

**THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DRM 17-139

RULEMAKING

**New Hampshire Code of Administrative Rules
Chapter Puc 1300, Utility Pole Attachment Rules**

NHTA's Comments on the Staff's Draft Final Proposal

The New Hampshire Telephone Association and its eleven (11) constituent members (collectively, "NHTA"),¹ in accordance with the Secretarial Letter of March 20, 2018, offer the following comments on the Draft Final Proposal submitted by the Staff of the Public Utilities Commission ("Commission") on March 15, 2018.

1. Summary

NHTA opposes the Final Draft Proposal and urges the Commission to reject the Staff's recommendation for its adoption. As it has since the outset of this proceeding, NHTA again asks the Commission to seek re-adoption of the existing Pole Attachment Rules (Chapter Puc 1300) without material changes.

The Draft Final Proposal represents a radical departure not just from the longstanding policies underlying the Commission's existing pole attachment rules (N.H. Admin. Rules Chapter Puc 1300) but from the direction the Commission itself was taking in the initial phases of this rulemaking. Up until this proposal, the oral and written comments of those actively involved with pole attachments in New Hampshire – both pole owners and attachers – described an existing regulatory framework that had been stable and free of litigated disputes for several years. Adoption of the Draft Final Proposal will risk destabilizing and disrupting that regulatory framework. In addition, the Final Draft Proposal reflects an unexplained reversal of longstanding

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.

policies of the State of New Hampshire, greatly undermining a statutory policy that favors freely negotiated pole contracts over heavy-handed regulation, and effectively negating the Commission's 1984 decision to follow a New Hampshire-specific approach to pole attachments rather than to accept regulation by the Federal Communications Commission ("FCC").

The Staff advances these dramatic policy reversals without having developed a factual record and without allowing adequate opportunity for parties to challenge the Staff's unsupported assumptions. While there are a small number of provisions in the Draft Final Proposal that NHTA might otherwise support, NHTA cannot support the process that produced this proposal.

In addition, the FCC pole-attachment rules that the Staff would incorporate as new provisions of Chapter Puc 1300 are presently on appeal at the U.S. Supreme Court and could be reversed and vacated once the appeal is resolved.² Thus, even if the Staff had engaged in an acceptable administrative process, incorporation of the FCC's new pole rules in New Hampshire is premature until the appeals process is completed.

Accordingly, NHTA urges the Commission to reject the Draft Final Proposal as filed and to readopt the Commission's existing Pole Attachment rules without any material changes.

2. Background

The Commission opened this proceeding on September 11, 2017, for the purpose of readopting Chapter Puc 1300 (Pole Attachments), which was due to expire on December 11, 2017. At an initial technical session held on October 6, 2017, a large number of stakeholders, including pole owners, attaching entities, and other interested persons, told the Commission Staff that there is widespread agreement that the existing Chapter Puc 1300 Rules are working well. No party identified any concerns or issues regarding pole-attachment rates. While there was concern expressed about make-ready delays that arose during a large-scale fiber-build project in 2011-13, no party identified any make-ready disputes that have resulted in litigation in recent years. The parties agreed that certain technical updates to the existing rules – such as replacing the term “competitive local exchange carrier” (“CLEC”) with the newer statutory concept of “excepted local exchange carrier” (“ELEC”) – were warranted. But from all appearances, there

² *In the Matter of Implementation of Section 224 of the Act*, WC Docket No. 07-245, Order (FCC 15-151, rel. Nov. 24, 2015) (the “2015 Pole Order”), *aff'd sub nom. Ameren Corp. et al. v. F.C.C. et al.*, 865 F.3d 1009 (8th Cir. 2017), *petition for cert. pending*, Docket No. 17-819 (Dec. 7, 2017).

was no reason to doubt that the Commission could readopt Chapter Puc 1300 within the expiration deadline and without material change in the provisions of the rules.

