHAIRMAN PILOTTE: Good morning, and we are back. Okay. We are going to Final Proposal 2009-79 from the Public Utilities Commission on Utility Pole Attachments. For the members who were not here at the last meeting, what I've asked Attorney Lucas to do is to give us a very quick summary of the objections that were initially presented by Ms. Davis and that will give us some idea what -- and hopefully, if other folks are planning on introducing same objections, we can refer to yes, it's been done, or I just concur with it rather than going back over the entire thing. So if the Committee members would concur, I would like to ask Attorney Lucas to just simply give us a very quick summary of what transpired last meeting. Attorney Lucas.

ATTORNEY LUCAS: Surely. The first issue was that PUC exceeding its authority from the standpoint of FairPoint who was the entity whose representatives gave testimony. In particular, the FairPoint representatives made reference to RSA 374:34-a and a rule PUC 1301.02 as bases for their opposition. As far as FairPoint is concerned, the PUC should not have any jurisdiction over New Hampshire governmental entities unless the governmental entities are engaged in telecommunications services or as providers. So that if attachments are sought on poles by the municipality for police or fire or other public service communications that that should not be the subject of PUC control.

The representatives made one -- gave one example which concerned them. They said in the case of a governmental entity and a competitive local exchange carrier, both seeking to locate on the pole, if the local exchange carrier thinks it has been discriminated against in favor of the governmental entity, then the local exchange carrier might file a complaint with the PUC.

The representatives indicated that the PUC assumes jurisdiction to resolve disputes involving pole locations even if the governmental entity is not engaged as a telecommunications service provider.

There were comments given by the representatives with respect to licenses and possibly the rights of governmental entities to attach poles, but it is not an area where they stated any opposition or any specifics that they were concerned about. So I'm going to skip that one.

The next area of concern was access to poles. Reference in this case by representatives was to 47 U.S.C. 224 and RSA, again, 374:34-a. And this is a situation where the federal statute specifically referred to in RSA 374:34-a provides that when a pole owner is unable to reach an agreement with the party seeking the pole attachment, the PUC should regulate and enforce rates, changes, terms and conditions to ensure that rates are just and reasonable. Again, there's a suggestion by the representatives that this might be exceeding the authority of the PUC.

The third area of concern was the location of attachments on a pole. The reference of the representatives was to PUC 1303.09. FairPoint requested that this provision be struck from the rules. It speaks to an owner denying an attachment solely because the only space available is below that of the pole owner or utility. The provision according to FairPoint has incredible public safety implications – their words. FairPoint places its attachments lowest on the pole because theirs are the heaviest cables and sag more than others. FairPoint, however, does not place its attachments at the lowest available point because of changing conditions, like, repaving roads. If an entity wants to attach and the only available space is below FairPoint and FairPoint said it would grant the attachment, move its wires down on the pole and might then have to bear 60 percent of the cost of moving the wires.

The final comment was with respect to safety hazards on

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pole -- hazards on poles. Reference of the representatives was to PUC 1303.10 and 1303.11. They admitted that these situations arise in very limited circumstances, but FairPoint fears that the PUC rules may result in the increased use of boxing and extension arms as a means of installing attachments which they feel jeopardizes the integrity of the pole and creates a safety hazard.

REP. SCHMIDT: Mr. Chairman.

VICE-CHAIRMAN PILOTTE: Okay. Yes.

REP. SCHMIDT: Attorney Lucas' presentation is very valuable, but when you were reading I think you misplaced an emphasis which leads to a misunderstanding. When you say box, it's boxing in is the term.

ATTORNEY LUCAS: Okay.

REP. SCHMIDT: Boxing in.

ATTORNEY LUCAS: It means putting attachments on either side of the pole.

VICE-CHAIRMAN PILOTTE: Okay.

ATTORNEY LUCAS: Thank you very much for correcting that.

VICE-CHAIRMAN PILOTTE: Thank you very much. I did indicate to the agency that -- to the PUC that they will be asked to come back to us at the end of the testimony today.

For members of the Committee the reason this has been suspended and come back we did have a -- we were losing the quorum at our last meeting. If we did not seek a waiver from the Director the rules would have automatically become valid, adopted, and I know Representative Patten felt very strongly since she was the one who had to leave and felt very strongly

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that unless we heard from the -- from everyone, we should request a waiver, which I did and at the request of the full Committee members at the time.

So we will continue now and I'd like to call on Mr. Paul Phillips from New Hampshire Telephone Association and I will try to float from those in favor of the rules and those in opposition to the rules and Mr. Phillips indicates that he is in favor of the rules, requests maybe five minutes and, hopefully, we can make some adjustment on that if we can, please.

PAUL J. PHILLIPS, ESQ., Primmer, Piper, Eggleston & Cramer, Littleton, NH: Thank you, Mr. Chairman, and Members of the Committee. I'm hoping to get off on a positive note by testifying in favor of the rule today.

My name is Paul Phillips. I'm from the law firm of Primmer, Piper, Eggleston & Cramer which is based in Burlington, Vermont, and Littleton, New Hampshire. I myself live in Plymouth, New Hampshire.

I'm here today on behalf of eight local telephone companies in New Hampshire who are members of the New Hampshire Telephone Association. They are Bretton Woods Telephone Company, Dixville Telephone Company, Dunbarton Telephone Company, Granite State Telephone Company, Hollis Telephone Company, Kearsarge Telephone Company, Merrimack County Telephone and Wilton Telephone Company. And these companies together provide local telephone service to about 36,000 customers in New Hampshire. They're both pole owners and pole renters and so I hope in this discussion that we are presenting a fairly balanced viewpoint or perspective to this issue.

The NHTA companies have been actively involved in the Public Utility Commission's rulemaking process since the beginning. We've testified at all of their workshops and at their public hearing. We filed detailed written comments with the PUC on March 5<sup>th</sup>, 2008, June 24<sup>th</sup>, 2008, December 5<sup>th</sup>, 2008, and most recently on June 25<sup>th</sup>, 2009. The NHTA members are here

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to offer qualified support for the rule. Although our members began this process in opposition to the draft rules, we have had many opportunities to express our concerns to the PUC and in nearly every case the staff has been responsive and has addressed our concerns adequately. We did not get everything we wanted from the PUC. This is not a perfect rule. But we are satisfied that the PUC has struck the right balance between many divergent and conflicting interests.

It's important for the Committee to remember the purpose of these rules which is not to resolve disputes over pole attachments but rather to establish the PUC as the appropriate tribunal for adjudicating pole disputes. And so the key to a successful rulemaking process here is to strike the proper balance and to set the rules of the road for the PUC to adjudicate these disputes. We believe the PUC has achieved that balance over the course of nearly 18 months of this rulemaking. It's been a very spirited give and take process in which every interest was heard. I want to commend the Commission and its staff for a very careful and thoughtful rulemaking process. And we ask the Committee members to approve these rules as they've been presented. And I'm happy to answer any specific questions you might have.

VICE-CHAIRMAN PILOTTE: Representative Schmidt.

REP. SCHMIDT: Thank you, Mr. Chairman. Let me ask you a somewhat hypothetical question or philosophical question. Do you believe it's possible to write a rule which is going to absolutely meet every need of every individual attacher?

ATTORNEY PHILLIPS: I've been doing this for only about 14 years, and I've never seen a rule that satisfies everybody. And particularly with a set of procedural rules that are attempting to establish an adjudicative process, you're never going to satisfy everybody. I mean, the whole point of the exercise is to allow parties to come in and state their positions and resolve their claims. And so this is a set of rules that attempts to do that. And no one's going to be satisfied with the

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rules and at the same time no one's going to be satisfied with the adjudications at the end of the day.

REP. SCHMIDT: Follow-up?

VICE-CHAIRMAN PILOTTE: Follow-up.

REP. SCHMIDT: Thank you. In other words, kind of somewhat restating the point that you made earlier. But you believe that these rules are a fair compromise of all the interested parties' interests that comes as far as it's possible humanly to meeting all the legitimate needs of the totality of the attachers?

ATTORNEY PHILLIPS: Well, as I say, we still have some areas of concern. I've not gone into those in detail because I think our message today to the Committee is that this is a balanced rule that does fairly serve the interests that are represented. And so I'm not going to tell you that it's, you know, the absolute best rule that there can be. As I say, it's not a perfect rule, but through the process that we have been engaged in, we feel that the Commission and staff has been very responsive to our concerns and the other concerns that have been expressed and in each case where we have felt the rule was too rigid, the Commission has softened it up. Where we felt the rule was too mushy, the Commission has tightened it up. So on balance we feel as though we have got a good rule here.

REP. SCHMIDT: Thank you. Mr. Chairman, I have another question but I'll defer to my colleagues.

VICE-CHAIRMAN PILOTTE: Okay. Representative Boyce.

REP. BOYCE: Now does this mean they're going to stipulate instead of court?

ATTORNEY PHILLIPS: Well, that's a good question. The -- under the Telecommunications Act of '96, the preferred

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tribunal is actually the Federal Communications Commission for pole disputes, until -- or unless and until a state Public Utilities Commission has adopted a set of rules that creates the PUC as the preferred tribunal and that's what this set of rules does. And so rather than having to go to the FCC, which is obviously a costly and time-consuming process, once these rules are in place we'll be able to go the PUC, which is a much more preferred solution.

VICE-CHAIRMAN PILOTTE: Okay. Representative Kidder.

REP. KIDDER: Yeah. In the interest of disclosure, how many of those eight local phone companies are owned by TDS?

ATTORNEY PHILLIPS: Four of them are.

REP. KIDDER: Thank you.

VICE-CHAIRMAN PILOTTE: Okay.

REP. SCHMIDT: Could I follow-up to Representative Kidder's question? And how many -- you indicated how many, the aggregate number of subscribers is of all of them. How many of the four, how many subscribers do the four represent?

ATTORNEY PHILLIPS: Of the TDS companies?

REP. SCHMIDT: Yes. Correct.

ATTORNEY PHILLIPS: Let's see. I have those right here. It's a little less than 30,000 of the 36,000 customers.

REP. SCHMIDT: Okay.

VICE-CHAIRMAN PILOTTE: Representative Schmidt, you were going to be next.

ATTORNEY PHILLIPS: The other largest is Granite State

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Telephone which represents about 8,000.

VICE-CHAIRMAN PILOTTE: You want to ask another question?

REP. SCHMIDT: Okay. Thank you. You indicated in your earlier statement that your companies are both owners and renters of poles. Am I correct that there's -- there was at one time, I'm interested in knowing whether it's still the case, that basically you have alternating ownership of poles. Is that still --

ATTORNEY PHILLIPS: There are joint use and joint ownership arrangements that we have with the electric company. That's right.

VICE-CHAIRMAN PILOTTE: Okay. Senator Carson.

SEN. CARSON: Thank you, Mr. Chairman. I just want to make sure that I heard you correctly when you testified, Mr. Phillips, that with the passage of these rules that the PUC will now be given adjudicative authority versus the federal government in issues of this nature.

ATTORNEY PHILLIPS: Well, that's correct. The Telecommunications Act says that the FCC has the default, if you will, jurisdiction until a state commission has adopted a set of rules that will allow the PUC to adjudicate these disputes. And so the intent of RSA 374:34-a was to create a statutory enactment that gives the PUC that authority. And so that's the intent of the statute and that's the intent of these rules.

VICE-CHAIRMAN PILOTTE: Thank you. Mr. Phillips, you've indicated that you support the rule. Okay. Is this with the condition approval request that was given to us at the last meeting?

ATTORNEY PHILLIPS: I need to be reminded about the reason for that conditional approval. I was here for that. I don't recall specifically the procedural reason why that was necessary.

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VICE-CHAIRMAN PILOTTE: Okay. Attorney Lucas, do you wish to address the issues that did come up in this one?

ATTORNEY LUCAS: Hum -- the only substantive comment we made was with respect to --

VICE-CHAIRMAN PILOTTE: Any substantive changes coming as a result of the conditional request is my question.

ATTORNEY LUCAS: I'm sorry, I was listening -- trying to listen to both of you.

VICE-CHAIRMAN PILOTTE: My question is are there substantial requests that are changes in the conditional approval request that Mr. Phillips may or may not be aware of?

ATTORNEY LUCAS: I don't believe so.

VICE-CHAIRMAN PILOTTE: Okay. Representative Schmidt.

