STATE OF NEW HAMPSHIRE

BEFORE

THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

DRM 08-004

RULEMAKING, PUC 1300 POLE ATTACHMENTS, REGULAR RULES

COMMENTS ON BEHALF OF

BayRing Communications

Otel Telekom

segTEL, Inc.

June 25, 2009

I. INTRODUCTION

At issue in this docket are the rules that will apply for utility pole use in New Hampshire. All parties have worked toward the implementation of rules governing access to poles , ducts, conduits and rights of way. BayRing Communications, Otel Telekom and segTEL, Inc. (hereinafter the NH-Based CLECs) appreciate the effort that has gone into these rules to date, and hope that the final product will result in rules that ensure competitively neutral and nondiscriminatory treatment for CLECs.

Unfortunately, the rules in their current iteration do not accomplish this goal. The rules conflict with the Telecommunications Act of 1996 and with the existing FCC pole attachment regulation regime that the rules seek to replace. Prior to the enactment of RSA 374:34-A, the FCC was the sole regulator of competitive pole attachments in NH under 47 U.S.C. § 224 *et seq.* Although by its very nature RSA 374:34-A enacts reverse-preemption in terms of providing a state-based regulatory venue for issues relating to competitive attachments, the authority allocated to the state by the Telecommunications Act does not allow the state to regulate in such as way as to subvert the express goals of the federal regime. Specifically, the primary goals of the federal regime are to (a) promote facilities based competition in the local exchange and broadband markets and (b) reduce regulatory barriers to entry for CLEC competitors. Thus, the rules promulgated in response to RSA 374:34-A must not conflict with or frustrate the federal regime.

The FCC has been regulating pole attachments for cable television (CATV) providers since 1960, and for CLECs since 1996. The FCC has adopted rules to implement the Pole Attachment Act and the Telecommunications Act of 1996. Many elements of the FCC's rules and determinations have come under scrutiny by federal courts at every level. Access to poles by competitors has been investigated, litigated and analyzed by the FCC in enforcement actions, decisions and appeals. The FCC, working from testimony, factual data, and a voluminous record, has established the precedent for pole attachment regulation within which its rules must be interpreted.

Furthermore, it is the position of the NH-Based CLECs that, to the extent that the Commission's rules deviate from the FCC's existing regime, such deviation must be based on

facts and legal arguments that demonstrate how the competitive environment or other features of New Hampshire specifically warrant such deviation. Despite the number of draft rules and the many opportunities for comment, no fact based inquiry has been performed, and there has been no testimony, cross examination, or briefing of issues. There is no record to support the material and substantial change in policies and deviation from the federal regime that these proposed rules represent.

The NH-Based CLECs call to the Commission's attention this week's ruling from the DC Court of Appeals which rejected rules and policy changes that deviate from precedent without providing a supportable rationale for doing so. See Verizon Telephone Companies v. FCC, CADC 08-1012, January 19, 2009, *slip op*.

The proposed rules deviate from the federal regime in part because the rules are asserting both the new authority the Commission is accorded by RSA 374:34-A, as well as changes the Commission wishes to make to its existing authority to regulate pole attachments made by other attachers. The NH-Based CLECs submit that the Commission has always had regulatory authority over the safety and management of utility poles, ducts, conduits and rights-of-way, extending to pole attachments made by non-utilities other than CATV under its general authority to oversee the outside plant of public utilities. The Commission's current rules for telephone and electric utilities reflect its authority in this regard. Because CATV is not a public utility, the Commission did not have the authority under then-current statutes to regulate attachments made by CATV providers. *See* Appeal of New England Cable Television Ass'n, 126 N.H. 149, 489 A.2d 124, N.H.,1985. In 1996, Congress preempted the Commission's authority to regulate attachments made by CLECs and CATV providers. Now, under RSA 374:34-A the Commission's authority to regulate competitive CLEC and CATV attachments in accordance with the federal mandates is restored.

The NH-Based CLECs believe that the New Hampshire legislature brought the regulation of utility poles back to New Hampshire in order to enhance the deployment of competitive networks, speed the development of broadband opportunities for the most rural areas of the state, and provide a convenient, efficient, and accessible venue for the resolution of disputes between parties that are all essentially neighbors in the New Hampshire market. It was inefficient,

inconvenient and expensive to export disputes between local parties to Washington. It is important to remember, however, that all parties who participated in the drafting and support of the enabling legislation specifically believed that they were asking for the FCC's rules and procedures to be adopted in a local venue, and not for the Commission to develop a new regulatory regime.

The NH-Based CLECs are each local companies, investing in rural areas of the state, employing a local work force, and providing innovative, reliable, and financially-sound options for New Hampshire. The NH-Based CLECs believe that the proposed rules will create a hostile environment for the deployment of competitive communications in the state, and urge the Commission to consider these comments and to amend the proposed rules to ensure that local regulation does not move the state backwards in this critical area.

For the Commission's convenience, the NH Based CLECs incorporate by reference the prior submissions in this rulesmaking proceeding of segTEL, Inc.

II. ARGUMENT

A. The proposed rules deviate from and are in conflict with 47 U.S.C. § 224, et seq., and the body of law governing such attachments.

The Commission was authorized in RSA 374:34-A to promulgate rules that are consistent with the regulation of the FCC and that are with regard to those attachments regulated under 47 U.S.C. § 224. The proposed rules deviate from and are in conflict with the federal regime in the following ways.

1. RSA 374:34-A restores to the Commission the authority to adopt rules for CLEC and CATV attachments.

Before the adoption of interim rules in 2007, access to poles, conduits and rights of way was regulated by the Federal Communications Commission (FCC) under 47 U.S.C. § 224 *et seq*. The statute not only acknowledges FCC regulation, but instructs the Commission to ensure that "the rates, charges, terms, and conditions" for "the types of attachments" regulated under 47 U.S.C. § 224 are "just and reasonable." In addition, the legislative notes require that the rules "be consistent with" the FCC regime for two years. While the sun has nearly set on that

provision, nonetheless the legislature's intent that the Commission adopt the FCC's body of determinations is clear.

