

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

Puc 1300 – Utility Pole Attachment Rules : DRM 17-139
: February 2, 2018



COMMENTS OF CTIA

CTIA hereby provides the New Hampshire Public Utilities Commission (“Commission”) with its Comments in response to the Commission’s November 28, 2017 Rulemaking Notice regarding amendments to Puc 1300 (the “Proposed Rules”).

As noted in CTIA’s October 27, 2017 comments in this proceeding regarding the Commission’s Initial Proposal for amendments to its pole attachment rules, CTIA believes the Commission’s proposals put it on the right path to facilitate rapid deployment of 5G in New Hampshire. CTIA commends the commission for continuing to examine potential improvement to its rules, supports many of the provisions in the Proposed Rules, and appreciates the Commission incorporating feedback to improve the Commission’s October 20, 2017 Initial Proposal in this proceeding.

The Commission is not alone in reviewing its infrastructure rules, but rather, joins a group of commissions, state and federal, that are examining their rules in order to remove barriers to investment in and deployment of infrastructure.¹ As the FCC has noted, “[C]ontinuing to meet this [wireless data] demand and realizing the potential benefits of next-generation broadband will depend, however, on having an updated regulatory framework that

¹ See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking, Notice of Inquiry, 32 FCC Rcd 3330 (2017) (“Wireless NPRM/NOI”); Accelerating Wireline Broadband Development by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) (“Wireline NPRM/NOI”).

promotes and facilitates next generation network infrastructure facility deployment.”² State commissions share this sentiment, as illustrated by the California Public Utilities Commission’s “decision [to] amend[] the ROW Rules to provide commercial mobile radio service (CMRS) carriers with nondiscriminatory access to public utility infrastructure, too. Such access will facilitate investment in wireless infrastructure, encourage widespread deployment of broadband wireless services, foster the provision of wireless service in previously unserved areas, and improve access to 911.”³

The need to remove barriers to wireless deployment has never been more acute. The wireless industry is at the very cusp of rolling out transformative 5G networks. Deploying these networks will require a massive investment in states like New Hampshire, and the wireless industry is prepared to make such an investment. It is estimated that wireless companies will invest \$275 billion over seven years to deploy their networks, and those networks are expected to create three million new jobs and boost the annual GDP by \$500 billion.⁴ The Commission’s decision in this docket will be influential in determining how robustly these benefits flow to New Hampshire.

Below, CTIA offers for the Commission’s consideration additional edits that CTIA believes will further tailor the Proposed Rules to promote and facilitate broadband deployment in a fair and efficient manner.

² Wireless NPRM/NOI, at 3331.

³ California Public Utilities Commission, *Decision Regarding the Applicability of the Commission’s Right-of-Way Rules to Commercial Mobile Radio Service Carriers*, Rulemaking No. 14-05-001 (rel. Feb. 1, 2016).

⁴ See accenturestrategy, “Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities,” available at <http://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrantsmart-cities-accenture.pdf> (“Smart Cities Paper”).

I. THE COMMISSION SHOULD ADOPT THE PROPOSED RULES TO FOSTER DEPLOYMENT OF NETWORK INFRASTRUCTURE

The Proposed Rules make a number of positive changes to Puc 1300, and the Commission should adopt those Proposed Rules without further amendment, except as otherwise specified herein.

The Commission should adopt without change the proposed amendment of Puc 1302.01 to specifically include references to wireless service providers and information service providers, and the proposed amendment of Puc 1302.06 to specifically include references to wireless antennas in the definition of “facility.” Specifying these rights for wireless providers will encourage the proliferation of broadband and reduce the potential for definitional disputes.

Additionally, the Commission’s proposal to apply reasonable, objective limits on pole owners’ ability to reject requests to attach wireless facilities above the communications space is prudent. The Commission’s proposed amendments to Puc 1303.01(a) and Puc 1303.09 clarify that rejection of requests to attach wireless facilities above the communications space, including to pole tops, is limited to reasons of capacity, safety, reliability, engineering, or lack of authority. The proposed rule is consistent with the statutory limits on pole owners’ ability to reject pole access requests (*see* RSA 374:34-a (VI)), and should be adopted. Wireless carriers share electric utilities’ desire for safe, reliable pole attachments. The Commission’s adoption of the objective standards contained in the Proposed Rules will promote deployment of advanced services while ensuring safe, continuous service by both electrical utilities and wireless providers.

II. THE COMMISSION SHOULD ADOPT THE FCC’S RATE FORMULAE FOR POLE ATTACHMENTS

Another step the Commission should take to streamline the pole attachment negotiation process and promote broadband deployment is to adopt the FCC’s rate formulae for pole attachments.