REP. SCHMIDT: Thank you. I'd like to follow-up on Senator Carson's question. And once the PUC by -- by the adoption of these rules, once the PUC is installed as the first -- as the arbiter, there's still recourse through appeal to the FCC?

ATTORNEY PHILLIPS: Yes. To the FCC?

REP. SCHMIDT: Yes.

ATTORNEY PHILLIPS: To the FCC?

REP. SCHMIDT: Yeah.

ATTORNEY PHILLIPS: I believe the appeal would be to the New Hampshire Supreme Court. There may be a mechanism in the Telecommunications Act for collateral proceeding at the FCC to challenge what the PUC may have done.

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REP. SCHMIDT: Okay. Thank you.

VICE-CHAIRMAN PILOTTE: Okay. Thank you very much, Mr. Phillips.

ATTORNEY PHILLIPS: Thank you.

VICE-CHAIRMAN PILOTTE: Going to call on Paul Sanderson and let's see.

SEN. CARSON: Susan Olson.

VICE-CHAIRMAN PILOTTE: And Susan Olson also with the same firm. Okay. I will say before we get going too far on this that the Chair was a little bit surprised this morning to see that we have a PowerPoint coming up. Just simply to indicate that I was surprised. Okay. Please, if you would.

PAUL G. SANDERSON, ESQ., Local Government Center: Thank you, Mr. Chairman. My name is Paul Sanderson. I'm a Staff Attorney at the Local Government Center and I'm here with my colleague, Susan Olson, who's also a staff member at New Hampshire Local Government Center and works with the legislature constantly through the New Hampshire Municipal Association.

We were present at the last meeting and we heard loud and clear some of the comments from members saying this stuff is terribly complicated. My head hurts. And so what we tried to do is put together a very brief PowerPoint to show you some of the concepts that we're talking about graphically. So if I could just have my colleague go over and be able to run the computer, I'll make my comments as quickly as we possibly can.

REP. SCHMIDT: Chair, can you see?

REP. PATTEN: If anybody can't see it.

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VICE-CHAIRMAN PILOTTE: I believe this is the one we are looking at.

ATTORNEY SANDERSON: We have also given you a printout of the slides as note pages.

SEN. CARSON: I had another printout of the slides.

REP. PATTEN: Look in your packet.

VICE-CHAIRMAN PILOTTE: Should be in the packet of the PUC.

ATTORNEY SANDERSON: Okay. Thank you.

VICE-CHAIRMAN PILOTTE: Please.

ATTORNEY SANDERSON: I think they're ready. Okay. First, a little bit of history. Public utilities have had the right to place their facilities in the rights of way of our state since 1881. And the reason for that is if we want to have these services be able to go to as many customers as possible, you have to be able to route them in the most efficient place. If utilities had to reach agreements with every single private landowner along the way it would take forever. And so since 1880 our legislature has decided properly that the public highways as rights of way are great places to put these things for that part of the public interest. Okay.

In the beginning it covered only telephone and telegraph and electricity. Later on cable TV was added in and when localities give franchises under RSA 53-C that also uses -- grants rights to use the right of way. One of the key parts of this, part of the balance and part of the partnership, is that municipalities grant a license to these operators so that they understand where these facilities are located. Okay. It becomes that partnership because the municipalities and the state on their particular highways have the duty to operate the right of way. And these things are inconsistent with transportation, but they're very

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consistent with the public good. So we need to know that these things are in our right of way. Thank you. Next slide. Okay.

VICE-CHAIRMAN PILOTTE: Seems to have fallen.

ATTORNEY SANDERSON: Okay. We're trying.

SEN. CARSON: That's okay. It happens. There you go.

REP. PATTEN: This is technology.

ATTORNEY SANDERSON: Okay. As Attorney Phillips explained to you, he explained the pole attachment act, okay, which was the federal response to this particular issue which says that under RSA -- 47 U.S.C. Sec 224, normally the FCC has the authority to regulate these items. However, they also gave permission, Congress gave permission for states to opt out. New Hampshire opted out by the adoption of 374:34-a and so, therefore, these rules are implementing the policy decision made by the legislature that it is appropriate for the PUC to adjudicate these disputes in our state. Thank you.

REP. SCHMIDT: Could I just interrupt for a second and ask are there any states that have not followed the same procedures as New Hampshire has?

ATTORNEY SANDERSON: Actually many states. There's only 18 that have opted out of that federal procedure. However, most of the New England states, in fact, regulate attachment disputes. Okay.

VICE-CHAIRMAN PILOTTE: Representative Kidder.

REP. KIDDER: Just a question. When was 374:34-a adopted?

ATTORNEY SANDERSON: 2007. From the municipal side, we absolutely support the policy decision to have pole attachment disputes adjudicated here in our state by an

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administrative agency of our state instead of forcing all of these disputes down to Washington. Okay. We also commend the PUC for its efforts to hold hearings and listen to all the different stakeholders here. They have not tried to impose these rules without taking comment. They have been in a two-year process of trying to obtain these -- information on these issues and respond. However, as we sit here today, we continue to have issues with some aspects of the proposed rule. Thank you, Sue.

Okay. This is just a copy of the statute so you have it in front of you. Next slide. Okay. This is part of the graphical thing we thought might help you to understand what the devil it is that are on these poles. Okay. If you begin to think of these things conceptually, telephone poles used to be telephone poles. You know, today they're vertical condominiums. Okay. At the very top of them you'll see electrical equipment. Okay. Electrical equipment is always at the top because --

REP. SCHMIDT: Right.

ATTORNEY SANDERSON: -- it's the most hazardous. Okay.

REP. SCHMIDT: Right.

ATTORNEY SANDERSON: As you heard from FairPoint last time they like to be the item on the bottom and the reason that they like to be there is because of the reasons they told you. It's the heaviest. Okay. And they need to have access to it for customer service. All of that place in-between, okay, is called the communication space. Okay. For those of us who have been working on this for the past several years we also like to call it the wild, Wild West. Okay. Because almost anything can be in there. Okay. So I would tell you that we have been working closely with the knowledge of the Commission, with the utilities for the past five years trying to improve municipal licensing processes, and reach agreements where we can have uniform documents that are in use throughout our 234 municipalities and that would not only be on the basic licensing of this equipment

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but also upon attachments to the poles that come from municipal uses. Okay. But now you begin to understand a little more graphically what it is we are talking about. Thank you. Next slide, Susan.

Okay. This slide will tell you a little graphically about some things that can go wrong. Okay. What you'll see on the left-hand side is a new pole that has been installed and an old pole or a portion of the old pole remains with some of the equipment still attached. Okay. So now you can see why it is that the telecommunications providers, like, FairPoint are so concerned with the idea of boxing. Boxing means instead of putting it on the road side of the pole, you would put it on the landowner side of the pole. Okay. And to the extent they try to move to new equipment like this, either in the ordinary maintenance situation or after an accident where a pole has been destroyed, boxing makes it extremely difficult for that to occur. Okay. The same thing with cross arms. Okay. It makes it very difficult for the equipment to be moved because the new pole is in the way. Okay.

Now it also used to be simpler when you had an electric company and a telephone company. Now you have an electric company, a telephone company, a cable TV provider, as well as many competitive local exchange carriers and others that have equipment in the communication space. If you have to coordinate all of that at once it becomes almost impossible, especially in an emergency situation.

REP. SCHMIDT: I have a question, Mr. Chairman.

VICE-CHAIRMAN PILOTTE: Follow-up.

REP. SCHMIDT: Is it not also the case that some municipalities and maybe all of them have some wires on some of the poles within the downtown area or maybe wider areas?

ATTORNEY SANDERSON: It varies. And you will learn, if you were to hear from the City of Manchester, in their fire

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alarm situation, they have approximately 2,500 fire alarm boxes that are maintained through their fire department that provide direct response capability for individual and users. Concord has something in the nature of 650 to 700. But these larger municipalities also use this space to have their own equipment to connect city hall to the fire station, the fire station to the police station, all of that to the schools.

REP. SCHMIDT: And those are on the poles?

ATTORNEY SANDERSON: Those are on the poles. Thank you. Next slide.

VICE-CHAIRMAN PILOTTE: Hum -- Mr. Sanderson.

ATTORNEY SANDERSON: Yes.

VICE-CHAIRMAN PILOTTE: This picture, how long before all of those wires are changed or is this a very -- very temporary. It's obvious because of an accident or some reason. But how long before -- is there a mandatory period for all of them to be attached to the single pole?

ATTORNEY SANDERSON: Every utility has policies in place.

VICE-CHAIRMAN PILOTTE: Okay.

ATTORNEY SANDERSON: Trying to have the time be as short as possible.

VICE-CHAIRMAN PILOTTE: Okay. Thank you.

ATTORNEY SANDERSON: However, it varies depending upon specifics.

VICE-CHAIRMAN PILOTTE: Thank you.

ATTORNEY SANDERSON: Okay. Now getting to our

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specific problems with these rules. Okay.

As has been noted, this section 1302.01 having to do with attaching entities, okay, municipalities believe that we should not be treated as attaching entities under the rule so long as we are putting equipment up there for the purpose of public safety. Okay. And the reason that we believe that is because the federal statute itself, which is the basis for RSA 374:34-a, indicates that governmental entities are not attaching entities under the federal scheme unless they're also telecommunications service providers. To put that in English, what that means is if, in fact, a municipality were running a telephone or a cable or a basic telecommunication provider system, we would absolutely be subject to the same rules as the incumbent local exchange carriers, the cable TV company or anyone else. But to the extent we have equipment up there that isn't doing that, but is only providing fire alarm service, connection between municipal buildings, then we are not telecom service providers and shouldn't be subject to the rule.

VICE-CHAIRMAN PILOTTE: Representative Schmidt.

REP. SCHMIDT: Thank you, Mr. Chairman. To the degree that I'm from Dover and I believe Dover has -- has -- we have something called DoverNet, which connects the City's high schools and public buildings and so forth with basically with Internet services.

ATTORNEY SANDERSON: Hm-hum.

REP. SCHMIDT: Is that not a communications property?

ATTORNEY SANDERSON: I don't know the -- the very specifics of your case.

REP. SCHMIDT: Okay.

ATTORNEY SANDERSON: But probably that would not be a telecommunications services provider, the reason being that

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it's all municipally-owned equipment, it's limited to municipal facilities, and it's there for public safety and other public government purposes. It's not designed to provide Internet service just for the sake of providing Internet service the way Comcast or others would do to an individual customer.

REP. SCHMIDT: That's your belief what the interpretation of the law would be?

ATTORNEY SANDERSON: Yes, sir.

REP. SCHMIDT: Thank you.

VICE-CHAIRMAN PILOTTE: Representation Boyce.

REP. BOYCE: Now, if PUC owns the pole, do they change them over or does each company have to go change their own?

ATTORNEY SANDERSON: When we talk about pole ownership, okay, as Attorney Phillips indicated to you, it is the utilities which own the physical pole. Okay. Usually jointly between the electric provider and the telephone provider. They also have agreements between themselves, joint operating agreements, where in one particular municipality the telephone company will take the lead. In another municipality the electric provider will take the lead in performing maintenance so they don't have to duplicate the equipment necessary to maintain these things in the field. Okay. It isn't the PUC that owns the poles. It isn't the municipality that owns the poles in most cases. The vast majority of the six hundred thousand poles that are installed in the State are owned jointly between the electric provider and the telephone service provider applicable to that particular municipality.

VICE-CHAIRMAN PILOTTE: Follow-up.

REP. BOYCE: These telephone and cables and other, the little ones, who changes those if you have a cross board, a new one, like the last picture?

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ATTORNEY SANDERSON: When you have these other individuals in the communications space, if they be a cable service provider or they be a competitive local exchange carrier, they have attachment agreements with the owners of the pole. And so those attachment agreements indicate what should happen when normal maintenance is required, when the pole has been hit and has to be changed on an emergency basis. It's those attachment agreements that determine when the staff of the other companies will go out and change the equipment.

VICE-CHAIRMAN PILOTTE: Okay.

ATTORNEY SANDERSON: Okay. Thank you. Next slide, please. Okay. Now, another problem that we have with the rules as drafted 1301.02, they seek to apply to any pole. Any and all poles in the state, at least as we read the rule. Okay. We have a problem with that for those utility poles that are placed on private property that have been placed there by easement agreement with the landowner. We believe that the PUC does not have authority to adjust or modify these particular agreements because they are a specific land type agreement between the pole owner and the landowner. Okay.

