



20 Church Street
Hartford, CT 06103
Telephone: 860-525-5065
Fax: 860-527-4198
www.lockelord.com

David W. Bogan
Partner
Direct Telephone: 860-541-7711
Direct Fax: 866-877-2145
david.bogan@lockelord.com

October 13, 2017

Via Electronic and U.S. Mail

David K. Wiesner, Esq.
Staff Attorney/Hearing Examiner
State of New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

Mr. Michael C. Ladam
Director, Regulatory Innovation and Strategy
State of New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

RE: DRM 17-139, Rulemaking – N.H. Code Admin. Rules PUC 1300 Utility Pole
Attachment Rules Readoption and Amendment

Dear Messrs. Wiesner and Ladam:

CTIA¹ was pleased to participate in the New Hampshire Public Utilities Commission's (the "Commission's") October 6, 2017 Technical Session in connection with the above-referenced proceeding. The Commission convened the proceeding to consider revisions to N.H. Code Admin. Rules PUC 1300 *et seq.*, which are due to expire eight years from their effective date, on December 11, 2017.

During the Technical Session, Commission staff indicated that the objective of the proceeding is to revise the rules to reflect changes in the communications marketplace since their enactment, and to provide a foundation for network deployment today and over the next several years. With that goal in mind, CTIA offers the following suggestions:

¹ CTIA—The Wireless Association® ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

1) Definition of “Attaching Entity”

The definition of “Attaching Entity” identifies those persons or entities with a statutory or contractual right to attach facilities of any type to a pole. While the definition does not expressly acknowledge wireless service providers as within its scope, such providers are presumably included within the category of “telecommunications providers,” which is included in the definition. “Telecommunications provider,” however, is not a defined term in Rule 1302 *et seq.* or under federal law. Presumably, the meaning of the term is a “provider” of (the federally defined term) “telecommunications service.” However, the lack of a definition of the term “telecommunications provider,” leaves at least some possibility for dispute over whether wireless service providers are included in the definition of “attaching entity.” Also problematic is the possibility that wireless providers could be excluded from the definition should broadband services be deemed not to be “telecommunications services” in the future.² Accordingly, CTIA asks that the definition of “Attaching Entity” be revised to expressly include “wireless service providers” within its scope.

2) Definition of “Facility”

The current rules define “Facility” as “the lines and cables and accompanying appurtenances attached to a utility pole....” However, for wireless providers, the lines and cables are appurtenances to wireless antennas. In order to disambiguate that a wireless antenna is a “facility” under the Commission’s rules, CTIA recommends that the definition be revised as follows:

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

² The question of whether broadband Internet access service (“BIAS”) is a telecommunications service or an information service is currently pending before the United States Supreme Court on a petition for a writ of *certiorari*. *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), petition for cert. filed, (U.S. Sept. 28, 2017) (No. 17-502). The Federal Communications Commission (“FCC”) also is considering whether to reclassify BIAS as an information service, *Restoring Internet Freedom*, WC Docket No. 17-108 a regulatory classification that the Supreme Court upheld in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005), but which the FCC subsequently changed in *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601, 62 Communications Reg. (P&F) 1, FCC 15-24 (rel. Mar. 12, 2015).

David K. Wiesner, Esq.
Mr. Michael C. Ladam
October 13, 2017
Page 3

3) Make-Ready Timeline

Wireless services are a critical component to ensure the widest possible availability of broadband in New Hampshire, and federal and state policies have emphasized the importance of broadband to America's citizens and economy. As the FCC stated:

Like electricity a century ago, broadband is a foundation for economic growth, job creation, global competitiveness, and a better way of life. It is enabling entire new industries and unlocking vast new possibilities for existing ones. It is changing how we educate children, deliver health care, manage energy, ensure public safety, engage government, and access, organize, and disseminate knowledge.³

Achievement of these goals requires that the Commission implement rules that strike a balance between pole owners (typically the Electric Distribution Companies or Incumbent Local Exchange Companies) and attachers, protect access rights, ensure just and reasonable rates, and establish timelines to promote efficiency in the pole attachment process.

