

STATE OF NEW HAMPSHIRE
Before the
PUBLIC UTILITIES COMMISSION

Docket No. DT 22-047

CHARTER COMMUNICATIONS, INC., COGECO US FINANCE, LLC
d/b/a BREEZELINE, AND COMCAST CABLE COMMUNICATIONS, LLC

PETITIONERS' SUPPLEMENTAL OBJECTION TO
CONSOLIDATED'S MOTION TO DISMISS

NOW COME Charter Communications, Inc., Cogeco US Finance, LLC d/b/a Breezeline and Comcast Cable Communications, LLC (“the Petitioners”), and respectfully supplement their November 28, 2022 Objection to Consolidated’s Motion to Dismiss with the information set forth below to further support the position that the Commission has authority to review the justness and reasonableness of Consolidated’s pole attachment rates and joint use charges even though Consolidated and the Petitioners are parties to pole attachment agreements.

Although Consolidated argues that the plain language of RSA 374:34-a restricts the Commission’s authority to decide pole attachment matters only when a pole owner and an attacher “are unable to reach agreement”,¹ a step-by-step review of the development of the Commission’s initial pole attachment rules reveals that Consolidated’s position was considered and rejected by the Commission when it adopted its Chapter 1300 pole attachment rules in 2009, thereby demonstrating that the Commission has authority to resolve disputes involving all pole attachment agreements.

¹ Consolidated Communications of Northern New England Company, LLC’s Motion to Dismiss the Petition dated August 22, 2022 at ¶ 7. Consolidated’s Motion asserts the Commission has jurisdiction relating to pole attachments only when a pole owner and an attacher are unable to reach agreement, and that only if such parties cannot reach an agreement does the Commission’s jurisdiction vest in terms of regulating and enforcing attachment rates, terms and conditions. *Id.*

In July 2007, the legislature enacted Laws of 2007, Chapter 340,² an act relative to pole attachments, codified as RSA 374:34-a effective July 16, 2007. The act authorized the Commission to regulate pole attachments, and required that the Commission “expeditiously adopt interim and then final rules to carry out the provisions of RSA 374:34-a.” N.H. Laws 2007, Ch. 340:2. The legislation stated the “interim rules may be effective for up to 2 years” and that “[o]nce the interim rules are adopted, pole attachments shall become subject to RSA 374:34-a and the rules of the public utilities commission.” *Id.*

On January 11, 2008, in Docket No. DRM 07-119, the Commission adopted Interim Rules governing utility pole attachments,³ and contemporaneously opened Docket No. DRM 08-004 for the purpose of promulgating regular (as opposed to interim) rules concerning pole attachments.⁴ The Commission’s Notice opening Docket No. DRM 08-004 scheduled a technical session at which there would be an opportunity to discuss how the interim rules should be revised for promulgation as regular rules.⁵

Relative to the instant dispute, it is important to note that the Interim Rules contained a provision, Puc 1303.04, entitled “Voluntary Agreements” which provided that “[a]ny pole attachment agreement entered into voluntarily under this part shall be presumed to be just, reasonable and nondiscriminatory. The commission shall not alter the terms of any such agreement.”⁶

² A copy of N.H. Laws of 2007, Chapter 340 is submitted as Attachment 1, and may also be accessed here: <https://bills.nhliberty.org/bills/2007/SB123>.

³ See Attachment 2, Public Utilities Commission Notice to Interested Persons “Re: Docket No. DRM 07-119 (interim rules), Docket No. DRM 08-004 (regular rules), N.H. Code of Administrative Rules Chapter Puc 1300 Utility Pole Attachments” (January 18, 2008) (Notice requesting comments on interim rules as the basis for possible rulemaking prior to formally proposing rules).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 5.

Several parties, including the New England Cable and Telecommunications Association (“NECTA”) and FairPoint Communications (Consolidated’s predecessor) filed comments on the Interim Rules.⁷ NECTA objected to Puc 1303.04 as presuming agreements that were supposedly entered into “voluntarily” were just, reasonable and non-discriminatory and could not be set aside.⁸ NECTA noted the Federal Communications Commission (“FCC”) had concluded early on that “‘it would be powerless to act in accordance with its mandate’ if it were precluded from granting relief from existing contracts.”⁹ NECTA argued that “to preserve the Commission as a forum comparable to the FCC,¹⁰ the terms of pole agreements should not enjoy a presumption of reasonableness, nor be excluded from Commission jurisdiction.”¹¹

FairPoint, on the other hand, proposed that the purpose of the Part 1300 rules should be limited to situations “whenever a pole owner is unable to reach an agreement with a party seeking pole attachments” and that “these Proposed rules are to apply to situations in which an agreement between the parties is not in place”.¹²

The Commission filed an Initial Proposal for Puc 1300 rules on May 12, 2009¹³ that, significantly for present purposes, did not include FairPoint’s recommended language. Most

⁷ See Attachment 3, Letter from Lynn Fabrizio, Staff Attorney to Debra Howland, Executive Director (December 3, 2008) (describing process in DRM 08-004 prior to the Commission’s formal initial rules proposal).