Reflecting this support of the existing regulatory framework among pole owners and attachers, the Staff's Initial Draft Proposal, dated October 20, 2017, made no material changes in the make-ready timeframes (Rule Puc 1303.12) or in the rules governing application and authorization for pole access (Rules Puc 1303.04 and 1303.05). While parties, including NHTA and the New England Cable Television Association ("NECTA"), challenged specific provisions of the Initial Draft Proposal, there was general support for the direction the Commission was taking in this readoption proceeding.

On November 28, 2017, the Commission formally submitted its Initial Proposal to the Administrative Rules Division of the Office of Legislative Services. The Initial Proposal contained several material changes from the Staff's Initial Draft Proposal, including, notably, an amendment to the rule governing Make-Ready Work Timeframes (Rule Puc 1303.12) that would retain the rule's existing timeframes for small projects (i.e., 300 poles or fewer) but would allow parties to negotiate a different make-ready schedule for larger projects (i.e. more than 300 poles). This proposed amendment, while material in effect, did not appear to impose unreasonable obligations on pole owners or attachers. In addition, the Initial Proposal made no material changes to Rules Puc 1303.04 or 1303.05, governing the application and authorization process for pole attachments.

At a public hearing held on January 24, 2018, CenturyLink Communications ("CenturyLink") appeared for the first time to explain that it had recently closed on its merger with Level 3 Communications and anticipated expanding its operations in New Hampshire. For this reason, CenturyLink advocated drastically reducing the Commission's existing Make-Ready Work Timeframes to bring them into line with current FCC rules, on the premise that a national standard would simplify CenturyLink's ability to expand into New Hampshire. CenturyLink provided no evidence to support its argument, particularly regarding the possible disruptive effect that major regulatory changes could have on pole owners in New Hampshire. Consequently parties like the NHTA companies could only point out that CenturyLink's concerns about difficulties with the existing Make-Ready Work Timeframes were speculative and untested.

On March 15, 2018, the Commission's Staff distributed the Draft Final Proposal, which now proposes major amendments to the Make-Ready Work Timeframes and to the provisions

governing applications and authorizations for pole access in the existing rules. As support for its Draft Final Proposal, the Staff has relied on arguments advanced by CenturyLink at the public hearing, which Staff described as “compelling,” despite the lack of an evidentiary record to substantiate those arguments and the lack of any opportunity for parties to challenge their factual basis. On March 20, 2018, the Commission requested written comments from the parties to the Staff’s Draft Final Proposal.

3. NHTA Comments

NHTA opposes both the policy choices and certain substantive amendments contained in the Draft Final Proposal. The proposal inexplicably reverses longstanding regulatory policies that favor voluntary pole agreements over strict regulations and that favor New Hampshire-specific rules over regulation by the FCC. In addition to these policy concerns, NHTA has particular objections to proposed amendments regarding overlashing (Rules Puc 1302.09 and 1303.07), pole surveys (Rule 1303.04), notification (Rule Puc 1303.06), installation and maintenance (Rule Puc 1303.07), Boxing and Use of Extension Arms (Rules Puc 1303.10 and 1303.11), and the use of self-help or outside contractors by attaching entities to perform Make-Ready (Proposed Rule Puc 1303.12(b)(1)(e)).

a. Objections on policy grounds.

i. The Commission should not weaken Chapter Puc 1300’s provisions favoring voluntary pole agreements.

The Draft Final Proposal demonstrates an unwarranted hostility to voluntary pole agreements, in contravention of New Hampshire statute and longstanding Commission policy. The Commission should reject the Draft Final Proposal and instead readopt the existing provisions of Chapter Puc 1300 that favor voluntary pole agreements over regulation.

New Hampshire law has long favored the use of voluntary agreements in pole-attachment arrangements. Under RSA 374:34-a,V, “Nothing in this subdivision shall prevent parties from entering into pole attachment agreements voluntarily, without commission approval.” The Commission’s existing rules, adopted in conformance with RSA 374:34-a, also favor voluntary agreements by authorizing the Commission to resolve disputes arising from voluntary agreements but placing the burden of proof on the party challenging the agreement to show that the agreement is not just reasonable, and nondiscriminatory. *See, e.g.*, Rule Puc 1304.01.

