

STATE OF NEW HAMPSHIRE

Before the

PUBLIC UTILITIES COMMISSION

TIME WARNER ENTERTAINMENT
COMPANY, L.P. d/b/a TIME WARNER
CABLE

Petitioner,

v.

PUBLIC SERVICE COMPANY OF NEW
HAMPSHIRE

Respondent.

Docket No. DT 12-____

PETITION FOR RESOLUTION OF DISPUTE

Counsel for Petitioner:

David A. Anderson
NH Bar No. 12560
Michele E. Kenney
NH Bar No. 19333
Pierce Atwood LLP
Pease International Tradeport
One New Hampshire Avenue, Suite 350
Portsmouth, NH 03801

Of Counsel:

Maria T. Browne, Esq.
Davis Wright Tremain LLP
1919 Pennsylvania Ave., N.W.
Suite 800
Washington, DC 20006
mariabrowne@dwt.com

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INTRODUCTION

Public Service Company of New Hampshire ("PSNH") is seeking to impose unlawfully high rents on pole attachments by Time Warner Entertainment Company, L.P. d/b/a Time Warner Cable ("TWC") in New Hampshire. PSNH's unlawfully high pole attachment rates appear to be based upon the superseded Federal Communications Commission ("FCC") formula governing rates for pole attachments by telecommunications carriers ("Historic FCC Telecom Rate Formula"). Use of this outdated formula is not supported by New Hampshire or federal law and runs counter to this State's clearly established policy to promote broadband deployment and the availability of competitive services throughout the State. Indeed, application of this Commission's pole attachment rate review standards, which necessarily take into account both the FCC's recent modification of its formula governing attachments by telecommunications carriers and the effect of pole rates on competition and broadband deployment, compels adoption of a uniform low rate for all pole attachments regardless of the services flowing over those attachments. At the very least, any new approach for setting pole rates for cable provided voice services in New Hampshire is a matter for this Commission, and not PSNH, to decide.

As this Commission recognizes, broadband penetration in New Hampshire, while robust, is not yet universal. Many residents in rural portions of the State do not yet enjoy the full benefits of advanced broadband services, such as competitively priced voice services. Numerous studies have shown and the New Hampshire Department of Resources and Economic Development has recognized that pole attachment rates are a significant factor in decisions to deploy broadband and offer competitive services. Permitting PSNH (and other New Hampshire pole owners likely to follow suit) to increase pole rents now would thwart the State's efforts to ensure that all of its residents benefit from the availability of high speed broadband services.

To accelerate broadband build-out and eliminate arbitrary deterrents to cable operators seeking to offer advanced broadband services, in April 2011, the FCC itself retreated from its bifurcated pole attachment rate structure. The FCC revised its formula for calculating the rates for pole attachments used to provide telecommunications in order to reduce the rates. Likewise, every certified state that has considered adopting the FCC's historic telecom surcharge has rejected it, and public interest groups charged with protecting electric utility rate payers have consistently supported elimination of a telecom surcharge and adoption of a uniform low pole rate such as that produced using the FCC cable formula.

Even when the FCC's bifurcated rate structure governed rates in New Hampshire (during the Commission's Interim rules and prior to the State's certification), the FCC's telecommunications rate formula did not apply to TWC's attachments. At no time has TWC provided switched telecommunications services in New Hampshire, and TWC's Voice over Internet Protocol ("VoIP") services were never deemed "telecommunications" services for pole rate purposes. As determined by the FCC and confirmed by the United States Supreme Court, cable operators that offer comingled broadband and cable services do not lose the protection of the FCC cable rate formula. And, as PSNH well knows, the FCC has not ruled that VoIP attachments may be priced using the telecommunications rate formula. Nor has the FCC ever classified VoIP services as telecommunications or telecommunications services; in fact, it has declined to do so on a number of occasions. While this Commission asserted jurisdiction over VoIP under state law in August 2011, it did so for the limited purpose of imposing certain consumer related regulations, and not in the context of pole attachments, where allowing higher pole rates undermines broadband deployment and increases pressure on consumer prices.

New Hampshire Statutes RSA 374:34-a requires this Commission to resolve disputes governing pole attachment rates, and to ensure that such rates are “just and reasonable.” The New Hampshire Code of Administrative Rules PUC 1304.06 sets forth six factors the Commission is to consider in establishing just and reasonable pole attachment rates. Notwithstanding the Commission’s clearly established authority and exclusive jurisdiction over pole attachment rate disputes, rather than seeking guidance from this Commission as to the appropriate amount of its attachment rates under governing PUC rules, PSNH unilaterally bifurcated its attachment rate structure, asserting that TWC’s alleged provision of “telecommunications services” entitled it to collect rates based on the FCC’s Historic Telecom Rate Formula. When TWC refused to pay the unlawful new rates and associated late payment fees, PSNH filed a seriously flawed breach of contract Writ of Summons in the Merrimack County Superior Court . This Commission, and not a court, is the appropriate body to determine pole attachment rates under its new pole attachment rate review standards.

Application of the Commission’s rate review standards compels rejection of PSNH’s telecommunications surcharge and adoption of the FCC’s cable rate formula, which balances the goals of promoting broadband and other advanced communications services with the interest in ensuring that pole owners are fairly compensated and electric rate payers are not unduly burdened. Moreover, incumbent local exchange carriers, such as FairPoint, which also own a substantial number of the state’s poles, would not suffer any competitive harm. A single rate approximating the FCC cable rate is necessary to ensure that New Hampshire does not fall behind in its effort to promote ubiquitous broadband deployment and the development of associated advanced communications services, such as VoIP.

For these and other reasons set forth below, the Commission should assert jurisdiction over this dispute and establish a pole attachment rental rate for PSNH using the FCC's cable rate formula.

I. PARTIES

1. TWC is a cable television operator that provides cable television and other lawful communications services over cable systems to customers in the State of New Hampshire. Time Warner Entertainment Company, L.P. is a limited partnership and Time Warner Cable Inc., its parent, is a Delaware corporation, both with principal places of business at 60 Columbus Circle, New York, New York 10023.

2. Respondent PSNH is an investor-owned electric utility that generates, transmits, distributes, and sells electricity to its customers in the State of New Hampshire. PSNH owns and controls utility poles located throughout the State of New Hampshire that are used by PSNH to distribute electricity to its customers. PSNH is a New Hampshire corporation with a principal place of business at 780 North Commercial Street, Manchester, New Hampshire 03101.

3. TWC's communications facilities are connected to poles owned by PSNH in certain locations within the State of New Hampshire. Certain poles to which TWC is attached are solely owned by PSNH and others are jointly owned with Verizon New England, Inc.

4. TWC and PSNH are parties to three pole attachment agreements: (1) Pole Attachment Agreement dated February 6, 2004 between Verizon New England Inc. and PSNH and Time Warner Entertainment Co., L.P. ("Pole Attachment Agreement 1"); (2) Aerial License Agreement dated October 27, 1998 between New England Telephone and Telegraph Company, d/b/a Bell Atlantic-New England and Public Service Company of New Hampshire and Contoocook Valley Telephone Company, Inc. and State Cable TV Corporation ("Pole

Attachment Agreement 2”); and (3) Aerial License Agreement dated August 17, 1993 between New England Telephone and Telegraph Company and Public Service Company of New Hampshire and Grassroots Cable Systems, Inc. (“Pole Attachment Agreement 3”). Copies of the agreements jointly referred to herein as “Pole Attachment Agreements,” are attached as Exhibit 1 to the Affidavit of Julie Laine (hereinafter “Laine Aff.”), Attachment A hereto.

II. STATEMENT OF AUTHORITY

5. This Commission has jurisdiction over this action under the provisions of the New Hampshire Pole Attachment Act, including but not limited to New Hampshire Revised Statutes Annotated (RSA) 374:34-a.