The Commission has the authority, under RSA 374:34-a(III), to adopt affirmative pole attachment rates. RSA 374:34-a(III) indicates that the Commission “shall adopt rules ... to carry out the provisions of this section, including appropriate formula or formulae for apportioning costs.” As pole rate formulae generally include an apportionment of cost, RSA 374:34-a(III) provides the Commission a clear jurisdictional basis to promulgate rate rules of general applicability.

The authority vested in the Commission under RSA 374:34-a(II), which includes all “authority referenced in 47 U.S.C. § 224(c),” reinforces the Commission’s authority to establish generally applicable rules governing rates. 47 U.S.C. § 224(c) indicates that “a State shall not be considered to regulate the rates, terms, and conditions for pole attachments”⁵ “unless the State has issued and made effective rules and regulations implementing the State’s regulatory authority over pole attachments.”⁶ Accordingly, the Commission reasonably can infer that “all authority referenced in 47 U.S.C. § 224(c)”⁷ includes the authority to regulate rates – which necessarily must include the authority to establish rates. In fact, under a reasonable interpretation of Section 224(c), it can be argued that a state does not wrest jurisdiction from the FCC until and unless it promulgates rules establishing rates or formulae to determine rates, criteria to evaluate reasonable terms and conditions of access, and processes for complaint resolution. Reading RSA

⁵ 47 U.S.C. § 224(c)(3).

⁶ 47 U.S.C. § 224(c)(3)(A).

⁷ RSA 374:34-a(II).

374:34-a(II) & (III) in conjunction, it is clear that the Commission has the authority to prescribe rate formulae rather than merely complaint resolution standards.

Exercising such authority, then, the Commission should adopt the FCC's rate formulae for pole attachments. The FCC's rate formulae have been extensively reviewed, and the United States Supreme Court, United States Courts of Appeal, the FCC, and numerous other state regulatory bodies and courts have held that the rates produced using the FCC formulae are compensatory and reasonable.⁸ In 2011, the FCC determined that pole rents must be based on the verifiable record of embedded (historic) costs, which includes all costs related to all poles, whether they are fully depreciated or new.⁹ The FCC concluded in the 2011 Pole Attachment Order that its revised rates would "more effectively achieve Congress' goals under the 1996 Act to promote competition and 'advanced telecommunications capability' by both wired and wireless providers by 'remov[ing] barriers to infrastructure investment,' and the broader pro-competitive goals and policies that Congress directed the Commission to carry out under the

⁸ See, e.g. *FCC v. Florida Power Corp.*, 480 U.S. 245, 253–54 (1987) (finding that it could not "seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory"); *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002), cert. denied, 540 U.S. 937 (2003) ("[A]ny implementation of the [Commission's cable pole attachment rate] (which provides for much more than marginal cost) necessarily provides just compensation."); *Cablevision of Boston Co., et al. v. Boston Edison*, Docket No. D.T.E. 97-82, 1998 WL 35235111, 18-19 (Mass. D.T.E. Apr. 15, 1998) (finding that FCC formula "meets Massachusetts statutory standards as it adequately assures that [the utility] recovers any additional costs caused by the attachment of [] cables . . . while assuring that the [attachers] are required to pay no more than the fully allocated costs for the pole space occupied by them."); *California Competition Decision*, 1998 Cal. PUC LEXIS 879 at 87-89 ("We conclude that the adoption of attachment rates based on the formula provides reasonable compensation to the utility owner . . . [T]he formula does not result in a subsidy since the formula is based upon the costs of the utility. A subsidy would require that the rate be set below cost. The fact that the rate is below the maximum amount that the utility could extract for its pole attachment through market power absent Commission intervention does not constitute a subsidy.")

⁹ See *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5246, para. 10 (2011) ("2011 Pole Attachment Order").

1996 Act.”¹⁰ To the extent the goals espoused by the FCC are shared by New Hampshire, the Commission should adopt the FCC’s rate formulae.¹¹

If the Commission declines to adopt generally applicable rate rules, it should make the FCC rate formulae the only factor used to resolve pole attachment rate disputes. Even if the Commission concludes that RSA 374:34-a does not authorize the Commission to adopt the FCC’s rate formulae as rules of general applicability, the Commission can narrow or eliminate rate disputes by adopting the FCC’s rate formulae as the sole factor it will use to resolve disputes. Pole owners will have no valid reason to seek rates in excess of rates derived from the FCC rate formulae if that is the sole factor used to resolve rate disputes. Providing this certainty to potential attachers will reduce disputes, attract investment, and speed deployment, while preserving the Commission’s resources by avoiding unnecessary disputes. To incorporate this change, the Commission should amend Puc 1304.06 by striking Puc 1304.06(a)(1)-(4) and (6).