Now, the landowner could consent to adding facilities that are owned by these other communication services provider, but we don't believe they're required by law to do so. Again, to put this in English. If you have a utility pole on your private property, okay, you have given the utility company that owns the pole the right to be there by means of a written easement agreement and that would include a joint use agreement by the electrical provider and the telephone provider. You may have also given a written agreement for cable to come there. Okay. However, we don't believe that because a competitive local exchange carrier or whoever else is seeking to attach is coming, that they have the absolute right to do so and would be able to go to the PUC and get an order to enter onto private property and change the relationship between the utility pole owner and the private landowner. Yes.

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VICE-CHAIRMAN PILOTTE: Follow-up.

REP. SCHMIDT: Can you give us some idea of how -- what kind of percentage these private agreements represent, vis-à-vis the overall pole?

ATTORNEY SANDERSON: It will vary by company. If you hear testimony from New Hampshire Electric Cooperative, the vast majority of their pole placements are on private property so for them the percentage would be very high. For a Public Service and a FairPoint, the percentage would be much lower and I'd let them tell you accurately what they believe their percentages are.

REP. SCHMIDT: Thank you.

VICE-CHAIRMAN PILOTTE: Mr. Sanderson, in the case of a private property position pole, can a landowner object to something that would become a service, a minimum service to someone way down the line? No I don't want to give permission to for this type -- high speed Internet connections because I don't -- you know, and yet this would be the only way to get it to the last person down the line. Is that what I'm hearing?

ATTORNEY SANDERSON: That's an excellent question because we believe that goes into issues with respect to dispute resolution. We don't find any indication here that those private landowners would ever have to be joined into an adjudicative proceeding dealing with these issues between that pole owner and that entity which seeks to attach. Okay. That kind of steals a little bit of my thunder from later on, but it's an excellent question and an excellent point.

VICE-CHAIRMAN PILOTTE: So it will be in English later on?

ATTORNEY SANDERSON: Yes.

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VICE-CHAIRMAN PILOTTE: Thank you.

REP. SCHMIDT: That's good to know.

SEN. CARSON: Thank you, Mr. Chairman. To just build upon that and, hopefully, it's not stealing your thunder, what happens if you have a right-of-way easement through a neighborhood, and the only reason I'm bringing this up because I'm dealing with this within our town with some constituents, with a clear right-of-way easement through private property, and you've got one person, say somewhere in the middle, who says okay, I have to give the electrical company because they own the easement but now the cable company wants to come in and put in a pole -- put in wires or somebody else wants to put in. I'm saying no. But it's critical that that person have the wires go through their property in order to hook-up everyone else. What happens in that kind of a situation? Who is going to have control over that whole process?

ATTORNEY SANDERSON: It would be great as a matter of public policy if the PUC were a place to adjudicate that particular dispute and help the utility providers or the other providers obtain the necessary property rights. The part of the thunder that's going to be somewhat stolen here is that we don't find any indication in these rules that there's a way to do that.

SEN. CARSON: Right. Okay.

ATTORNEY SANDERSON: It would be great if they could.

SEN. CARSON: That's what I wanted you to say. It may be, again, stealing the thunder because what I'm hearing is from what I've heard from just the brief testimony is that there really is no statutory authority for the PUC to be doing this. They're trying to do it through rules and that's problematic.

ATTORNEY SANDERSON: That is our concern precisely.

SEN. CARSON: Okay. That's fine. Thank you.

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ATTORNEY SANDERSON: Okay. The Access Standard under proposed Rule 1303.01, okay, that these rules talk about the only reason that you can deny this is lack of space on the pole or for general engineering concerns. Okay. Now the general engineering concerns are important to the pole owners because certainly if there is material up there and it's heavy and more material could go up there that could physically break the pole, you know, the way we like to sometimes explain these things is while we may be exempt from some of our laws and rules we're not exempt from the laws of physics, and so we don't want to break poles. And so that's a perfectly good reason to deny access to someone who -- whose proposal might cause a break of the pole. But we believe that there are other good reasons that are not set forth in these rules. And the first one and most important to us is the lack of a municipal license for these third party facilities.

Now, again, as I go back to my first historical slide, this scheme, RSA 231:159 to 182, which deals with municipal licensing, has been in place since 1880. So back then they had no idea of the type of uses that we're making of these facilities today. So they don't specifically mention these type of third party providers.

SEN. CARSON: Hm-hum.

ATTORNEY SANDERSON: The third party providers have often taken the view that, hey, if you have a license out there and you've given it to the pole owner, if we reach agreement with them then what's your problem. Well, our problem is that as owners and operators of the municipal right of way we need to know they're there. And we need to know they're there because of public works concerns, public safety concerns for our first responders, and because the legislature has told us we must tax these facilities under RSA 72:23. And if we don't know that you're there, we can't meet any of those responsibilities. Thank you. Next slide, please.

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VICE-CHAIRMAN PILOTTE: Senator.

SEN. CARSON: Just a quick kind of a situation that I don't see here. What if you have a set of poles in a particular area and say PSNH, just for conversation sake owns poles, but they want to reserve space for future growth or they're going to be doing something else. How does that fit into this? Yes, the space is there but they don't -- they own the pole. They own the license to the pole. They don't want to grant access to the pole because they want to keep space open.

ATTORNEY SANDERSON: Okay.

SEN. CARSON: What happens there?

ATTORNEY SANDERSON: This has been the subject of concern and litigation under the federal law ever since the passage of the Telecommunications Act of 1996. The reason for that is you can have good motives for wanting to reserve space, such as the future expansion of your plant, and you might have bad motives, which is keeping out competition.

SEN. CARSON: Hm-hum.

ATTORNEY SANDERSON: Okay. If you're an incumbent local exchange carrier you'd love to say, my competitors, the competitive local exchange carriers can't come, okay, because I own the poles and if I lock them out they can't participate. The federal law says you can't do that, okay, and that's why the language that you see in both New Hampshire statute, 374:34-a, and the federal statute where they say that you can't keep them out for discriminatory reasons. That it has to be based upon some issue related to physics and engineering judgment. So you're very right that this is an issue that is in the process of being resolved all over the country as well as in our state. Okay.

SEN. CARSON: Thank you.

VICE-CHAIRMAN PILOTTE: Follow-up.

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SEN. CARSON: It seems we have two competing sets of law. We have state laws or statute and we have the federal. Are we trying to intermingle them and is that going to be a problem or is one going to supersede the other?

ATTORNEY SANDERSON: Well, in the normal rules relating to preemption the Feds will always win. Okay. However, in this case the federal law says, okay, state, if you are willing to administer this attachment program, we will defer to you and your state law will control.

SEN. CARSON: Okay.

ATTORNEY SANDERSON: So long as you don't violate our overarching principles of not discriminating against carriers and not inhibiting the roll-out of necessary telecommunications services and that was the language that the PUC sought to employ when they went forward and sponsored 374:34-a. That's why they used the specific language in the statute that they did which adopts the principles of federal law.

VICE-CHAIRMAN PILOTTE: Okay.

ATTORNEY SANDERSON: Okay. So as I indicated to you before, we have been working on this issue with the utilities and with the PUC's knowledge for five years, part of which was a docket that was opened by the PUC in 2005, docket number DRM 05-172, which has not yet been completed. We continue to work cooperatively in an effort to try to get improvements in municipal licensing and in municipal attachments. Next slide, please.

Now the dispute resolution part of 1304, what we worry could happen is that a dispute occurs between a pole owner and someone who seeks to attach. They then move to the PUC for the purpose of an adjudicative proceeding to resolve the dispute. We find nothing in the rules that would allow or require municipalities to be joined into that. Okay. We think that that's a

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violation of 541-A:39. We believe that we're necessary parties because this material that is placed into the right-of-way affects the right-of-way. Therefore, we believe as operators of this highway that we are directly affected and we're necessary parties to these adjudicative disputes. Okay. It's entirely possible that a proposed attacher could come forward that serves only a private interest. You know, for example, a company that wants to connect two of their own buildings. If that's adjudicated without having had a municipal license in place first, there's no particular finding in advance that such a facility would serve the public good. We think that violates the municipal licensing scheme. And so what we're asking for here is for the PUC to deal with this dispute resolution process and make the municipalities necessary parties so that we know these disputes are occurring, that our views can be heard, and that the adjudicative process can take all of that into consideration. Thank you. Next slide, please.

VICE-CHAIRMAN PILOTTE: Representative Schmidt.

REP. SCHMIDT: Thank you.

ATTORNEY SANDERSON: Yes.

REP. SCHMIDT: Certainly there must be all kinds of court proceedings dealing with this particular aspect someplace in the United States if not here in New England or even in New Hampshire.

ATTORNEY SANDERSON: Well, as you might imagine, any time that you're in other parts of our country and the prospect is that the only place you can adjudicate it is Washington D.C., that's not something where you're going to have an awful lot of disputes that proceed all the way to decision. There are a few, you know, where you talk about major utilities and major types of facility installations miles and miles and miles and hundreds of attachments. What we're talking about sometimes is four, five and six attachments which would not justify a full federal proceeding in Washington. So, therefore,

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there isn't a lot of case law from our perspective that resolves and deals with that particular type of issue. So, therefore, when we are talking about requested action, you know, we had talked about the entry of a preliminary objection based upon what staff has indicated to you and based upon these objections that we've raised, but we also feel it's important that the PUC consider adjudicative rules in their PUC 200 series. Their 200 rules were adopted in two -- adopted in 2006. This enabling statute was based in 2007, and so it does not deal specifically with this problem and this type of case because when their rules were adopted, the case didn't exist. And so, therefore, it would be our request that the agency consider adopting new provisions in PUC 200 to deal specifically with this type of adjudicative dispute that protects the rights of private landowners, protects the rights of municipalities to intervene and for their issues to be heard.

VICE-CHAIRMAN PILOTTE: Follow-up.

REP. SCHMIDT: Follow-up to the last question and that is that you said there's not very much case law. But is it your opinion that there's no -- there's no -- might not be a lot of case law but there could be one or two cases that are very pertinent to this particular issue about -- about the rights of -- you just got done talking about private landowners and municipalities. Is it your opinion that there is no valid case law that doesn't get at this?

ATTORNEY SANDERSON: I certainly wouldn't say there's no valid case law because there certainly have been issues relating to the relationships of utility owners and these attaching entities that have gone all the way up to and been adjudicated by the United States Supreme Court and you'll hear about some of those probably from the -- the competitive local exchange carriers. I will tell you that there aren't any cases from New Hampshire and that the right-of-way law in other parts of our country is entirely different from the right-of-way law that is applicable in New England states.

REP. SCHMIDT: Hm-hum.

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ATTORNEY SANDERSON: Okay. Because in most places roads were engineered. And most places roads are clearly owned by the public by means of fee interest. In our case over 80 percent of our roads are what we call prescriptive right-of-way but that's a whole day worth of discussion and I won't do that to you now. Just to suggest to you that our road law is very different from that in other parts of the country.

VICE-CHAIRMAN PILOTTE: Representative Boyce.

REP. BOYCE: Now, if property --

REP. SCHMIDT: I'm okay.

REP. BOYCE: One property refused, could they put upon the other set and run the wires and back to the other pole?

ATTORNEY SANDERSON: There are all kinds of solutions that could be adapted in the field in individual situations. In the right case that might happen. Okay. But that would be as a result of an application and receipt of a municipal license so that the municipality knew what was going to happen with those poles. I think all of us would like to have the provision of the maximum amount of services to our homes as possible with the minimum amount of negative impact upon our public rights of way. So we are all on the same page trying to get to that goal.

VICE-CHAIRMAN PILOTTE: Sir, did you -- you said that one of the reasons why you're not necessarily considered a necessary party is that under certain circumstances some attachments, again, have been made without a license from the municipality?

ATTORNEY SANDERSON: Yes.

VICE-CHAIRMAN PILOTTE: Did I hear that?

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ATTORNEY SANDERSON: Yes, because what we have learned in our investigations, because we are dealing with something that is now 130 years in practice, okay, practices have varied over time. Some municipalities and some utilities have been great about getting licenses at all locations. Others have not. And so if you asked me as a representative of a municipality do you know where every pole is in your community, the answer would be no. If you asked the utility that was responsible for placing poles in that municipality, do you know where every pole is that you have in that municipality and do you have a license behind it, they would have to say as well no. And it isn't because of a lack of attention, it's because we are 130 years into this.

