

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE**

PUBLIC SERVICE COMPANY OF  
NEW HAMPSHIRE,  
*Plaintiff,*

vs.

TIME WARNER ENTERTAINMENT  
COMPANY, L.P.  
*Defendant.*

No. 12-cv-00098-PB

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S  
MOTION TO DISMISS OR IN THE ALTERNATIVE, MOTION TO STAY**

Defendant Time Warner Entertainment Company, L.P. d/b/a Time Warner Cable ("Time Warner Cable") submits this Reply Memorandum in Support of its "Motion to Dismiss for Lack of Subject Matter Jurisdiction, or to Stay Proceedings" (Doc. No. 5) ("Motion").

**I. INTRODUCTION**

As explained in detail in Time Warner Cable's Motion and supporting memorandum (Doc. No. 5-1) ("Memorandum" or "Mem."), the dispute between these parties exists because PSNH imposed a new pole rent surcharge on Time Warner Cable when it introduced Voice over Internet Protocol (VoIP) service, and Time Warner Cable believes that surcharge to be "unjust and unreasonable." The law governing pole attachment agreements and rates confers jurisdiction for such disputes upon either the Federal Communications Commission ("FCC") or, in New Hampshire after 2007, the Public Utilities Commission ("PUC"). The statutes direct the agencies, not courts, to decide whether pole rent is reasonable.

PSNH's "Objection to Motion to Dismiss" (Doc. No. 18) ("Objection") fails to respond to the key points of Time Warner Cable's Motion on the mistaken ground that this dispute is a

routine contract collections matter when in fact there is no contract dispute independent of the reasonableness of PSNH's effort to impose a VoIP surcharge on Time Warner Cable's pole rent.

Unlike a routine commercial contract, the Agreement between the parties was at all times governed by federal and state laws that permit parties to a pole attachment agreement to obtain an expert agency resolution of any dispute that concerns the reasonableness of rates, terms or conditions of the signed contract. Under the FCC's "sign and sue" policy, and the rules of the PUC, Time Warner Cable *always* has had the ability to file an administrative complaint to resolve any dispute over the reasonableness of rates PSNH has imposed under the Agreement.

## II. ARGUMENT

### A. There Is No Contract Dispute Independent of the Reasonableness of PSNH's Effort to Impose a VoIP Surcharge on Pole Rent.

PSNH's Objection proceeds on the false assumption that this the parties dispute concerns a "contract and debt action[ ]," to be resolved "without the need for prospective ratemaking issues to be determined by the PUC." *See, e.g.*, Objection at 1-2; 7, 8, 14. Yet PSNH fails to address – much less refute – that Time Warner Cable's fundamental challenge goes to the *reasonableness* of the VoIP fees PSNH seeks, as determined by the laws governing pole attachment rental rates and regulatory classification of VoIP service. And the law assigns administration of those issues to regulatory agencies.

PSNH does not deny that the dispute is limited to this issue of first impression.<sup>1</sup> Nor does PSNH mention a single issue of routine contract law that is in dispute. There is no conceivable

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<sup>1</sup> In fact, a recently enacted New Hampshire law specifies that VoIP services are to be deregulated, and clarifies that VoIP deregulation does not affect the Commission's jurisdiction over pole attachment disputes. *See* SB 48 (N.H. 2012) (An Act "relative to state regulation of telephone service providers and clarifying the authority of the contract public utilities commission to regulate pole attachments") *history and text available at*

manner in which the dispute between these parties will be resolved without a determination of whether PSNH's pole rent surcharge for Time Warner Cable attachments that deliver VoIP services is "just and reasonable" under the state's regulation of pole attachments.<sup>2</sup>

Apparently, the parties dispute the factual adequacy of PSNH's notices of rate increases. But that potential fact issue is not material because it cannot exist independent of the question of the reasonableness of PSNH's purported VoIP surcharge.<sup>3</sup> The adequacy of PSNH's notice of rate increases is immaterial if the PUC does not find the rates to be "just and reasonable." And as discussed in the next section, PSNH's pole rates have been governed by the FCC and PUC throughout the existence of the Agreement. Under governing law, Time Warner Cable could not be deemed to waive agency oversight, and the PUC retained jurisdiction through today to decide the lawfulness of PSNH's pole rate surcharge for VoIP services.