By contrast, the Draft Final Proposal's hostility to voluntary agreements is unmistakable. Four separate amendments proposed by the Staff would either eliminate or greatly weaken the requirement for parties to enter into voluntary pole agreements as part of the pole-attachment process. These four provisions of the Draft Final Proposal are as follows:

1. In the existing **Rule Puc 1303.04**, the Commission presently requires, with respect to an applicant for pole attachments, that "Requests made under these rules and pursuant to a pole attachment agreement for access to poles shall be in writing." (Emphasis added.) In the Draft Final Proposal, the Staff recommends changing the "and" to "or", which would allow an applicant to request pole attachments without first entering into a pole attachment agreement.
2. In **Rules Puc 1303.10 (Boxing of Poles)** and **1303.11 (Use of Extension Arms)**, the existing rules provide that "Pole owners shall grant or deny permission to use [boxing / extension arms], in writing, within 30 days of receiving a request." The Draft Final Proposal, in amending each of these rules, would change this sentence, in relevant part, as follows: ". . .within 30 days of receiving a request not made in connection with an application for attachment." (Emphasis added.) Again, the effect of this change is to authorize attachment requests outside the written application process.
3. In the new Make-Ready Work Timeframe provisions (**Rule Puc 1303.12**) as recommended by the Staff, the **proposed Rule 1303.12(e)(1)** would authorize a deviation from the required make-ready timeframes "if the parties have no agreement specifying the rates, terms, and conditions of attachment . . ." This concept of an attachment request made without an existing attachment agreement comes directly from the FCC's rules³ and is entirely new to Chapter Puc 1300.
4. Finally, in **Rule Puc 1303.05**, the Draft Final Proposal would impose an entirely new requirement on pole owners, as follows: "A pole owner shall post on its public website a copy of each pole attachment agreement executed with an attaching entity, with the name of and other identifying information regarding the attaching entity redacted, on or before the later to occur of 30 days following execution of each agreement or 60 days following the effective date of these rules." The Staff's accompanying Memorandum describes this new provision as fostering "transparency." However the new provision, if adopted, would erode the voluntary nature of pole agreements. Pole owners would no longer be able to negotiate pole-attachment terms to reflect current conditions, but would instead be required to adopt the terms of prior agreements most favorable to the attacher.⁴ A single "standard" agreement would emerge that would take on the

³ 47 C.F.R. § 1.1420(h)(1).

⁴ This concept is analogous to the "most favored nation" provision of the federal Telecommunications Act governing interconnection agreements. *See* 47 U.S.C. § 252(i). However, the provision in the Staff's Draft Final Proposal is not authorized by statute.

status of an enforceable regulation, ensuring that all attachers enjoy the most favorable terms available to any one of them, while constraining the negotiating ability of pole owners to vary those terms.

Each of these provisions would weaken or, over time, entirely eliminate the role that voluntary pole agreements now play in the pole-attachment process. In place of voluntary agreements, the Staff's Draft Final Proposal would substitute the FCC's rates, terms, and conditions of attachment, including the FCC's make-ready timeframes and its rate formulae for attachments.

The Staff's Draft Final Proposal recommends these changes without having developed any factual record for the Commission to consider or allowing any party to challenge the Staff's unsupported assumptions. The Commission should not make such a radical departure from longstanding statutory and regulatory policy under these circumstances. NHTA urges the Commission to reject the Draft Final Proposal, and to readopt the existing provisions of Puc Chapter 1300 without material changes.

ii. The Commission has no basis for replacing 35 years of local control with regulations from the FCC.

The Draft Final Proposal would eliminate the existing Make-Ready Work Timeframes in the existing rule (Rule Puc 1303.12) and replace them with the much shorter and more onerous timeframes in the FCC's rules.⁵ Since 1984, the Commission has consistently made clear that it considers pole attachments to be a local, rather than a federal, concern.⁶ Now, without the benefit of any fact-finding, the Staff recommends reversing nearly 35 years of state policy in favor of an unquestioning adoption of significant federal regulations. The Commission should reject the Staff's recommendation.

