

## **3.700 POLE ATTACHMENTS**

### **3.701 Applicability and General Provisions**

- (A) This Rule governs the attachment of lines, wires, cables, or other facilities by any Attaching Entity seeking to attach to a pole owned by a Pole-Owning Utility, at rates, terms, and conditions that are just and reasonable. This Rule applies to poles used in the distribution system used to serve customers, and not to poles used as part of a company's transmission system. In applying this Rule, the Board shall consider the interests of entities seeking or having attachments, Pole-Owning Utilities, and the customers of each.
- (B) Except as specifically provided, nothing in this Rule shall be construed to confer a right upon any Attaching Entity to alter, move, or otherwise perform work upon facilities owned by another Attaching Entity or by a Pole-Owning Utility.
- (C) Except as specifically provided, nothing in this Rule shall be construed to supersede, overrule, or replace any applicable safety code (including the National Electrical Safety Code [NESC]) or safety rules, VOSHA regulations, any other law or regulation, tariffs and protocols approved by the Board, nor the reasonable engineering standards and good-faith work practices of any Attaching Entity or Pole Owner.

### **3.702 Definitions**

- (A) Access means physical access to poles and rights-of-way necessary and sufficient to allow connection of cables and other appurtenances by an Attaching Entity, and to inspect, maintain, and repair such cables and other appurtenances.
- (B) Attaching Entity means an entity holding a certificate of public good from the Board, or a Broadband Service Provider, that seeks to attach a facility (or has attached a facility) of any type to a pole or right-of-way for the purpose of providing service to one or more customers, including but not limited to telecommunications providers, cable television service providers, incumbent local exchange carriers, competitive local exchange carriers, electric utilities, and governmental entities.
- (C) Broadband Service Provider means an entity authorized to do business in the state of Vermont that seeks to attach facilities that ultimately will be used to offer Internet access to the public. Wireless Broadband Service Providers must hold an FCC license or use equipment that complies with applicable FCC requirements<sup>1</sup>. A Broadband Service Provider who does not hold a certificate of public good from the Board must, before availing itself of the provisions of this Rule, file with the Board and with any affected Pole-Owning Utility an affidavit that sets forth the Provider's

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1. See 47 C.F.R. Part 15.

name, form of legal entity, contact information, agent for service of process, proposed general area of service, proof of insurance, and a representation that the Provider will abide by the terms and conditions of this Rule and any applicable pole attachment tariffs, including any protocols filed pursuant to section 3.708(K) of this Rule and Orders issued by the Board.

- (D) Core Services means the original regulated business of a utility company. For example, the Core Service of an electric utility is the provision of electric service, but not the provision of telephone or cable television service.
- (E) Make-ready means work necessary to make a pole available for attachment of additional facilities.
- (F) Pole Attachment or Attachment means an attachment or addition by an Attaching Entity to a pole or right-of-way.
- (G) Pole-Owning Utility means a company, as defined in 30 V.S.A. § 201, that is subject to regulation by the Board, and that has an ownership interest in utility poles or rights-of-way.

### **3.703 Tariff Required**

- (A) Each Pole-Owning Utility shall file a pole attachment tariff with the Board. The tariff shall include rates, terms, and conditions governing attachment to poles and rights-of-way in which the Pole-Owning Utility has an ownership interest.
- (B) The tariff may incorporate a standard contract or license for attachments, so long as it is available to any Attaching Entity within the scope of this Rule and its provisions are not contrary to the provisions of this Rule.
- (C) The tariff may include terms that are just and reasonable subject to approval by the Board, and it may include limitations on liability, indemnification, insurance requirements, and restrictions on access to Pole-Owning Utility facilities.
- (D) Tariff provisions filed under this section shall not supercede the terms of any applicable contract.

### **3.704 Contracts for Cost, Maintenance, and Use of Poles**

- (A) Contracts Authorized. Pole-Owning Utilities and Attaching Entities may enter contracts concerning the cost, maintenance, and use of poles.
  - (1) Any contract purporting to take effect after the effective date of this Rule shall be submitted to the Board for review pursuant to 30 V.S.A. § 229.
  - (2) Unexpired contracts on the effective date of this Rule between Attaching Entities and Pole-Owning Utilities shall remain in effect until they expire according to their terms.

- (B) Investigations. The Board may investigate the terms and rental rate of any proposed or existing contract between Attaching Entities and Pole-Owning Utilities. Where the public interest so requires, the Board may order that terms or rates be modified.
- (C) Expiring Contracts. When a pole attachment contract has expired or is about to expire, and an Attaching Entity cannot reach agreement on a rental rate with the Pole-Owning Utility, any party may petition the Board to set an attachment rate. In reaching a decision the Board may consider the terms and conditions of previous contracts between the parties and the rental calculation in section 3.706.
- (D) Public Records. A pole attachment contract in the possession of the Board is a public record unless the Board orders otherwise, for good cause shown.