**B. The Reasonableness of Terms Imposed Under the Agreement At Issue Has Always Been Subject to Regulatory Oversight Upon an Administrative Complaint.**

Since its execution, the rates, terms and conditions of the Agreement between PSNH and Time Warner Cable have been covered by statutes and agency regulations designed to assure that cable operators are able to file administrative complaints to challenge the reasonableness of those terms and conditions. At the time the Agreement was executed in 2004, it was governed by the federal Pole Attachment Act and the rules of the FCC. Mem. at 4 – 6. Under the FCC's rules,

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<http://www.nhliberty.org/bills/view/2012/SB48>, at II (VoIP deregulation) and at III.e (pole attachment regulation among statutes not affected by VoIP deregulation).

<sup>2</sup> PSNH does not deny, for example, that Time Warner Cable has paid PSNH over \$1.2 million for all PSNH invoices at the contract rate for "TV & Internet" services. See, e.g., Mem. at 8 – 9 (citing Laine Aff.). Nor can PSNH dispute that Time Warner Cable objected to PSNH's VoIP surcharge all along. Mem. at 8 - 9.

<sup>3</sup> Time Warner Cable also disagrees with numerous other subjective interpretations of the Agreement PSNH offers as "Contract Facts," Objection at 2 – 7, which also do not exist independent of the question for the PUC, i.e. whether PSNH's VoIP surcharge is "just and reasonable."

“when the parties fail to resolve a dispute over [rate] charges . . . an attacher may ‘sign’ a contract with a utility and later file a complaint with the FCC to contest an element of that agreement deemed to be unfair. This is the so-called ‘sign and sue’ rule.”<sup>4</sup> Another federal court recently observed, in a similar dispute over VoIP pole fees, that the FCC recently affirmed the “‘sign and sue’ policy of encouraging parties to sign an agreement then challenge the specific terms for reasonableness in a complaint to the FCC.” *Union Elec. Co. v. Cable One, Inc.*, 2011 U.S. Dist. LEXIS 109552 \* 12-13 (E.D. Mo. Sept. 27, 2011) (granting motion to stay case on utility contract claims pending FCC resolution of complaint) (citing *Implementation of Section 224 of the Act, Report and Order on Reconsideration*, 26 F.C.C.R. 5240, 5245, 5292 – 5295 (April 7, 2011)). There is no time limit for challenging a utility’s rates, terms or conditions for pole attachments under the rule. The PUC rules likewise allow challenges to existing agreements. Puc 1304.02 (petitions), 1304.04 (PUC modification of agreements). Thus, the Agreement on which PSNH seeks recovery was never immunized from regulatory challenge.

The federal pole attachment regulations gave way in New Hampshire to state law pursuant to RSA 374:34-a, which directed that the PUC “shall regulate and enforce the rates . . . for such pole attachments. . . to provide that such rates . . . are just and reasonable.” RSA 374:34-a, II. In addition, the statute conferred upon the PUC specific “authority to hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments.” RSA 374:34-a, VII. The authority to determine

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<sup>4</sup> *Southern Company Services, Inc. v. FCC*, 313 F.3d 574, 578 (D.C. Cir. 2002) (citing *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, Report and Order*, 13 F.C.C.R. 6,777, 6,780-90 ¶ 16-21 (Feb. 6, 1998) (available at 1998 WL 46987) and *Amendment of the Commission's Rules and Policies Governing Pole Attachments, Consolidated Partial Order on Reconsideration*, 16 F.C.C.R. 12,103, 12,112 ¶ 12 (May 25, 2001) (available at 2001 WL 575495)). For additional discussion of the sign-and-sue rule, see also *Southern Company Services*, 313 F.3d at 582 – 584.

the reasonableness of pole attachment rates, terms and conditions is not granted to any court or any other decision-maker. The PUC's rulemaking in response to the Legislature's enactment of RSA 374:34-a confirms that only the PUC may resolve such disputes.