VICE-CHAIRMAN PILOTTE: Okay.

ATTORNEY SANDERSON: Okay. Just to show you what's at stake I just put a couple of pictures at the end that will show you what can happen. This is a road project in Newington in 2006. It's actually at the end of the Little Bay Bridge. And it was a very complicated utility move in there, too. Okay. So what you'll see by looking at that particular picture is what looks like and is a utility pole planted in the middle of the traveled way. Okay. And that's because the road got constructed before the utility got moved. And so this is why it's very important for governmental operators of highways and utility companies to get on the same page when we're talking about utility pole placements and the various facilities and how they move so that this type of thing doesn't happen. No one wants this to happen, either on the utility side or on the highway side but it can.

The next thing, and this is really the last thought I have to leave you with, when we talk about ice storm issues, okay, as happened, and all sorts of trees came cascading down and wires were driven down to the ground, the ones who came there first were first responders. Okay. And so this is really just a graphic to show you that when things happen, when emergencies happen, they're the people who are most at risk. If as municipalities we don't know what's up in the sky, then these first responders don't know what they're facing in an emergency situation. That's not a

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good situation. That's why we've worked hard and will continue to work hard with the utilities to make that go away so that we do understand what's there, okay, and that we are working together to try to make this process better. So that really is the end of my comments. I've taken up time. I'd be happy to answer any other questions that you have.

VICE-CHAIRMAN PILOTTE: Follow-up?

ATTORNEY SANDERSON: Thank you.

VICE-CHAIRMAN PILOTTE: Representative Schmidt.

REP. SCHMIDT: So you're asking us to enter a preliminary objection with regard to this proposed rule?

ATTORNEY SANDERSON: Yes, sir, based upon the specifics that we raised in the presentation.

REP. SCHMIDT: Hm-hum.

ATTORNEY SANDERSON: Thank you.

VICE-CHAIRMAN PILOTTE: Thank you very much.

REP. MILLHAM: I got a question.

VICE-CHAIRMAN PILOTTE: Yes, I'm sorry.  
Representative Millham.

REP. MILLHAM: What's that thing you have?

ATTORNEY SANDERSON: Oh, this is another -- this one came from the ice storm. This is actually 200 feet of wire and --

REP. SCHMIDT: It was 200 feet of wire.

ATTORNEY SANDERSON: When it was under tension it was 200 feet long. And when the ice storm brought it down this

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is what it came down to. So this is what it is when public works facility operators as well as first responders and utility crews, this is what they face in the field. This stuff is dangerous.

REP. PATTEN: Was that live?

ATTORNEY SANDERSON: Yes. It used to look like this end and that's what it came to be. That's how much stress and tension is on these things.

REP. PATTEN: Thank you.

ATTORNEY SANDERSON: Thank you.

REP. SCHMIDT: Oh, what tangle webs we weave.

VICE-CHAIRMAN PILOTTE: Oooh, oooh. And I have another card from Jeremy Katz from segTEL, and segTEL had given us written testimony which was in your packet last time. Okay. Is Mr. Katz here?

JEREMY KATZ, Chief Executive Officer, segTEL: Yes. I also sent some proposed changes to the rule last night which may have made it to you.

REP. PATTEN: This one here. It looks like it's an e-mail.

REP. SCHMIDT: Okay. This?

SEN. CARSON: Yep.

VICE-CHAIRMAN PILOTTE: Okay.

REP. SCHMIDT: Yep, that's it.

VICE-CHAIRMAN PILOTTE: Thank you.

MR. KATZ: Good morning. I'm Jeremy Katz. I'm the Chief Executive Officer of segTEL. We are a competitive local

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exchange carrier based up in Lebanon, New Hampshire. We build fiber optic networks in Vermont, New Hampshire, Maine, and Massachusetts. Been doing business in the telecommunications sphere since 1995 shortly before the Telecommunications Act of '96. I've sent in some proposed rule changes which I'd like to go over and then also provide some of my experiences first or offer my experiences to you because I think I'm the only CLEC or cable TV representative here.

VICE-CHAIRMAN PILOTTE: Mr. Katz, we'll be working from yesterday's comments or comments from earlier?

MR. KATZ: Yesterday.

VICE-CHAIRMAN PILOTTE: And do you wish -- we will not to be looking at these today; is that correct?

MR. KATZ: I don't believe we have a need to look at the old ones.

VICE-CHAIRMAN PILOTTE: Thank you.

MR. KATZ: So the first thing that I'd like to say in response to the Local Government Center's discussion and presentation that was just made was segTEL disagrees. Our position is that there's really nothing new under the sun. It's all been done before. It's all been adjudicated before. We're now at the better part of 14 years into the Telecommunications Act of 1996. The players might change, the specific location of a dispute might change, a specific fact might change, but the rules and process for making attachment to poles and for providing the services that typically go on the pole is, by and large, at this time a substantially mature process. It might be new for the Public Utilities Commission to be regulating disputes under this process, but the FCC and the federal courts have a tremendous history of determinations that were made regarding issues, especially the issues that were previously brought up.

Now, I guess for the sake of being efficient, I'd like to

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simply first present the recommendations or really quite small changes to the 1300 rules that we had sent in. There were nine specific changes and I'm going to apologize in advance. Some of the markings on here are actually the red lines of the Commission because I'm not very good with Microsoft Word and I didn't know how to X out their filings. So I'll simply point you to the first change which is in 1301.01. And segTEL had recommended that in the sentence, "nothing in this rule shall be construed to supersede, overrule, or replace any other law, rule or regulation," that everything after law, rule or regulation be deleted. And the reason is, is that if nothing is going to be construed to supersede, overrule, or replace any other law, we simply don't need to get into identifying every single other law that's not superseded. There are many laws that aren't going to be superseded or overruled, and they're not simply limited to RSA 231. So the blanket statement appears to really accomplish the job just fine. The --

VICE-CHAIRMAN PILOTTE: I'm sorry.

MR. KATZ: Yes.

VICE-CHAIRMAN PILOTTE: Maybe I'm confused, but it seems to me I thought the conditional approval request had made that change already; is that correct? Attorney Eaton.

ATTORNEY EATON: The Commission's? No.

VICE-CHAIRMAN PILOTTE: No.

ATTORNEY EATON: No.

REP. PATTEN: Do we -- excuse me. Do we have a conditional approval request?

ATTORNEY EATON: We have a conditional approval request from the Commission dated August 18<sup>th</sup>. It has a cover letter on it.

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SEN. CARSON: Yep.

REP. PATTEN: All right. Okay. Thank you.

ATTORNEY EATON: I think that's the copy from which Mr. Katz is working from, adding his own annotation on top of it.

REP. PATTEN: Okay. I see now.

MR. KATZ: When my markup deleted it actually just moved into the right-hand column the deleted verbiage if that helps.

The second recommendation that segTEL has is on Page 2 in section 1301.01. In the second line where the terms are just, reasonable, and non-discriminatory, segTEL would like to see competitively neutral also added in. We believe the term competitively neutral is somewhat different than non-discriminatory. Historically, non-discriminatory typically means within a class of similarly situated individuals. So, for instance, you won't discriminate between CLECs, whereas our concern is, for instance, that let's say Internet service providers want to get onto the poles next, that CLECs are not placed in a disadvantaged position versus terms that might be offered to another industry participant, such as the Internet service provider and competitively neutral addresses that in a way that non-discriminatory might not do so.

The third and fourth changes come in section 1303.04 with access and response requirements. The first change is the deletion of the words "and survey fee." So it shall be completed and communicated to the applicant seeking to attach, dot, dot, dot, of receiving a completed application. We would simply end that sentence at completed application and remove survey fee and the reason is because the Federal Communications Commission has already adjudicated, at least related to CLECs and cable TV providers, that it is not an appropriate policy for pole owners to charge any prepayment fees to get access to

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poles. So this is -- this was already adjudicated. It was adjudicated in the first local competition order and has come out in other FCC enforcement proceedings as well. And so requiring in the rules a prepayment that has already been found to be a violation of federal law places the rules at conflict with the mandated federal regime.

The other suggestion we have was changing the word within to no later than on the 45 day time line on request for access. And the difference between within and no later than is -- comes back to the concept that when somebody is building a network, time is of the essence. If there's a potential to provide an approval four days afterwards because, well, maybe the incumbent utility is not very busy that month, that should come as fast as it's able to be delivered. Not simply put on a let's respond on the 45<sup>th</sup> day. And no later than for us implies more of a sense of urgency that time is of the essence in deploying facilities than within which seems to imply you can just simply wait for the full-time frame in order to respond.

The fifth recommended change is in section 1303.05. SegTEL recommends adding a sentence in here that says, "No pole owner shall withhold or delay written authorization except in accordance with the Commission's rules." The basis for this recommendation is that an attached -- an attaching entity is required to receive an authorization in writing, but really if that authorization isn't forthcoming for an indefinite amount of time, nothing happens. Essentially, it's the onus is on the attaching entity to then start what for small companies is a -- is a quite expensive and time-consuming process making repeated complaints to the regulatory commission. Whereas in reality, if the rule says that you're supposed to get your authorization in writing, there should be no reason that a pole owner should fail to provide that authorization that is required. And we think adding this sentence addresses the concern that we have which is that essentially an entire business plan or project can be frustrated by a pole owner gaming the system with ambiguity in the rules.

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VICE-CHAIRMAN PILOTTE: Okay. Questions or comments?

SEN. CARSON: I have a question.

VICE-CHAIRMAN PILOTTE: Yes, Senator Carson.

SEN. CARSON: Thank you, Mr. Chairman. I don't necessarily agree with what you have here because, again, and it was something that was brought up by the Municipal Association about individuals that have poles on private property or in rights of way through private property. And the way that you're proposing this be written that no pole owner shall withhold or delay written authorization. Well, what if they say no? What if they just say no, I'm -- I don't want you to use my pole?

MR. KATZ: I guess there's two answers to that. The rules explicitly state why a pole owner can reject an application and under the federal regime those rules by which an application can be denied are very, very limited. And, for instance, in answering the Local Government Center's claim the issue of those poles and easements on private property has already been determined by the Federal Communications Commission and those rights have to be conveyed unless they're expressly prohibited. So when we have these issues, I mean, I think there are a substantial amount of red herrings that are thrown out as to reasons why deployment can be delayed and these were thrown out in 1996 to 2001 when the FCC's rule makings were going on and they were duly considered and adjudicated and rejected at those times.

SEN. CARSON: May I follow-up, Mr. Chairman?

VICE-CHAIRMAN PILOTTE: Follow-up.

SEN. CARSON: My concern is that you are assuming that you're going to get the authorization. Perhaps it would be better to have some sort of response, a written response to your request as opposed to a written authorization.

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MR. KATZ: And I actually agree and but that's addressed immediately above on 1303.04, which provides that a response must be provided by the 45<sup>th</sup> day. So, you know, the issue that we have and to provide an example, we apply to attach to a mile of poles in any town. And the survey's completed and turns out that attachment can be granted. Okay. There's no major issue. We all go out, the electric company, the phone company -- the telephone company, and the poles are fine. The actual physical license might not be issued for eight to 15 months afterwards. Because, I don't know, there's paperwork, because the field engineer didn't submit the paperwork. Because somebody left the company and didn't leave their work flow queue. For any reason which is not a theoretical because, in fact, with one utility, the average amount of time to receive survey responses that segTEL experienced was in excess of 300 days. Average time off of surveys. So the ability to deny for a legal purpose is in 1303.04. The responsibility to provide the authorization in the absence of a denial is what we're -- we really want to see in 1303.05.

SEN. CARSON: Okay.

VICE-CHAIRMAN PILOTTE: Representative Patten.

REP. PATTEN: Yes, I'd like to just have you say that what I heard was what you said. I have poles --

MR. KATZ: Hm-hum.

REP. PATTEN: -- that I have given an easement to New Hampshire Cooperative.

MR. KATZ: Hm-hum.

REP. PATTEN: Whatever. It's not PSNH. And you're saying to me that if -- in the federal government, somebody wants to come in and put something on my pole, that I have no right as a private property owner to say no even just because I don't want anything on my pole?

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MR. KATZ: The -- and I'm going to have to say the -- the first thing is we have a proceeding that's up for --

REP. PATTEN: Is that what he said?

REP. SCHMIDT: Kind of what I understood.

MR. KATZ: There's presently a proceeding at the Public Utilities Commission involving segTEL that is up for adjudication on this precise issue.