6. The Commission’s jurisdiction over the types of attachments regulated under 47 U.S.C. § 224 was established pursuant to RSA 374:34-a and Section 224(c) of the Communications Act of 1934, as amended (47 U.S.C. § 224(c)), upon the Commission’s certification to the Federal Communications Commission (“FCC”) on January 23, 2008 that appropriate rules implementing the Commission’s regulatory authority over pole attachments were effective. That certification preempts the FCC from accepting complaints under Section 224(c).¹

7. PSNH is a public utility as defined in RSA 362:2. PSNH owns and controls utility poles in the State of New Hampshire.

8. TWC is a cable television service provider that has attachments on PSNH poles in certain areas in the State of New Hampshire pursuant to the Pole Attachment Agreement(s). *See supra* ¶ 4.

¹ See *New Hampshire Joins States That Have Certified That They Regulate Pole Attachments*, 23 FCC Rcd 2796 (released Feb. 22, 2008).

9. TWC and PSNH have a dispute that has arisen under the Pole Attachment Agreements.

10. Under RSA 374:34-a and PUC 1304.03, the Commission has jurisdiction over all aspects of this Petition.²

III. FACTS

11. TWC provides various communications services over its cable systems to subscribers in New Hampshire and elsewhere, including traditional cable television service, broadband Internet access service and other state-of-the-art services such as high-definition video and video-on-demand. Laine Aff. ¶ 4. TWC began to provide interconnected Voice over Internet Protocol (“VoIP”) service in parts of the State at the end of 2005. *Id.* ¶ 6. Although TWC has continued to expand the areas in which it provides VoIP service, it does not yet offer the service everywhere it provides video and Internet services. *Id.* At no time has TWC provided circuit switched telecommunications services in New Hampshire. *Id.* ¶ 7.

12. In the last five years alone, TWC has invested approximately \$12 million dollars to maintain, expand and upgrade our cable system facilities within New Hampshire so it can deliver increased video, broadband Internet access, voice and other advanced services to an ever-growing percentage of our customers. Laine Aff. at ¶ 5. This is significant, especially given the number of homes passed and customers served. In New Hampshire, TWC’s facilities pass 83,000 homes, and TWC provides services to approximately 60,000 subscribers in the state. *Id.*

13. TWC’s cable television system facilities are currently attached to poles belonging to several New Hampshire pole owners, including PSNH. More than 97 percent of the PSNH poles

² The Commission is authorized and directed by the statute to determine just and reasonable pole attachment rates and to order payment or a refund, as appropriate, plus interest, as of the date of the petition. RSA 374:34-a; PUC 1304.07.

to which TWC is attached are owned jointly with FairPoint Communications, Inc. ("FairPoint"). See Laine Aff. ¶ 8 and Ex. 2 thereto.

14. TWC pays PSNH annual recurring pole attachment rent for the use of PSNH's poles pursuant to the Pole Attachment Agreements. See *supra* ¶ 4.

15. Pole Attachment Agreement 1 includes an Appendix I setting forth, *inter alia*, PSNH's annual attachment fees of \$4.10 per jointly owned and jointly used PSNH and FairPoint pole, and \$8.20 per solely owned PSNH pole. Pole Attachment Agreement 2 includes an Appendix I setting forth, *inter alia*, PSNH's annual attachment fees of \$3.42 per jointly owned and jointly used PSNH and FairPoint pole and \$6.84 per solely owned PSNH pole. Laine Aff. Ex. 1. TWC has been unable to locate its copy of Appendix I to Pole Attachment Agreement 3, the oldest of the three agreements. Laine Aff. ¶ 11. However, based upon the date of such Agreement, upon information and belief, the attachment fees and charges set forth therein are similar to or less than the fees set forth in Agreement 2, Appendix I. *Id.*

A. Invoices and Payments

16. For each bi-annual billing period beginning January 1, 2006 to June 30, 2006 through January 1, 2012 to June 30, 2006, PSNH has sought to change its pole attachment fees by providing invoices to TWC that included new annual per pole rent charges which were to take effect at the beginning of the next calendar year. See Laine Aff. ¶ 14 and Ex. 2 (sample invoices) (hereinafter jointly referred to as "Invoices"). In each such Invoice, PSNH listed attachment fee amounts for "TV & Internet" and higher attachment fee amounts for "Communications." *Id.* The fees also differed depending on whether a pole was "solely-owned" by PSNH, "jointly-owned" with another pole owner (typically the incumbent telephone company) or owned by PSNH and two other pole owners ("tri-owned"). *Id.* In addition, the

invoices listed different charges for Communications in Urbanized and Non-Urbanized areas.

Id.

17. PSNH's most recent Invoice seeks to charge \$10.07 for TV and Internet attachments to PSNH solely owned poles and \$22.96 for Communications attachments to PSNH solely owned poles. Laine Aff. ¶ 15 and Ex. 2. Rates for jointly owned poles are half these amounts, reflecting FairPoint's 50 percent ownership in the poles. *Id.*

18. Among other things, the Invoices were insufficient to increase rates under the parties' Pole Attachment Agreements. Article III of both Pole Attachment Agreement 2 and Pole Attachment Agreement 3 required "separate execution of Appendix I" to effect changes, which PSNH did not seek, or obtain. Laine Aff. ¶12 and Ex. 1. In addition, PSNH did not provide TWC with sufficient notice, as required by Section 3.1.2 of Pole Attachment Agreement 1, or an updated Appendix I following the effective date of notices of the attachment fee increases, as required by Section 3.1.3 of Pole Attachment Agreement 1. Laine Aff. ¶ 12.

19. As set forth above, each of the Invoices identified different rates for "TV & Internet" as opposed to "Communications." *Supra* ¶ 17. Upon information and belief, these different rates charged by PSNH were intended to reflect the pole attachment rental rates established using the FCC formula for calculating the maximum pole attachment rate that utilities may impose on cable operators as set for the in 47 C.F.R. § 1.1409(e)(1) ("FCC Cable Rate Formula") and the FCC's historic formula for calculating the maximum pole attachment rate that utilities may impose on telecommunications carriers as previously set forth in 47 C.F.R. § 1.1409(e)(2) (superseded) ("Historic FCC Telecom Rate Formula"), respectively. *See* Attachment B hereto (FCC rules setting forth the formulas).

20. As described more fully below and as reflected by PSNH's rates, the Historic FCC Telecom Rate Formula generally results in higher pole rental rates than the FCC Cable Rate Formula. The FCC recently determined that this "surcharge" imposed upon providers of telecommunications services hindered its important federal statutory objectives and modified the Historic FCC Telecom Rate Formula to "better enable providers to compete on a level playing field, [] eliminate distortions in end-user choices between technologies, and lead to provider behavior being driven more by underlying economic costs than arbitrary price differentials."³ The FCC thus revised its formula for calculating the maximum pole attachment rate that utilities may impose on telecommunications carriers as set forth in 47 C.F.R. § 1.1409(e)(2) (as amended) ("Revised FCC Telecom Rate Formula"). See Attachment B.

21. PSNH's Invoices continued with these apparent FCC attachment classifications in setting rates after this Commission assumed pole attachment jurisdiction in 2008, after this Commission's pole attachment rules became effective in December 2009, and after the FCC's adoption of the Revised Telecom Rate Formula. See Laine Aff. ¶ 22 and Ex. 3 (letter dated Nov. 18, 2011 from PNSH to Time Warner).