The PUC rules adopted as required by RSA 374:34-a "provide for rates, charges, terms and conditions for pole attachments that are just, reasonable and in the public interest." Puc 1301.01 (PUC rules at Mem., Appendix 2). Those rules specifically allow an attaching party, like Time Warner Cable, to "petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement." Puc 1304.02. Conversely, the rules do *not* provide parties with an option to file a complaint in court for a determination of the reasonableness of rates, terms or conditions. Thus, any entity seeking to complain about the reasonableness of a pole attachment agreement, or to resolve a dispute as to the reasonableness of any pole attachment rate, term or condition, has only one option consistent with the statute and rules: complaints must be filed with the PUC, which has the only jurisdiction over such disputes.<sup>5</sup>

PSNH incorrectly reads the phrase "may petition the commission" in the PUC rules to mean that PUC adjudication is merely one option, and a court action is another. Objection at 7. The governing statute does not allow that argument, however, providing that "[w]henver a pole owner is unable to reach agreement" with a prospective attaching entity, "the commission *shall regulate* . . . rates, charges, terms, and conditions for such pole attachments . . . to provide that

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<sup>5</sup> The rules include detailed standards and provisions for pole attachment dispute resolution, augmented by the PUC's general adjudication rules. See Puc 1304.01 – 1304.07. In any complaint against utility pole rent, the Commission "shall consider" the interests of subscribers to the services of the attaching party, the interests of the consumers of any pole owner, and certain formulae adopted by the FCC for analyzing pole rents. Puc 1304.05. The PUC may order any attaching entity to remove its facilities, Puc 1304.03, or it may modify the rates, charges terms or conditions of attachment. Puc 1304.04. The procedural rules impose a series of shifting presumptions and burdens, Puc 1304.06, and allow the PUC to "order a payment or refund, as appropriate." Puc 1304.07.

such rates, charges, terms, and conditions are just and reasonable.” RSA 374:34-a. Thus, the PUC *must* regulate pole rates challenged as unreasonable.

As Time Warner Cable acknowledged in its initial Memorandum, the PUC proceedings specified for pole attachment disputes do not occupy the *entire* field of pole attachment disputes such that no court ever has jurisdiction over any related dispute. Mem. at 12 n. 12. But the governing statutes and rules detailed above and in Time Warner Cable’s Memorandum clearly make the *reasonableness* of a pole-owning utility’s rates, terms or conditions for pole attachments a matter of agency oversight, not contract. The PUC has sole jurisdiction to resolve complaints against unreasonable pole attachment rent. This Court should therefore dismiss PSNH’s Complaint and allow the PUC to exercise its statutory jurisdiction.

**C. There Are No Retrospective Issues for Bifurcation.**

PSNH wrongly suggests that this dispute neatly divides between a “retrospective factual and legal dispute” for this Court to decide and “prospective ratemaking issues” for the PUC’s resolution. *See, e.g.*, Objection at 1, 8. PSNH provides no authority or explanation for this proposition, which is baseless in light of the FCC’s “sign and sue” rule and PUC rules that similarly allow review of the reasonableness of executed agreements. Puc 1304.02 & . 1304.02.

PSNH renews groundless arguments it made to the PUC that the pole rent it imposed in the past under the Agreement are categorically protected from PUC review under Part I, Article 23 of the New Hampshire Constitution, which prohibits “the making of retrospective laws.”<sup>6</sup> Yet “[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from

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<sup>6</sup> This provision mirrors the protections of the contract clause of the United States Constitution. *Cloutier v. New Hampshire*, No. 2010-714, 2012 N.H. LEXIS 42, at \*10 (N.H. Mar. 30, 2012).

the power of the State by making a contract about them.”<sup>7</sup> For over thirty years, pole attachment rates have been subject to close regulatory oversight through “an ongoing battle over the rates that utilities may charge cable television companies for attachments of cable to their poles.”<sup>8</sup> In light of the history of pole attachment oversight for “just and reasonable” terms, PSNH has no credible claim that it reasonably expected to charge rates for attachments used to provide VoIP without the distinct possibility of regulatory review.