VICE-CHAIRMAN PILOTTE: The question is that is what you said?

MR. KATZ: Yes. To the extent that a incumbent -- that a pole owner receives a right, they have to provide access to that facility with the same right that they have for themselves unless there was a prohibition. There are easements that are granted, for instance, that might say I'm providing access to the New Hampshire Electric Coop, you know, exclusively for the purpose of placing a drop pole from the street to my house and for providing electricity to my house. And in that case there would not be a right for us, for a competitive, for any phone company to go and make an attachment without either the landowner -- a license permission modification of the easement or something of this sort. There is landowner consent required because that is an easement that is limiting in its nature. It is not compatible with another use.

If the easement is a general easement, a utility easement that says I'm providing you access to place wires, to place a pole and wires on my property, okay, that has been determined to be -- the word is compatibility. Compatible with the implementation of fiber optic deployment. So a wire -- a general easement to place an electrical distribution facility or a telecommunications facility has been deemed to be compatible with the use for what is contemplated under the act.

VICE-CHAIRMAN PILOTTE: Okay.

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REP. PATTEN: I probably ought to look at my easement for what I did and maybe everybody else in the State of New Hampshire that private property owners to look at what their easements say for on private property. Because what you're saying to me is something that I am -- private property rights are sacred here in New Hampshire. I don't care where they are in the rest of the states. The other thing -- but I'll just go on. I just have to calm down after that one.

MR. KATZ: I can tell you I agree completely because on my own property, we have a drop pole that goes right across in front of my house.

REP. PATTEN: I bet you knew you had to have an exclusive easement on your property.

MR. KATZ: Oh, no, no, no, no. This is one that existed for awhile. But when we dropped a provider that had wires, you know, we actually had an expectation that the provider would remove its wires. 'Cause there was, you know, it was sort of an eye sore. There was no need for it and the response that I actually got was no. That's not the way it works. These wires are here. And you know, so on. So I sort of got a tough luck on my own property on that from that provider.

VICE-CHAIRMAN PILOTTE: Representative Schmidt.

REP. SCHMIDT: Okay. I'm okay sitting next to you, am I?

REP. PATTEN: That's okay. I'm fine.

REP. SCHMIDT: I certainly am okay with the idea that theoretically, anyway, that a private property owner can say you can't bring stuff onto my property that I don't want. But to the question I have is with regard to an easement to allow transmission across my property to somebody else's property.

MR. KATZ: Hm-hum.

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REP. SCHMIDT: One or more. And to the degree am I understanding you correctly that if you let some service provider put on something going across your property to somebody else's property that basically you have implicitly granted the right to everybody else that is legally entitled to attach in that vicinity to go across your property? That's --

MR. KATZ: Remember, it's not everybody else because there are very few entities that have statutory rights of attachments. It's simply the cable companies and competitive telecom providers.

REP. SCHMIDT: I don't mean everybody else. I don't mean Joe Blow can come and do it.

MR. KATZ: And I guess because I -- I'm an executive, I'm not an attorney. And so I rather than providing a legal argument, what I can provide more of is the experience of the rules making at the Federal Communications Commission and the impetus for the act that made -- that gave these rights. And when you look at it back in 1995 and early 1996 when the act was being approved by Congress, there -- there really wasn't a lot of new technology coming out. You know, dial-up was sort of a little treat, if you could get it in '95 with a local phone number. And Congress said what is stopping all of these new companies from coming in and deploying technology that might be useful to bring out the next technological revolution, the Internet. You know, whatever might be next that we do not yet know. And --

REP. SCHMIDT: Things like DSL?

MR. KATZ: Things like anything. Things, you know, TV over your cell phone. You know, who knows. But what is stopping it? And what Congress essentially said was the prior regime that existed before 1996 was stifling innovation. It was preventing -- it was providing a barrier to entry to new providers to be able to come in and to innovate. And so what types of things were barriers, you know, to entry? Well, going and

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theoretically having to receive condemnation easements or negotiate with every individual property owner along 75 miles of a fiber optic run. That was seen as something that was a substantial barrier to entry. The incumbent utilities had almost a century of negotiating and acquiring those property rights. Getting access to poles was simply seen as a major impediment. You know, should --

VICE-CHAIRMAN PILOTTE: Mr. Katz.

MR. KATZ: Yes.

VICE-CHAIRMAN PILOTTE: Has your question been answered, Representative Schmidt?

REP. SCHMIDT: Certainly it's all informative but we could go on for hours.

VICE-CHAIRMAN PILOTTE: Thank you. Thank you.

MR. KATZ: So --

VICE-CHAIRMAN PILOTTE: You're not done. I'm sorry. I thought you were done. I'm sorry.

REP. PATTEN: He's only at number five. We have four more to go.

MR. KATZ: So on six, number six is actually on 1303.06, notification in section (b). SegTEL suggested adding the word materially to subsections (1) and (2). Materially modifying or materially increasing. Essentially, our worry is that we would be actually unable to honor a customer request to install service in less than 60 days if we had to provide notice to the pole owners every time we were going to install a service, make a splice on the pole, and it's not the customer drop line which is already exempted but it's that when we provide service to an end user customer, there is a physical change of the wires on the pole that we make in order to provide that service. We install a splice

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case. It's, you know, about the size of a shoe box. That's, you know --

REP. SCHMIDT: That's what those things are.

MR. KATZ: -- it's an added load or weight on the pole. We go up, we materially change the wire. We'll sort of strap on what's usually called a C Wire which is a self-supporting wire that is what goes off and these changes are immaterial. In fact, they are the normal part of doing business in providing service. But our worry is that if they're without the word material it puts us in a situation where our ability to meet customer service requests is -- on our own network is substantially delayed.

VICE-CHAIRMAN PILOTTE: Okay.

MR. KATZ: Our seventh recommendation on 1303.07 (a) is to delete everything after RSA 155, IV, which is the section regarding Telcordia Technologies. Telcordia Technologies is not an industry-based standard. It's the Bell Operating Company standard that Verizon operated under. Not all phone companies use it. Not all electric companies. It's not even an electrical standard. So the electric companies don't use it and it is not a publicly available standard without paying for a substantial, very expensive recurring license fee and, you know, really, I think what we're all looking for is to have standards that everyone knows and are accessible and understands in order to comply with.

The eighth and ninth changes are just in 1303.12 which, again, make the same changes that we suggested in the survey section which one are removing the reference to require prepayment because, again, this has already been adjudicated to be an unjust and unreasonable act and it creates an immediate conflict if the rules require a prepayment, whereas the FCC has ruled that prepayments are not allowed. And then changing the no later than or changing the within to no later than to provide the time is of the essence nature. So unless there are any questions on my suggestions, I just had four or five notes on

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other presentations that were made that I would like to comment on.

REP. PATTEN: I just have a question on his presentation.

VICE-CHAIRMAN PILOTTE: Okay.

REP. PATTEN: Yes. Can you tell me if you have given these changes to PUC during their time that they had for getting public comment or is this the first time they've seen it?

MR. KATZ: We were -- we made changes -- we made recommendations and comments throughout the proceeding. These changes were made specifically in reference to the most recent conditional approval request that came from the PUC. So, you know, they couldn't have been made until the conditional approval request was, but we did share it with PUC staff.

REP. SCHMIDT: How long have they had it?

MR. KATZ: Well, the -- the original -- sorry.

MS. FABRIZIO: Jeremy has raised these issues throughout the course of the proceedings in one way or another.

VICE-CHAIRMAN PILOTTE: The agency will be coming back.

REP. PATTEN: They'll talk to us.

VICE-CHAIRMAN PILOTTE: Okay.

MR. KATZ: So just very quickly. And, you know, not to dwell --

VICE-CHAIRMAN PILOTTE: So what --

MR. KATZ: Sorry.

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VICE-CHAIRMAN PILOTTE: -- what we heard right now is that none of these changes that you're proposing today --

MR. KATZ: Hm-hum.

VICE-CHAIRMAN PILOTTE: -- were to the regular rulemaking, the regular fixed text of July 16<sup>th</sup>; is that correct? Only to the conditional approval recommended changes. Is that the statement you're making?

MR. KATZ: I'm not sure I understand the ramifications of how I'm going to answer that.

REP. PATTEN: Well, you did this, you just told us -- excuse me, Mr. Chairman -- you just said that these are in response to the conditional approval request.

MR. KATZ: Yes, that's correct.

REP. PATTEN: Which means that nobody, you know, they have not been -- they were not there when the initial proposal and the Final Proposal that we had back when we were together before. So that we -- this is the first time that they have been put on based on the conditional approval request, which is what happens with all responses to conditional approval requests.

MR. KATZ: Okay.

REP. PATTEN: They haven't been vetted in the public and all of that because conditional approval requests are not vetted by the public -- in the public.

MR. KATZ: Okay. So yes.

REP. PATTEN: You did say yes?

MR. KATZ: Yes; but all of these were placed and filed in prior comment as well. This is not the first time.

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REP. PATTEN: It's not the first time.

VICE-CHAIRMAN PILOTTE: So that's the statement we need to get on record.

MR. KATZ: Sure.

VICE-CHAIRMAN PILOTTE: All of these had been made aware to the PUC during the regular rulemaking procedure.

MR. KATZ: Yes. In which we participated in, yes.

REP. PATTEN: Thank you.

VICE-CHAIRMAN PILOTTE: Thank you. And are there any that were not made earlier that are specific to the conditional approval request?

MR. KATZ: The addition of the sentence in 1303.05 in that manner, in its present construction, was made after the conditional approval -- exclusively made after the conditional approval request.

REP. PATTEN: On Page 3.

VICE-CHAIRMAN PILOTTE: Right. I'm just --

REP. PATTEN: That's the one.

VICE-CHAIRMAN PILOTTE: Okay. I'm sorry. Thank you.

MR. KATZ: Okay. And so just quickly provide a couple of responses to the other commenters. On the FairPoint discussions about boxing and extension arms, coming from the field and having played a part in these proceedings, the rules on boxing and extension arms and our interpretation of it which we, by and large, support is essentially it's not saying boxing and extension arms are good or appropriate. It's saying that an attaching entity shouldn't be placed at a disadvantage in using these processes

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when the pole owner themselves are using that same process. So, for instance, if you have a line of poles where FairPoint themselves have two attachments, one on either side of the pole and that pole is already boxed, it is essentially discriminatory and a problem for the pole owner to require a competitor to buy a whole new pole in order to make room to make the attachment when that pole could -- which has already by practice been boxed can be additionally boxed.

VICE-CHAIRMAN PILOTTE: Mr. Katz, at this point on these issues I think I would rather get the PUC's response to those objections.

MR. KATZ: Okay.

VICE-CHAIRMAN PILOTTE: Otherwise, we can get into round-robin, round-robin, round-robin.

MR. KATZ: Okay.

VICE-CHAIRMAN PILOTTE: And I would hate to have to do that. I mean, I thought we had to cancel once. We are going to have to postpone a second time for others. So do you have other concerns, sir?

MR. KATZ: The -- I'm pretty sure the Commission would be able to respond to the rest.

VICE-CHAIRMAN PILOTTE: Thank you. I do not have any additional cards. Is there someone who I've inadvertently forgotten? Okay. May I ask the Commissioner and other members of the PUC, other folks with the PUC to come up. Good afternoon, Commissioner Below.

CLIFTON BELOW, Commissioner, Public Utilities Commission: Good afternoon. Just looking at the clock. Thank you.

VICE-CHAIRMAN PILOTTE: I'm sure you realize you

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have your work cut out for you.

MR. BELOW: Yes. And thank you for your attention to what is at times very arcane, but very important rules.

This Final Proposal comes to you after an extensive, lengthy, intensive process that did, as you heard, began back in 2005 when the Commission was investigating a variety of utility pole practices, including the whole issue of double poles, and attachments, and such. And that investigation, one of the things that led to was the enactment of RSA 374:34-a to give the Commission jurisdiction over utility pole attachments. I think as you've heard we -- coming out of that docket and talking with the Science, Technology and Energy Committee in the House, we came forward and proposed that legislation and crafted it, in large part, to satisfy the requirements of the federal law and the FCC rules that allow states to assert this jurisdiction or sort of take it back, if you will because, in fact, that's where the jurisdictional lied before the enactment of the Federal Telecommunication Act back in the '90s.

PUC proposed  
crafted  
leg.