Under Section 224(b) of the Communications Act of 1934, the FCC is authorized to regulate the rates, terms, and conditions of pole attachments "[s]ubject to the provisions of subsection (c) of this section . . ." 47 U.S.C. § 224(b). Under Subsection (c):

(1) Nothing in this section shall be construed to apply to, or to give the [FCC] jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the [FCC] that—

(A) it regulates such rates, terms, and conditions; and

⁵ See 47 C.F.R. § 1.1420.

⁶ *In re Concord Elec. Co.*, DE 83-03, Order No. 16,884 (N.H. PUC, Jan. 27, 1984), slip op. at 7.

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.

47 U.S.C. § 224(c)(1)-(2).

In 1984, the Commission determined that “[t]he matter of cable attachments to utility poles is essentially local in nature and this Commission, which regulates other practices of the utilities, is better equipped to regulate the rates, terms and conditions of cable attachments to utility poles than is the FCC.”⁷ The Commission’s adoption of Chapter Puc 1300 further reflected its decision to regulate pole attachments at the state level, rather than the federal level. The Commission has not deviated from this course in nearly 35 years.

Nonetheless, in a late-breaking proposal and without having made any evidentiary record to support it, the Staff now recommends that the Commission delete its existing rule governing Make-Ready Work Timeframes (Rule Puc 1303.12) in its entirety, and substitute in its place the more onerous provisions of the FCC’s current make-ready rules. The Staff takes on faith the notion that the significantly shorter FCC timeframes are reasonable for New Hampshire, without adducing any evidence of local conditions and applicable municipal and county requirements. The late introduction of these amendments has also not allowed the parties to challenge the Staff’s unsupported assumptions regarding these provisions.

The Staff’s proposal, if adopted, would impose unreasonable and infeasible scheduling obligations on pole owners like the NHTA member companies. The existing framework for Make-Ready Work timeframes under the current Chapter Puc 1300 is operating smoothly, as evidenced by the lack of make-ready disputes on the Commission’s docket for the last several years. Imposing the FCC’s deadlines on New Hampshire pole owners is simply an invitation for attaching entities to litigate make-ready disputes before the Commission. The Commission should not undermine a stable framework for pole attachments and replace it with the prospect of protracted litigation.

The Commission has steadfastly applied a local approach to its pole attachment rules since 1984. Replacing that approach with a federal framework may look appealing to companies wishing to avoid state variations in attachment rules, but it poses substantial risks of destabilizing a relatively calm attachment environment in New Hampshire. Without any evidence that the

⁷ *Id.*

FCC's timeframes are actually workable in New Hampshire, the Commission should reject the Staff's proposal and leave the existing rules in place without material change.

iii. The Draft Final Proposal is a solution in search of a problem.

The Staff's Draft Final Proposal would completely alter the regulatory landscape for pole attachments in New Hampshire. Adoption of such radical changes should only result from a full and fair process in which countervailing evidence and arguments are advanced and tested, and from a complete evidentiary record from which the Commission can draw rational conclusions. Instead, the Commission is asked to act in the absence of any evidentiary record, and on the basis of arguments that have not been fairly tested.

From November 11, 2017, to March 15, 2018, this proceeding appeared to be headed in the direction of the Commission's readoption of the existing Chapter Puc 1300 rules with a few material amendments to which some parties had objected, but without major changes in the rules governing access to poles and make-ready, and without major policy changes. The direction of this proceeding changed completely in the last three weeks with the Staff's circulation of the Draft Final Proposal on March 15th. The Staff's Memorandum offers little or no insight into the rationale for these major changes, nor could it reasonably be expected to do so, as the Commission has not developed a factual record or conducted a hearing from which to evaluate any evidence or arguments. Instead, the Commission is asked to adopt these major changes in regulatory policy based on speculation and unsupported assumptions.