Fortunately, the Commission can benefit from federal efforts preceding the Commission's current exercise. With this in mind, the Commission should adopt pole attachment rules and timelines mirroring the FCC's rules. In devising its rules, the FCC concluded that absent oversight and guidance, pole attachment negotiation processes may be prolonged, unpredictable, result in the imposition of unreasonable costs on attachers, and may create inefficiencies by deterring market entry.⁴ The federal rules have withstood legal challenges,⁵ and have proven to be fair and effective in promoting network deployment.

Federal law requires "rates, terms, and conditions that are just and reasonable,"⁶ and the FCC's rules provide the flexibility required to adjust for the advent of new technologies while ensuring just and reasonable access to utility poles. The FCC's rules provide that a utility must provide nondiscriminatory access to any pole, conduit or right-of-way owned or controlled by it, on just and reasonable rates, terms and conditions, and may only deny access where there is

³ *In re the Implementation of Section 224 of the Act and a National Broadband Plan for Our Future*, WC Docket No. 07-245 and GN Docket No. 09-51, Report and Order and Order on Reconsideration (Apr. 7, 2011), FCC 11-50, ¶19 ("Pole Attachment Order").

⁴ See Pole Attachment Order, at ¶ 6.

⁵ See *City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863 (2013); and *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013).

⁶ 47 U.S.C. §224.

David K. Wiesner, Esq.
Mr. Michael C. Ladam
October 13, 2017
Page 4

insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes.⁷ The rules also establish an access timeline that sets maximum timeframes for application processing and the performance of pre-construction surveys and make-ready work. The FCC's rules provide a four-stage timeline for attachments to utility poles in the communications space, with a maximum of 148 days for all four stages:

- Survey – 45 days;
- Estimate of make-ready work – 14 days;
- Attacher acceptance – 14 days; and
- Completion of make-ready work – 60-75 days.⁸

Notably, the FCC timeline applies to both wireline and wireless attachments and provides up to an additional 30 days for wireless attachments above the communications space (for a total of 178 days).⁹ It also allows for additional time for larger requests (more than 300 poles or 0.5% of the pole owner's total, whichever is less). In those cases, the rules afford additional increments of 15 days for the survey, and 45 days for the make-ready work, for a total of 208 days for attachments in the communications space, and 238 days for wireless attachments above the communications space.¹⁰ Additionally, the rules allow an attacher to use utility-approved contractors to perform make-ready work in cases where the pole owner has not done so within the prescribed period.¹¹

Consistency with the FCC's rules governing pole access will promote efficiency by ensuring that larger, multistate attachers and owners have a consistent, familiar set of rules across multiple states.

⁷ See 47 C.F.R. §1.1403. The FCC also recently entered into an agreement to streamline historic review for small cell collocations. Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order, 29 FCC Rcd 12865, 12867, ¶ 3 (2014); Erratum, 30 FCC Rcd 31 (2015) (Infrastructure Report and Order), aff'd *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015). The FCC has also taken steps to streamline tower siting review. *In re Petition for Declaratory Ruling*, 24 FCC Rcd. 13994 ¶ 45 (rel. Nov. 18, 2009).

⁸ See Pole Attachment Order, at ¶ 8.

⁹ *Id.* at ¶ 33.

¹⁰ [CITE] *Id.* at ¶ 8.

¹¹ [CITE] *Id.* at ¶ 23.

David K. Wiesner, Esq.
Mr. Michael C. Ladam
October 13, 2017
Page 5

4) Pole Top Attachments

During the Technical Session, there was a robust discussion of the attachment of wireless equipment to utility poles. In particular, staff asked wireless representatives about the implication of the current rules on the implementation of “small cell” technology.

The demand for wireless connectivity continues to increase exponentially as new devices, technologies and services are created every day. To meet this demand, wireless networks must be augmented with new technology called “small cells” to increase capacity and improve coverage of current 4G networks, and prepare for the rollout of the next generation of wireless networks, referred to as 5G.

Small cells are wireless antennas that are typically installed on existing structures like utility poles, street lights and traffic signal poles, frequently on the tops of such structures. A policy that fails to expressly authorize the installation of wireless attachments on pole tops poses the very real possibility of creating or exacerbating areas of inadequate wireless coverage and/or capacity, and potentially denying consumers benefits, including public safety enhancements such as Next Generation 911 services, smart traffic lights, smart parking, and more.