When the US Congress wrote the obligation of utilities to provide access to poles, ducts, conduits and rights of way into law, it knew that incumbent telephone companies, incumbent electric companies, municipalities, and owners of private networks *could* all benefit from unfettered access to utility poles. Even so, Congress did not see fit to provide statutory rights of access to poles, conduits, and rights of way to any of those parties. Instead, Congress provided statutory access exclusively to the CLEC and CATV industry. No rights of access are statutorily granted by § 224 for any other party. RSA 374:34-A envisions regulation "with regard to the types of attachments regulated under 47 U.S.C. section 224." As such, the rights and privileges contemplated in this rulemaking should apply exclusively to the rights of CLEC and CATV parties to access *incumbent* poles, conduits, and rights of way.

To the extent that third party attachment by non-status parties is contemplated or permitted the Commission must recognize that rights including but not limited to "just and reasonable rates," "nondiscriminatory access," and "modifications to allow access" are specific rights that Congress has accorded only to CATV and CLECs. Third parties may *at best* be granted rights that are equal to but *no better* than the CATV and CLEC industry. However, there is broad agreement among both the incumbent utilities and the competitive providers that there is no basis in law for granting special rights to non CLEC/CATV entities.

2. The "types of attachments" regulated under 47 U.S.C. § 224 includes utility facilities as well as documentation regarding those facilities.

Consistent with federal statutes and FCC rules, attachments is a term that encompasses all competitive access to facilities of the incumbent utility. "Pole Attachments" also include attachments to ducts, conduits and rights of way. The rules should pertain to all utility facilities, including poles, conduits, rights of way, handholes, manholes, splice points, pedestals, and all similar structures, equipment, appurtenances on or about the network owned or controlled by a utility. Rather than engaging in a tedious process of naming every type of utility facility to which access must be provided the Commission rules should start with the rebuttable

presumption that any utility facility meeting the requirements of section 224 must be open to access.

Access must also include the documentation of those facilities, including, but not limited to, maps, records, plats, plans and other such documentation of the utility's network that would reasonably allow a competitive attacher to investigate and determine reasonable routes for its facilities. The NH-Based CLECs anticipate that many of these plans are non-public information and acknowledge that certain restrictions, such as viewing only at the incumbent's New Hampshire offices, at the Public Utilities Commission office, or redaction of customer names, may be necessary to protect the interests of incumbent utilities and their customers.

3. The Commission is pre-empted from developing rules that are in conflict with the pro-competitive goals of the Telecommunications Act of 1996.

The Telecommunications Act broadly pre-empts the range of this Commission's authority to develop rules. While RSA 374:34-A provides state-level authority to regulate pole attachments, that authority must be utilized in a manner that does not conflict or interfere with the Congressional mandate of the Act. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. 47 U.S.C. § 253 (a). Therefore, the Commission may not create rules that could be construed as prohibiting or having the effect of prohibiting the provision of interstate or intrastate telecommunications services by CLECs.

B. Where the proposed rules deviate from and conflict with the federal regime, the Commission has not based those differences on a record developed through testimony and evidence.

1. The Commission has based differences in the rules on comments from all parties. The FCC rules are based on evidence, testimony and regulatory enforcement of rules in response to bad behavior.

The FCC, as the prior enforcement agent on these issues, developed a voluminous record of rulings and enforcement proceedings and crafted decisions that should be instructive and persuasive in the creation and enforcement of local rules for pole attachment regulation. Many of the cases that were decided by the FCC under 47 U.S.C. § 224 were appealed, and thus there

exists a substantial history of judicial determinations including those by the US Supreme Court on the issue of pole attachments.

In contrast, the Commission's proposed rules represent an effort to address concerns of all of the parties that have commented on the various iterations of proposed rules over the past two years. With the long history of pole regulation at the federal level, the NH-Based CLECs believe that the Commission should grant a substantial amount of deference to this history both to understand the nature and body of enforcement actions, and to avoid time-consuming litigation of issues that have been conclusively decided on the federal level. See, for example, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15449, 16058-107, paras. 1119-240 (1996) (*Local Competition Order*) (Part XI.B. "Access to Rights of Way").

To the extent that the Commission chooses to propose rules that vary from the federal regime, the NH-Based CLECs believe there should be a fact-based inquiry into whether the changes the Commission contemplates will provide equal or improved regulatory treatment of CLEC and CATV attachments.

C. Deviation from and conflict with the federal regime will hamper the development of competitive networks in New Hampshire.

RSA 374:34-A provided the Commission with the authority to return utility pole regulation to New Hampshire. There has been great interest in local regulation of poles, such that throughout the development of these rules, many parties have filed comments.

Incumbent telephone companies have primarily been concerned with maintaining the value of their investment, and have commented primarily about real and perceived costs that are being passed back to them. Incumbent telephone companies, as sole or co-owners of the poles at issue here, are already attached to the poles that fall under these rules.

Incumbent electric companies are concerned that the rules are more expansive than the Telecommunications Act provides for. Available space on and in poles, ducts, conduits and rights of way, as one would expect of bottleneck facilities, is limited. From the electric utility

point of view, the obligation to provide access to CATV and CLECs is enough; adding entitlements to other parties goes too far. Incumbent electric utilities, as sole or co-owners of the poles at issue here, are already attached to the poles that fall under these rules.

Municipalities have attempted to parlay the rules into a right of free access to the poles without regulatory oversight or recourse. Some municipalities are already attached to poles without pole owner consent and despite pole-owner objections.

CATV providers are primarily concerned about rates for attaching to poles. CATV providers are already attached to many of the poles that fall under these rules.