III. THE COMMISSION SHOULD ADOPT THE FCC’S TIMELINES TO REASONABLY EXPEDITE THE POLE ATTACHMENT PROCESS

A key factor in encouraging broadband deployment is to ensure that there are known, defined, and reasonable timelines governing the process of applying for and constructing pole attachments. The FCC’s pole attachment timelines are widely used, reasonable, and have been effective in promoting network deployment. As such, the Commission should incorporate them into its Proposed Rules.

The FCC’s timelines include the following four defined stages:

- 1) Survey: 45 days.
- 2) Estimate of make-ready work: 14 days.
- 3) Attacher acceptance: 14 days.

¹⁰ *Id.*, paras. 131-136.

¹¹ CTIA notes that the Commission will need to amend its rules to incorporate the FCC’s rate formulae. As the Commission does not currently have generally applicable rate rules, it would need to create a new rule section to insert such new rule or rules.

4) Completion of make-ready work: 60-75 days.¹²

Additionally, the FCC rules provide for additional time in certain instances. When wireless attachments are to be installed above the communications space, 30 additional days can be granted (for a total of 178 days). And for larger requests (more than 300 poles¹³ or 0.5% of the pole owner's total, whichever is less), the FCC's rules afford additional increments of 15 days for the survey, and 45 days for the make-ready work, for a total of 208 days for attachments in the communications space, and 238 days for wireless attachments above the communications space.¹⁴

Adopting the FCC's pole attachment timelines, which are shorter and more segmented than the Commission's timelines, will reduce the time to market equation for attachers and, much like adoption of the rate formulae, reduce the opportunity for disputes and uncertainty. Accordingly, the Commission should make conforming changes to Puc 1303.04 and 1303.12 to reflect the FCC timelines.

¹² See 47 CFR § 1.1420.

¹³ During the hearing, Commissioner Bailey queried questioned CTIA's counsel regarding small cell deployment. CTIA's counsel misunderstood the question and as a result mistakenly overstated the anticipated deployment pattern for small cells. A host of technical, engineering, and topographic factors will affect and inform deployment density, but deployment is not anticipated to include "every pole" or density near such measure.

¹⁴ *Id.*

Certificate of Service

I hereby certify that on this 2nd day of February, 2018 a copy of the foregoing has been sent by electronic mail to persons listed on the service list.

/s/

Benjamin J. Aron

Executive.Director@puc.nh.gov
ak6444@att.com
alexander.w.moore@verizon.com
amanda.noonan@puc.nh.gov
awalsh@tillotsoncorp.com
bentond@nhec.com
bob.reals@libertyutilities.com
brian.buckley@oca.nh.gov
brian.shepperd@unh.edu
camerinos@nhec.com
carol.burke@eversource.com
carol.miller@livefree.nh.gov
carolyn.ridley@centurylink.com
chris_hodgdon@cable.comcast.com
christopher.allwarden@nu.com
david.bogan@lockelord.com
david.shulock@puc.nh.gov
david.wiesner@puc.nh.gov
dhartford@clf.org
donald.kreis@oca.nh.gov
douglas.frazier@eversource.com
ehawes@acadiacenter.org
emerrill@metrocast.com
epler@unitil.com
eric.stanley@libertyutilities.com
escarponi@fairpoint.com
gmk@fhllplaw.com
heather.tebbetts@libertyutilities.com
imalmgren@veic.org
james.brennan@oca.nh.gov
joseph.fontaine@des.nh.gov
jreyes@brownrudnick.com
karen.cramton@puc.nh.gov
karen.sinville@libertyutilities.com
kwante@bwtc.ne
kwelch@brownrudnick.com

lee.lajoie@nu.com
legal@gsc.tech
leszek.stachow@puc.nh.gov
letourneau@unitil.com
llackey@firstlight.net
lloyd@unitil.com
matthew.fossum@eversource.com
mauraweston@comcast.net
maureen.karpf@libertyutilities.com
mdean@mdeanlaw.net
michael.ladam@puc.nh.gov
michael.licata@libertyutilities.com
michael.sheehan@libertyutilities.com
mreed@fairpoint.com
ocalitigation@oca.nh.gov
pamela.hollick@centurylink.com
pcianelli@necta.info
pmchugh@fairpoint.com
pPhillips@primmer.com
randy.knepper@puc.nh.gov
rcarmichael@186comm.com
robert.meehan@fairpoint.com
sarah.knowlton@libertyutilities.com
scnelson@gsinet.net
scott.brooks@tdstelecom.com
sdavis@fairpoint.com
sgeiger@orr-reno.com
Stacey_Parker@cable.comcast.com
Stephen.Hall@libertyutilities.com
steven.mullen@libertyutilities.com
taylorp@unitil.com
tim.p.loken@windstream.com
tom.frantz@puc.nh.gov
trina.bragdon@ottcommunications.com
twilkerson@necta.info