As perhaps you've heard, we did start over a year and a half ago with this rulemaking after doing some more basic interim rules. We've had at least four separate technical sessions and opportunities for comments working with staff as we developed these permanent rules or not permanent rules but --

VICE-CHAIRMAN PILOTTE: Proposed.

MR. BELOW: -- proposed rules beyond the initial interim. And, you know, we had a large number of comments by parties, some with very obviously competing interests on these difficult issues. You know, thick folder on my part, much thicker part on the staff. An enormous amount of work has gone by the staff and the Commission on this.

I think you've heard from a variety of these interests. Ultimately, it's not possible to make everyone happy. This is not a situation where you can have a win, win, win for everybody.

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We are dealing -- you know, we tried to take into account all those different perspectives and, you know, we have carefully read and considered all of the comments that we have received and tried to create the right balance.

You have heard some comments today that I think are new that we had not heard before and I just as we go through these want to be clear about where that lies.

I do have one handout that I'd like to provide which is simply sort of a summary of the -- give all of them. This is simply a summary of the comments that we received by some of the dates of it and a copy of our docket sheet in the proceeding that just illustrates some of the -- or illustrates the comments and the stages in the process.

What we're -- you know, we are dealing with three overlapping -- at least three areas of overlapping law. There's the whole PUC title that we're operating under the authority with regard to these rules. There's the whole body of federal law that has some preemptive authority that we are trying to mesh with. And then there's the body of municipal law with regard to the rights of way as well as arguably, you know, separate law with regard to private property easements and such. One of the things we have tried to avoid doing in our rules is going beyond what we think is our jurisdiction. We don't really have jurisdiction with regard to municipal authority over their authority under right of way. That's an independent authority that exists separate from whatever authority we have and so we have not tried to draw that into the rules. Perhaps in some ways that -- perhaps the municipalities might like us to more clearly state and I think this is an area where you might want to consider making a recommendation for further legislation, such as the whole notion that as part of these rules we require all attachers to provide notice to municipalities and/or even the question of whether they need to get a separate license for their attachments from municipalities. We don't feel we have the jurisdiction to really decide those questions or address those, so we haven't tried to in these rules.

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I think staff -- I guess you kind of got the recap from what had been addressed last time, but I think we want to go through and address some of the issues that have come up and I guess I'd like to get a sense of your time, what you -- how long you want to go before you break for lunch.

REP. SCHMIDT: Lunch? We don't do lunch.

SEN. CARSON: I've got to leave at one.

VICE-CHAIRMAN PILOTTE: You're leaving at one. Is there anyone else who needs to leave at any particular time?

REP. SAD: One o'clock for me as well.

VICE-CHAIRMAN PILOTTE: I think all of us would probably feel better if this were one were under our belt before we move on to try to adjust the belt size.

MR. BELOW: Okay. And with me here today is Lynn Fabrizio who's a staff attorney and Kate Bailey who's the Director of our Telecommunications Division, which has sort of taken the lead on this pole issue, although other divisions have been involved, electric division has been involved as well.

Where do we want to start? Maybe it will be helpful actually to go through the Municipal Association comments in the first instance.

VICE-CHAIRMAN PILOTTE: Commissioner, could I ask you --

MR. BELOW: Hm-hum.

VICE-CHAIRMAN PILOTTE: About two minutes ago you made a statement that there are things that you heard today for the first time.

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MR. BELOW: Yes.

VICE-CHAIRMAN PILOTTE: Would it be possible to at least address those --

MR. BELOW: Yes.

VICE-CHAIRMAN PILOTTE: -- upfront?

MR. BELOW: Yes.

VICE-CHAIRMAN PILOTTE: Then the others that you, quote, unquote, have heard before, have in your opinion taken into consideration and either adopted or not. Then we -- I think it might be a little bit easier for us if we --

MR. BELOW: Sure.

VICE-CHAIRMAN PILOTTE: -- you know, segregated them this way, please.

MR. BELOW: Sure. In that regard, I would sort of urge you to resist what some parties are suggesting which is to substitute your judgment on policy issues for ours where we've tried to reconcile the different comments. Obviously, you want to be concerned with whether we have the statutory authority consistent with the intent, whether we followed the appropriate process and the rules are written in a way that conform to the requirements of the rule. But the reality is we had to make some difficult policy choices and there are arguments on both sides of shifting the weight or the balance in these rules; but as you heard from Paul Phillips from the Telephone Association, he indicated that we felt like we struck the right balance between many diverse and conflicting interests. And there's, you know, if we start shifting on one point other parties may pop up and say, well, gees, you know. So that's a concern.

In terms of the specific issues, the ones that are new are, besides the one that Jeremy Katz just commented on that he

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pointed out were new to the conditional rules on 1303.05, that new sentence about no pole owner shall withhold or deny written authorization in accordance with Commission rules -- I think I'll just say we might -- there might be a little concern about that and kind of relates back to the Municipal Association concern under 1303.01 as to the basis for denial. I should just say, also, as you heard we do have an adjudicative proceeding at the Commission on this question of whether there's authority under state law and federal law with attachments when they're, you know, private right of way, in effect, on private property. And so, you know, we can't really go into that. We have tried to avoid that in the rules, sort of prejudging that issue in any way. And, you know, arguably that might involve other courts with regard to easement law or federal law.

So the issues, the other issues, the major thing that's new today is in the Municipal Association comments. And certainly the -- or the Local Government Center. Certainly they have been an active participant and I think have been very helpful and are working very hard to align their interests and our interests. Our interests statutorily is an arbitrator of these different interests. Traditionally, our role as an arbitrator for finding the public interest is between the investor of the utilities and the customers. Over time that has broaden as sort of a referee in some of these wholesale competition issues which includes this whole issue about attachments to pole because it's both federal policy and state policy to promote competition in telecom services, access to Internet throughout the state. These are all public policy issues that are of concern, at the same time maintaining reasonable rates for the existing customers, ensuring the property rights and management prerogatives of these investors of utilities are also respected. There's a whole bunch of balancing that's going on here, as well as obviously the municipal interest, the general public safety interest, a whole bunch of things.

The issues that are specifically new -- and maybe Lynn can highlight some of them at this point. And I should say although the Municipal Association was very active in the technical sessions and provided comments in the stakeholders, you will see

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from the handout I provided you they chose not to make any comments to the Commissioners in the Final Proposal. Once we went forward and had the public hearing on the Final Proposal and the public comment period, the Local Government Center did not provide any comments to the Final Proposal for consideration by the Commissioners. That isn't to say we didn't consider the things they raised in technical sessions because staff brought those to us and we did have access and reviewed their earlier comments earlier in the process, but they didn't actually make any comments on the Final Proposal just to be clear and didn't testify at the hearing on that. And their couple issues that they've raised today which -- one of which is brand new to today specifically and I'll just call your attention to that. If you go to their handout under Dispute Resolution 1304, the notion that there's no requirement as the highway operator, i.e., the municipality as a necessary party, that's a suggestion we never heard before, quite honestly.

The broader issue about dispute resolution which is talked about in their written comments that were provided on September 3<sup>rd</sup>, that the notion that they should be placed in the PUC 200 rules perhaps instead, that was also new as of September 3<sup>rd</sup>. So Lynn, do you want to elaborate or Kate on those?

LYNN FABRIZIO, ESQ., Staff Attorney, N.H. Public Utilities Commission: No. I would just reiterate that the provisions we had not seen before these comments were filed are the first argument which is a rulemaking argument and the last argument which is really a rulemaking argument as well as to where dispute resolution should fall within the rules. And -- I mean, we have looked at these comments since we've seen them and disagree with Mr. Sanderson's interpretation of the requirements. But the issue that he raised under Dispute Resolution as to the neglect of the rules adding a requirement to add municipalities as necessary parties, I think, yes, we don't have that but we don't generally need to put that into a general rule such as this. In the event when the issue is brought before the Commission, the Commission will absolutely ensure that any

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necessary parties are made mandatory parties. But we do not anticipate under these rules that every single dispute brought before the Commission will necessarily require municipality presence. For example, if it's a question of reasonable rates under a pole attachment agreement, I don't think the Commission would find that a municipality should be a mandatory party. On the other hand, there's absolutely nothing in the rules prohibiting the municipalities to intervene in any proceeding brought under these rules before the Commission.

VICE-CHAIRMAN PILOTTE: There are times when if you're not at the table you're on the menu though, isn't there?

MR. BELOW: It's just it's not clear that we feel that we have the authority to put into the rules that we could mandate a municipality be a party to a proceeding. That kind of gets into the question of an unfunded mandate. I don't think we have any problem with the idea that they be a party and we would welcome legislation that might make that clear, that they be made parties. But it's just not --

VICE-CHAIRMAN PILOTTE: As a matter of course are they informed?

MR. BELOW: Well, we haven't really -- we haven't had any disputes under these rules come before us except maybe the one that's being adjudicated.

KATHRYN BAILEY, Director, Telecommunications Division, Public Utilities Commission: We issue an order of notice and we publish it in a newspaper in the area.

MR. BELOW: The one that came -- the one that we're adjudicating we did make all of the affected property owners parties and required the utility or the petitioner to give them all notice, invite their comment and participation and have a hearing or a meeting locally to ensure that.

MS. FABRIZIO: And similarly, and I think if a dispute

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brought before the Commission appears to implicate the municipality directly, absolutely the Commission would notify that municipality as a matter of course.

VICE-CHAIRMAN PILOTTE: What I seem to have heard when he was making his presentation was they need to know to be informed that something is going on. They may decide not to show but at least are invited. Does that occur or not as a necessary thing?

MS. FABRIZIO: As Ms. Bailey said, that any proceeding that is initiated the Commission is made public through an order of notice that is published in a newspaper of general circulation.

VICE-CHAIRMAN PILOTTE: Thank you.

MS. FABRIZIO: But again, I think that it depends on the scope of the dispute brought before the Commission and we're simply --

VICE-CHAIRMAN PILOTTE: Thank you.

MS. FABRIZIO: This is a new area for us and it's hard to express.

VICE-CHAIRMAN PILOTTE: Thank you. Representative Schmidt.

REP. SCHMIDT: Thank you, Mr. Chairman. I mean, accepting the fact that nothing human beings devise is ever totally perfect so there's no system, no situation which can, you know, avoid the "cool hand Luke" situation, failure to communicate. And when I was in the Marine Corps they used to say 10 percent of the people never get the word. So whatever 90 percent of the people know, the other 10 percent are going to go like I never heard of that before. But accepting that reality, are you saying that any issues that come up that would impact a municipality they would know about either by being informed directly by the Commission or it's an issue -- it's of such fame in

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that particular municipality that, obviously, they're going to know about it. 'Cause what I'm concerned about, obviously, is that we don't get a -- establish a regime here which effectively is going to not notify the municipality that's impacted by the situation. And I think I understood Commissioner Below to say and you to say essentially they're going to know.

MR. BELOW: I think looking in the future I can't say that definitively. I mean, you have to inventory every municipal official in the state to find out if in the past they felt like they have always been informed about. I mean, we make our best efforts. I mean, it's not hard to e-mail and provide notice and often we require utilities in different cases to provide specifically notice to municipalities. I mean, it's such a broad question I'm hesitant to be definitive because I'm actually vaguely recalling one case with a water utility where municipality said we should have known something about this 'cause it had something to do with hydrants so we sort of stopped the case and backed up and said we have to go back and engage this municipality because they didn't feel like they had proper notice of an issue that affects their interest. Any entity that has an interest that's affected by a proceeding has a right to be a party. We do have a law, for instance, that says the OCA, you know, automatically the consumer advocate is given notice automatically of all of our proceedings and they can just by right, by just sending a letter, become a party. I think something like that might make sense on a parallel basis to municipalities where we would -- they would simply, you know, could automatically become a party. But I think we would need statutory authority to just sort of automate that process. I mean, we're not -- we're -- we are receptive and welcome the idea of trying to be as inclusive and communicative as possible. I'm just, you know, not sure what the -- is being asked for in this case.

REP. SCHMIDT: Well, your assurances --

VICE-CHAIRMAN PILOTTE: Follow-up.

REP. SCHMIDT: And thank you, Mr. Chairman. Your

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assurances and all of this that's going on the record is very helpful because with regard to your reference to this water situation, you said whoops, these people should have been involved. They weren't. We're not going to continue and say tough luck, you should have known about this. You started all over again and got them involved. And so I think it's important for me to hear that every reasonable effort will be made to communicate and to make sure that a municipality is informed to the degree that it wouldn't -- because the notoriety of the particular issue, know about in their own town could miss it.