Rule 1303.09 sets forth the permissible locations of attachments on a pole. The rule provides that “[n]o attaching entity shall be denied attachment solely because the only space available for attachment on a pole is below the lowest attached facility.” CTIA submits that the rule should be restated to indicate that any attachment complying with the National Electrical Safety Code (“NESC”) is permitted. The restated rule should also indicate that pole-top attachments are permissible as long as such attachments are installed in accordance with the NESC, as adopted in RSA 155-A:1, IV, and the SR-1421 *Blue Book – Manual of Construction Procedures, Telecordia Technologies, Inc.*¹² This change will help ensure that small cells can be deployed where they are needed for the benefit of consumers, while providing a widely-accepted safety standard for installation.

5) Dispute Resolution

Finally, it was noted during the Technical Session that the Commission does not have a mechanism or process within its pole rules to address situations in which there is a failure to negotiate in good faith or to timely complete make-ready work or other necessary steps in a

¹² The rule currently refers to the versions of each cited standard prevailing at the time of the rules’ adoption in 2007. However, because those references are subject to revision, it may be more appropriate to refer to the most “recent edition” of each.

David K. Wiesner, Esq.
Mr. Michael C. Ladam
October 13, 2017
Page 6

reasonable timeframe. CTIA agrees that despite the fact that there appear to have been few such instances, the Commission should adopt a vehicle by which such occurrences can be addressed. In that regard, CTIA suggests that the Commission consider implementing a process such as the “*Rapid Response*” procedures for joint use pole disputes formulated by the Maine Public Utilities Commission in Docket No 2010-00371. The Maine rules, which provide a forum and expedited process for resolution of pole attachment disputes, have been widely endorsed by a variety of market participants.

6) Rate Standard of Review

In lieu of a pole attachment rate or rate methodology, the Commission’s rules indicate factors that the Commission will consider “[i]n determining just and reasonable rates for the attachment of competitive local exchange carriers and cable television service providers to poles ...”¹³ CTIA strongly favors adoption of a rate methodology mirroring the methodology found in the FCC’s rules, but if the Commission maintains its current approach of eschewing a rate methodology in favor of specifying factors to be considered in determining a reasonable rate, it should make two amendments to its current rules. First, the current rules reference the FCC’s rate formulae in effect on July 16, 2007 as a factor for consideration. The FCC has since changed its rate methodology, so, at minimum, the Commission should edit the date contained in the Commission’s rules to reflect the FCC’s current rate formulae.

Second, Rule 1304.06(a) indicates the factors the Commission will consider in determining just and reasonable rates for competitive local exchange carriers’ (“CLEC’s) and cable television service providers’ pole attachments only. Rates for all other attachers are subject to review under the separate standard enunciated in Rule 1304.06(b). The only difference between the two sections is that Rule 1304.06(a) specifically references 47 CFR §1.1409(c) – (f), the FCC’s rate formulae, while there is no such reference in Rule 1304.06(b). The FCC’s rate methodology, however, applies not only to CLECs’ and cable television service providers’ pole attachments, but to wireless carriers’ pole attachments, too. Thus, the Commission’s rules potentially afford disparate treatment to wireless carriers’ pole attachments even while citing a federal rule that afford equal treatment. This inconsistency should be removed by identifying wireless carriers along with CLECs and cable television service providers in Rule 1304.06(a).

¹³ N.H. Code Admin. Rules PUC 1304.06(a).

David K. Wiesner, Esq.
Mr. Michael C. Ladam
October 13, 2017
Page 7

Thank you for your anticipated consideration of these recommendations. Please do not hesitate to contact Kathryn Boucher of this office (860-541-7714) or me should you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read 'D. Bogan', with a long horizontal flourish extending to the right.

David W. Bogan

Enclosures

cc: Service List

David K. Wiesner, Esq.
Mr. Michael C. Ladam
October 13, 2017
Page 8

Certificate of Service

I hereby certify that on this 13th day of October, 2017 a copy of the foregoing Appearance has been either sent by electronic mail or first class mail, postage prepaid, to persons listed on the Service List.

A handwritten signature in black ink, appearing to read "D. Bogan", written over a horizontal line.

David W. Bogan