### **3.705 Joint Ownership of Poles**

- (A) Joint Ownership. Two or more utilities may own poles jointly. The cost, maintenance, and use of such poles may be controlled by a contract under section 3.704 and shall be reviewed as required under that section.
- (B) Shared Revenue. Unless otherwise provided by contract, each owner of a jointly-owned pole shall receive rental payment from each Attaching Entity in accordance with its ownership interest.

### **3.706 Rental Calculation**

- (A) Scope. This section establishes pole attachment rates for inclusion in the tariffs of Pole-Owning Utilities.
- (1) Unless the Board rules to the contrary in a particular case, rates under this section do not apply where the rights of the Attaching Entity and the Pole-Owning Utility are defined by a contract (including a Joint Ownership Agreement or Joint Use Agreement).
  - (2) Where an electric utility or an incumbent local exchange carrier cannot reach agreement on a rental rate with the Pole Owner, either party may petition the Board to set a rate. The Board may consider the terms and conditions of any previous attachment or joint-use contracts between the parties in setting a rate not inconsistent with the principles of this Rule.
- (B) Single Rate. Each Pole-Owning Utility shall calculate a single pole rental rate and shall include that rate in its pole attachment tariff.
- (C) Rental Charge Formula. The annual rental rate per pole shall be calculated using the following formula:

$$\begin{bmatrix} \text{Annual} \\ \text{Rental} \\ \text{per Pole} \end{bmatrix} = \left[ \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \right] \times \begin{bmatrix} \text{Net} \\ \text{Investment} \\ \text{per Pole} \end{bmatrix} \times \begin{bmatrix} \text{Carrying} \\ \text{Cost} \\ \text{Ratio} \end{bmatrix}$$

**(D) Definitions.**

- (1) Except where otherwise controlled by contract, "Space Occupied by Attachment" is defined as follows.
  - (a) If the Pole-Owning Utility has conducted a study of the space actually occupied by a particular type of attachment (including safety space) on the Pole-Owning Utility's poles, then an amount defined in a tariff, but in no event less than the amounts specified in paragraph (b) below.
  - (b) Otherwise, the following quantities:
    - (i) 1.0 foot for Attaching Entities that are cable television operators and that do not provide local exchange telephone service; and
    - (ii) 2.0 feet for all other Attaching Entities except incumbent local exchange carriers and electric utilities.
- (2) "Total Usable Space" is defined as follows.
  - (a) If the Pole-Owning Utility has conducted a study of its average pole height, total usable space means the Pole-Owning Utility's average pole height less the unusable space on the pole. Any study may be based upon plant records or field inspections. Poles not suitable for bearing an Attaching Entity's attachments shall be excluded. The forty-inch safe space below the electric attachments, as required by the National Electrical Safety Code, shall be counted as usable space.
  - (b) "Unusable space" shall mean the 6 feet buried in the ground plus the first 18 feet above ground and below the first attachment, unless the Pole-Owning Utility has conducted a study of the actual average amount buried or the clearance above ground below the first attachment.
  - (c) Otherwise, total usable space shall be 16 feet, which is based upon a presumed pole height of 40 feet, less 24 feet presumed unusable space.
- (3) "Net Investment per Pole" is that part of pole account attributable to poles physically located in Vermont, and adjusted for depreciation and deferred taxes. This net amount is then divided by the number of poles owned by the Pole-Owning Utility in Vermont.
- (4) "Carrying Cost Ratio" is the allowable revenue for each dollar of net pole investment, taking into account annual maintenance expense, depreciation, administrative expense, taxes, and return on net investment.

**(E) Associated Companies.** A Pole-Owning Utility that also engages in the provision of another utility service or cable service shall impute to its costs of providing such other services (and charge any affiliate, subsidiary, or associated company engaged in the provision of such other services) an amount equal to the pole attachment rate for which a company providing such other service would be liable under this section if

it were not the pole owner.