In the initial phases of this proceeding, the written comments and oral representations of the parties reflected a general consensus, among pole owners and attachers alike, that the existing attachment rules were working well, and that no disputes had arisen in New Hampshire regarding the rates, terms or conditions of attachment in several years. Where parties had a disagreement, the issues had proven susceptible to informal settlement. In sum, the positions of the parties, up until the public hearing, was that there was no compelling rationale to disturb the existing framework for pole attachments.

At the public hearing, the Commission, the Staff and the parties heard arguments based on assumption and speculation from a company that has expressed its intention to expand its newly acquired operations in New Hampshire. That company naturally favors a national standard for the regulation of pole attachments, so that it will not have to take account of state

variations even as it expands its services in the various states. Contrary to the Staff's view, such an argument is not "compelling," but merely convenient. It says nothing about the actual operation of New Hampshire's pole attachment rules other than that they are different from what the company has experienced under federal regulations.

From this argument, the Commission has no basis for evaluating those differences, other than to recognize that any level of variation will be less convenient than no variation at all. It would be absurd for the Commission to decide, based on an argument of convenience, that New Hampshire's longstanding policy favoring local regulation should be abandoned in favor of a federal regulatory framework. New entrants have adapted and conformed to New Hampshire's local pole attachment rules for years, if not decades, with the result that the existing framework operates smoothly for its participants. The Commission would be taking a needless and imprudent risk if it radically altered a stable regulatory framework in response to the unfounded fears of a new entrant.

The Commission should not take that risk. Without an adequate process or the development of a factual record, the Commission's most prudent choice is to reject its Staff's recommendation and instead to propose readoption of Chapter Puc 1300 in its current form without material amendments.

iv. The Commission should not incorporate the FCC's pole rules while they are still under appeal at the U.S. Supreme Court.

Although the Staff proposes to incorporate the FCC's make-ready rules almost verbatim into Chapter Puc 1300, the FCC's rules remain under appeal as of the date of these comments.⁸ Thus, even if the Staff's Draft Final Proposal were supported by an evidentiary record and resulted from a fair and adequate process, the Commission should still refuse to incorporate the FCC's make-ready rules and attachment-rate formulae until the final appeal is resolved.

b. Objections to particular amendments

As previously noted, NHTA requests that the Commission reject, in its entirety, of the Draft Final Proposal recommended by Staff. But in the event the Commission decides to move forward, in whole or in part, with the Draft Final Proposal, NHTA has particular objections to the provisions of the proposal discussed below.

⁸ See footnote 2, *supra*.

i. Overlapping (Rules Puc 1302.09 and 1303.07)

NHTA objects to the provisions of the Draft Final Proposal governing overlapping (Rules Puc 1302.09 and 1303.07). As a basic policy matter, NHTA does not oppose the Staff's intent to include overlapping as an express provision of Chapter Puc 1300. However, the Staff's proposal does not place sufficient limits on an attachers' right to overlap facilities to its own existing pole attachments. Specifically, an attacher should only be allowed to overlap its own facilities to its own existing pole attachments.

NHTA would add the following boldfaced and underlined language to the Staff's proposed definition of "Overlap":

"Overlap" means the tying or lashing of **an attaching entity's** additional communications wires, cables, fiber-splice closures, or similar incidental equipment to an attaching entity's own existing communications wires, cable, or supporting strand already attached to poles.

Draft Final Proposal (Rule Puc 1302.09). Limiting the definition in this way will ensure that attaching entities do not abuse their overlapping rights by subleasing their attachment spaces to third parties.

If the Commission adopts the foregoing language in Rule Puc 1302.09, NHTA can support the inclusion of a right to overlap in Rule Puc 1303.07.

ii. Pole access and surveys (Rule Puc 1303.04)

NHTA objects to certain amendments proposed in Rule Puc 1303.04 (Request for Access and Response Requirements).⁹ Specifically, NHTA raises the following concerns:

- In the first sentence, the proposal would change "access to a utility's pole" to read "access to poles." This change is inconsistent with the Staff's revised definition of "Pole" (in Rule Puc 1302.10), which requires a pole to be "owned in whole or in part by a public utility." NHTA asks that the full phrase ("access to a utility's pole") be restored to Rule Puc 1303.04.
- Also in the first sentence, the Staff proposes eliminating the requirement of a 45-day survey "for an application not exceeding 200 poles" and establishing two different survey timeframes based on the size of the pole order, with the shorter timeframe applying to "all

⁹ NHTA has previously discussed its objections, on policy grounds, to changing "and" to "or" in the first sentence of Rule Puc 1303.04 and to deleting the language, at the end of that sentence, about "receiving a complete request for access." NHTA does not need to repeat those objections but focuses instead on its concerns with the substance of particular provisions discussed here.

requests for pole attachment up to the lesser of 300 poles or 0.5 percent of the pole owner's poles in a state.” (Proposed Rule Puc 1303.12(d)(1). The Commission has no factual basis for replacing a 200-pole limit with a 300-pole limit for survey timeframes; such a change would place an unreasonable burden on NHTA and other pole owners in New Hampshire. NHTA asks that the 200-pole limit be restored to the survey language in Rule 1303.04.

iii. Notification (Rule Puc 1303.06)

NHTA objects to the additional language proposed in Rules Puc 1303.06(a) and 1303.06(b). In each of these rules establishing notification timeframes, the Draft Final Proposal would add the following exception: “Except as otherwise provided in Puc 1303.04 and Puc 1303.12 with respect to access and make-ready work . . .” But the notification requirements in Rule Puc 1303.06 bear no relation to access and make-ready timeframes. Rather than clarifying the issue of timeframes, the Staff's proposed language *creates* confusion by treating unrelated elements as if they are related. NHTA asks that the quoted phrase be deleted from the Draft Final Proposal, which will restore the language in the two rules to their existing state.

iv. Installation and maintenance (Rule Puc 1303.07(c))

NHTA objects to the language that the Staff proposes to add to Rule Puc 1303.07(c). The Draft Final Proposal would add the phrase “the cost to remove a duplicate pole that was not removed when a pole was replaced earlier, or the cost to complete other work started before the make-ready work . . .” to an existing rule governing poles and attachments that are not in compliance with applicable codes. The phrase bears no relation to the existing rule and creates confusion about which practices do or do not comply with applicable standards and codes. In addition, there has been no factual support offered to warrant including the additional circumstances alluded to in the proposed amendment. NHTA asks that the phrase be eliminated, which would restore Rule 1303.07(c) to its existing language.

v. Boxing and use of extension arms (Rules Puc 1303.10 and 1303.11)

NHTA objects to certain amendments proposed in Rules Puc 1303.10 (Boxing of Poles) and Puc 1303.11 (Use of Extension Arms).¹⁰ The existing rules allow the practices of boxing or

¹⁰ As with footnote 9, *supra*, NHTA has previously discussed its objections, on policy grounds, to the language in Rules Puc 1303.10 and 1303.11 that authorize attachment requests “not made in connection with an

extension arms to be used “as defined in the company’s written methods and procedures.” The new proposal would add, as an alternative scenario, the use of boxing or extension arms “as actually implemented by the company on a regular basis.” This alternative introduces an ambiguous and subjective set of facts, which is likely to invite litigation when disputes about its meaning arise. The alternative describes an extremely rare situation in any event, but the proposed language needlessly opens a new avenue for disputes between pole owners and attachers. NHTA asks that the proposed amendment be removed from both of the rules.

In a similar fashion, the Draft Final Proposal, in both the Boxing and Extension Arms rules, would amend the phrase “[Boxing / Extension arms] *may* be permitted only with express, written authorization by the pole owner,” to read, “[Boxing / Extension arms] *shall* be permitted only with express, written authorization by the pole owner.” The apparent purpose of this change is to impose a new mandate on pole owners. But the change merely introduces confusion into the rule. A grant of permission by definition is a discretionary, not a mandatory, act. Permission cannot be mandated. NHTA recommends restoring the language to its current form.