22. At all times relevant to this Petition, TWC has objected to payment of pole attachment rates based on PSNH's classification of certain TWC attachments as telecommunications and apparent use of the FCC's Historic Telecom Rate Formula to calculate those rates. See Laine Aff. ¶17 and Ex. 4 (attaching Letter dated Apr. 3, 2007 to John Pearson from Julie Patterson; Letter dated Aug. 6, 2008 to Mr. John Pearson from Julie P. Laine f/k/a Julie Patterson; Letter to John Pearson from Julie Laine f/k/a Julie Patterson dated Jan. 14, 2011). Consistent with its notice to PSNH that the FCC's Historic Telecom Rate Formula did

³ *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, ¶ 147 (2011) ("April 2011 FCC Order").

not apply because TWC was not providing telecommunications services, TWC paid the rates charged by PSNH for “TV & Internet,” which rates appeared to have been calculated using the FCC Cable Rate Formula. Laine Aff. ¶ 18. TWC has continued to pay for all PSNH attachments at the amount charged for TV & Internet attachments to the present. *Id.*

23. At all times relevant to this Petition, TWC’s refusal to pay a telecommunications surcharge, and payment for all attachments at the rate that PSNH charged for TV & Internet service was appropriate.

24. At no time in New Hampshire has the FCC’s Historic Telecom Rate Formula applied to pole attachments over which cable, Internet access services, and VoIP services, are transmitted. Indeed, as discussed below, the FCC has never classified VoIP services as telecommunications services, either as a general matter or for pole attachment purposes. In addition, the PSNH Invoices sought to impose a telecommunications surcharge in communities where TWC has never offered any type of voice service. Laine Aff. ¶ 19.

25. TWC has paid PSNH over \$1.2 million in pole attachment fees for billing periods dating from January 1, 2006 to the present, for all PSNH invoiced attachments at the PSNH rate for TV & Internet. *See* Laine Aff. ¶ 20 and Ex. 3.

26. Throughout this period, PSNH continued to assess TWC for alleged underpayments and to impose late payment charges on such alleged underpayments. Laine Aff. ¶ 21 and Ex. 3 (PSNH Nov. 2011 Letter).

27. In a letter dated November 18, 2011, PSNH stated its position that, “[b]ecause Time Warner’s attachments are for the purpose of providing telecommunications service, Time Warner is responsible for payment of the rate applicable to attachments used for the provision of telecommunications services.” Laine Aff. ¶ 22 and Ex. 3.

28. Other poles to which TWC is attached are owned by FairPoint, Central Maine Power, National Grid, Contoocook Valley Telephone, Littleton Water and Light, and Municipal Electric Department. No pole owner in New Hampshire other than PSNH has sought to impose a bifurcated rate structure for TWC television, Internet and voice services or a surcharge on TWC voice services. Laine Aff. ¶¶ 23-24.

B. Regulation of Pole Attachment Rental Rates in New Hampshire

29. Notwithstanding the parties' Pole Attachment Agreements and the Notices, pursuant to RSA 374:34-a, the rates that PSNH may charge for pole attachments have at all times been limited by state or federal law.

30. New Hampshire enacted RSA 374:34-a pertaining to pole attachments on July 16, 2007 (hereinafter "New Hampshire Pole Attachment Act"). The New Hampshire Pole Attachment Act directs the Commission to adopt rules to carry out provisions of the New Hampshire Pole Attachment Act and to regulate and enforce rates, charges, terms and conditions for such pole attachments "to provide that such rates, charges, terms and conditions are just and reasonable." *Id.*

31. The Commission adopted "Interim" pole attachment rules on January 17, 2008. *See* PUC 9073, INTERIM, eff. Jan. 17, 2007, superseded by PUC 9614, eff. Dec. 12, 2009. The "Interim" rules provided that "[i]n determining just and reasonable rates under this Chapter, the commission shall apply the standards and formulae adopted by the FCC in 47 CFR 1.1409(c) through (f) in effect on July 16, 2007." PUC 9073, INTERIM, 1304.04, eff. Jan. 17, 2008.

32. The Commission certified to the FCC its intent to regulate pole attachments on January 23, 2008, which certification was accepted by the FCC on February 22, 2008.⁴

⁴ *New Hampshire Joins States That Have Certified That They Regulate Pole Attachments*, 23 FCC Rcd 2796 (released Feb. 22, 2008).

33. On December 12, 2009, the Commission's current pole attachment rate review standards became effective. *See* PUC 1304.06. Under PUC 1304.06, the Commission must consider six factors in resolving a pole rate dispute including not just the FCC's formulae in effect on July 16, 2007, but also, *inter alia*, relevant federal, state or local laws, rules and decisions, the impact on competitive alternatives, the potential impact on the deployment of broadband services and the potential impact on the pole owner and its customers. The Commission has not had occasion to apply these standards to date. However, consideration of the relevant factors supports TWC's continued payment of PSNH's attachment rate applicable to TV & Internet, which appear to have been calculated using the FCC Cable Rate Formula.

34. In August 2011, the Commission issued an order concluding that VoIP based services provided by cable operators are "telecommunications services" under New Hampshire state law for the limited purpose of applying certain consumer protection requirements.⁵ In the Commission's words, such limited regulation was "consistent with the New Hampshire State Constitution provisions for free and fair competition."⁶ The Commission's order did not address the pole attachment rates applicable to VoIP services.

35. State legislation currently is pending that would reverse the Commission's classification of VoIP under New Hampshire law, but would not disturb the Commission's jurisdiction over pole attachments.⁷

36. Before the Commission's January 2008 certification to the FCC establishing the Commission's jurisdiction over pole attachments and until December 12, 2009,⁸ the FCC's rules

⁵ Order Finding Jurisdiction and Requiring Limited Jurisdiction, No. 25,262 (Aug. 11, 2011) at 59 (hereinafter "August 11 PUC Order").

⁶ *Id.*

⁷ S.B. 48, 2011 Session (N.H. 2012) (passed by Senate, Jan. 18, 2012), *available at* <http://www.gencourt.state.nh.us/legislation/2012/SB0048.pdf> (addressing state regulation of telephone service providers and clarifying the authority of the Public Utilities Commission to regulate pole attachments).

and policies governed pole attachment rates, terms and conditions in New Hampshire. Those FCC rules applied different attachment fee formulas to (i) attachments by cable operators (including those providing broadband Internet access services) (the “FCC Cable Rate Formula”) and (ii) attachments by cable operators over which telecommunications service is provided and attachments by telecommunications carriers (the “Historic FCC Telecom Rate Formula”).

37. At no time have the applicable FCC or New Hampshire Commission pole rate rules required cable operators providing VoIP service to pay a higher pole attachment rate than cable operators providing cable television and Internet services. To the contrary, the applicable Commission rules and policies derive from the FCC’s pole attachment rate rules and policies, which have never required payment of a telecommunications surcharge by cable operators that provide VoIP services.

C. Court Complaint

38. On February 1, 2012, PSNH filed a Writ of Summons asserting breach of contract and debt claims against TWC in Merrimack County Superior Court. *See Public Serv. Co. of New Hampshire v. Time Warner Entm’t Co.* (hereinafter “Court Compl.”), which is attached hereto as Attachment C.⁹ *See also* Laine Aff. ¶ 25.

39. PSNH claims in the Court Complaint that TWC owes PSNH damages in the amount of \$1,096,226.20 as of January 16, 2012 and that this amount will continue to accrue until paid in full. Court Compl. ¶ 18. The Court Complaint does not state when the alleged damages began to accrue or otherwise explain the basis of PSNH’s claim. However, based upon

⁸ New Hampshire adopted an interim rule governing pole attachment rental rates effective January 17, 2008, which provided that the FCC formulas would govern pole attachments in New Hampshire until such time as the Commission adopted permanent regulations. PUC 9073 INTERIM, eff. Jan. 17, 2008, superseded by PUC 9614, eff. Dec. 12, 2009.

⁹ TWC removed the Superior Court Complaint to the United States District Court for the District of New Hampshire, and will be filing a motion to dismiss or stay that case because the dispute is solely within this Commission’s jurisdiction.

correspondence between the parties, TWC has reason to believe that PSNH's Court Complaint is an illegal attempt to extract unjust and unreasonable pole attachment rates from TWC based upon its provision of VoIP services in certain areas in New Hampshire. *See* Laine Aff. ¶ 25 and Ex. 3.