The final group that has commented in this docket are CLECs such as the NH-Based CLECs. The NH-Based CLECs have provided substantial testimony in the FCC's investigation into utility pole practices (Docket #11303) and are willing to submit to the Commission their testimony related to specific impediments to deployment and competitive harm in New Hampshire. CLEC authorization to pole access is statutory in nature, and the successful realization of that access has been repeatedly frustrated by incumbent and third party activity. During the course of this rulemaking the NH-Based CLECs have made more than one hundred applications, pursued agreements, and acquired licenses to install fiber optic cable in the most rural areas of New Hampshire. Yet progress has been hampered by the very policies contemplated by these rules.

When the NH-Based CLECs argue that anti-competitive practices effectively hamper the installation of high-speed networks in the state, they are not making theoretical arguments. Rather, they are describing current conditions that interfere with competition in New Hampshire. The NH-Based CLECs hope that the Commission will address these issues, and send rules to the legislature that embody the intent behind RSA 374:34-A: to bring effective regulation to the area of access to poles, ducts, conduits and rights of way, consistent with the current regulations and determinations of the FCC.

III. DETAILED COMMENTS

Puc 1301.01 Purpose. *The purpose of Puc 1300, pursuant to the mandate of RSA 374:34-a, is to ensure rates, charges, terms and conditions for pole attachments are just, reasonable and in the*

public interest. Nothing in this Rule shall be construed to supersede, overrule, or replace any other law or regulation, including municipal and state authority over public highways pursuant to RSA 231:159 et seq.

The NH-Based CLECs request that the Commission delete the final sentence of Puc 1301.01 (underlined).

47 U.S.C. § 253 (c) addresses State and local government authority, stating, "Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."

The FCC has enumerated the types of activities contemplated by the term "manage the public rights of way" in Classic Telephone, Inc., Petition for Emergency Relief, Sanctions and Investigation, Memorandum Opinion and Order, 12 FCC Rcd 15619, at 15637, n.102 (citing Classic Preemption Order, 11 FCC Rcd at 13103, ¶ 39). Citing to the legislative history, the FCC states that management of the public rights of way includes "coordination of construction schedules, determination of insurance, bonding, and indemnity requirements, establishment and enforcement of building codes and keeping track of the various systems using the rights-of-way to prevent interference between them."

See Puerto Rico Telephone Co., Inc. v. Municipality Of Guayanilla, 450 F.3d 9, C.A.1 (Puerto Rico),2006 (Under the Telecommunications Act, once the party challenging a regulation or ordinance establishes that it violates the provision relating to removal of barriers to entry, the burden is properly on the state or local government seeking the safe harbor to establish that it applies.)

As such, any component of RSA 231:159, *et seq.* that goes beyond management of the public rights-of-way or fair and reasonable compensation for use of the rights of way, is preempted. The municipalities, by requesting the addition of preservation language into Puc 1301.01, are asking the Commission to engage in reverse preemption in matters over which the federal government has occupied the field. Far from a benign change, the inclusion of this

language ensures that litigation will be necessary to resolve issues that the federal government decisively enacted in 1996.

Including preservation language in the Commission's rules will invite local attempts at regulation, creating, in effect, more than one hundred municipal utility commissions, all pre-empted by the Act, and will force CLECs to spend time and money on federal litigation to unnecessarily preserve the preemptive regime already put in place by the United States Congress. One need not look far for evidence that this is not simply hypothetical. See, for example, New Hampshire District Court 07-cv-340-JL, which enjoined a New Hampshire municipality from acting on its stated intention to remove and destroy CLEC equipment after 10 days advance notice, citing to authority the municipality erroneously claimed under RSA 231:177.

Puc 1302.02 Applicability*. Puc 1300 shall apply to*
(a) Public utilities within the meaning of RSA 362, including rural electric cooperatives for which a certificate of deregulation is on file pursuant to RSA 301:57, that own, in whole or in part, any pole used for wire communications or electric distribution.

The NH-Based CLECs request that the Commission replace the term "Public utilities" with "Incumbent utilities" in Puc 1301.02.

These rules extend access beyond that envisioned or contemplated by the Telecommunications Act, and, in the process, create the opportunity for discriminatory treatment of CLECs as opposed to CATV providers and municipalities. Under federal law and FCC rules, those poles owned or controlled by incumbent utilities, because those poles were installed under the grant of monopoly authority , control and a guaranteed rate of return, are to be opened to access by CLECs and CATV providers. Nothing in the federal regime, RSA 374:34-A, nor the proposed rules, extends the obligation for access to poles owned or controlled by CATV providers or municipalities. Yet, because CLECs are public utilities, the proposed rules currently require that poles owned or controlled by CLECs must be open to access.

This raises the very real possibility that a CLEC could create a customer market, develop a business plan to access that market, invest in conduit and right-of-way, and then be forced to provide state-mandated access to an Internet Service Provider that, under the federal regime is accorded no right of access. Alternatively, a CLEC could construct a network over a new pole line to sell lit optical services to two car dealerships and the very same car dealerships could

demand access to the CLEC constructed facilities, circumvent the entire investment, and leave the CLEC with grievous and unrecoverable stranded costs. Nothing in the current proposed rules would prevent either scenario.

The NH-Based CLECs are concerned that these proposed rules impermissibly expand both the definition of those parties obligated to provide access and those parties entitled to access, and that this expansion will have serious unintended consequences.

