DRM 17-139

Chapter Puc 1300 – Utility Pole Attachment Rules

Comments of the Electric Utilities on the March 15, 2018 Staff Proposal

Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty Utilities, New Hampshire Electric Cooperative, Public Service Company of New Hampshire d/b/a Eversource Energy, and Unitil Energy Systems, Inc. (collectively, the "Electric Utilities") provide the below comments, edits, and suggestions on the draft Puc 1300 rules as presented in the March 15, 2018 memorandum from Commission Staff. The Electric Utilities continue to support the extension of the existing rules and believe the rules are adequate to address the needs of New Hampshire pole owners and attachers and that there is no compelling reason to materially amend them. The Electric Utilities' position is that the Staff proposal should be rejected and either the existing rules should be maintained or that the changes identified in the 11-9-17 Initial Proposal, with only minor adjustments where needed, be used.

I. Process Concerns on Staff Proposal

1. In the course of the docket, there was an initial technical session leading to relatively minor proposed changes in the Initial Proposal of 11-9-17. With respect to those minor changes a public hearing was held and written comments were taken. In the Staff draft of 3-15-18, however, there were substantial, material proposed changes that directly impact utility operations and engineering, along with a request for a new Fiscal Impact Statement ("FIS"), and a recommendation for additional public comment. Despite the significant initial process in the docket, the Commission determined that only written comments were permitted to be filed within 2 weeks of this new recommendation. Should the Staff's recommendation become the Commission's latest proposal, this process is inadequate to ensure the development of a full and proper record and a complete vetting of this new, and vastly different, proposal.

2. With respect to the request for a new FIS, the Staff memorandum accompanying the proposed changes states that an FIS is needed for "a more specific analysis of the proposed change in the FCC rate formulae rule reference." This proposed limitation on the scope of the FIS disregards other changes proposed by the Staff that would have substantial financial impacts. For example, adhering to the new make-ready timeframes proposed by Staff will likely require pole owners to hire additional contractors to supplement their own internal workers. Ultimately, the additional costs of these contractors will be borne either by the pole owners or their customers, including individual customers and political subdivisions of the state. Those costs, and others, need to be accounted for in any new FIS.

3. The markup provided by Staff is inaccurate. Based upon a review of the language, the Staff proposal appears to accept all changes from the 11-9-17 Initial Proposal and then make further proposed edits from that document. The changes in the 11-9-17 Initial Proposal were not agreed to, approved by the Commission, or implemented, and are not the regulations in existence. This presents an inaccurate picture of the true scope of the Staff's proposed edits as

compared to current practices and requirements. The proposed edits should be rejected and if Staff desires to present a new proposal it should do so by proposing amendments to the present rules.

4. The memorandum which accompanied the proposed changes relies heavily on the speculative comments of a late entrant,[1] CenturyLink, in justifying its proposed changes and ignores the comments of pole owners in the state. With particular reference to the proposed make-ready timelines, the Staff relies upon CenturyLink's contention that the existing rules "could allow for undue delays." Thus, CenturyLink is speculating that there "could" be issues, but it was not aware of any actual issues or problems. In fact, during the public comment hearing, CenturyLink admitted that it was only just now exploring potential deployments in the northeast, and did not identify any plans for any work in New Hampshire. Transcript of January 24, 2018 Public Comment Hearing at 13-15.

Nonetheless, the Staff found this speculation and conjecture to be a "compelling" reason to propose a new, and vastly more complicated, make-ready structure, as well as a new and unnecessary requirement that all pole attachment agreements be publicly posted. Other than the unique circumstances of the New Hampshire Optical deployment, the Electric Utilities are not aware of any party identifying any actual instance in this Docket where the existing make-ready requirements hampered deployment. Essentially, the Staff determined that the speculation of CenturyLink, and to a lesser extent CTIA, was sufficient justification for wholesale revisions to the make-ready requirements. Such reliance rejects the comments and concerns of the pole owners in New Hampshire without explanation or justification and without identifying any actual issues or problems that need such corrective measures. Speculation by prospective attachers that there "could" be an issue is not good cause for broad revisions to the rules and serves only to create a solution in search of a problem.

II. Comments on Proposed Rules

1. Puc 1302.09 (and 1303.06(b) and 1303.07(d))

Allowing overlashing in the manner proposed by the Staff is not reasonable. New facilities, whether attached by overlash or otherwise, can add significant weight and strain on poles and can compromise the safety of the poles, and the safety of other poles and attachments. For example, overlashing can create additional wind and ice load on poles and associated equipment, or increase sag on a line that may result in violations of pole loading standards, separation standards, or clearance requirements. Merely providing notice to the pole owner of a proposed overlash is not adequate.

[1] CenturyLink did not file an appearance in this docket until February 2, 2018, the last date to provide comments on the underlying initial proposed Puc 1300 rule changes.