Alternatively, PSNH may be relying on inapplicable principles of “retroactive” or “retrospective” ratemaking. “Generally, retroactive rate making occurs when a utility is permitted to recover an additional charge for past losses, or when a utility is required to refund revenues collected, pursuant to then lawfully established rates.” *In re Petition of Elizabethtown Water Co.*, 107 N.J. 440, 448, 527 A.2d 354, 357, 1987 N.J. LEXIS 329 \*10 (1987). This principle, however, rests on the inapplicable constitutional prohibition against retrospective legislation because altering approved tariffs after the fact through ratemaking “would be creating a new obligation in respect to a past transaction.” *Appeal of Pennichuk Water Works*, 120 N.H. 562, 565 – 566, 640, 419 A.2d 1080, 1083 (1980).<sup>9</sup> Those concepts have no relevance here.

PSNH’s effort to impose a VoIP pole attachment surcharge was never approved by any agency. Instead, PSNH was at all times exposed to agency review of its pole rent terms, first

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<sup>7</sup> *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908); *see also Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 413 – 414 (1983) (no contract impairment found because “the parties are operating in a heavily regulated industry.”).

<sup>8</sup> *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993) (history of pole attachment regulation); *see also FCC v. Florida Power Corp.*, 480 U.S. 245, 241 (1987) (utilities “were exploiting their monopoly position by . . . widespread overcharging.”).

<sup>9</sup> The filed rate doctrine, which precludes some utility rates from certain later challenges, is also inapplicable because PSNH never obtained PUC review of the pole rent at issue. *See, e.g., A.S.I. Worldwide Communications Corp. v. WorldCom, Inc.* 115 F. Supp. 2d 201, 208 (D.N.H. 2000).

under the FCC's "sign and sue" policy and later under RSA 374:34-a and the PUC rules. There is no "retrospective" element of this dispute available for bifurcation.

**D. Time Warner Cable Does Not Rely on Abstention Principles.**

PSNH mentions *Colorado River* abstention, Objection at 12 – 14, even though Time Warner Cable does not rely on any abstention doctrine. Indeed, PSNH admits that a factual precedent for that doctrine is missing if it were relevant, Objection at 12, and offers no clear reason why that case is analogous. *See generally Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800, 802 (1976). In any event, the legislation in that case "consent[ed] to jurisdiction in the state courts concurrent with jurisdiction in the federal courts," *id.* at 808, providing a statutory basis for concurrent state and federal court actions. But the federal Pole Attachment Act and RSA 374:34-a do *not* allow concurrent jurisdiction in the agencies and courts over disputes as to the reasonableness of pole attachment rates, terms and conditions. Instead, the law confers sole jurisdiction for those determinations upon the PUC.

**E. PSNH Cites Inapposite Cases on Exhaustion of Remedies and Fails to Address the Governing Statutes.**

PSNH does not deny that it failed to use the administrative process specified for the resolution of disputes. RSA 374:34-a; Puc 1304.02 ("A party. . . may petition the commission . . . for resolution of a dispute arising under such agreement . . ."). Instead, PSNH suggests that exhaustion was unnecessary, relying on wholly inapplicable cases in which the only issue was one of statutory interpretation, not "reasonableness" of practices.<sup>10</sup> This case does not require

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<sup>10</sup> Objection at 10 – 11 (citing *Pheasant Lane Realty Trust v. City of Nashua*, 143 N.H. 140, 141-42 (1998) (statutory interpretation); *Bedford Residents Group v. Town of Bedford*, 130 N.H. 632, 639 (1988) (same); *Londonderry v. Faucher*, 112 N.H. 454, 456 (1972) (constitutionality of ordinance)). PSNH also grossly distorts the holding of a FERC case, where "the applicable statutory and regulatory provisions permit[ted] retroactive collections" under certain energy contracts. *Williston Basin Interstate Pipeline Co. v. ARCO Oil & Gas Co.*, 41 FERC ¶ 61063,



statutory interpretation. And the statutes at issue do not allow parties to shield the issue of reasonableness of pole attachment rates from regulatory review.

PSNH simply has not analyzed, much less rebutted, exhaustion requirements under the federal and state laws that govern *this* dispute, both before and after New Hampshire certified to regulate pole attachments. Because PSNH failed to commence and exhaust the prescribed regulatory process for the resolution of disputes as to the reasonableness of pole attachment rates, terms or conditions, this Court has no jurisdiction to hear the case.