The FCC explains, "As initially enacted in 1978, Congress in section 224 sought to ensure that utilities' control over poles and rights-of-way did not create a bottleneck that would stifle the growth of cable television systems that use poles and rights-of-way. The 1996 Act amended section 224 in important respects. As amended by the 1996 Act, section 224 defines a utility as one "who is a local exchange carrier or an electric, gas, water, steam, or other public utility and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communications." 47 U.S.C. § § 224(a). The 1996 Act, however, specifically *excluded* incumbent LECs from the definition of telecommunications carriers with rights as pole attachers. See 47 U.S.C. § § 224(a)(5). Because an incumbent LEC is a utility and not a telecommunications carrier for purposes of section 224, an incumbent LEC must grant other telecommunications carriers and cable operators access to its poles, ducts, conduits, and rights-of-way, even though an incumbent LEC has no rights under section 224 with respect to those of other utilities. This is consistent with Congress's intent that section 224 promote competition by ensuring the availability of access to new telecommunications entrants. See Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference, 104th Cong., 2d Sess. 98-100, 113." Qwest Forbearance Petition, 20 F.C.C.R. 19415, WC Docket No. 04-223, 2005.

Puc 1302.01 "Attaching entity" *means a natural person or an entity with a statutory or contract right to attach a facility of any type to a pole, including but not limited to telecommunications providers, cable television service providers, incumbent local exchange carriers, competitive local exchange carriers, electric utilities, and governmental entities.* [Rule number corrected.]

The NH-Based CLECs request either: a) the definition of "attaching entity" be limited to those with a statutory right to attach under 47 U.S.C. § 224, i.e., CLECs and CATV providers; or b) two definitions be created, acknowledging that those with a statutory right to attach have been

granted specific rights that are not accorded to other attachers who may have a contractual but not a statutory right to attach.

RSA 374:34-A limits the Commission's jurisdiction regarding pole attachments to "the types of attachments" contemplated by 47 U.S.C. § 224. Both the federal and state regimes designate CLEC and CATV as having statutory rights, but do not extend those rights to other parties. The only types of attachments contemplated by 47 U.S.C. § 224 are those attachments made by CLECs and CATV providers. The definition of attaching entity is overly broad both in the various entities it actually lists, and also in the implication that the list is "not limited to" only those entities listed.

The proposed rules thus place all parties that seek to attach on parity with all other parties. Space on poles and in ducts and conduits is valuable and limited. The US Congress rejected that approach when it chose to enfranchise some, but not all, types of prospective attachers. It is already difficult enough for CATV and CLEC attachers to get access without impermissibly asking them to compete with unentitled entities. Under the proposed rules, for example, an ILEC could achieve an anti-competitive goal of exclusion by contractually affording access to its captive affiliated Internet provider, and thereby ensure that no space remained for CLEC attachments.

The FCC has recognized that certain municipal attachments for one-way fire alarm and emergency signaling have predated the enactment of the 1996 Act. By way of example, many municipalities in New Hampshire have legacy attachments to utility poles for fire alarms, traffic signals, or street lighting purposes. Such rights date back to the days before residential telephones were nearly ubiquitous and when the public safety was best served by physical pull-boxes for emergency signaling. Provided that pole owners enforce safety obligations upon all parties the NH-Based CLECs have no opposition to one-way signaling attachments that pre-date the Act being grandfathered *provided that* this does not provide any future rights of municipalities to parlay their placement by change of use into a free and preferential competitive advantage.

A municipality's historic presence on utility poles only allows their continued presence at the discretion of the pole owners; it does not extend to the right to make changes in the type,

weight and placement of facilities, nor to expanding the use without limitation or conditions. Legislation dating back as early as 1881 exempts utility facilities from adverse possession and prescriptive easement claims. Specifically, RSA 231:174 states as follows**: "No enjoyment by a person, copartnership, or corporation for any length of time of the privilege of having or maintaining wires and their supports and appurtenances in, upon, over, or attached to any building or land of other persons, shall create an easement or raise any presumption of a grant thereof**." The plain language interpretation of 231:174 is that that the presence of signal wires on utility poles does not in any way create an ongoing entitlement to a municipal entity.

Enforcing attachment policies that recognize different classes of attachers does not constrain a municipality's ability to own and operate networks for its own use or for public use. A municipality or any other party can readily apply to the Commission for authority to be a utility. There are many regulated municipal water companies, as well as a municipal electric company in New Hampshire. To the extent that a municipality would like to convey communications for the general public there is a defined path open to them and they should access it rather than circumvent it.

Finally, non-utility status does not exempt non-utility parties from compliance with applicable safety codes and obligations. Municipalities should also be required to comply with applicable safety codes for their signaling attachments because any exception to safety code compliance endangers the safety and lives of utility workers.

As noted above, by extending access beyond that envisioned or contemplated by the Telecommunications Act, the proposed rules create the opportunity for discriminatory treatment of CLECs. The NH-Based CLECs are concerned that this expansion will have serious unintended consequences, including but not limited to the necessity for CLECs to litigate rights and remedies that have long been established under the federal regime.

Puc 1302.07 "Make-ready work" *means the movement of cables and other facilities or the replacement of an existing pole with a taller pole to allow for additional attachments.*

The NH-Based CLECs request that the Commission adopt a broader, more industry-standard definition of make-ready, such as: "Make-Ready Work" refers to all work required to prepare poles, conduit systems, rights-of-way and related facilities for attachments. "Make-

Ready Work" includes, but is not limited to, clearing obstructions (*e.g.*, by "rodding" ducts to ensure clear passage), the rearrangement, transfer, replacement, and removal of existing facilities on, within or in a pole, conduit system or right-of-way where the facility in question is currently in compliance with applicable code and such work is required solely to accommodate the proposed attachments and not to meet the pole owner or any other party's business needs or convenience. "Make-Ready Work" may require excavation of existing facilities and may include the repair or modification of facilities (including, but not limited to, conduits, ducts, handholes and manholes) or the performance of other work required to make a pole, conduit system or right-of-way usable for the initial placement of the proposed attachments.

Further, the NH-Based CLECs request that additional rules be included that delineate the responsibilities of all parties (pole owners, existing attachers and prospective attachers) with respect to make-ready work.