MR. BELOW: One of the things we have been trying to do within our resources is Safety Division has been very actively, in part, in response to the ice storm, working with both utilities and municipalities and the state emergency people to develop a much -- a better GIS system and a uniform system to have information about all these poles, all these attachments, and I think there is work that needs to be done there so that both the municipalities, the state emergency people, state highway people, and the PUC and all of the utilities know exactly who's on what poles and what attachments so you know who to contact in an emergency when a pole is down. Some of that has historically been hit or miss. There has not been uniform licensing or uniform attachment databases. We have been working to make progress in those areas, both with the telecom and the electric utilities, there's a lot of work to still be done. But it's --

REP. SCHMIDT: Thank you. That's very helpful.

VICE-CHAIRMAN PILOTTE: Thank you. Representative Patten.

REP. PATTEN: Yes. Good afternoon. Good to see you. I'll still call you a Senator no matter what, but you're on the PUC. In 374:34-a in Roman numeral II it says whenever a pole owner is unable to reach an agreement with a party seeking pole attachments, blah, blah, blah, what happens. Now I have heard a couple of times this morning that you are the adjudicator, the arbitrator, if there is a dispute. When I look at the purpose and

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applicability in 301.01 and 301.02, I don't see that these rules only kick in if there is a dispute. How -- how do you -- it seems like you're just it's -- this is just saying, okay, we're going to ensure the rates, the charges, terms and conditions for pole attachments are just, reasonable, and in the public interest. There's nothing I can read of this that says only in a dispute. Can you tell me how you got to here?

MR. BELOW: Yes. And I think it's important to backup to the PUC's general statutory authority. And this is cited as a basis for these rules as well. Under RSA 374:3, it's entitled Extent of Power and it says the Public Utilities Commission shall have the general supervision of all public utilities and the plants owned, operated, or controlled by the same. So plants -- plants is all the physical assets and poles are part of the plants of the public utilities -- so far as necessary to carry into effect the provisions of this title.

Now, the title is most of this book here. So you have to start looking at the title. The title has a whole bunch of things in it, including a requirement that every public utility provide such service and facilities as shall be reasonably safe and adequate in all -- and in all other respects just and reasonable. So -- and then we go on and there's other authorities, responsibilities, the Commission has the power, it shall be its duty to keep informed as to the manner in which the lines, property control are operated by the utilities, are managed and operated not only with respect to safety, adequacy, and accommodation offered by their service, but also with respect to their compliance with all provisions of laws and so forth.

So, you know, when we kind of go into the whole statutory scheme, traditionally the PUC has general supervisory authority over all of the plant of the public utilities that we regulate. And, you know, that's a specific limited realm. The rules apply to poles are defined as those that are owned, in whole or in part, by a public utility. This is 1302.08. So we're not attempting to regulate any plant or property that's not owned by public utilities that are under our general supervision with regard to both safety

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and adequacy, as well as a bunch of the other policy things that are stated in statute about wanting to encourage and promote competition in telecommunications and Internet access and all that stuff. So -- and there's also a law that talks about not having double poles, redundant lines as part of our title. So we have this general picture that we have a public policy that says we'll have one set of poles. We don't have redundant lines. It's a natural monopoly. Somebody's got to regulate that, including with regard to the safety of it. We have general authority over all of the plants, supervisory authority over all of the plant. As matter of fact, we have a duty to keep informed about and ensure that they're providing safe service with the facilities owned by them. That's the big picture.

The specific statute was written in a way to satisfy the federal requirements so that -- and when you look at the specific statute that you're just citing, about this ability when they're unable to reach agreement for the types of attachments that are regulated under that, that's where something -- that was drafted to respond to specific federal requirement that we have this authority to settle disputes under the federal law.

REP. PATTEN: Okay.

MR. BELOW: But what's important is the last sentence of that section says, this authority shall include, but not be limited to the state regulatory authority referenced in 47 U.S.C. Section 224 (c). So one of the principle statutory construction as you know is that words are presumed to have a purpose and, you know, there's this extra language that's saying it's not limited to just what the federal law gives us authority for. What's the purpose of that? I interpret that to mean we're taking back something that we had before there was a federal law, which is the ability to regulate these pole attachments. And we got a clarification in statute that conforms with the federal requirements as to how we take that power back and now we're back to under our general supervisor authority and ability to make rules to exercise that authority adopting this rule.

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REP. PATTEN: Okay. And I can follow you when I see where you are interpreting that you have that. Now, with the -- if I may, Mr. Chairman?

VICE-CHAIRMAN PILOTTE: Please.

REP. PATTEN: With the municipal requirement and ability of what we need to do to license, and this is not private property, 'cause that's at this moment in time. Under the public right of way and the municipal authority to license, is there anywhere in your rules that you need to be able to see or is there statutory that you can look at the municipal license prior to having any of these things go up on the poles?

MR. BELOW: Hum -- well, I think there's two places where we've tried to address that. One is right in the purpose statement, the 1301.01, where we said nothing shall be construed to supersede, overrule, replace any other law, rule, or regulation. And we've specifically included to try to satisfy the concerns of the municipalities, including municipal and state authority over public highways pursuant to 231:159 and what follows. That's one place where we have tried to address it. The other place is specifically in 1303.01, the Access Standards and this is one of the specific issues raised by the Municipal Association is seeking to say that, you know, we haven't put in here a basis for denial as to with regard to both whether they really have the authority under the underlying easement of private property or whether there's the authority with regard to licensing if they're licensed from the municipality the requirements aren't satisfied or something like that. We added a sentence there that is important that says 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.

I guess it's not clear to us -- I'm just saying it's not clear to us because it's not an issue that we have had to decide and it's not an issue where we find statutory authority for us to sort of weigh in on. So in sense, we do not have an opinion as to whether every wire that's strung on a utility pole, that's attached

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to a utility pole in a municipal right-of-way has to be licensed by the municipality. We don't know and we're not the court of competent jurisdiction to decide that question. And I think, I don't -- my impression is that's a disputed issue. But I just -- if you would like us to decide that issue, I think we need expressed statutory authority or direction to say that we don't allow a pole attachment unless they have already been licensed by the town. But I just -- I don't know whether that's the case or not. But we're not trying to do anything in the rules, if that's the case, if that's the law, we are not trying in any way to supersede or preclude that.

REP. PATTEN: Okay. So you're going and if I may, Mr. Chairman, going to 231:159 which is the -- up through probably 60 or 80 or whatever because I haven't read the whole thing, that that is the municipal authority to be able to license.

MR. BELOW: Yes.

REP. PATTEN: And there is, perhaps, a difference of opinion of whether the statute is not absolutely clear. Because you're telling me, I think I just heard you say that every pole and wire that is in the public right-of-way in the municipality, if they're owned either by the municipality or the state right-of-way needs to have a license. You do not know that by all of your experience.

MR. BELOW: No, I believe that generally to be the case. I mean --

MS. FABRIZIO: It's the law. But we felt that it wasn't appropriate to codify those laws in our rules, because it seemed to go beyond the scope of the statute that gave us the authority to make this rulemaking.

REP. PATTEN: I can see why you stopped. Whether I agree with that or not doesn't matter. I can see why you stopped.

MR. BELOW: I agree that -- I think the law is pretty clear

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about all the poles being licensed. What I'm saying is I think other parties sitting behind us would argue about whether a competitive telecom service provider in all instances has to get a separate license for their wires on the pole. I just don't know about that.

REP. PATTEN: You don't know. Okay. All right. Thank you.

VICE-CHAIRMAN PILOTTE: Representative Schmidt.

REP. SCHMIDT: Thank you, Mr. Chairman. Again, just because you just referenced it a moment ago, 1301.01, and Mr. Katz in his testimony indicated he would like to see the last section struck beginning with the words including municipal and so forth till the end. And so he says it's unnecessary. It's already implicit in the prior language. Seems to me like this is just saying in case you didn't notice we are talking about this, too.

REP. SAD: Hm-hum.

REP. SCHMIDT: You don't see any harm in -- you don't see any advantage in striking that language, I take it?

MR. BELOW: Not particularly. I mean, it does call people's attention to that particular statute which I don't think there's any harm in because there's significant issues there.

VICE-CHAIRMAN PILOTTE: Miss Fabrizio, you were going through the list of all the new items. We are up to item three, I believe.

MS. FABRIZIO: I think those were the key issues that were raised for the first time by the Local Government Center. And then as you already know, the changes that Mr. Katz has proposed were new as well, although some of these issues had been discussed generally through technical sessions before the Commission, the specific language is new today.

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VICE-CHAIRMAN PILOTTE: Okay. And I do thank you for addressing those and now addressing all the others which had been in your testimony had come up earlier. You have taken them in consideration and opted to leave the rules as they are. Is that what I'm hearing?

MR. BELOW: Generally, yes. I guess we could start by saying that some of segTEL's suggestions we're not adverse to and actually a couple of them, I think, are probably improvements. And I guess we would be, if it would help facilitate the process, we'd consider making, if it's possible, to make an additional conditional approval request to accept some of those language changes, but not others.

VICE-CHAIRMAN PILOTTE: We would need specific language.

MR. BELOW: Okay.

VICE-CHAIRMAN PILOTTE: And, obviously, Mr. Katz has suggested some so if you wish to endorse some, then we can decide whether or not they would help.

MR. BELOW: Let's go right through those real quickly and get those. I think not the first one. Not -- I don't think we want to change 1301.01.

VICE-CHAIRMAN PILOTTE: Not even adding competitively neutral?

MS. FABRIZIO: Oh, no. He was on the first page.

MR. BELOW: The first page, 1301.01.

REP. SCHMIDT: That's where he wanted to delete that last couple --

VICE-CHAIRMAN PILOTTE: I'm terribly sorry.

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MR. BELOW: The 1303.01 on Access Standards, yes. We are okay with adding competitively neutral there. That's consistent with federal law. It's not -- it's not critical, but.

Not  
added to  
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version )

VICE-CHAIRMAN PILOTTE: So in 1303.01 adding competitively neutral would not be a problem for you.

MR. BELOW: Correct.

VICE-CHAIRMAN PILOTTE: Okay.

REP. PATTEN: I have a question on that.

VICE-CHAIRMAN PILOTTE: Yes.

REP. PATTEN: And I'm -- I'm a little uncomfortable with the process. But because in the changing of these for competitively neutral and go through the nine, say we go through the nine and that is good. My feeling is, is that -- and in last month when we were here we had about three issues that there was one person that said was substantially different and when we went and talked to the Department, Health and Human Services, you looked and it was just a changing and we decided that it was not substantial. There's part of these that look like they should be, you know, substantial and especially number five that I'm not, you know, too wild about. That perhaps instead of doing a conditional approval that I would feel more comfortable so that everybody would be able to weigh in on the changes as a preliminary objection. I'm still not absolutely positive that we have addressed the issue of all of these rules that we have here in 1300 going and it's explicit that it's only under disputed so that you're the arbiter of this. And I am -- I'm concerned about it. I don't know if anyone else is. But I would be more comfortable instead of going through the nine to be able to do a preliminary objection so that they would be able to have -- people would be able to weigh in on the nine and also have in writing from the PUC why they feel that it's more than just being an arbiter. Because this looks like it ends up addressing all of those poles and attachments and everything that -- not just in the disputed

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area. That's my thoughts. I don't know what anybody else thinks.

VICE-CHAIRMAN PILOTTE: Senator Carson.

SEN. CARSON: Thank you, Mr. Chairman. I'm going to have to agree with Representative Patten. I'm very uncomfortable in reading through the packet, prior testimony, testimony that we received, that there are some considerable objections, especially concerning whether or not the PUC is exceeding the authority granted to it. I think these are things that we need to work through. And if I heard you correctly today, Commissioner Below, you had even said that we might need some statutory guidance on some of these things, and I think we need to flesh out what we need to do statutorily before we go ahead and put something into rules, and then and go in and put a bill or ask for a new law that's going to be in conflict. I think this just needs some more work. And I would support Representative Patten's motion for a preliminary objection.