⁸ See Attachment 4, Comments of The New England Cable & Telecommunications Association, DRM 08-004 (Regular PUC 1300 Rules re Utility Pole Attachments) (March 5, 2008) at 1.

⁹ *Id.* at 4.

¹⁰ Prior to the enactment of RSA 374:34-a, New Hampshire pole attachment issues were subject to the FCC’s jurisdiction.

¹¹ See Attachment 4, Comments of The New England Cable & Telecommunications Association, *supra*.

¹² See Attachment 5, Comments of Northern New England Telephone Operations, LLC d/b/a FairPoint Communications, DRM 08-004 (December 5, 2008) at ¶¶ 3, 9; see also Attachment 6 (i.e., Attachment 1 to FairPoint’s 12/5/08 Comments) proposing redlines to Puc 1301.01, Purpose (purpose of Puc 1300 is to provide for just and reasonable rates, charges, terms and conditions “whenever a pole owner is unable to reach agreement with a party seeking pole attachments”), and 1304.01, Lack of Agreement (proposing that only an “entity seeking a pole attachment agreement” may petition the Commission).

¹³ See Attachment 7, Letter from Thomas B. Getz, Chairman, Public Utilities Commission to Scott F. Eaton, Director, Administrative Rules Division, Office of Legislative Services, Re: Puc 1300 - Utility Pole Attachments, PUC Docket: DRM 08-004 (May 12, 2009) enclosing Puc 1300 Initial Proposal – Annotated Text (showing changes from Current Interim Rules) and Puc 1300 Initial Proposal – Fixed Text and other documents.

notably, the Commission's Initial Rules Proposal **eliminated** Section 1303.04 of the Interim Rules (*i.e.* the provision that prohibited the Commission from altering the terms of a voluntary pole attachment agreement).

The Commission's Initial Proposal also contained two more changes to the Interim Rules (both of which are set forth below) that have a direct bearing on the instant proceeding. The first change was an amendment to Section 1304.02 of the Interim Rules which proposed to limit the ability to petition the Commission for dispute resolution for pole attachment agreements entered into on or after July 17, 2007 (*i.e.*, the day after RSA 374:34-a became effective):

Puc 1304.02 Dispute Following Agreement or Order. A party to a ~~voluntary~~ pole attachment agreement entered into ~~pursuant to this chapter~~ on or after July 17, 2007, or a party subject to an order of the commission establishing rates, charges, terms or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order.

The second change to the Interim Rules was to add a new section, Puc 1304.06, which, among other things, proposed to create a presumption that voluntary pole attachment agreements are presumed just, reasonable and nondiscriminatory, and that pole attachment agreements signed prior to July 17, 2007 are presumed to have been entered into voluntarily:

Puc 1304.06 Burden of Proof.

(a) A pole attachment agreement entered into voluntarily under this part shall be presumed to be just, reasonable and nondiscriminatory for purposes of adjudication before the commission. An attaching entity filing a petition under this part shall have the burden of proving that an agreement entered into voluntarily is not just, reasonable and nondiscriminatory.

(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.

(c) When the presumption of voluntariness has been successfully rebutted pursuant to (b) above, the burden of proving that the agreement is just, reasonable and nondiscriminatory shall shift to the pole owner.

NECTA strenuously opposed the creation in Section 1304.06 of a rebuttable presumption regarding the voluntariness of pole agreements entered into before July 17, 2007, as well as the proposed requirement for an attaching entity to prove its signature on a pole agreement was not voluntary.¹⁴ NECTA contended these provisions were unreasonable and contrary to decades of practice and likely to lead to fact-intensive disputes.¹⁵ Unitil Service Corp. also expressed concern about Sections 1304.02 and 1304.06.¹⁶ On the other side, Public Service Company of New Hampshire recommended modifying proposed Rule Puc 1304.06(b) “to provide that all pole attachment agreements entered into be conclusively presumed to have been entered into voluntarily by both parties”.¹⁷

On July 17, 2009, the Commission filed its Final Proposal for its Puc 1300 rules.¹⁸ The Final Proposal did not contain FairPoint’s recommendation to restrict the Commission’s jurisdiction to situations where a pole owner and attacher are unable to enter into a pole attachment

¹⁴ Attachment 8, Comments of New England Cable and Telecommunications Association on Initial Proposal For Final Attachment Rules, DRM 08-004 (June 25, 2009) at 6.