40. On March 12, 2012, TWC removed the Court Complaint to the United States District Court for the District of New Hampshire ("District Court"), which is attached hereto as Attachment D. TWC intends to request that the District Court dismiss the complaint based on this Commission's exclusive jurisdiction over pole attachment rental disputes and alternatively, based on the Commission's primary jurisdiction over matters raised in the Complaint.

41. Pursuant to RSA 508:4, the statute of limitations for breach of contract claims in New Hampshire is three years. Accordingly, the period in dispute between the parties in the Court Complaint is from February 1, 2009 to January 31, 2012.

IV. ARGUMENT

A. Under the Commission's Six Factor Rate Review Standard, PSNH Pole Attachment Rates Should Be Set Using the FCC Cable Rate Formula for All Communications Attachments

42. New Hampshire's pole attachment statute, enacted in 2008, directs the Commission to adopt and enforce rules ensuring that pole attachment rates are just and reasonable. RSA 374:34-a. In doing so, the statute affords the Commission discretion to adopt a single formula or formulae for apportioning costs.¹⁰ The Commission, in adopting PUC 1304.06, chose not to adopt the FCC's historic bifurcated rate structure for pole attachments or to impose a telecom surcharge on VoIP. Instead, it adopted a six factor standard for just and reasonable attachment rates. This standard affords the Commission flexibility to reject the telecom surcharge imposed by PSNH based on the FCC's Historic Telecom Formula and adopt instead a single rate formula

¹⁰ RSA 374.34-aat III.

that is consistent with its stated goals of competitive broadband deployment, the FCC Cable Rate Formula. As set forth herein, application of the six factors for just and reasonable attachment rates set forth in RSA 374.34-a compels rejection of a telecom surcharge and adoption of the FCC Cable Rate Formula.

1. Relevant federal, state or local laws, rules or decisions.

43. The first standard to be considered in establishing just and reasonable attachment rates for cable operators under the Commission's rules – relevant federal, state or local laws, rules or decisions – supports rejection of telecommunications rate surcharge and adoption of the FCC Cable Rate Formula for all cable pole attachments regardless of the services delivered over such attachments.¹¹ As set forth more fully below, the FCC's Cable Rate Formula has been employed by the FCC for over three decades, upheld by courts against utility takings claims, applied to comingled cable and broadband services, and adopted by numerous certified states. In contrast, other states that have considered the FCC's Historic Telecom Rate Formula have rejected it, as did the FCC itself in its 2011 landmark order amending its rules. Moreover, this Commission's recent decision to classify VoIP as telecommunications services under state law for limited regulatory purposes does not alter the conclusion that pole rents for all services in New Hampshire should be set using the FCC Cable Rate Formula.

¹¹ New Hampshire's incumbent local exchange carriers (ILECs) own a significant percentage of the poles in New Hampshire, either individually or jointly with electric companies. In fact, as set forth above, the majority of PSNH poles to which TWC is attached are jointly owned by PSNH and FairPoint. In recognition of this fact, the Commission's rules do not include ILECs as attaching entities governed by the same rates as cable operators.

a. The FCC Modified the Historic Telecom Rate Formula to Eliminate the Telecom Surcharge and Produce Rates That Approximate the Cable Rate

44. In April 2011, the FCC modified the Historic Telecom Rate Formula so as to produce rates that approximate rates produced using the FCC's Cable Rate Formula.¹² In doing so, it sought to "minimize the difference in rental rates paid for attachments that are used to provide voice, data, and video services, and thus ... remove market distortions that affect attachers' deployment decisions."¹³ In support of its decision, the FCC found that under the FCC Historic Telecom Rate Formula, "cable operators have been arbitrarily deterred from offering new, advanced services" because of the "financial impact" that could result from application of a higher telecom rate.¹⁴ Thus, the FCC determined that "implementing a low and more uniform rate" would "eliminate competitive disadvantages."¹⁵ It also sought to "reduce disputes and costly litigation about the applicability of 'cable' or 'telecommunications' rates to broadband, voice over Internet protocol, and wireless services that distort attachers' deployment decisions."¹⁶

45. At the same time, the FCC ensured that the Revised FCC Telecom Rate Formula adequately compensated pole owners,¹⁷ preserved "appropriate incentives" for them "to invest in poles,"¹⁸ and did not impose an undue burden on utility ratepayers.¹⁹

46. The FCC issued its decision in light of "nearly a decade of experience" applying the historic telecom formula.²⁰ This Commission has recognized the FCC's authority in the subject matter of pole attachments.²¹

¹² April 2011 FCC Order ¶ 126.

¹³ *Id.*

¹⁴ *Id.* ¶ 174.

¹⁵ *Id.* ¶ 176.

¹⁶ *Id.* ¶ 174.

¹⁷ *Id.* ¶¶ 182-198.

¹⁸ *Id.* ¶ 151.

¹⁹ *Id.* ¶ 149.

47. Due to specific requirements in its authorizing statute pertaining to cost allocation, the FCC did not adopt the Cable Rate Formula for attachments used to provide telecommunications services, but instead modified the telecommunications formula to produce rates approximating rates produced using the cable formula.²² It did this by modifying the cost measures that factor into the telecommunications formula.²³ This Commission is not so constrained. It is free to adopt a single formula under its authorizing statute. *See* RSA 374:34-a (III) (“The commission shall adopt rules ... to carry out the provisions of this section, including appropriate formula or formulae for apportioning costs.”).

**b. Under Federal Law, the FCC Cable Rate Formula Governs
Comingled Cable and Broadband Service, Including VoIP**

48. The FCC long has held that cable operators that offer broadband services along with cable service do not lose the protection of the FCC Cable Rate Formula.²⁴ In 1998, the FCC found that increasing the cable pole rate for the provision of Internet services would conflict with Congressional objectives to promote the deployment of broadband and new advanced services:

In specifying this rate, we intend to encourage cable operators to make Internet services available to their customers. We believe that specifying a higher rate might deter an operator from providing non-traditional services. Such a result would not serve the public interest. Rather, we believe that specifying the [cable rate] will encourage greater competition in the provision of Internet service and greater consumer benefits.²⁵

49. In 2002, the U.S. Supreme Court agreed, declaring that the FCC’s interpretation was consistent with Congress’ general instruction to “encourage the deployment” of broadband

²⁰ *Implementation of Section 224 of the Act*, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, ¶ 2 (2007).

²¹ *See, e.g.*, Interim Rules adopting FCC pole attachment rate formulas.

²² April 2011 FCC Order ¶ 149.

²³ *Id.* ¶ 161.

²⁴ *See Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 936 (D.C. Cir. 1993).

²⁵ *Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 6777, ¶ 32 (1998).

Internet capability and, if necessary, “to accelerate deployment of such capability by removing barriers to infrastructure investment.”²⁶

c. Courts Have Upheld the FCC Cable Rate Formula against Pole Owner Challenges

50. The FCC Cable Rate Formula has been upheld as constitutional by the United States Supreme Court.²⁷

51. A common argument of pole owners is that the FCC Cable Rate Formula is a subsidy because it does not require attachers to pay a larger share of pole costs. This contention has been uniformly rejected by courts that have considered it.²⁸

52. In a decision involving pole attachment rates imposed by Alabama Power, the Eleventh Circuit confirmed that the FCC Cable Rate Formula provides adequate compensation for utilities. “The known fact is that the Cable Rate requires the attaching cable company to pay for any ‘make-ready’ costs and all other marginal costs (such as maintenance costs and the opportunity cost of capital devoted to make-ready and maintenance costs), in addition to some portion of the fully embedded cost.”²⁹

²⁶ *NCTA v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (“*Gulf Power*”). The FCC’s decisions preserving the Cable Rate Formula following the 1996 Act helped to ignite over \$180 billion in cable broadband investment that has transformed the nation’s communications infrastructure and enabled the first ever successful facilities-based voice competition to the ILEC monopoly – cable VoIP. It is estimated that consumers saved over \$100 billion from 2003 to 2011 from this new competition. See Cable industry investment statistics, available at <http://www.ncta.com/Statistics.aspx>. See also Dr. Michael D. Pelcovits and Daniel E. Haar, Microeconomic Consulting & Research Associates, Inc., “Consumer Benefits from Cable-Telco Competition,” November 2007, at 19, available at http://www.micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf.