If accepted, the Staff proposal should be amended to provide that the pole owner has the right to information about the proposed overlash, to review the proposed overlash within a reasonable and sufficient time frame, ***and*** to reject the proposed overlash for reasons of insufficient capacity, safety, reliability, or generally applicable engineering purposes. Furthermore, the Electric Utilities understand that some entities have a practice of allowing other entities to "sub-lease" space on poles by having a new company's attachment overlash on an existing attachment. Such activities should not be permitted. All attachers and attachments should be known and identified and every new attachment, including by overlash, must be reviewed for safety.

2. 1303.01(a) and 1303.09

"Above the communications space" is unclear as used here. What space is included or excluded? Must an attachment be allowed in the electrical space? As pole owners have already argued, if an attacher is ever to be allowed in the electric space it should only be because that attacher has been required to demonstrate that such attachment is the only feasible attachment, and that the proposed attachment may be made safely and in compliance with all applicable codes and standards. The burden should be on the attacher to demonstrate that attaching above the communications space is necessary. To the extent an entity believes pole top attachments may be needed, some accommodation may be possible (such as installing a separate pole), but attachments "above the communications space" should not be permitted as a matter of right.

3. 1303.01(c)

The term "another alternative" is unclear. Merely identifying some potential alternative should not be a basis to allow an attachment. There should be agreement on any alternative proposed, and simply being able to conceive of an alternative should not be sufficient to allow a new attachment. In any event, it must be made clear that a pole owner has the ultimate discretion to reject any proposed alternative for the reasons set forth in Puc 1303.01(b).

4. 1303.05

There is no demonstrated reason in the record for requiring the posting of contracts on pole owners' websites. If the intent is to compare terms and conditions among attachers, some consideration must be given to the fact that there may be reasonable, legitimate reasons for different terms between different attachers, and that absolute uniformity it not necessarily desirable. This provision does not appear necessary.

Furthermore, a problem raised by this addition to the rules, as well as other additions addressed in these comments, is that it runs counter to the intent inherent in the current rules favoring arms-length contracting among pole owners and prospective attachers without the need for regulatory direction or intervention. There was general agreement throughout this rule

making process that the existing framework was effective. No party claimed, or presented evidence of, discriminatory treatment. Requiring the public posting of pole attachment agreements will make it difficult for pole owners and attachers to negotiate agreements that, while non-discriminatory, are nonetheless tailored to the specific circumstances of the contracting parties. Furthermore, the rule as written appears to require the public posting of all existing pole attachment agreements, which may have been negotiated at arms' length among willing parties with the expectation of confidentiality or privacy.

5. 1303.07(c)

The additions for earlier replaced poles and "other work" do not fit with the rest of the rule on costs of work to add new attachments. Moreover, the reference to "other work" is vague and should be clarified or deleted.

6. 1303.10 and .11

Adding the "as actually implemented" term broadens the scope of permissible actions, and will likely act as an invitation for disagreements and disputes. Pole owners should be permitted to define in writing the terms upon which boxing or use of extension arms is allowed.

7. 1303.12

(a). This subsection includes a provision for presenting an estimate for make ready work based upon a contractor's survey. The rule, however, is not clear on whether the pole owner is bound by the contractor's estimate. If a pole owner disagrees with the scope or cost of a contractor's estimate, a pole owner (or other attacher) should have a right to reject or modify the estimate. Moreover, subpart (a)(2) references a "valid" estimate, but does not explain how a "valid" estimate differs from another kind of estimate. All of these issues require clarification.

(b). The notice periods and obligations required in this subsection are not workable as presented. As an initial matter, requiring pole owners to "notify immediately and in writing all known entities with existing attachments that may be affected by make ready work" upon payment of make ready charges creates an immense administrative burden for pole owners, the cost of which will apparently be borne by said pole owners. Furthermore, the notice to be delivered by the pole owner to all attachers is required to state what the deadline is for make-ready work for all attachers, but is not specific to particular poles in a set or particular attachers on a pole or set of poles. In a job involving, for example, 200 poles, the range of potential attachers and attachments could be significant. It would result in some attachers receiving immediate notices because they have facilities on only one or two poles out of the entire set, or attachers receiving notices to complete make-ready work that will depend upon other attachers

completing work on hundreds of other poles first. The burden on the pole owner to coordinate that activity would be significant.

Additionally, this notice appears to set a deadline for the pole owner to have make-ready work done, but does not provide any deadlines for any individual attachers. A pole owner should not be required to set deadlines for each attacher on each pole in a request of hundreds of poles. Determining such individualized deadlines would put an onerous burden on the pole owner, and would require the pole owner to devote significant resources to monitoring compliance with any individual deadlines imposed. Also, this proposal does not explain why there are different timelines for wireless attachments "above the communications space." There is no justification given for different times.

Lastly, it is not clear who is required to enforce the time frames. If an attacher has been notified and does not move, does that permit the new attacher to move the existing facilities? If so, what additional notice must the new attacher give, if any? What liability does the new attacher have for any damages during the move? Alternatively, what happens when delay by one existing attacher causes a second existing attacher to miss a deadline – who is responsible for any corrective action? In this example, can the new attacher move the second attacher's facilities, even though the second attacher is not at fault for any delay, and would not otherwise allow others to move its facilities? None of these matters is explained by the proposal. Without a clear delineation of responsibility, the rule as drafted is unworkable.

