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Ms. 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
Time Warner Entertainment Company, L.P.

Dear Director Howland:

This letter responds to the April 13, 2012 letter filed by Public Service Company of New Hampshire (PSNH) objecting to the scope of potential relief awarded by the Commission on the Petition for Resolution of Dispute in Docket No. DT 12-084 (Petition) filed by Time Warner Cable Entertainment Co., L.P. (Time Warner Cable). Specifically, PSNH claims that Time Warner Cable's Petition would illegally impair PSNH's "vested rights regarding fees, dispute resolution and choice of forum," which PSNH claims to be set by contract.

Time Warner Cable's Petition asks the Commission to determine reasonable annual rates for its attachments to PSNH utility poles using the standards set forth in applicable rules in light of PSNH's imposition of a surcharge on Time Warner Cable's provision of VoIP service over its cable systems to New Hampshire customers. Time Warner Cable's Petition is expressly contemplated by Puc 1304.03, which provides that "[a] party to a pole attachment agreement ... may petition the commission pursuant to Puc 203 for resolution of dispute arising under such agreement or order," as well as the very contract that PSNH claims to be sacrosanct.

Nevertheless, PSNH urges the Commission to consider Time Warner Cable's Petition only "to the extent that it applies to investigating rates prospectively, not retrospectively," based upon its assertion that the "Constitutional prohibition on retrospective laws protects the sanctity of the contractual agreements that are in effect between PSNH and Time Warner Cable." PSNH Letter at 2. In fact, a retroactive ruling by the Commission would not constitute substantial impairment of this particular contract because Article III expressly contemplates such a ruling. *See* Petition at Attachment A, Affidavit of Julic Patterson Laine at Ex. 1 (Pole Attachment Agreement dated February 6, 2004). In addition, where, as here, the exact issue in dispute has been subject to a long history of regulation, the law is clear that there can be no reasonable expectation that a contract provision will be enforced as if there were no controlling regulations.

As long held by the Supreme Court, "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908). In the leading case of *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983), for example, the Court rejected a utility's challenge under the contracts clause to state natural gas price controls because "the parties are operating in a heavily regulated industry" and "State authority to regulate natural gas prices is well established." *Id.* at 413-414. Moreover, the Court found it significant that "the contracts expressly recognize the existence of extensive regulation," and "[p]rice regulation . . . was foreseeable as the type of law that would alter contract obligations." Pole attachment rates have likewise been subject to a long history of close regulatory oversight, as the parties' contract recognizes. PSNH has no credible claim that it had a reasonable expectation that it would be able to increase rates for pole attachments as a result of Time Warner Cable's introduction of VoIP services.

Indeed, for more than thirty years there has been "an ongoing battle over the rates that utilities may charge cable television companies for attachments of cable to their poles." *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993) (summarizing history of pole attachment regulation). Congress enacted the Pole Attachment Act of 1978, codified at 47 U.S.C. § 224, principally "to protect cable television companies from the anticompetitive practice by utilities of charging excessive pole attachment rates." *Id.* at 932. The Supreme Court recognized that the law was passed because "utility companies were exploiting their monopoly position by engaging in widespread overcharging." *FCC v. Florida Power Corp.*, 480 U.S. 245, 241 (1987) (*quoted in Texas Utils.*).

The Pole Attachment Act and the FCC's rules thus governed the reasonableness of any rates PSNH charged Time Warner Cable under any pole attachment agreement up until 2008, when New Hampshire asserted its jurisdiction over pole rates pursuant to RSA 374:34-a. The FCC's rules, which governed the parties at the time they entered the three agreements submitted with Time Warner Cable's Petition, expressly allowed attaching entities to enter into pole attachment agreements and subsequently file a complaint with the FCC challenging the terms of those agreements. *See Implementation of Section 224 of the Act*, 26 FCC Rcd. 5240, 5292-52101 (2011) (reviewing and rejecting proposals to change the "long-standing 'sign and sue' rule, which allows an attacher to challenge the lawfulness of terms in an executed pole attachment agreement."). Thus, PSNH can claim absolutely no reasonable expectation that it was ever entitled to unilaterally set rates without being subject to regulatory oversight.

PSNH cites New Hampshire Supreme Court cases on retrospective laws, but none of those cases involves facts or regulatory schemes remotely comparable to Time Warner Cable's challenge to PSNH pole rates. For example, in *Appeal of Pennichuck Water Works*, 120 N.H. 562 (1980), the Court denied a utility's request to raise the rates of its customers for prior consumption under tariffed rates. By contrast, PSNH never properly effectuated, and Time Warner Cable never agreed to pay, PSNH's attempted rate increases. Likewise, the recent case of *Cloutier v. New Hampshire*, No. 2010 -714 (March 30, 2012), says nothing relevant to this case, other than to confirm that the provision referenced in the New Hampshire Constitution "duplicates the

proscription found in the contract clause of the United States Constitution." Yet, as set forth above, well-established principles of contracts clause jurisprudence bar PSNH's claim of vested rights.

In sum, the Commission of course will determine the appropriate scope of relief in this matter, but PSNH's objection to the scope of any relief is both premature and without foundation in the New Hampshire Constitution.

Sincerely,

DAVIS WRIGHT TREMAINE, LLP

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