REP. SCHMIDT: Well --

VICE-CHAIRMAN PILOTTE: What I've heard Representative Patten sort of like conceptually saying an objection based on a lot of these 12 items. However, we have had other items that have been questioned by other folks, including the question of having to absorb 60 percent of the cost of relocating fees for lines by the pole owner. If it's a phone line because of a sagging issue, that also is an issue that came up. A question of the -- whether or not the Commission has authority in the area of the boxing issues and others, and whether or not those things are there. So it would be on several bases, not only on the basis of one particular person to come up.

REP. PATTEN: And I would -- I know that there has been -- and I don't know whether at our last meeting we had a -- one from Donahue, Tucker, and --

REP. SCHMIDT: Ciandella.

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REP. PATTEN: However you pronounce that, about some issues and it would not just be based on segTEL but on what we're doing. Because I think there needs to be time for you to answer those objections and we had -- we had FairPoint here which is what we got at the last meeting. So perhaps you can, you know, be able to have time to be able to do them. I would assume, unless you're going to -- that there would not be incredible amount of harm to be -- that would be done if we did not approve these today or give you a conditional approval.

MR. BELOW: Well --

REP. PATTEN: In your eyes probably harm but in our eyes probably not.

MS. FABRIZIO: I think one of the things Committee would have to do is push back the deadline again to meet the requirements.

VICE-CHAIRMAN PILOTTE: If, however, we enter a preliminary objection, at that point you have 180 days to respond to that objection, I believe. Attorney Eaton.

ATTORNEY EATON: They have 45 days and, of course, that deadline could be waived, also.

VICE-CHAIRMAN PILOTTE: Within or no later than 45 days. You decide whether or not that's an important distinction.

MR. BELOW: I think we -- if I may? We'd like to move this along because I think our understanding of the legislative intent is to get this framework up and running because this is important to address the expansion of Broadband deployment in New Hampshire, quite honestly, is very much a function of getting these rules in place because there are a whole bunch of issues around the ability of competitive people to get on the poles and to move that process along, as well as to resolve some of these safety issues. I -- so I would urge you if you want to do a preliminary objection to try to -- if you sweep in all the

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comments, most of the comments we think are ones that we have addressed. We thought through. We can certainly write it all up for you again. But, I mean, there is always sort of a resource question. It's going to take away from other things we need to be doing. But that's okay. I guess the concern is that there are -- there are a bunch of these issues that are like, for instance, on the boxing, or the cost allocations, that we think are clearly within our statutory authority. They are basically policy judgment calls. There's nothing new in the issues that have been raised. And so I guess we are having a hard time trying to understand what the basis for an objection is.

VICE-CHAIRMAN PILOTTE: That statement would be an excellent statement to put in a response to a preliminary objection.

MR. BELOW: Okay.

VICE-CHAIRMAN PILOTTE: Okay. Are there other issues we need to -- okay. Other statements you wish to -- need to be made today?

MR. BELOW: Well, I just want to go ahead and give you one issue which is sort of fundamental. The Local Government Center has objected to the definition of attaching entities which references governmental entities. That is actually pretty basically the identical language out of the federal definition of attaching entities. That's part of the federal scheme. It's reflected in this scheme. I think they have asked to be expressly excluded with regard to their attachments. We think there's an important safety issue, public safety issue, and I know they're very concerned about public safety, too, which is that somebody has to regulate the safety and the arrangement of attachments to poles. And what they're, I think, proposing is that with regard to their attachments that are not clearly telecom, they make those judgments. So you would, in effect, have 234 different sets of standards for when a municipality attaches when it's not telecom versus one uniform statewide standard. And I think under our authority to regulate the plant -- we've got a general authority over the plant of

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utilities that we regulate. It is both logical and inherent in the statutory authority that we be able to set safety standards for how attachments are done to the plant of utilities that we regulate.

VICE-CHAIRMAN PILOTTE: Senator Carson.

SEN. CARSON: Thank you, Mr. Chairman. That's something that you've said more than once today about -- about the plant. But a lot of these poles are owned by private entities. So are you saying that, say, FairPoint Communications that owns a pole is the same as their facility plant. I mean, for me that's confusing. Because I'm looking at these things, you're talking about a plant, a physical plant where their communications are out of, all their systems, and/or are you talking about the wires is part of the plant? And that might be, again, it's confusing because you're using one term and we're talking about poles here. And you're claiming now that you have complete jurisdiction over poles but what about those owned by private industries?

MR. BELOW: Well, that's exactly what our statutory authority is. We're carrying out an authority under the Constitution that belongs to the legislature. We, like municipalities, only have those powers that are given to us by the legislature. Our -- the authority to regulate monopolies in this state is inherent to the legislature. The legislature created the PUC to carry that out. The private property that you're referencing is that monopoly property, the poles and the wires of the telecommunication company, the incumbent one, and the electric utility.

The term plant is, I think, very widely accepted. I don't think there's any doubt under the law that the plant of the utility includes the poles and wires. If they're owned by the utilities they're subject to our regulation. I mean, the plant, the term plant is just means -- it doesn't mean a power plant. It means -- I mean, that's included, the term plant under the law here refers to really all the physical assets of the utility that are used related to their -- well, it's really all of it, of the entity that we regulate.

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VICE-CHAIRMAN PILOTTE: Follow-up?

SEN. CARSON: Thank you, Mr. Chairman. I don't mean to be argumentative, but I want to get a good handle on this. If --

MR. BELOW: Sure.

SEN. CARSON: If a general accepted definition of a plant includes the poles, then why did we need to pass a statute giving you authority over the poles?

MR. BELOW: Because the federal law took that authority away from us. Before the Telecommunication Act existed I think there was no doubt that -- that that authority rested in the state to regulate attachments to the plant --

SEN. CARSON: Hm-hum.

MR. BELOW: -- of the utilities that we regulate, particularly 'cause we have a charge to be concerned with the safety of all those facilities which includes the poles and wires running down the street. The Telecommunication Act said it's -- this involves interstate commerce. Telecom is transitioning from being a historic monopoly to being something that is more subject to competition. So as a matter of national policy, we're going to assert federal authority over attachments to poles that's been part of state jurisdiction in order to promote access for telecom competitive providers and cable companies that provide another resource in interstate commerce that's of national interest and we are going to set parameters so the monopoly owners of those poles can't preclude other competitors from getting on those poles if -- you know, except for, you know, certain reasons as you've heard. They also said, but if states already are doing this or do this, consistent with the federal law, and there are some parameters and that's our statutes written to conform with the federal requirements of where we can take that authority back, then the states can continue to exercise or take back that authority that we used to have.

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SEN. CARSON: Okay. Thank you.

VICE-CHAIRMAN PILOTTE: Representative Schmidt, you had a follow-up?

REP. SCHMIDT: I think that statement is very helpful. I'm not violently opposed to a preliminary objection, because I think there are some issues that have been raised that could benefit from, you know, 45 more days of time to incorporate the suggestions that you're not opposed to that segTEL -- that Mr. Katz put forward and some further clarification. But to the degree that we could come to an agreement on the language to incorporate what you yourself have seemingly agreed to that some of their suggestions could be put right in there right today in our deliberations. That some of the other objections that have been raised are ones that you have addressed over and over again in the public hearings, I think your clarification with regard to municipality's position is very insightful to me. That you're not trying to insert yourself into their realm. And you have specifically in your language exempted them from that particular aspect, not weighed in on it, said that's another bailiwick. We are not trying to exert authority over that. And I think we can go round and round and round and round. And the reality is that if I understood the original testimony correctly that until the rules are adopted we don't have in the State of New Hampshire the authority -- the implemented facility I should say maybe than authority -- the implemented facility of taking back what the federal communications act took away from us. In other words, we are doing what the act still mandates but our law and the federal communications, whatever it's called -- say it again?

MS. FABRIZIO: Telecom Act.

REP. SCHMIDT: The Telecommunications Act of 1995, I guess. That it's important for us to implement our law with these rules to enable us to do everything that the federal communications act mandates but also to do the additional things that it took away from us. And to the degree we don't do that, we

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are no better off than anybody else. And I'd like to see us reassert the right and the power and the authority of State of New Hampshire to do these additional things. So I'm completely open to, even if it doesn't wind up in a unanimous vote of the Committee, to adopting these rules today if we can come to agreement on the few things that you've -- that Mr. Katz has recommended that you're okay with.

VICE-CHAIRMAN PILOTTE: Thank you, Representative Schmidt. Senator Carson.

\*\* SEN. CARSON: I'd just like to make a motion.

VICE-CHAIRMAN PILOTTE: I have received a different card from Ms. Davis. Ms. Davis, your comments at our last meeting were reported to us by Attorney Lucas. If there is -- unless he inaccurately presented your testimony, I think you've had your chance at the apple and I, you know, as I said, I hate to get into round-robin here.

SARAH DAVIS, ESQ., FairPoint Communications: That's why I didn't put my card until now. There were two clarifying statements and one I have a concern because they're changing. If their intent is to change now then I would like to re-comment. If that's not going to happen, I'm fine.

VICE-CHAIRMAN PILOTTE: I believe what is likely to happen is right now -- I'm just trying to arbitrate here. I think what is likely to happen is that a preliminary objection will be made and probably, you know, prevail. And that you will then have an opportunity to have some input into the utilities, the Commission's response to the objection. And unless you have something totally new, I really must say we must move on.

MS. DAVIS: Okay. Sure.

SEN. CARSON: Thank you, Mr. Chairman. Mr. Chairman, I'd like to move preliminary objection.

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REP. PATTEN: I'll second that.

VICE-CHAIRMAN PILOTTE: And seconded by Representative Patten. On the basis of?

SEN. CARSON: Well --

VICE-CHAIRMAN PILOTTE: Public testimony?

SEN. CARSON: Public testimony. Questions that have arisen during our exchange here today concerning whether or not the PUC has the authority that they're trying to -- I got a list here.

REP. PATTEN: Statutory authority.

SEN. CARSON: The statutory authority for what they're actually proposing. There is -- and I think that would probably be good enough because they'll have the copy of our comments and the testimony and they can address that.

VICE-CHAIRMAN PILOTTE: Attorney Eaton.

ATTORNEY EATON: Would include staff comments, the conditional approval request they submitted was trying to address that.

VICE-CHAIRMAN PILOTTE: And staff comments as reflected in the conditional approval request.

ATTORNEY EATON: Now by public testimony you mean testimony not only today but received earlier?

VICE-CHAIRMAN PILOTTE: Absolutely.

ATTORNEY EATON: Okay.

VICE-CHAIRMAN PILOTTE: Absolutely. Otherwise, I would have to indulge Ms. Davis and have her give us all that

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again. Okay. So we do have a motion for preliminary objection based on public testimony which is to include that at our previous meeting and conditional approval request.

REP. PATTEN: And staff comments.

VICE-CHAIRMAN PILOTTE: And staff comments. Okay. Are there questions or comments? Yes, Representative Schmidt.

REP. SCHMIDT: I'm going to vote no against the motion because I think it's -- I want to indicate that this is -- this process has gone on for a long time and it's time to resolve this.

VICE-CHAIRMAN PILOTTE: Thank you. Okay. Any other questions or comments?

REP. SCHMIDT: Request a roll call.

VICE-CHAIRMAN PILOTTE: Okay. A roll call has been requested. Could I have that? Thank you. Representative Schmidt.

REP. SCHMIDT: No.

VICE-CHAIRMAN PILOTTE: Representative Patten.

REP. PATTEN: Yes.

VICE-CHAIRMAN PILOTTE: Representative Gottling is absent. Representative Millham.

REP. MILLHAM: Yes.

VICE-CHAIRMAN PILOTTE: Representative Boyce.

REP. BOYCE: Yes.

VICE-CHAIRMAN PILOTTE: Representative Taylor is absent. Representative Casey is absent. Representative Sad.

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REP. SAD: Yes.

VICE-CHAIRMAN PILOTTE: Representative Kidder.

REP. KIDDER: Yes.

VICE-CHAIRMAN PILOTTE: Senator Carson.

SEN. CARSON: Yes.

VICE-CHAIRMAN PILOTTE: And no other Senators being present.

REP. PATTEN: How about you?

VICE-CHAIRMAN PILOTTE: And the Chair would vote when there is a dispute.

REP. PATTEN: Okay.

VICE-CHAIRMAN PILOTTE: Unless -- unless that is precluded in our rules.

ATTORNEY EATON: No, you can not vote if you don't want to.

VICE-CHAIRMAN PILOTTE: Okay. So the vote will be 6 to 1. Therefore, the motion carries.

\*\*\* {MOTION ADOPTED}

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