²⁷ *FCC v. Florida Power Corp.*, 480 U.S. 245, 253-54 (1987).

²⁸ See, e.g., *id.* (finding it could not “seriously be argued, that a rate providing for the recovery of fully allocated cost, including the cost of capital, is confiscatory”); *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1368-69 (11th Cir. 2002); *Detroit Edison Co. v. Michigan Public Serv. Comm’n*, 1998 Mich. App. LEXIS 832, at *6-7 (Nov. 24, 1998), *aff’g*, *Consumers Power Co., Detroit Edison Co.*, Setting Just and Reasonable Rates for Attachments to Utility Poles, Ducts and Conduits, Case Nos. U-010741, U-010816, U-010831, Opinion and Order, 1997 Mich. PSC LEXIS 26 (Feb. 11, 1997); *Trenton Cable TV, Inc. v. Missouri Public Serv. Co.*, PA-81-0037, ¶ 4 (rel. Jan. 25, 1985) (“Since any rate within the range assures that the utility will receive at least the additional costs which would not be incurred but for the provision of cable attachments, that rate will not subsidize cable subscribers at the expense of the public.”).

²⁹ *Alabama Power*, 311 F.3d at 1368-69.

d. States and Public Interest Groups Recognize the FCC Cable Rate Formula as the Appropriate Methodology for Calculating Pole Attachment Rents

53. The majority of certified states have adopted the FCC's Cable Rate Formula for all attachments. Not one state has adopted the FCC's Historic Telecom Formula. In rejecting a bifurcated rate structure, New York held that the telecommunications formula "would undermine efforts to encourage facilities-based competition and to attract business to New York."³⁰ Similarly, as explained by the state of California, "there is generally no difference in the physical connection to the poles or conduits attributable to the particular service involved ... applying a consistent rate for use of cable attachments, including provision of telecommunications services ... promotes the incentive for facilities-based local exchange competition through the expansion of existing cable services."³¹ In 2005, the Connecticut Department of Public Utility Control also rejected utility efforts to impose a pole rate surcharge for additional services.³² Both the Oregon and Utah PSCs adopted pole rent formulas for all attachers and services based on the cable formula and filed comments in the federal rulemaking proceeding that such pole rates fairly

³⁰ *Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Companies*, Order Directing Utilities to Cancel Tariffs, Cases 01-E-0026, *et al.*, at 4 (NY PSC Jan. 15, 2002).

³¹ *See Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service*, R. 95-04-043, I. 95-04-044, Decision 98-10-058 (Cal. PUC. Oct. 22, 1998).

³² *See* Petition of the United Illuminating Company For A Declaratory Ruling Regarding Availability of Cable Tariff Rate For Pole Attachments By Cable Systems Providing Telecommunications Services and Internet Access, Docket No. 05-06-01, Decision, 2005 Conn. PUC LEXIS 295, at *11-12 (Dec. 14, 2005). *See also* Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted Under 3 AAC 52.900 – 3 AAC 52.940, Order Adopting Regulations, 2002 Alas. PUC LEXIS 489, at *6 (Oct. 2, 2002) ("The CATV formula is reasonable and should be the default formula for calculating pole attachment rates if the pole owner and the attachers cannot negotiate their own agreement. We find that the formula provides the right balance given the significant power and control of the pole owner over its facilities."); *see also Cablevision of Boston Co. v. Boston Edison Co.*, Docket D.P.U./D.T.E. 97-82 (1998) (cable rate assures payment by cable operators of "the fully allocated costs for the pole space occupied by them"); *Detroit Edison Co. v. Michigan Public Serv. Comm'n*, 1998 Mich. App. LEXIS 832, at *6-7 (Nov. 24, 1998), *aff'g Consumers Power Co., Detroit Edison Co.*, Setting Just and Reasonable Rates for Pole Attachments to Utility Poles, Ducts and Conduits, Case Nos. U-010741, U-010816, U-010831, Opinion and Order, 1997 Mich. PSC LEXIS 26 (Feb. 11, 1997).

compensate utilities and avoid creating barriers for new and existing technologies.³³ And, the Regulatory Commission of Alaska issued pole regulations adopting the FCC cable formula for both cable and telecommunications attachments, concluding that “the CATV formula . . . provides the right balance given the significant power and control of the pole owner over its facilities;” and “that changing the formula to increase the revenues to the pole owner may inadvertently increase overall costs to consumers.”³⁴

54. The National Association of State Utility Consumer Advocates (“NASUCA”), which, like the Commission, has a legal obligation to represent the interests of both cable and electric utility consumers endorsed the FCC’s Cable Rate, finding “this is the rate that should be used for all pole attachments, regardless of the exact service provided over the attachment, and regardless of the identity of the attacher.... Equally importantly, the Commission must not increase the rate paid by broadband service providers because this would be contrary to ‘the nation’s commitment to achieving universal broadband deployment and adoption.’”³⁵

55. Similarly, the National Association of Rural Utility Commissioners sponsored a pole attachment study strongly supporting the Cable Rate Formula, stating, “[w]e also recommend that a single formula be determined and that the ‘telecommunications surcharge’ currently in the FCC rules be eliminated.”³⁶

³³ See Comments of Public Utility Commission of Oregon in Docket 07-245, at 1 and attached PUC Order at 9-10, filed Mar. 7, 2008; Comments of Utah Public Service Commission in Docket 07-245, at 1, filed Mar. 7, 2008.

³⁴ *In the Matter of the Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint Use Regulations Adopted Under 3 AAC 52.900 – 3 AAC 52.940*, Order Adopting Regulations, at 3-5 (Alaska PSC, Oct. 2, 2002).

³⁵ Reply Comments of National Association of State Utility Consumer Advocates (“NASUCA”) in FCC Docket 07-245, filed Apr. 22, 2008, at 1-2, 5. NASUCA is a national association of consumer advocates in more than 40 states and the District of Columbia who are “designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.” *Id.* at 1 n.3.

³⁶ NARUC Ad Hoc Committee Report at 5, *available at* www.naruc.org/publications/poleattachment_summer01.pdf. The study was presented during the NARUC July 2001 Summer Meeting in Seattle, Washington with a disclaimer: that the opinions asserted in the study were those

e. The Commission's Recent Decision Classifying VoIP as Telecom is Not Inconsistent with Adoption of the FCC Cable Rate Formula

56. Although this Commission decided in August 2011 to classify VoIP as a telecommunications service under state law for certain limited regulatory purposes, it clearly stated its intent that such classification “would entail minimal regulatory oversight” and would “have minimal, if any, competitive impact on Comcast or Time Warner services in New Hampshire.”³⁷ Indeed, the Commission in its VoIP Order found that “[s]uch limited regulation is consistent with New Hampshire State Constitution provisions for free and fair competition,” which the Constitution states “should be protected against all monopolies.”³⁸

57. In direct contravention of this stated intent, allowing utilities to impose a telecommunications surcharge for competitive voice services would negatively impact TWC’s competitive services in New Hampshire. If the FCC’s Historic Telecom Rate were adopted, cable pole rents would more than double throughout the state. And, in contravention of the exact constitutional provision the Commission sought to uphold, a telecom surcharge would encourage utilities to leverage their monopoly control over what has been determined to be an essential facility for cable deployment.³⁹

58. In upholding the FCC’s decision to apply the Cable Rate Formula to comingled cable and broadband services the United States Supreme Court observed: “[s]ince the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge

of the Ad Hoc Committee that prepared the report in response to a resolution by the NARUC Board of Directors and did not represent the beliefs of any individual Commission or NARUC generally.