The proposed definition is far too restrictive, and does not contemplate the work necessary to bring poles into compliance with applicable codes. Keeping the proposed definition would inhibit deployment as it would allow pole owners to assess the total value of utility plant as a make-ready cost even if the properly maintained utility plant would accommodate an attacher with no work. There would be no incentive for incumbents to properly place and maintain facilities, and would allow incumbents to foreclose competition by, for instance, placing the shortest possible poles on new routes or placing lengths of unused cable in every open conduit leaving a central office.

Make ready work is not about making room for attachments. Make-ready work is about safety. Surveys are done whenever a competitive attacher seeks to make a new attachment. As a result of this survey, make-ready work may be required. Make ready work falls into four categories, only one of which is paid for by the prospective attacher.

In the first instance, the survey may reveal facilities that are out of code, severely degraded, or otherwise unusable. A utility does not always know that its plant must be replaced until they have a reason to look at it. Make ready work to make a facility safe and compliant would be required regardless of the prospective attachment. The work necessary to make a

facility safe and code-compliant that is not a direct result of the prospective attachment is performed at the incumbent utility's sole cost. The proposed rules do not reflect this.

The second reason for make-ready is when a pole facility is safe and compliant but the prospective attachment would create a non-compliant situation because the existing attachers have made their attachments either in an inefficient manner or at inappropriate locations. In this case the make-ready must be performed in a prompt and efficient manner to accommodate a prospective attacher but the prospective attacher does not typically pay to remedy the prior actions of others. The proposed rules do not address this situation.

The third reason for make ready is when a pole facility is safe and compliant and all attachments are proper but the prospective attachment would create a noncompliant situation absent necessary alterations. In this case the prospective attacher is the cost causer and the incumbent utilities are making modifications exclusively for the purpose of accommodating the new attachment. Here, the prospective attacher would be responsible for the payment of actual and reasonable costs of the incumbent's modifications that are made. This appears to be what is contemplated by the proposed rules, but the rules do not adequately proscribe the attacher's responsibilities.

Finally, make-ready work may be undertaken to remedy compliant but undesireable situations such as double poles or boxed poles. The make-ready process is one that depends upon communication, cooperation and responsiveness between all attachers. The Commission's rules should emphasize that not only should make-ready be efficiently performed, but notifications for make-ready (including, for instance, pole transfers) be efficiently communicated. A complaint and penalty process should exist for attachers failing to timely respond to make ready requests.

Puc 1303.01 Access Standard. *The owner or owners of a pole shall provide attaching entities access to such pole on terms that are just, reasonable and nondiscriminatory. Notwithstanding this obligation, the owner or owners of a pole may deny a request for attachment to such pole when there is insufficient capacity on the pole or for reasons of safety, reliability and generally applicable engineering purposes.*

The NH-Based CLECs request that the first sentence of Puc 1303.01 be revised to read: "The owner or owners of a pole shall provide attaching entities access to such pole on terms that

are just, reasonable, competitively neutral, nondiscriminatory and that do not conflict with federal law."

Puc 1303.02 Owner Obligation to Negotiate. *The owner or owners of a pole shall, upon the request of a person entitled to access under these rules seeking a pole attachment, negotiate in good faith with respect to the terms and [conditions] for such attachment.* [typographical error corrected]

The NH-Based CLECs request that the Puc 1303.02 be appended with the following sentence: "The owner of a pole shall be responsible for ensuring that the rates, charges, terms, conditions for entities with a statutory entitlement to attach are in compliance with the Telecommunications Act of 1996."

Puc 1303.04 Request for Access and Response Requirements*. Requests made under these rules and pursuant to a pole attachment agreement for access to a utility's poles shall be in writing. Absent extraordinary circumstances, a survey for an application not exceeding 200 poles shall be completed and the results communicated to the applicant seeking to attach within 45 days of receiving a completed application and survey fee. If permission for access is not granted within 45 calendar days of receiving a complete request for access, the owner must confirm the denial in writing by the 45th day.*

The NH-Based CLECs request rewording this rule: "Requests made under these rules and pursuant to a pole attachment agreement for access to a utility's poles shall be in writing. . Time is of the essence for licenses to be issued in response to requests. In order to meet the required time frames, licenses may be issued prior to the completion of surveys. Surveys shall be scheduled on a first come, first-served basis. Any request not denied in accordance with these rules within 45 days shall be deemed granted."

The proposed rule calls for responses to applications "within 45 days." While the NH-Based CLECs support an outside limit on the number of days it might take a utility to respond to a complicated request, in our collective experience, incumbent utilities routinely take 45 days to respond to every application, irrespective of the number and kind of attachments being requested. In the interest of promoting competitive networks, the NH-Based CLECs urge the Commission to change the language of this rule to indicate that time is of the essence. The NH-Based CLECs also request that the Commission provide for the FCC requirement that applications be responded to piecemeal, allowing for individual poles included in a request to be approved, even as other poles in the request may be reasonably delayed.

The proposed rule contemplates what might happen if a request goes without a response for more than 45 days, but is not in compliance with FCC rules. The FCC has consistently ruled that any application not responded to within 45 days is deemed granted. See, for example, Cavalier Telephone, LLC v. Virginia Electric and Power Company, 15 F.C.C.R. 9563, where the FCC Enforcement Bureau notes "We have interpreted the Commission's rules, 47 C.F.R. § 1.1403 (b), to mean that a pole owner 'must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted.' We conclude that Respondent is required to act on each permit application submitted by Complainant within 45 days of receiving the request. To the extent that a permit application includes a large number of poles, Respondent is required to approve access as the poles are approved, so that Complainant is not required to wait until all the poles included in a particular permit are approved prior to being granted any access at all. Respondent shall immediately grant access to all poles to which attachment can be made permanently or temporarily, without causing a safety hazard, for which permit applications have been filed with Respondent for longer than 45 days."