**F. The Doctrine of Primary Jurisdiction Is An Alternative Basis to Stay this Case.**

Time Warner Cable invoked the doctrine of primary jurisdiction as an alternative to its Rule 12(b)(1) argument, not as any form of admission. *See* Objection at 2. Time Warner Cable believes that the PUC has exclusive – as opposed to primary – jurisdiction because the primary jurisdiction doctrine applies only where “initial decisionmaking responsibility between agencies and courts . . . *overlaps* and potential for conflicts exist.” 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 14.1 (5th ed. 2010) (emphasis added). Because RSA 374:34-a requires the PUC to regulate pole rates to assure they are reasonable, and the material dispute between the parties is whether PSNH’s VoIP surcharge is reasonable, this Court should dismiss the case outright.

If, however, the Court finds that it has jurisdiction, Time Warner Cable alternatively submits that the doctrine of primary jurisdiction applies because, at minimum, it “requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.” *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956). *See* Mem. at 15 – 20.

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1987 FERC LEXIS 618 (Oct. 22, 1987). The pole attachment laws do not similarly authorize utilities to collect fees that are challenged as unjust and unreasonable practices.

PSNH does not address the distinction made in several cases cited by Time Warner Cable by courts that deferred to the FCC, despite utility company claims for breach of contract, on grounds that the agency has jurisdiction over disputes that involve challenges to unjust or unreasonable pole rates. *See* Mem. at 17 – 20 (citing *Mile Hi Cable Partners v. Public Serv. Co. of Colo.*, 17 FCC Rcd. 6268, 6271 ¶ 7 (2002) (contract action properly before the FCC for determination of just and reasonable rates, terms and conditions), *aff'd*, 328 F.3d 675 (D.C. Cir. 2003); *Marcus Cable Assocs. v. Texas Utils. Elec. Co.*, FCC 03-173, 18 FCC Rcd. 15932, 15935-37 ¶¶ 6-8 (2003) (dispute as to reasonableness of utility fees for attaching parties' sublease of rights was within agency's jurisdiction); *Cavalier Tel. v. Virginia Elec. & Power Co.*, 15 FCC Rcd. 9563, 9566 ¶ 5 (2000) ("certain" remedies for breach of contract may be pursued in forums other than the Commission, but not questions of reasonableness of rates, terms and conditions concerning pole attachments), *vacated by settlement*, 17 FCC Rcd. 24414 (2002)). *See also* *Union Elec. Co. v. Cable One, Inc.*, 2011 U.S. Dist. LEXIS 109552 \* 12-13 (E.D. Mo. Sept. 27, 2011) (staying case on utility contract claims pending FCC resolution of complaint as to reasonableness of VoIP pole rent). If jurisdiction exists for this Court to entertain any aspect of the dispute between these parties under the Agreement, it is otherwise ripe for application of the doctrine of primary jurisdiction to allow the PUC to determine whether PSNH's VoIP surcharge was and is just and reasonable.

### **III. CONCLUSION**

WHEREFORE, for all of the foregoing reasons, Time Warner Cable respectfully requests that this Court dismiss the case in its entirety or, in the alternative, that this Court stay the action pending resolution of the proceedings at the New Hampshire Public Utilities Commission.

Respectfully submitted,

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

By its attorneys,  
Pierce Atwood LLP

Dated this 19th day of June, 2012.

Of counsel:

Robert G. Scott, Jr.

Maria T. Browne

Davis Wright Tremaine LLP

1919 Pennsylvania Ave., N.W., Suite 800

(202) 973-4200

Washington D.C. 20006

By: /s/ David A. Anderson

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

**Certificate of Service**

I hereby certify that a copy of the foregoing Reply Memorandum in Support of Defendant's Motion to Dismiss or in the Alternative, Motion to Stay, was served on the following on this 19th day of June, 2012, and in the manner specified herein:

Electronically Served Through ECF:

Charles P. Bauer, Esquire

Erik G. Moskowitz, Esquire

Gallagher, Callahan & Gartrell, P.C.

214 North Main Street

P.O. Box 1415

Concord, NH 03302-1415

/s/ David A. Anderson

David A. Anderson