³⁷ August 11 PUC Order at 59.

³⁸ *Id.* (citing N.H. Const., pt. 2, art. 83).

³⁹ See *Alabama Power*, 311 F.3d at 1362 (“As the owner of these ‘essential’ facilities, the power companies had superior bargaining power, which spurred Congress to intervene in 1978.”).

monopoly rents.”⁴⁰ The Court went on to conclude that failing to uphold application of the Cable Rate Formula “would defeat Congress’ general instruction to the FCC to ‘encourage the deployment’ of broadband Internet capability and, if necessary, ‘to accelerate deployment of such capability by removing barriers to infrastructure investment.”⁴¹

59. It is important to note that the New Hampshire Legislature may alter this Commission’s regulatory treatment of VoIP services this year. The Senate has passed SB 48, which would remove VoIP services generally from the Commission’s regulatory oversight while preserving the Commission’s duty to regulate pole attachments to assure just and reasonable rates.⁴² The bill is now pending in the House Committee on Science, Technology, and Energy.

60. Even if the Commission were to determine that its state law classification of VoIP service as a telecommunications service compels adoption of a bifurcated rate structure in New Hampshire, the impact of the Commission’s VoIP Order on this dispute is necessarily limited to PSNH’s billings the Order’s effective date of September 25, 2011 (45 days after the date of the Order). Accordingly, given the requirement in PUC 1303.06(a)(2) that pole owners provide sixty days advance notice of rate increases and the ordinary biannual billing cycle, the earliest this rate structure would have applied would have been to the January 1, 2012 – June 30, 2012 billing period.

2. Impact on Competitive Alternatives

61. Consideration of the second factor in the Commission’s rate review standards weighs in favor of elimination of a telecommunications surcharge for cable operators. As set forth above, New Hampshire’s incumbent phone providers own a large number of the State’s

⁴⁰ *Gulf Power*, 534 U.S. at 330.

⁴¹ *Id.* at 339 (quoting 47 U.S.C. § 1302(a) and (b)).

⁴² S.B. 48, 2011 Session (N.H. 2012) (passed by Senate, Jan. 18, 2012), *available at* <http://www.gencourt.state.nh.us/legislation/2012/SB0048.pdf>.

poles. For example, FairPoint is a joint owner on more than 97 percent of the PSNH poles to which TWC is attached. Laine Aff. at ¶ 8 and Ex. 2 (2012 Invoice, showing 21,565 Joint TV/Internet attachments and 16,712 Joint Communications attachments and 595 Sole TV/Internet attachments and 560 Sole Communications attachments.)

62. As a pole owner, FairPoint is not similarly situated to attaching entities like TWC that depend upon poles and conduit owned by others for distribution of their plant throughout the State. The Commission's rules recognize this distinction in providing rate protection to cable operators (and CLECs) in one section of the rules (PUC 1304.06(a)), and for all other attachers (PUC 1304.06(b)) in another. Likewise, federal law governing pole attachments evolved to establish parity between pole owning incumbent phone companies, deemed to control an essential facility, and cable operators seen as competitors.⁴³

63. As set forth above, TWC does not offer competitive VoIP service throughout its New Hampshire service territory. Moreover, TWC's decisions to deploy broadband and offer advanced broadband services such as VoIP are impacted by the cost of deployment, including pole rents. Laine Aff. ¶ 26.

64. Moreover, TWC is not advocating for a better rate than its similarly situated competitors would receive.

65. Further, other attachers, including ILECs, are free to request a ruling from this Commission concerning the rates they pay when they attach to poles owned by other entities.

66. A uniform low pole attachment rate for all services offered by cable operators and CLECs would reduce disparity among service providers.

⁴³ *FCC v. Florida Power Corp.*, 480 U.S. at 253 (recognizing that Congress enacted the 1978 Pole Attachment Act "as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service.")

3. Potential Impact on the Pole Owner and its Customers

67. Adoption of the FCC's Cable Rate Formula would not negatively impact PSNH or its customers.

68. As set forth above, courts have upheld the FCC Cable Rate Formula as compensatory. Indeed, the FCC, in its April 2011 Order, concluded that the Revised Telecom Rate Formula and the FCC Cable Rate Formula are compensatory to utilities "because these rates meet or exceed incremental cost, and satisfy all constitutional compensation requirements."⁴⁴

69. Under the Federal Pole Act, a cable attachment rate is considered "just and reasonable" if it allows the utility to recover at least its incremental costs but no more than the fully allocated costs of the attachment.⁴⁵ The FCC Cable Rate Formula produces rates on the *high end* of this statutory range – attributing fully allocated costs to cable attachers.⁴⁶

70. Under the Federal Pole Act, these fully allocated costs are identified as a percentage of the operating expenses and capital costs incurred by a pole owner in owning and maintaining poles. The specific percentage of these costs paid under the FCC Cable Rate Formula is based on the ratio of space used by the attacher to the amount of "usable space" on the poles.⁴⁷ This use ratio (typically 7.41 percent) is applied to calculate the share of costs of the *entire* pole to be paid by the attacher for each pole it occupies.⁴⁸

⁴⁴ April 2011 FCC Order ¶ 183.

⁴⁵ 47 U.S.C. § 224(d)(1).

⁴⁶ See *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987); S. Rep. No. 95-580 (1977), at 2, *reprinted in* 1978 U.S.C.C.A.N. 109, 110.

⁴⁷ It is presumed for efficiency's sake that a cable attacher occupies one foot of space on the pole. It is also presumed that there is normally 13.5 feet of "usable space" on a pole. 47 C.F.R. § 1.1418. Consequently, a typical cable attacher pays 7.41 percent ($1 \div 13.5$) of the annual costs of maintaining and owning the entire pole (including usable and unusable pole space costs).

⁴⁸ *Id.* It is critical to understand that under the Cable Rate Formula the attacher pays an appropriate share of the costs of the *entire* pole – *usable and unusable* pole space – for each pole it occupies. A common misunderstanding, and one often repeated by pole owners, is that the attacher is only paying a share of the costs of the *usable* space on the pole (*i.e.*, the 13.5 feet of usable space that is normally presumed on a typical pole). However, this fallacy has been recognized and firmly repudiated: "[Such misstatements are] a complete mischaracterization of the Pole Attachment Act and the Commission's rules." *Alabama Cable Telecomms. Ass'n v. Alabama Power Co.*, 16 FCC Rcd 12209,

71. Significantly, the annual rent paid to pole owners under the FCC Cable Rate Formula is *in addition to* “make-ready” costs that the attacher pays to the pole owner that would not be incurred by the pole owner “but for” the pole attachment.⁴⁹ Make-ready costs include such items as pre-construction survey of poles by the pole owner, engineering, and pole change-outs required to accommodate an attachment.⁵⁰ Thus, under the Cable Rate Formula, the attacher pays make-ready charges to utilities covering all marginal costs needed to rearrange or build poles tall enough for the attacher. The attacher then pays annual rent on top of make-ready amounts to the pole owner based on fully allocated costs for the *entire* pole – *usable as well as unusable space*. Thus, consistent with federal and state goals, the FCC Cable Rate Formula at once permits utilities to recover their costs while promoting broadband deployment and competition.

72. The impact of the rate differential on PSNH annual operating revenue would be insignificant and highly unlikely to impact utility rate payers. Indeed, PSNH has reported annual operating revenues in New Hampshire exceeding \$1 billion annually for the last three years.⁵¹ Moreover, TWC’s payment for services at the TV & Internet rate during the entire period for which a dispute has existed between the parties has not had any demonstrated impact on utility rate customers or PSNH’s pole investment. In fact, PSNH’s reported pole investment increased more than ten percent from year end 2006 to year end 2010. *See* Attachment E (FERC Form 1, 2006 year end data p. 207 line 64 showing \$189,179,694 and FERC Form 1, year end 2010 data p. 207 line 64 showing \$208,842,716).

