



**Public Service
of New Hampshire**

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A Northeast Utilities Company

Robert A. Bersak
Assistant Secretary
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April 13, 2012

Debra A. Howland
Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429



Re: Docket No. DT 12-084
Petition for Resolution of Dispute with Public Service Company of New Hampshire

Dear Director Howland:

On March 30, 2012, Time Warner Entertainment Company, L.P. d/b/a Time Warner Cable ("TWC") filed a "Petition for Resolution of Dispute" with the Commission that has been docketed as DT 12-084. In that Petition, citing to RSA 374:34-a and Rule Puc 1304.06, TWC has asked the Commission to "establish a pole attachment rental rate for PSNH using the FCC's cable rate formula." Petition at 4.

Public Service Company of New Hampshire ("PSNH") does not dispute TWC's right to file the Petition to the extent that it seeks Commission action to prospectively establish just and reasonable rates for the attachment of TWC's facilities on poles owned wholly or in-part by PSNH. However, PSNH objects to any attempt by TWC to retrospectively challenge before this Commission the contractual obligations that TWC has voluntarily entered into.

TWC admits in its Petition that the attachment of its facilities to poles owned by PSNH is governed by existing contract. Existing attachment fees and charges, as well as dispute resolution processes, choice of forum, and other detailed terms and conditions, are established pursuant to the contractual relationship that have been voluntarily agreed to by and between the parties. Pursuant to the contractual relationship with TWC, PSNH has filed suit against TWC in Merrimack County Superior Court to recover attachment fees that have not been paid by TWC. The contractual relationship between TWC and PSNH predates both RSA 374:34-a and Rule Puc 1304.06. That contractual relationship is protected by Part I, Article 23 of the New Hampshire Constitution which prohibits the making of retrospective laws.

Just two weeks ago, the New Hampshire Supreme Court, in *Cloutier v. State of New Hampshire* (Docket No. 2010-714, March 30, 2012), noted "Although this provision [Part I, Article 23] does not specifically reference existing contracts, 'we have held that its proscription duplicates the

protections found in the contract clause of the United States Constitution,” citing to *State v. Fournier*, 158 N.H. 214, 221 (2009). The Court continued that “‘every statute which takes away or impairs vested rights, acquired under existing laws, . . . must be deemed retrospective’ within the meaning of Part I, Article 23,” citing to *Tuttle v. N.H. Med. Malpractice Joint Underwriting Assoc.*, 159 N.H. 627, 640 (2010). Previously, in *Appeal of Pennichuck Water Works*, 120 N.H. 562 (1980), the Court determined that the Part I, Article 23 prohibition on retrospective laws applied in the context of utility rates and charges.

As a result, notwithstanding TWC’s assertion that the Commission has jurisdiction over the entirety of the dispute between it and PSNH, the Constitutional prohibition on retrospective laws protects the sanctity of the contractual agreements that are in effect between PSNH and TWC. If the Commission deems it appropriate to entertain TWC’s Petition, it should only do so to the extent that it applies to investigating rates prospectively, not retrospectively.

The proper forum to hear any dispute regarding the existing contractual relationship between PSNH and TWC is the Merrimack County Superior Court. The Commission should reject TWC’s attempt to wrest jurisdiction regarding the enforcement of those contracts from that court, as such action would impair the vested rights regarding fees, dispute resolution and choice of forum that have expressly been agreed upon by contract.

Very truly yours,



Robert A. Bersak
Assistant Secretary and
Assistant General Counsel

cc: Service List, DT 12-084

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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Docket #: 12-084-1 Printed: April 13, 2012

FILING INSTRUCTIONS:

a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:

DEBRA A HOWLAND
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NHPUC
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b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.

c) Serve a written copy on each person on the service list not able to receive electronic mail.