As to the addition of the underlined language in the NH-Based CLECs' proposal, the rules should provide for a standard, neutral and nondiscriminatory application process for all prospective attachers granted rights by 47 U.S.C. § 224, establishing which utility will accept initial applications and setting a timeframe for the application to be distributed to the other joint owners. Prospective attachers that make a proper application pursuant to the process established by the rules should have the minimum survey and make-ready timeframes applied to its application.

Finally, this rule contemplated prepayment of survey fees and make-ready work charges in direct contravention to the federal regime. The NH-Based CLECs address prepayment below.

Puc 1303.06 Notification.
(a) A pole owner shall provide a person with facilities attached to a pole no less than 60 days' written notice prior to:
(1) Removing any of that person's facilities,
(2) Increasing any annual or recurring fees or rates applicable to the pole attachment, or
(3) Modifying the facilities other than as part of routine maintenance or response to an emergency.
(b) Attaching entities shall provide written notice to pole owner or owners no less than 60 days prior to:

(1) Modifying an existing attachment other than as part of routine maintenance or response to an emergency;
(2) Increasing the pole loading of an existing attachment; or
(3) Changing the purpose for which an existing attachment is used. Separate and additional attachments are subject to pole attachment application and licensing processes.

The NH-Based CLECs request that part (b) of Puc 1303.06 be revised to reflect: a) that nothing in these rules shall prohibit a CLEC or CATV from exercising its license to attach to the pole owners' facilities and to maintain the attacher's own facilities; b) that, pursuant to FCC rulings, overlashing or increasing the load of an existing attachment is relevant only to make-ready work and not to attachment fees; c) notification of the change in purpose of an attachment is only required where such change results in a change in the applicable rates for those attachments; and d) revise the final sentence of part (3) to read "separate and additional attachments not specifically covered by a current license require a new pole attachment application and license."

The proposed rule would require a CLEC or CATV provider to provide sixty days notice prior to installing a customer drop, as well as requiring attachers to both a) notify the ILEC that it has acquired a new customer, and b) delay providing service to that customer for two months. The notification requirements in part (b)(1) are not reasonable.

The FCC has determined that changing the load on a pole may require an assessment of the need for make-ready work, but does not incur additional attachment fees. The FCC has said, "We do not believe that an attachment 'burden on the pole' relates to anything other than an assessment of need for make-ready changes to the pole structure, including pole change-out, to meet the strength requirements of the NESC. Make-ready costs are non-recurring costs for which the utility is directly compensated and as such are excluded from expenses used in the rate calculation. We agree with USTA that the statutory language for allocating costs in Section 224 refers to space, not load capacity. See In re Amendment of Rules and Policies Governing Pole Attachments, 15 F.C.C.R. 6453, CS Docket No. 97-98, April 03, 2000.

Notification of a change in the purpose of attachments (for instance, from transmission of video to transmission of video and voice) is reasonable, but requiring 60 days advance notice is

not. The effect of this rule is to require that a new market entrant give its primary competition 60 days advance notice of an intent to compete.

Puc 1303.07 Installation and Maintenance.
(a) All attachments shall be installed in accordance with the National Electrical Safety Code, 2007 edition, the National Electric Code as adopted by RSA 155-A:1,IV, and the SR-1421 Blue Book – Manual of Construction Practices, Issue 4, Telecordia Technologies, Inc. (2007), and in accordance with such other applicable standards and requirements specified in the pole attachment agreement.

The NH-Based CLECs request that Puc 1303.07 be revised to delete the Blue Book as a required standard.

Published by Telcordia, the Blue Book is a manual of standards used primarily by the Bell Operating Companies. While agreements with Verizon and FairPoint reference the Blue Book, agreements with other ILECs do not. Unlike the National Electric Safety Code, the Blue Book is not generally available. The Blue Book requires a company to contract for "enterprise licensing," based on number of employees, very similar to how software is purchased. Requiring the Blue Book effectively mandates that each CLEC, CATV Provider, municipality and ILEC must obtain Telcordia licenses, at substantial cost with no additional benefit.

The NEC and NESC have been sufficient to every other party constructing and maintaining utility poles and lines over the years. Adopting the proprietary standard used by only one utility is unduly restrictive and burdensome.

Puc 1303.10 Boxing of Poles
Pole owners may restrict the practice of boxing poles consistent with the restrictions it places on its own practice of boxing poles as defined in the company's written methods and procedures. Such boxing shall be safely accessible by bucket trucks, ladders or emergency equipment and otherwise consistent with the requirements of applicable codes, including the National Electric Safety Code.

The NH-Based CLECs request that Puc 1303.10 be revised to read "A pole owner may restrict the practice of boxing poles consistent with the restrictions it places on its own practice of boxing poles as evidenced in the pole owner's physical plant within the exchange or municipality where the poles are located."

The NEC and NESC (above) already proscribe how and when pole boxing is acceptable. It has already been established that utilities in the state engage in pole boxing. To restrict pole boxing to written procedures that may or may not be followed in practice is discriminatory and unduly restrictive to new attachers in that there is no penalty for an incumbent that routinely violates its written procedures in practice, yet allows it to rely on the ignored procedures to deny competitive access.

Puc 1303.12 Make-Ready Timeframes.
Unless otherwise agreed by parties to a pole attachment agreement, pole owners shall complete make-ready work within 180 days after any required pre-payments of any make-ready estimates provided to the attaching entity by the pole owner or owners.
Unless otherwise agreed by the parties to a pole attachment agreement, make-ready work shall be deemed to include all work, including but not limited to rearrangement and/or transfer of existing facilities, replacement of a pole or any other changes required to accommodate the attachment of the facilities of the party requesting attachment to the pole.

The NH-Based CLECs request that Puc 1303.12 be revised to read "Time is of the essence in the completion of make-ready work. Pole owners shall schedule make-ready work in a nondiscriminatory manner with all other projects in a work region on a first come-first served basis and shall ensure that make-ready work is completed within 180 days from the date of application. In order to meet the required time frames, temporary attachment may be made in advance of the completion of make-ready work, when such temporary attachments can be safely made within the requirements of applicable safety codes."