¶ 60 (2001) (emphasis added). In 2001, the FCC observed that, “under the Cable Formula, the costs of unusable space are allocated based on the portion of usable space an attachment occupies, the space factor.” *Amendment of Commission’s Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 53 (2001).

⁴⁹ April 11 FCC Order at ¶¶ 185-187.

⁵⁰ *See, e.g., Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, 72 F.C.C.2d 59, ¶¶ 8-9, 29-31 (1979) (defining make-ready costs).

⁵¹ *See* http://www.nu.com/investors/reports/Financial_Reports.asp (downloaded on 3/30/12).

4. *Potential Impact on the Deployment of Broadband Services*

73. This Commission recently reported to the FCC that it “frequently hears from residents who cannot get landline broadband service – either DSL or cable Internet – at their locations” and commended the FCC on its “efforts to implement reforms to make high-speed broadband availability a reality for all of America at just and reasonable rates.”⁵²

74. In 2008, the New Hampshire Department of Resources and Economic Development & the Telecommunications Advisory Board recognized the critical necessity of improving access to poles to further the state’s broadband deployment objectives.⁵³

75. A key state objective for the next few years is to improve access to affordable broadband connectivity in all regions of the state. Recent broadband maps show that broadband is available in some form across the entire state,⁵⁴ but deeper analysis by broadband type and speed reveals that much work still remains to achieve full connectivity in many rural areas.⁵⁵

76. Neighboring states have been ranked higher than New Hampshire for broadband deployment. “Massachusetts ... has been active on broadband initiatives” and is “ranked higher

⁵² *In re Connect America Fund; A Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*; Comments of the New Hampshire Public Utilities Commission, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 07-135; WC Docket No. 05-337; CC Docket No. 01-92; CC Docket No. 96-45; WC Docket No. 03-109 (Aug. 24, 2011).

⁵³ State of New Hampshire Broadband Action Plan (June 30, 2008) at iv (“Improve utility pole access” is listed as one of seven “critical” action items “to move the State forward to ensure that New Hampshire maintains and expands its leadership position” on broadband deployment).

⁵⁴ See Broadband Service Availability Map, NH BROADBAND MAPPING & PLANNING PROGRAM (last visited Mar. 13, 2012), http://iwantbroadbandnh.com/maps/Sept2011/Sept2011_AccessAll.pdf (showing broadband in all areas of New Hampshire as of Sept. 30, 2011, but noting that “[a] census block is mapped as ‘served’ if service is delivered to any part of the block”).

⁵⁵ See, e.g., Transfer Technology with Maximum Advertised Download Speed Map, NH BROADBAND MAPPING & PLANNING PROGRAM (last visited Mar. 13, 2012), http://iwantbroadbandnh.com/maps/Sept2011/Sept2011_TechWithFastestDownloadSpeed.pdf (showing regional disparities in terms of broadband access type and maximum speeds thereof); Maximum Advertised Download Speed Greater Than or Equal to 6 mbps Map, NH BROADBAND MAPPING & PLANNING PROGRAM (last visited Mar. 13, 2012), http://iwantbroadbandnh.com/maps/Sept2011/Sept2011_MaxDownloadSpeed6plus.pdf (showing broad swaths of New Hampshire that lack broadband connectivity of 6 Mbps or greater).

on many of the economic and broadband rankings when compared to New Hampshire.”⁵⁶

“Connecticut’s level of broadband deployment is among the best in the United States.”⁵⁷

77. As set forth in the State’s Broadband Action Plan, “[a]ttachment fees for pole access should be *consistent and competitive* so that they do not hinder the further deployment of broadband services.”⁵⁸

78. As found by the FCC based upon an extensive record developed in the federal pole proceeding, “pole rental rates play a significant role in the deployment and availability of voice, video and data networks.”⁵⁹ A lower and more uniform rate pole attachment rate serves to “eliminate barriers to broadband deployment, provide regulatory certainty, promote deployment and competition, spur investment and reduce significant indirect costs cause by the existing differences between the rates paid by competitors.”⁶⁰

5. Formulae adopted by the FCC in 2007

79. Consideration of the fifth factor – the formulae adopted by the FCC in 47 C.F.R. § 1.1409(c) through (f) in effect on July 16, 2007 – does not require adoption of the FCC’s Historic Telecom Rate Formula.

80. First, all that the Commission rules require is that both of the FCC’s formulas in place in 2007 be considered along with the standard’s other factors. As set forth above, the Commission’s authorizing legislation, RSA 374:34-a, allows the Commission to adopt a single rate formula.

⁵⁶ State of New Hampshire Broadband Action Plan at 17-18.

⁵⁷ Connecticut Academy of Science and Energy Report for the Connecticut General Assembly Commerce Committee and Energy and Technology Committee, “Advanced Communications Technologies” (Dec. 2006) at vi.

⁵⁸ *Id.* at 39 (emphasis supplied). The Report identifies “the need for ‘make ready’ terms and consistency in the attachment fees that broadband providers incur to have access to utility poles when deploying infrastructure.”

⁵⁹ April 11 FCC Order ¶ 172.

⁶⁰ *Id.*

81. Second, given the events that have transpired since the adoption of the Commission's rules in 2009, in particular, the FCC's decision to abandon a bifurcated rate structure, the FCC's rules in place five years ago should have little, if any, influence over this Commission's decision to adopt pole attachment rates.

82. Indeed, if this Commission were to decide, contrary to the overwhelming conviction of other regulatory bodies and public interest groups, that adoption of a bifurcated rate structure was appropriate, then, at the very least, it should adopt the FCC's Revised Telecom Rate Formula. While this formula does not fully address the problems associated with the superseded formula (because it still requires the parties to agree upon the appropriate number of attaching entities over which costs are to be allocated), it does at least produce rates that are more in line with this Commission's objective to promote ubiquitous broadband in New Hampshire.

83. As described by the FCC, the Revised FCC Telecom Formula, like the FCC Cable Rate Formula, is "readily administrable, consistent with Congress' instruction to develop a regulatory framework that may be applied in a 'simple and expeditious' manner with a 'minimum of staff, paperwork and procedures consistent with fair and efficient regulation.'"⁶¹

6. Other interests of subscribers and users

84. In addition to all of the factors set forth above, the FCC Cable Rate Formula is easy to administer and relies primarily upon publicly available utility cost information. In the case of PSNH, the data is available from the FERC Form 1 filing. Where pole rate calculations can be easily performed by the attaching parties, the need for regulatory intervention is minimized. The ability of the parties to rely on such public information and the agency and judicial precedent that has accumulated over the years regarding various issues that have arisen is invaluable in providing substantial guidance to pole owners and attaching parties alike without the need to

⁶¹ April 11 FCC Order ¶ 172.

resort to expensive and time-consuming administrative challenges. Pole regimes based on the FCC Cable Rate Formula provide a fair and efficient mechanism for parties to resolve the vast majority of issues informally among themselves.

85. In contrast, the potential for disputes is more likely using either the FCC's Historic Telecom Formula or the FCC Revised Telecom Formula. Disputes mainly concern the rural or urban nature of the service territory and the total number of attaching entities over which certain costs are to be allocated. In contrast, the FCC Cable Rate Formula does not vary depending upon the nature of the service territory or number of attaching entities.

B. Even under a Bifurcated Rate Structure, Such as Was in Effect in New Hampshire until December 2009, TWC's VoIP Service Attachments May Not Be Assessed at Rates Using a Telecom Rate Formula

86. Until Commission's rate review standards were adopted in December 2009, New Hampshire pole attachment rates were limited by the FCC pole attachment rent formulas. Throughout the period the FCC pole attachment rent formulas were effective, VoIP attachments were appropriately priced using the FCC's Cable Rate Formula.