### **3.707 Non-Exclusive Right of Access**

- (A) **Right of Access.** A Pole-Owning Utility shall provide all Attaching Entities non-discriminatory access to any pole, support structure, or right-of-way in which it has an ownership interest.
- (1) A Pole-Owning Utility may deny access for reasons of safety, reliability, or generally applicable and accepted engineering standards.
  - (2) A Pole-Owning Utility may deny access on a non-discriminatory basis where there is insufficient capacity. Insufficient capacity shall not be a legitimate grounds for denial of access where Make-ready work can be used to increase or create capacity.
  - (3) A Pole-Owning Utility may not favor itself over any Attaching Entity, nor deny access based on a reservation of space for its own use. However, a Pole-Owning Utility may favor itself when it has a need for space on a pole or poles in order to provide its core service and when it also has a bona fide development plan that shows a need for additional attachments to the poles in question within three years of the date of adoption of the plan; provided that the Pole-Owning Utility may not so favor itself for more than three years in any ten-year period.
  - (4) Broadband Service Providers and wireless telephone providers shall be authorized to have antennas installed within or above the electric supply space. All such installations of Broadband Service Provider and wireless telephone provider facilities on utility poles must conform to the most recent edition of the NESC as well as the other rules and practices in 3.701(C). Installation and maintenance work in this area shall be done only by the electric utility or Outside Contractors as provided in 3.708(G).
  - (5) Termination demarcation. An Attaching Entity may designate one or more utility poles as its customer interface location for purposes of utility service delivery to the Attaching Entity.
- (B) **Exclusive Access Prohibited.** No utility, cable television system, or telecommunications carrier subject to the Board's jurisdiction may enter into a contract with a property owner that provides exclusive access to poles or rights-of-way inside or upon commercial or residential buildings.
- (C) **Burden.** In any proceeding before the Board or a court concerning a denial of access to a pole or right-of-way, the party contending that access is not available shall have the burden of making a *prima facie* case.

### **3.708. Applications for Attachment and Make-ready Work**

- (A) **Application.** Applications for attachment by an Attaching Entity to a Pole-Owning Utility shall be submitted in writing.

(B) Responsibility. During the Make-ready process, the Pole Owner is presumed to have control of the pole and is responsible for meeting all time limits in this section. Pre-existing Attaching Entities are responsible for completing their work within a time that allows the Pole Owner to comply with the requirements of this section.

- (1) If the work on a pole is not completed within the allowed time because of delays caused by another entity attached to the pole, and the Pole Owner is liable for any penalties or damages because of the delay, the Entity causing the delay shall indemnify the Pole Owner for penalty or damages paid.
- (2) The allowed time periods and deadlines in this section apply unless otherwise agreed by the various parties, and except for extraordinary circumstances and reasons beyond the Pole-Owner's control.
- (3) If an application involves poles owned by multiple owners, then the longest applicable time limit applies.

(C) Initial Action and Survey. Any required Make-ready survey is to be completed within the time period set out in this subsection, starting from the date the completed application is received, unless otherwise agreed by the parties. The Make-ready survey period shall depend on the number of poles or attachments involved, as a percentage of the total number of poles owned. If a Pole-Owning Utility intends to deny access to poles under 3.707(A)(1),(2),or (3), it shall state with specificity the grounds for the denial.

- (1) Make-ready survey work on fewer than 0.5% of a company's poles or attachments shall be completed within 60 days.
- (2) Make-ready survey work on 0.5% or more but less than 3% of a company's poles or attachments shall be completed within 90 days.
- (3) Make-ready survey work on 3% or more of a company's poles or attachments shall be completed within a time to be negotiated between all the affected owners and attachers. The time shall be negotiated in good faith and shall be reasonable in light of subsections (1) and (2), above.

(D) Applicant's Authorization and Payment. After completion of the Make-ready survey, the entity seeking attachment shall authorize the Pole-Owning Utility to complete Make-ready work and shall make all required advance payments.

- (1) Unless otherwise agreed, Make-ready work, permits, inspection, and rearrangement costs shall be based on a reasonable estimate of costs and shall be paid in advance.
- (2) The Pole-Owning Utility's tariff may require prepayment, or other reasonable assurance of credit worthiness, before performing the Make-ready survey.
- (3) The costs of the Make-ready survey shall be payable even if the entity decides not to go forward with construction of its attachments.

(E) Time to Complete Make-ready. The Pole-Owning Utility and Attaching Entities already attached to the pole shall complete necessary Make-ready work within the periods allowed by this section.