The proposed rule deviates from the federal regime in several respects. First, the FCC has ruled that prepayment of estimated survey and make-ready costs is unjust and unreasonable. The Commission has historically agreed with this view. Throughout the development of the SGAT, the Commission consistently found that prepayment of services unduly hampered competition. In 97-176 (SGAT) the Commission found that CLECs should not prepay certain costs due to the ongoing business relationship between the CLEC and the incumbent. In Order No. 23,738 the Commission stated that the RBOC, "should collect the disconnect fee at the time it actually incurs the cost and not before." The Commission extended this idea to collocation, finding not only that prepayment was unnecessary, but that the RBOC should extend terms to the CLEC. The Commission wrote: "in order to foster the entrance of collocated CLECs, and in the interests of establishing just and reasonable rates for collocation, we will allow all collocation

NRCs to be amortized over a period of up to 5 years, at the CLEC's option, with a carrying charge equal to the overall cost of capital included in the cost study, for the unamortized balance."

Yet, despite FCC orders showing that prepayment of estimated costs is unreasonable, the proposed rules continue to contemplate prepayment of estimated charges for surveys and make-ready work. See Knology, Inc. v. Georgia Power Co., 18 F.C.C.R. 24615, November 20, 2003 (make-ready estimates, assessment of make-ready only to the prospective attacher, and lack of detailed billing are found unreasonable.) also see In the Matter of The Cable Television Association of Georgia, et al. v. Georgia Power Company, Order, 18 FCC Rcd 16333, ¶ 20 (2003).

Second, this rule defines make-ready work as "**all work**, including but not limited to rearrangement and/or transfer of existing facilities, replacement of a pole or any other changes required to accommodate the attachment of the facilities of the party requesting attachment to the pole." Not only is this definition of make-ready inconsistent with the definition of make-ready in Puc 1302.07, no carve-out has been made for poles that are non-compliant with safety standards, nor for poles on which there are unauthorized attachments, which conflicts with current rules for electric and telephone utilities. See Puc 306 and Puc 413. Under the proposed rule, the pole owners would have every incentive to delay routine maintenance in the hopes that an attacher would apply to be on their poles, and thus bear the burden of bringing each pole into compliance with applicable standards. The NH-Based CLECs propose a definition of make-ready in the discussion of Puc 1302.07, above.

While the NH-Based CLECs support an outside limit on the number of days it might take a utility to complete make-ready work, in our collective experience, certain incumbent utilities routinely schedule make-ready work at their convenience, irrespective of other work being done in the area. In the interest of promoting competitive networks, the NH-Based CLECs urge the Commission to change the language of this rule to indicate that time is of the essence. Make-ready work should be slotted into the first available work-order slot in the incumbent's outside plant processes. Any other result would produce a discriminatory regime where the incumbent would be able to perform its own customer installations and network builds immediately while

impeding competition by routinely scheduling make-ready work to take the longest possible timeframe. The NH-Based CLECs also request that the Commission provide for the FCC requirement that temporary attachments be allowed when they can safely be made.

Puc 1304.03 Unauthorized Attachments. *A pole owner may, but is not obligated to, petition the commission pursuant to Puc 203 for an order directing the removal of facilities that are attached to a pole without authorization pursuant to this chapter.*

The NH-Based CLECs request that Puc 1304.03 be revised to read "A pole owner or attaching entity whose facilities are being interfered with may, but is not obligated to petition the commission pursuant to Puc 203 for an order directing the removal of attachments made by an attacher without a statutory right to attach and without authorization pursuant to this chapter."

The proposed rule deviates from the federal regime with respect to unlicensed attachments made by CLEC and CATV attachers. The FCC has ruled that unauthorized attachments made by an otherwise-entitled CLEC or CATV provider may not be removed. Under FCC rulings, unauthorized CLEC/CATV attachments are presumed to have been in place for 5 years and the CLEC or CATV must pay the pole owner for the following: a) five years of attachment fees; b) any make ready work necessary to bring the pole into compliance with applicable codes; and c) interest on a) and b) at a rate equal to that charged by the Internal Revenue Service on delinquent taxes. The NH-Based CLECs call to the Commission's attention that in this instance, as part of the penalty for making an unlicensed attachment, the make-ready work an unlicensed CLEC or CATV attacher is obligated to pay is the entire cost of bringing the pole into compliance with code, whether the CLEC or CATV attacher is the cost causer or not. The FCC adopted this regime in recognition that there must not be anti-competitive incentive, in the event an incumbent ignores an attacher's application, to have an application be deemed granted, yet the facilities subject to removal on notice.

Puc 1304.05 Rate Review Standards.
(a) In determining just and reasonable rates for the attachments of competitive local exchange carriers and cable television service providers to poles owned by Public Utilities as defined in 1301.02a the commission shall consider:

(1) The interests of the subscribers and users of the services offered via such attachments;
(2) The interests of the consumers of any pole owner providing such attachments; and
(3) The formulae adopted by the FCC in 47 CFR § 1.1409(c) through (f) in effect on July 16, 2007.

(b) In determining just and reasonable rates for all other attachments under this chapter, the commission shall consider:

(1) The interests of the subscribers and users of the services offered via such attachments; and

(2) The interests of the consumers of any pole owner providing such attachments.

The NH-Based CLECs request that Puc 1304.05 (b) be appended to include a third provision "(3) The fully allocated costs of the incumbent utility."."

Puc ***1304.06 Burden of Proof***.

(b) A pole attachment agreement signed prior to July 17, 2007, shall be presumed to have been entered into voluntarily. An attaching entity may rebut the presumption of voluntariness by demonstrating that signing the agreement, regardless of its terms, was reasonably necessary to avoid significant delay in deployment of facilities.