**vi. Performance of make-ready work by attaching entities
(Rule Puc 1303.12)**

NHTA objects to the proposed amendment, in the Make-Ready rule (Proposed Rule Puc 1303.12) that would allow an attaching entity, under certain circumstances, to bypass the pole owner and “complete the specified make-ready work.” Proposed Rule Puc 1303.12(b)(1)(e). Such a provision poses inherent risks to the safety of the pole owner’s personnel and property and the property of other attachers on those poles, and, in certain cases, would violate the terms of a pole owner’s collective bargaining agreement with its unionized workforce.

The proposal comes verbatim from the rules promulgated by the FCC. *See* 47 C.F.R. § 1.1420(e)(1)(v). However, the Commission has not engaged in any fact-finding to support such a proposal in New Hampshire. The Commission should not adopt such a rule without satisfying itself that the amendment adequately protects the health and safety of pole workers and safeguards the property of the pole owners and the other attaching entities.

In the absence of adequate factual support for the amendment, NHTA proposes eliminating this provision from the Draft Final Proposal.

application for attachment.” NHTA does not need to repeat those objections but expresses concern instead about the substance of other provisions of the two rules discussed here.

viii. Reference to 2017 FCC rate formulae (Rule Puc 1304.06(a)(5))

NHTA renews its objection¹¹ to the Staff's decision to incorporate, by reference, the 2017 rate formulae adopted by the FCC into Rule Puc 1304.06(a)(5). As previously noted, the FCC's Pole Order still faces a final appeal at the U.S. Supreme Court, and so the Commission should properly await the disposition of that final appeal before acting in reliance on the FCC's decision.¹² Moreover, as NHTA noted in its February comments, the FCC, in establishing its new rate formulae, redefined the word "cost" (as that word is used in 47 U.S.C. § 224) to mean:

(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.¹³

By definition, the FCC's new rate formulae do not allow pole owners to recover 100% of their properly allocated costs. The Commission now proposes to incorporate this cap on cost recovery into its own New Hampshire rules.

This seemingly minor "update" of a date in Rule Puc 1304.06(a)(5) actually represents a significant shift in regulatory ratemaking policy in New Hampshire. The Commission has not developed any factual record to support such a policy shift or explain why a cap on pole owners' ability to recover their pole costs is good public policy in New Hampshire. The Commission has not evaluated what the financial impact would be if pole owners in New Hampshire were suddenly deprived of the opportunity to recover up to 56% of their pole costs.

NHTA cannot support this amendment in the Draft Final Proposal and urges the Commission to reject it and to restore the current language of Rule Puc 1304.06(a)(5).

4. Conclusion

NHTA has raised a number of objections to the Draft Final Proposal, both on policy grounds and on the merits of particular amendments in the proposal. Principally, NHTA contends that, by introducing sweeping, last-minute changes in longstanding regulatory policy,

¹¹ NHTA incorporates by reference herein its comments previously submitted on February 2, 2018, in response to the Staff's Initial Proposal in this proceeding. See Letter from Paul J. Phillips to Debra A. Howland, DRM 17-139 (Feb. 2, 2018).

¹² See footnote 2, *supra*.

¹³ *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"), at ¶ 149.

the Draft Final Proposal reflects a significant failure of process on the part of the Commission Staff. The parties should not be put in the position of having to respond to radical policy changes at the tail-end of a regulatory proceeding. Without having developed a factual record to support its proposed amendments, the Staff has relied on conjecture and untested arguments as the sole basis for its recommendation of major policy changes. The NHTA cannot support the Draft Final Proposal on this basis and urges the Commission to reject the proposal in its entirety.

The most prudent course for the Commission is to seek readoption of Chapter Puc 1300 in its existing form, without material changes. But in the event the Commission decides to proceed with the Draft Final Proposal, despite the failure of process that produced it, NHTA has made specific objections to certain amendments in the proposal and has made recommendations on how to resolve its objections.

The NHTA member companies thank the Commission for the opportunity to comment on the Staff's Draft Final Proposal.

Respectfully submitted,

The New Hampshire Telephone Association and its
constituent members

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Dated: April 5, 2018

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