87. The FCC has never applied the FCC's telecom rate formulas to VoIP attachments despite requests by pole owning utilities to the FCC to do so.⁶²

88. To the extent the FCC has addressed pole attachment rates applicable to comingled cable and broadband service, it concluded that such attachments should be priced using the FCC Cable Rate Formula.⁶³

⁶² See April 11 FCC Order ¶ 154 n.464; *Pleading Cycle Established For Comments On Petition For Declaratory Ruling of American Electric Power Service Corporation, et al. Regarding the Rate For Cable System Pole Attachments Used To Provide Voice Over Internet Protocol Services*, Public Notice, WC Docket No. 09-154, DA 09-1879 (2009).

⁶³ See *Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 6777, ¶¶ 99-102 (1998), *aff'd*, *NCTA v. Gulf Power*, 534 U.S. 327 (2002).

89. The FCC has never classified VoIP as telecommunications service.⁶⁴ Indeed, the FCC has expressly declined to address the statutory classification of VoIP services, except in two limited circumstances. Specifically, the FCC ruled that VoIP services involving “net protocol conversion” are information, *not* telecommunications services,⁶⁵ but that certain “IP-in-the-middle” services were telecommunications services.⁶⁶

90. In its April 7, 2011 Order modifying the FCC’s Historic Telecom Rate Formula, the FCC confirmed that it has not yet classified interconnected VoIP for pole attachment rate purposes, and that the April 2011 Order did not “disturb prior Commission decisions addressing particular scenarios” such as the rate that applies to comingled video and broadband service.⁶⁷

91. As such, under the FCC formulas that governed at all times prior to adoption of the Commission’s pole rate review standards, VoIP was an information service for purposes of determining the appropriate pole attachment rental, which would have been established using the FCC Cable Rate Formula.⁶⁸

92. For these reasons, TWC already has paid the maximum lawful amounts to PSNH for pole attachments, based on the FCC Cable Rate Formula. PSNH’s attempt to extract retroactive and prospective rents from TWC, based on the FCC Historic Telecom Rate Formula, is, therefore, unjust and unreasonable.

⁶⁴ Although the FCC has imposed a number of substantive obligations on interconnected VoIP providers, it has been careful to avoid any regulatory classification of those services. *See, e.g., IP-Enabled Services*, Report and Order, 24 FCC Rcd 6039 ¶ 15 n.9 (2009); *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 ¶ 59 n.188 (2007); *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 ¶ 49 n.166 (2006).

⁶⁵ *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, ¶ 2, n.3 (rel. Feb. 19, 2004).

⁶⁶ *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (rel. Apr. 21, 2004).

⁶⁷ April 11 FCC Order ¶ 154 & n.464. *See also* Br. for Respondent at 12, *American Elec. Power Serv. Corp. v. FCC*, No. 11-1146 (D.C. Cir. filed Feb. 17, 2012) (“Even before the 1996 Act, the Commission, with this Court’s approval, had held that cable operators that offer broadband services along with cable service do not lose the protection of the regulated cable rate.”).

⁶⁸ *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 999 (2005); *Gulf Power*, 534 U.S. at 338-39.

C. If The FCC's Historic Telecom Formula or Revised Telecom Formula Are Adopted, A Proceeding Is Necessary to Determine the Appropriate Rate

93. In the event a telecom rate would apply to any of TWC's attachments, TWC requests that the Commission ensure PSNH's telecom rates are calculated and assessed in accordance with the Commission's rules.

94. The FCC's Historic and Revised Telecom Formulas include variables that are or may be in dispute, including the appropriate nature of the entire PSNH service territory where TWC is attached (rural or urban) and the appropriate number of total attaching entities over which certain of the pole costs are to be allocated.

95. In addition, under both FCC telecom formulas, presumptions exist that may be rebutted, including the pole height and the amount of the pole owner's investment in appurtenances (i.e., cross arms).

96. Accordingly, a proceeding would be necessary to determine the correct rates using either the FCC's Historic Telecom Rate Formula or Revised Telecom Rate Formula.

97. In contrast, if the Commission determines that the FCC's Cable Rate Formula applies, then the current rate applicable to TV& Internet services (upon information belief, the FCC Cable Rate Formula) would apply to PSNH attachments in New Hampshire.

V. FURTHER EFFORTS AT INFORMAL RESOLUTION WOULD BE FRUITLESS

98. In 2006, PSNH unilaterally declared that TWC was providing telecommunications services and began billing TWC at a rate that included an impressible telecom surcharge. In response, TWC notified PSNH that "TWC's residential Digital Phone service is a VoIP-based service that has not been classified as a telecommunications service by the Federal Communications Commission" and sent PSNH a check for pole attachment rent, based on the cable rate. *See Laine Aff.* at ¶ 14 and Ex. 2.

99. For all succeeding pole attachment invoice periods, PSNH sought to collect a telecom surcharge for certain TWC attachments and TWC continued to pay for all attachments at the rate invoiced for TV & Internet Service, as was appropriate under governing FCC formulas and New Hampshire pole attachment rules.

100. TWC notified PSNH again in 2008 and 2011 that VoIP attachments were not subject to the telecom surcharge. Laine Aff. at ¶ 17 and Ex. 4.

101. In November 2011, PSNH again asserted that “because Time Warner’s attachments are for the purpose of providing telecommunications service, Time Warner is responsible for payment of the rate applicable to attachments used for the provision of telecommunications services.” Laine Aff. ¶ 22 and Ex. 3.

102. PSNH filed its Court Complaint on February 1, 2012 without any notice or warning to TWC. Laine Aff. ¶ 25; Attachment C.

103. Unfortunately, the parties remain far apart on the matter in dispute and TWC believes that further attempts to resolve this matter without the Commission’s involvement would be fruitless. Laine Aff. ¶ 27. Immediate resort to this Commission’s processes, and grant of the relief requested, are necessary to ensure that TWC’s right to just and reasonable pole attachment rates, terms and conditions are protected.

VI. RELIEF REQUESTED

For these reasons, TWC respectfully requests the Commission to:

- Assert its jurisdiction over all matters raised in this Petition;
- Find that, pursuant to PUC 1304.06, the FCC’s Cable Rate Formula applies to all attachments to PSNH poles by cable operators, regardless of the communications services provided over such attachments, and has since December 12, 2009;
- Alternatively, find that, pursuant to PUC 1304.06, the FCC’s Cable Rate Formula applies to comingled cable, Internet and VoIP attachments to PSNH poles, and has since December 12, 2009;

- Find that, pursuant to PUC 9073, INTERIM, adopting the FCC pole attachment rate formulas, the FCC's Cable Rate Formula applied to comingled cable, Internet and VoIP attachments from January 17, 2008 to December 11, 2009;
- Order PSNH to cease and desist its unlawful, unjust and unreasonable rates, terms and conditions of attachment in a manner consistent with this Complaint;
- Order PSNH to cease and desist from employing such unreasonable rates, terms and conditions of attachment in the future; and
- Award such other relief the Commission deems just, reasonable and proper.

Respectfully submitted,

TIME WARNER ENTERTAINMENT L.P.
d/b/a TIME WARNER CABLE

By its attorneys,
Pierce Atwood LLP

By: 

David A. Anderson
NH Bar No. 12560
Michele E. Kenney
NH Bar No. 19333
Pierce Atwood LLP
Pease International Tradeport
One New Hampshire Avenue, Suite 350
Portsmouth, NH 03801
Telephone: (603) 433-6300
Email: danderson@pierceatwood.com
Email: mkenney@pierceatwood.com

Of counsel:

Maria T. Browne
Davis Wright Tremaine LLP
1919 Pennsylvania Ave., N.W.
Suite 800
Washington D.C. 20006

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