The NH-Based CLECs request that Puc 1304.06 be revised to read "A pole attachment agreement between an incumbent utility and a statutory attacher signed prior to July 17, 2007, shall be presumed to be a contract of adhesion. A pole owner may rebut the presumption of adhesion by demonstrating that the terms of the contract offered were fully open to negotiation. A pole owner may demonstrate this by showing that contracts made in the same time frame with similarly situated attachers have significant variations in terms and conditions." Alternatively, the NH-Based CLECs request that the proposed rules include a "fresh look" provision allowing existing contracts to be arbitrated by the Commission upon the request of a competitive attacher.

While the NH-Based CLECs recognize that the proposed rule represents acknowledgement by the Commission that pole attachment agreements may not be voluntary, the rule deviates from the federal regime. The FCC and federal courts have taken the view that attachment contracts cannot be presumed to be either voluntary or reasonable.

The FCC's presumption of the involuntary nature of contracts between incumbents and CLEC/CATV attachers was reviewed by the Supreme Court of the United States. The Supreme Courtrecognized that utility poles are bottleneck facilities, which is the reason Congress decided to impose regulation. National Cable & Telecommunications Ass'n v. Gulf Power Co., 534 U.S. 327, 341 (2002). The incumbent and competitor are not on equal terms at any time in contract negotiations. The competitor who refuses to sign an unjust and unreasonable contract, or who must submit to exhaustive negotiations which consume resources in unequal proportion for competitor and incumbent, must abandon the prospect of getting into business, because **there is**

no alternative to use of existing poles. By comparison, the worst that can happen to a pole owner whose contract is revised after signing because of a regulator's review is that (a) the pole owner enjoys the negotiated rate, term or condition until it is overturned; and (b) the rate, term or condition is later modified to be just and reasonable. The pole owner forfeits nothing, and has an equal opportunity to demonstrate that the rate, term or condition is just and reasonable.

The NH-Based CLECs and other competitive attachers have operated under this Federal regime for many years, and entered into contracts with full knowledge of the protection afforded to them by the FCC. Retroactive rulemaking and the imposition of a conflicting regime is both unfair and severely prejudicial to the interests of CLEC and CATV interests.

IV. ADDITIONAL RULES

The NH-Based CLECs request the addition of certain other provisions to Puc 1300.

A. Contract terms.

1. Advance payment of survey costs and make-ready work charges shall not be required.

2. Requirements such as indemnification, insurance obligations shall be mutual.

The proposed rules are silent on certain topics that have been the subject of FCC Enforcement Division determinations, which find that certain contract terms should be disallowed in attachment contracts, such as those requiring advance payments, bonding, insurance obligations, and other anti-competitive practices that effectively impede access. Incumbent utilities have historically demanded these requirements from competitive attachers even though the incumbents are only entitled to reimbursement for actual costs of providing facility access. Some utilities may justify such terms by expressing concern that the applicant lacks sufficient credit history. However, the appropriate requirement for a legitimate and justifiable credit concern is collection of a security deposit with interest payable when the deposit is returned. When a credit concern cannot be demonstrated, no security deposit should be required. Pole owners should not be allowed to require advance payments, bonding, or insurance obligations, which have no relation to actual costs. Without endorsing any specific policy the NH CLECs note that the Commission has considered concerns of this nature in the past and if it believes that there is a major issue here the Commission has the ability to provide a centralized vehicle to ensure that the legitimate payment entitlements of incumbents are secured.

The FCC has also determined that obligations contained in pole attachment agreements must be made mutual where it is logical and reasonable to do so. To that extent, both parties must be bound to insure and indemnify the other for their own actions and both parties must be obligated to operate their utility plants in a manner that is safe and compliant with appropriate regulation, law and good industry practice.

B. Independent contractors.

1. Qualified Workers: A utility may require that individuals who perform specific functions have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access must be able to use any individual workers who meet these criteria.

In order to expedite surveys, the rules should allow attachers to use independent contractors that would be approved by an individual utility or by an accreditation program. Allowing third-party contractors will ensure that surveys are done in a timely manner, that the utility does not include standard or deferred maintenance in its make-ready work or otherwise inflate make-ready costs.

C. Charges

1. Make-ready work: A CLEC or CATV attacher shall pay the actual cost of make-ready work done exclusively for the purpose of accommodating the new attachment.
2. Moves and rearrangments: A CLEC or CATV attacher shall pay the actual cost to move or rearrange its facilities to accommodate a new attachment when such move or rearrangement is made at the attacher's convenience or to bring the attacher's facilities into compliance with applicable codes.
3. Surveys: A CLEC or CATV attacher shall pay the actual costs of surveys in preparation for new attachments. Costs for multi-purpose surveys such as those made to consider deferred maintenance, facility inventory, long-term planning, or any other purpose besides the attachment's direct impact shall be apportioned between the pole owner and the prospective attacher.

In some cases, utilities may also use attachment surveys to consider deferred maintenance, facility inventory, long-term planning, or any other purpose besides the attachment's direct impact. To the extent they do so, the utility should bear the cost for the survey to the extent that it seeks to investigate issues unrelated to a prospective attachment. Utilities should not be allowed to delay competitive attachment on the basis of unrelated discretionary or remedial work.

Make-ready costs should not be assessed to a prospective attacher for deferred maintenance, correction of safety violations, or replacing facilities that would be otherwise necessary or required with the adoption of the NESC. A new competitive attacher should only be charged for the impact caused by the competitive attacher's attachment on the pole and not to correct safety issues. For instance, a competitive attacher should not be charged if a pole is too fragile for its current load or if the electric incumbent's facilities have sagged over time and need to be moved back to the proper place.

New competitive attachers also should not be required to pay the make-ready costs to correct improper attachments by another attacher such as a cable company, CLEC, or municipality, as envisioned in Puc 421.02(c). If an existing competitive attacher must correct an improper attachment prior to the new attacher gaining access, the existing competitive attacher should pay the associated costs.