(b)(1)d. and other references to 15 days. The notice in this section is proposed to require that it include information on the pole owner's "right to 15 additional days to complete make ready." Is that the same as the 15-day "right of control" referenced elsewhere? If not, what is it? This notice also appears to include information about the pole owner's right, but not on how that "right" is asserted. Is an additional notice required? If so, when and to whom? Subsection (f)(1), as proposed, states that the attacher may take certain actions if the pole owner "failed to assert its right". How is that right asserted and who determines if it is properly asserted?

(b)(1) and (2). The rules as currently written require that make ready work involving 300 poles or fewer be completed within 150 days after any required pre-payments are received by the pole owner. For make-ready work involving more than 300 poles, the pole owner and prospective attacher shall negotiate in good faith a schedule for completion of make-ready work. These time frames have served pole owners and attachers well in New Hampshire, and no evidence was provided in this Docket demonstrating that the existing time frames have prejudiced pole owners or attachers. Under the proposed Puc 1303.12 rule, the timeline for completing make ready work is now reduced to 60 days (for attachments in the communications space) and 90 days (for attachments above the communications space) following the notification described above. This is a reduction of approximately three months' time to complete make-ready work in the communications space and two months' time above the communications

space. Based on the record in this docket, there is no justification for such a dramatic reduction in the make-ready time frames, which will immediately create administrative and operational burdens for pole owners if these rules are adopted as proposed. The resources of electric company pole owners, including administrative staff and qualified line workers, are dedicated to maintaining a safe and reliable electric distribution system. Imposing new and dramatically reduced timelines for surveys and make ready work upon pole owners will put considerable strain on these resources, particularly in those circumstances where a pole owner receives competing or overlapping applications from multiple attachers, and divert them from providing the electric companies' core services

Moreover, the creation of new timelines for "larger orders" is manifestly prejudicial to pole owners in New Hampshire, many of which do not operate at the scale of owners in larger jurisdictions. For example, pole owners are now able to negotiate make ready timelines for jobs involving 300 or more poles in good faith, but under the new rules, any job involving 300 to 3,000 poles (or 5% of the pole owner's poles in the state) will have a mere 15 additional days to complete a required survey and 45 additional days to perform make-ready work. The new rules would already slash make ready time frames for jobs under 300 poles dramatically. The expectation that a pole owner could complete make ready work on up to 2,700 more poles with only an additional 45 days is not supported in the record and obviously unreasonable.

In its memorandum supporting the further amendments to the Puc 1300 rules, the Staff credits comments by CenturyLink, a late entrant to this docket that admittedly has not begun deployments in New Hampshire, and CTIA, an industry group, touting the effectiveness of the FCC rules and timeframes. While these timeframes are undoubtedly favorable to these prospective attachers, there has been no examination into whether they are appropriately balanced to protect the interests of pole owners (and their customers), or if they would be workable in New Hampshire. As noted in prior comments, the FCC pole attachment rules are subject to "reverse pre-emption" for a reason: the States are in the best position to establish a jurisdiction-specific framework. New Hampshire elected not to adopt the FCC framework, and developed its own rules that have worked well to date. The absence of disputes before the Commission is a testament to the effectiveness of the current rules.

(f). If an attacher elects to use a contractor, what rights does the contractor have, and what liability will the contractor have for damage to any facilities? Pole owners cannot be held responsible for any work done by any contractor at the behest of the new attacher. If attachers' contractors are to be permitted, pole owners must have the right to inspect and correct any changes made by the contractor and to recover the cost of such work from the contractor or new attacher, or both.

The proposed rules are also unclear as to how such a contractor would be paid, given that the make ready time frames are initiated by pre-payment to the pole owner, and make-ready work may be substantially underway by the time that the attacher invokes its right to hire a contractor to complete the work. The pole owner must be fully compensated for any make ready work that it performs. To the extent that the contractor's estimate for completing the work exceeds the pole owner's estimate, that excess amount must be borne by the attacher.

Lastly, in no event should a contractor retained by a new attacher be permitted to move electric facilities at the behest of a new attacher. That limitation must be made clear.

As a final note, implementing the new notice requirements called for by the Staff seems to require that numerous written notices be provided at different stages and to different entities. A general listing might be as follows:

1. notice from attacher to owner for survey

2. notice from owner to attacher of survey results

3. notice from owner to attacher of estimate

4. notice from attacher to owner of acceptance

5. notice from owner to all existing attachers of new attachment and timeline for make ready – not clear if each attacher must provide notice of its timing for its make ready work

6. notice from owner, somehow and at some point, of "right to 15 additional days" sent to someone

7. notice from owner to attachers of any delay for any reason

8. notice from new attacher to owner if the new attacher intends to use a contractor and ability of owner to "consult with the authorized contractor" – not clear if other attachers are also notified of use of contractor or what notice existing attachers might give for rejecting contractor, if permitted to do so.

Other notices may be required in certain instances, or may be required depending on how the Staff might propose to answer other questions or issues posed in these comments. It is not clear what value is obtained by having such voluminous exchange of notices.