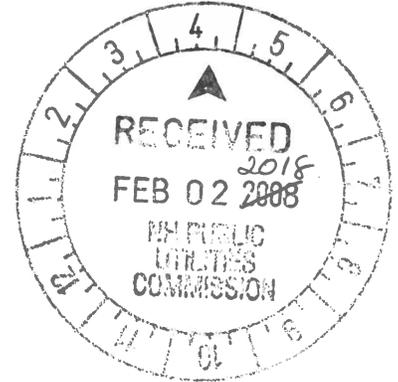


Via Electronic Mail

February 2, 2018

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

**Re: DRM 17-139 (Rulemaking – N.H. Code Admin. Rules Chapter Puc 1300)**

Dear Ms. Howland:

The New Hampshire Telephone Association and its eleven (11) constituent members (collectively, “NHTA”),¹ as interested persons in the above-referenced proceeding, offer the following written comments on the Commission’s proposed readoption, with amendments, of N.H. Code Admin. Rules CHAPTER Puc 1300 (Utility Pole Attachments). These written comments supplement the oral testimony offered by NHTA at the public hearing conducted by the Commission on January 24, 2018.

As described further below, NHTA opposes the Commission’s proposal to amend Rule Puc 1304.06(a)(5), which would substantially alter the methodology that the Commission (and, by extension, utility parties who are engaged in future contract negotiations) will use to determine just and reasonable rates for pole attachments. The Commission should not adopt this amendment without evaluating the regulatory need and the regulatory impact of such a substantial policy change. Because this proposed amendment would have a significant financial impact on future rate negotiations and rate litigation, the NHTA also takes issue with the assertion in the Commission’s Fiscal Impact Statement (“FIS”) that the proposed amendments will have no financial impact on independent businesses such as the NHTA member companies. The Commission should either revise the FIS to acknowledge the financial impact on independent businesses or should explain its reasons for not doing so.

¹ The eleven constituent members of NHTA are: Bretton Woods Telephone Company, Inc.; Dixville Telephone Company; Dunbarton Telephone Company, Inc.; Granite State Telephone, Inc.; Northern New England Telephone Operations, LLC d/b/a Consolidated Communications – NNE; Northland Telephone Company of Maine, Inc. d/b/a Consolidated Communications/ Northland; Hollis Telephone Company, Inc. d/b/a TDS Telecom; Kearsarge Telephone Company d/b/a TDS Telecom; Merrimack County Telephone Company d/b/a TDS Telecom; Union Telephone Company d/b/a TDS Telecom; and Wilton Telephone Company, Inc. d/b/a TDS Telecom.

Finally, NHTA respectfully requests an explanation of the basis for the Commission's assertion of jurisdiction over wireless carriers and wireless facilities in the proposed amendments.

1. Introduction

The NHTA has participated actively in this proceeding from the outset. NHTA representatives and counsel participated in the Commission's technical workshop in this Docket on October 6, 2017. Following the technical workshop, Staff requested additional information from pole owners in an email on October 9, 2017, and NHTA timely responded in writing to the Staff's information requests on October 13, 2017. On October 20, 2017, Staff circulated its initial proposal for readoption and amendment of Chapter Puc 1300, and NHTA timely offered written comments to the Staff's proposal on October 27, 2017. Finally, as noted, NHTA representatives attended the Commission's public hearing on January 24, 2018, and offered public comment through its counsel.

In each of its oral and written submissions in this proceeding, NHTA has argued in favor of readoption of the existing Chapter Puc 1300 rules without material change. NHTA has repeatedly observed that no party or interested person has identified any dispute between attaching entities and pole owners concerning the rates, terms or conditions of attachment during the last five (5) years. A dispute that arose in 2011-13 during the Broadband Technology Opportunities Program (BTOP) fiber-build project was ultimately resolved by mutual agreement of the parties.² Thus, even in that unusual circumstance, which involved make-ready on approximately 23,000 utility poles across the state over a relatively short time period, the existing Utility Pole Attachment rules provided an effective means for resolving the dispute. No project of similar scale has arisen in the last five years or is likely to arise again in the foreseeable future.³

In addition, no party or interested person has expressed any concern about or dispute with the pole-attachment rates that parties have negotiated under the existing rules.

In an environment of significant regulatory stability between pole owners and attaching entities, the Commission should not introduce material changes in the Utility Pole Attachment rules without explaining its intentions and evaluating the potential for disruption and litigation that could result from the Commission's proposed changes.

² *New Hampshire Optical Systems, Inc. Petition for an Investigation into Proposed Charges for Utility Pole Make Ready*, Docket No. DT 12-107, Secretarial Letter Re: Notice of Settlement and Closing Docket (July 19, 2013).