- (1) The Make-ready completion period shall depend on the number of poles or attachments involved, as a percentage of the total number of poles owned.
    - (a) Make-ready work on fewer than 0.5% of a company's poles or attachments shall be completed within 120 days of authorization and payment.
    - (b) Make-ready work on 0.5% or more but less than 3% of a company's poles or attachments shall be completed within 180 days of authorization and payment.
    - (c) Make-ready work on 3% or more of a company's poles or attachments shall be completed within a time to be negotiated between all the affected owners and attachers. The time shall be negotiated in good faith and shall be reasonable in light of subsections (a) and (b), above.
  - (2) Time shall be measured from the later to occur of:
    - (a) receipt of the authorization and payment (if any) under subsection (D); and
    - (b) all applicable state or municipal permits have been obtained. If the permitting authority requires participation by the Pole-Owning Utility, the latter shall act in good faith.
- (F) **Least Cost Methods.** In completing Make-ready work, a Pole-Owning Utility shall pursue reasonable least-cost alternatives, including space saving techniques currently relied upon by that utility; however, it shall at all times maintain compliance with the National Electrical Safety Code, state and local laws and regulations, and Pole-Owning Utility construction standards.
- (G) **Outside Contractors.** All Pole-Owning Utilities and Attaching Entities shall maintain a list of contractors whom they allow to perform Make-ready surveys, Make-ready, installation or maintenance, or other specified tasks upon their equipment. In the event that a Pole-Owning Utility cannot perform such work in a timely manner, the Attaching Entity may demand that outside contractors be sought. The Pole-Owning Utility shall thereupon exercise best efforts to hire one or more contractors from the list to perform such work, under the supervision and control of the Pole-Owning Utility. If the Pole-Owning Utility is not an electric utility and there are electric lines on the pole, the pole owner shall provide the operator of the electric lines with advance notice of the work to be done and shall allow the electric utility to join or take over the supervision and control of the work of the outside contractor.
- (H) **Payments.** After completion of Make-ready work, the applicant shall pay the cost of all Make-ready work actually required for the attachment that has not been pre-paid, or shall be refunded any excess of the pre-payment not actually required.
- (1) The applicant shall not be responsible for any portion of the Make-ready expense that is attributable to the correction of pre-existing violations, unless the applicant has caused a portion of the violation.
  - (2) The costs of any modification that is also specifically used by other existing Attaching Entities shall be apportioned accordingly.
  - (3) Where a Pole-Owning Utility currently relies upon one or more techniques

referenced in subsection (F) as part of its normal operating procedures but refuses to utilize such techniques for the benefit of the entity seeking attachment, that entity shall only be responsible for the cost that would have been incurred had such techniques been utilized (provided such use would have been in accordance with generally accepted engineering practices).

- (I) Overlashing. Any overlashing must be done in accordance with generally accepted engineering standards. The Attaching Entity shall give ten days' notice to the Pole-Owning Utility before beginning such overlashing.
  - (1) No additional application or payment is required for an Attaching Entity to overlash more of its facilities to its existing attached facilities, unless it necessitates additional costs such as guying or additional pole strength, occupies additional attachment space on the pole, or provides a different utility service than the existing facilities.
  - (2) If the new facilities deliver a utility service that ought to pay a higher rental under this rule, the Attaching Entity shall begin paying the higher rate.
  - (3) If the new facilities are owned by someone other than the existing Attaching Entity, then both shall pay rental, each at the rate designated by this rule.
- (J) Lowest Attachment Point. No Attaching Entity shall be denied attachment solely because the only space available for attachment on a pole is below the lowest attached facility. If the owner of the lowest facility wishes to relocate its existing facilities to a lower allowable point of attachment so that the new Attaching Entity will be above all existing facilities, the owner of such existing facilities shall pay one-half of the cost of moving its facilities.
- (K) Attachment Protocol. Each Pole-Owning Utility shall include in its pole-attachment tariff required by section 3.703 a reasonable protocol under which it will allow attachments by Broadband Service Providers or wireless telephone providers in areas of its poles that are not ordinarily used for attachments or for equipment that is unusually large. Such protocol may include the provision of a separate pole for the attachment of this equipment if:
  - (1) the proposed attachment cannot be made to the existing pole consistent with 3.701(C);
  - (2) the separate pole is requested by the attaching entity; or,
  - (3) the provision of the separate pole is less expensive than the proposed attachment to the existing pole.

### **3.709. Notices from Pole-Owning Utility**

- (A) A Pole-Owning Utility shall provide each Attaching Entity 60 days' written notice prior to:
  - (1) Removing facilities or terminating service to those facilities, where that action arises out of a rate, term, or condition of the pole attachment agreement; or
  - (2) Increasing pole attachment rates by contract or tariff.

(B) Unless otherwise agreed, a Pole-Owning Utility shall provide an Attaching Entity 30 days' written notice before modifying any of the Attaching Entity's facilities. Less than 30 days' notice may be provided for routine maintenance, modification in response to emergencies, or modifications that are beyond the reasonable control of the Pole-Owning Utility, provided that the notice is reasonable under the circumstances and as prompt as practicable.

#### **3.710 Complaint Procedures**

- (A) A party aggrieved by a violation of these rules may file a complaint or petition with the Board. The Board shall take final action within 180 days after the filing of the complaint or petition.
- (B) An Attaching Entity aggrieved by a proposed change to a Pole-Owning Utility's tariff may intervene in any rate case following such a tariff filing.

#### **3.711 Effective Date**

This rule shall take effect on July 14, 2008. However, any new pole attachment tariffs required by the 2008 amendment need not take effect until September 1, 2008, and Pole-Owning utilities need to file new tariffs that will take effect on that date.