¹⁵ *Id.* NECTA commented that “the voluntariness presumption in Rule 1304.06(b) is especially unsupported and pernicious. In New Hampshire, attachers signed pre-2007 pole agreements with the reasonable expectation that the FCC rules then in force would permit them to sign a pole attachment agreement and seek redress at a later time without restrictions. Presuming voluntariness for such agreements has it exactly backwards. Accordingly, the presumption of voluntariness for the pre-July 2007 agreements is particularly inappropriate and should be deleted.” Attachment 8 at 8.

¹⁶ See Attachment 9, Letter from Gary Epler, Attorney for Unitil Energy Systems to Debra Howland, DRM 08-004 (June 25, 2009) (recommending deletion of the phrase “entered into pursuant to this chapter on or after July 17, 2007” from Section 1304.02). “The second area of concern for UES is with respect to the Dispute Resolution section, specifically Puc 1304.02, which appears to limit the pole attachment agreements subject to the Commission’s review to those entered into on or after July 17, 2007. UES submits that there is no ‘vintage’ limitation on the attachment agreements which are subject to the Commission’s review authority in the enabling legislation. RSA 374:34-a, VII is broad in its scope, providing that:

‘The commission shall have the authority to hear and resolve complaints concerning the rates, charges, terms, conditions, voluntary agreements or any denial of access relative to pole attachments’.

This section provides the Commission the authority to resolve disputes concerning voluntary agreements without restriction as to the date such agreement was entered into.” Attachment 9 at 2.

¹⁷ See Attachment 10, Comments of Public Service Company of New Hampshire, DRM 08-004 (June 25, 2009) at 12. PSNH also recommended deletion of Section 1304.06(c) (regarding shifting the burden of proof to the pole owner) in its entirety.

¹⁸ See Attachment 11, Letter from Clifton C. Below, Commissioner to Scott F. Eaton, Director, Administrative Rules Division (July 17, 2009) (establishing text of final proposed rule).

agreement. The Final Proposal eliminated the language in Section 1304.02 that would have limited the ability to petition the Commission to agreements entered into on or after July 17, 2007, and eliminated Section 1304.06, Burden of Proof, entirely.

On September 4, 2009, the Joint Legislative Committee on Administrative Rules (“JLCAR”) notified the Commission of JLCAR’s preliminary objection to the Commission’s Final Proposal for the Puc 1300 rules.¹⁹ In response, the Commission made no changes to Section 1304.03, Dispute Following Agreement or Order (now Section 1303.03).²⁰ On November 23, 2009, JLCAR sent a revised objection to the Commission’s Final Proposal, and the Commission responded on December 2, 2009 noting further responsive amendments not pertinent here.²¹ On December 9, 2009, the Commission voted to approve the Final rules, and a day later filed the Final Rules with the Office of Legislative Services.²²

As the foregoing discussion makes abundantly clear, when the Commission developed its final pole attachment rules in 2009 (which have recently been readopted without amending the language at issue here), it considered but rejected the jurisdictional argument that Consolidated now advances in the instant docket. Accordingly, as it did in 2009, the Commission should reject the position that its jurisdiction over pole attachment disputes is limited only to those cases where

¹⁹ See Attachment 12, Letter from Scott F. Eaton, Administrative Rules Director of JLCAR to the Public Utilities Commission (September 4, 2009). As indicated in Attachment 13, *infra*, the Preliminary Objection did not relate to the issues discussed herein.

²⁰ See Attachment 13, Letter from Thomas B. Getz, Chairman, Public Utilities Commission to the Honorable Maurice Pilote, Vice Chair, Joint Legislative Committee on Administrative Rules, Re Response to JLCAR’s Preliminary Objection Notice (October 16, 2009) (containing the Commission’s detailed response to JLCAR). JLCAR voted to approve the Final Rules on December 3, 2009. Former Rule Puc 1303 has been transferred to the New Hampshire Department of Energy, and former Rule Puc 1304 became Puc 1303 rule effective November 29, 2022.

²¹ See <https://www.puc.nh.gov/regulatory/Docketbk/2008/08-004.htm>, Tabs 57 and 58.

²² See Attachment 14, Letter from Thomas B. Getz, Chairman Public Utilities Commission to Carol Holahan, Director, Office of Legislative Services (December 10, 2009) (noting the Commission’s intention that the rules become final a day after filing).

the parties do not have a pole attachment agreement in place and should deny Consolidated's Motion to Dismiss.

Respectfully submitted,

**Charter Communications, Inc.,
Cogeco US Finance, LLC d/b/a
Breezeline, and Comcast Cable
Communications, LLC**

By their Attorneys,
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Certificate of Service

I hereby certify that on the date set forth above a copy of the foregoing Supplemental Objection was sent electronically to the Service List for this docket.



Susan S. Geiger