³ New Hampshire's recent decision to opt in to the contract between AT&T Communications and the federal First Responder Network Authority (FirstNet) reduced the prospect for a new wave of large-scale utility pole attachments in the state.

2. The NHTA Opposes the Proposed Amendment to Rule Puc 1304.06(a)(5)

The Commission proposes to amend Rule Puc 1304.06(a)(5) to require the Commission, when determining just and reasonable rates for pole attachments, to “consider . . . [t]he formulae adopted by the FCC in 47 C.F.R. § 1-1409(c) through (f) in effect on October 1, 2017.” (Emphasis added.) Under the existing rule, the Commission is required to consider the FCC rate formulae as they were in effect on October 1, 2007.

The amendment would bring the FCC’s recent changes to the formulae for calculating federal pole-attachment rates into the Commission’s rules.⁴ These federal changes have the effect of substantially reducing the telecommunications rate formula for pole attachments and bringing that formula closer to the rate formula for cable-television attachments.⁵ In New Hampshire, where there are no longer only “cable only” attachments, adoption of the FCC’s new rate formulae would significantly reduce pole revenues, with substantial adverse financial impact on pole owners.

The Commission’s proposal is to *consider*, rather than to *require*, the new FCC formulae in determining just and reasonable attachment rates in New Hampshire. Nonetheless, the only possible purpose of the Commission’s amendment is to exert downward pressure on attachment rates in line with the FCC’s *Federal Pole Order*.

The proposed amendment to the Commission’s ratemaking methodology first appeared in the Staff’s preliminary rulemaking proposal on October 20, 2017. No interested person or party to this proceeding had requested such a change at the technical session on October 6, 2017. Indeed, the participants at the technical session unanimously agreed that there are no rate issues or disputes that have arisen under the current rules. There has been no subsequent technical session to discuss the factual basis for the Commission’s proposal or to evaluate the financial and other impacts such a change is likely to have. The Rulemaking Notice Form that accompanies the Commission’s submission to the Office of Legislative Services offers no insight or explanation about the Commission’s intent in making such a substantial change in the ratemaking methodology or of the facts that presumably support the Commission’s action or of the proposed amendment’s likely impacts. As discussed further below, the Commission’s Fiscal Impact Statement (“FIS”) actually claims that the proposed amendments will have no fiscal impact whatsoever on independent businesses in New Hampshire.

At the public hearing in this matter, Commissioner Bailey offered some insight into the Commission’s thinking when she asked whether the FCC’s new rate formulae are based on “costs.” NHTA acknowledges that the FCC’s methodology begins with costs, but only after the FCC first redefines the word “cost” (as it is used in 47 U.S.C. § 224) to mean:

⁴ See *In the Matter of Implementation of Section 224 of the Act; a National Broadband Plan for Our Future*, WC Docket No. 07-245 et al., Report and Order and Order on Reconsideration (FCC 11-50, rel. Apr. 7, 2011) (the “*Federal Pole Order*”).

⁵ *Id.*, at ¶ 8, and at ¶¶ 135-137.

(a) in urban areas, 66 percent of the fully allocated costs used for purposes of the pre-existing telecom rate; and (b) in non-urban areas, 44 percent of the fully allocated costs used for purposes of the pre-existing telecom rate.⁶

By definition, then, the FCC's new rate formulae do not allow pole owners to recover 100% of their properly allocated costs. The Commission's current rules are also based on costs, but without imposing caps on cost recovery. The Commission has made no effort to explain why a cap on pole owners' ability to recover their pole costs is good public policy in New Hampshire, or what the financial impact would be on pole owners in New Hampshire if they were suddenly deprived of the opportunity to recover up to 56% of their pole costs.

When it first adopted CHAPTER Puc 1300 and certified to the FCC that New Hampshire would not accept federal jurisdiction over pole attachments in New Hampshire, the Commission signaled its determination to implement a New Hampshire-specific regulatory policy over utility poles. Simply adopting the proposed amendment to Rule Puc 1304.06(a)(5) without any meaningful fact-finding or regulatory rationale undermines the Commission's reverse-preemption authority. The Commission should delete this amendment from its proposal before it submits its final proposed rule to the New Hampshire legislature.

3. The NHTA Requests Modification of the Commission's Fiscal Impact Statement

In the Fiscal Impact Statement accompanying its proposal, the Commission states, "There is no difference in cost when comparing the proposed rules to the existing rules," and answers "None" in response to a request to identify the "[c]osts and benefits ... to independently owned businesses." The NHTA asserts that the FIS does not comply with New Hampshire law, as it understates or ignores the financial impact of the Commission's proposed amendment to Rule Puc 1304.06(a)(5) on the NHTA member companies and other utility pole owners in New Hampshire. The Commission should withdraw, revise and resubmit its FIS to comply with New Hampshire law, or should explain its reasons for not doing so.

Under RSA 541-A:5, IV, an agency's fiscal impact statement, for purposes of a proposed rulemaking, shall consist, in relevant part, of the following:

(d) A comparison of the cost of the intended action with the cost of the existing rule, if there is an existing rule, and, to the extent that the proposed rule had expired, indicating the cost of the expired rule and, if applicable, the difference in cost of any proposed change from the expired rule.

(e) *An analysis of the general impact of the intended action upon any independently owned businesses*, including a description of the specific reporting and recordkeeping requirements upon small businesses which employ fewer than 10 employees.

RSA 541-A:5, IV(d) & (e) (emphasis added).

⁶ *Id.*, at ¶ 149.

As the foregoing provisions indicate, a fiscal impact statement is not limited to a cost comparison between the existing rule and the proposed rule but should include “[a]n analysis of the general impact of the intended action upon any independently owned businesses . . .” In the present proceeding, the general impact of the Commission’s rate-formula proposal on NHTA’s constituent members could be substantial, since the proposed change to Rule Puc 1304.06(a)(5) is likely to influence both the renegotiation of existing pole contracts and the outcome of any litigated pole disputes brought before the Commission.

By failing to articulate the intended purpose of the Commission’s action or to acknowledge the potential for substantial revenue impacts on independent businesses such as the NHTA member companies, the Commission has not complied with RSA 541-A:5, IV, in preparing and submitting its FIS in this proceeding.

NHTA asks that the Commission withdraw its FIS and reissue it with the analysis required by RSA 541-A:5, IV(e). In the event the Commission declines to withdraw and reissue its FIS, NHTA asks the Commission to explain why it decided to overrule NHTA’s arguments, as required by RSA 541-A:11, VII(b).⁷

4. Request for Further Commission Explanation Under RSA 541-A:11, VII

In addition to the foregoing request for explanation, NHTA also respectfully asks the Commission to explain the basis for its assertion of jurisdiction over wireless carriers and wireless facilities in the proposed amendments. The Commission proposes adding “wireless service providers” to the definition of “Attaching Entity” in Rule Puc 1302.01; adding “wireless antennas” to the definition of “Facility” in Rule Puc 1302.05; authorizing “wireless facility attachments above the communications space on the pole” in Rule Puc 1303.01; and including “wireless service providers” among the attaching entities for which the PUC is given authority to “determin[e] just and reasonable rates for [their] attachments” in Rule Puc 1304.06(a).

The proposed inclusion of wireless carriers and wireless attachments in CHAPTER Puc 1300 appears to contravene the express exemption of wireless carriers and wireless services from the Commission’s jurisdiction under RSA 362:6 and 362:7, IV. The Commission has previously concluded that “the Commission does not have jurisdiction over any cellular carrier because the

⁷ Under RSA 541-A:11, VII:

VII. If requested by an interested person at any time before 30 days after final adoption of a rule, the adopting authority shall issue an explanation of the rule. The explanation shall include:

(a) A concise statement of the principal reasons for and against the adoption of the rule in its final form.

(b) An explanation of why the adopting authority overruled the arguments and considerations against the rule.

New Hampshire legislature specifically removed cellular carriers from the jurisdiction of this Commission.”⁸

By contrast, when the New Hampshire legislature exempted IP-enabled services and Voice Over Internet Protocol (“VoIP”) services from the Commission’s jurisdiction under RSA 362:7, II, the legislature expressly preserved the Commission’s authority to regulate the pole attachments of providers of IP-enabled services and VoIP services under RSA 362:7, III(d). No similar preservation of Commission jurisdiction applies in the case of wireless carriers and services.

NHTA asks that the Commission provide an explanation, under RSA 541-A:11, VII, of why the express exemptions for wireless carriers and wireless services in 362:6 and 362:7, IV do not apply in the case of wireless pole attachments.

On behalf of NHTA and its constituent members, thank you for the opportunity to submit these written comments. Please let me know if you have any questions.

Sincerely,

The New Hampshire Telephone Association and
its constituent members

By: Primmer Piper Eggleston & Cramer PC,
Their Attorneys

By: 
Paul J. Phillips (N.H. Lic. #20788)

cc: Service List, NHPUC DRM 17-139 (electronic mail only)

⁸ *RCC Minnesota, Inc., et al., Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. DT 03-128, Order Regarding Jurisdiction of the Commission (N.H. PUC, Order No. 24,245, Dec. 5, 2003), slip op. at 14.