

PUBLIC UTILITIES COMMISSION

**MAINE PUBLIC UTILITIES
COMMISSION**

**Consideration of a rulemaking
procedure to repeal and replace
Chapter 880 of the Commission’s rules**

Docket No. 2015-

**REQUEST OF THE OFFICE OF
THE PUBLIC ADVOCATE FOR
RULEMAKING**

June 29, 2015

It is a goal of the state of Maine that “[b]roadband service become and remain, as nearly as possible, universally available in this State.”¹ Yet many Maine residents still do not have access to this valuable resource, and in recent years Maine, once a national leader in internet adoption, has moved to the back of the pack.² The lack of broadband infrastructure is an impediment to creating jobs and boosting the state’s economy: Governor LePage has noted that without access to high-speed internet service, “many industries simply cannot prosper in our state. . .”³

While there are many factors that contribute to Maine’s broadband challenges, the state’s antiquated rules governing the rights of third parties to attach to utility poles are clearly part of the problem. Maine’s existing rules governing pole attachment focus primarily on the rates that may be charged for attachment, and not on the terms and conditions of

¹ 35-A M.R.S. § 9202-A(1).

² See Maine Public Broadcasting Network, *Maine Mayors Group Issues Report Calling for More High-Speed Broadband Access*, March 18, 2015, available at: <http://news.mpbnet/post/maine-mayors-group-issues-report-calling-more-high-speed-broadband-access>; *Maine broadband service ranks 49th out of 50 states*, Portland Press Herald, January 8, 2014, available at: <http://www.pressherald.com/2014/01/08/maine-broadband-going-nowhere-fast-service-ranks-49th-out-of-50-states/>; *Maine officials search for ways to ‘slingshot’ state from back of pack on Internet speed*, Bangor Daily News, January 15, 2015, available at: <http://bangordailynews.com/2015/01/15/business/maine-officials-search-for-ways-to-slingshot-state-from-back-of-pack-on-internet-speed/>; *Maine’s Slow Internet Service Rivaling Developing Nations*, Bloomberg News, September 3, 2014, available at: <http://www.bloomberg.com/news/videos/b/6303818c-3afb-4bad-9387-f4950566d439>.

³ Bangor Daily News, *Maine officials search for ways to ‘slingshot’ state from back of pack on Internet speed*, January 15, 2015, available at: <http://bangordailynews.com/2015/01/15/business/maine-officials-search-for-ways-to-slingshot-state-from-back-of-pack-on-internet-speed/>.

such attachment. In the absence of clear Commission rules governing reasonable pole attachment terms, conditions and practices, companies seeking to provide broadband service face unnecessary costs and delays resulting from pole attachment disputes that hinder the expansion of broadband networks.⁴

To further the state policy of expanding broadband access, the Office of the Public Advocate, pursuant to 5 M.R.S. § 8055 and Chapter 110 of the Commission's rules, requests that the Commission initiate a rulemaking proceeding to revise its Chapter 880 rules governing pole attachment as proposed in Attachment A to this petition. This revised Chapter 880:

- (1) provides entities which control utility poles, as well as those seeking to attach their facilities to such poles, with clear guidance as to what terms and conditions of attachment will be presumed reasonable;
- (2) allows the Commission to continue to review pole attachment disputes on a case by case basis;
- (3) preserves the Commission's ability to order the use of different terms and conditions when applying those contained in the rule would produce an unreasonable result; and
- (4) codifies the existing expedited review of pole attachment disputes that the Commission currently employs.

Adopting the proposed revisions would allow parties concerned with pole attachment to know in advance what the Commission would find to be reasonable in the majority of cases, reducing uncertainty and disputes and contributing to the quicker expansion of broadband networks. The changes included in the proposed revisions to Chapter 880 represent modest changes to the existing rules, consistent with national standards and the

⁴ *Re Investigation into Practices and Acts Regarding Access to Utility Poles*, No. 2010-00371, Notice of Investigation at 1 (Me. P.U.C. December 15, 2010) ([T]he placement of new facilities to existing poles has been a source of controversy before the Commission.”).

Commission’s previous findings and current practice. It is our hope that as a result, these changes could be adopted relatively quickly, while laying the groundwork for future reform that could encourage further broadband expansion.

I. Importance of Joint Use of Utility Poles

The ability of broadband providers to access the existing utility poles within the State is critical to the deployment of broadband throughout Maine. As the Commission has observed, to duplicate the existing utility pole infrastructure that is already in place “would be beyond the ability of all but the largest companies.”⁵ In addition, the creation of duplicate systems of utility poles would be “economically inefficient” because “nearly every residence or business [already] receives utility services through existing poles.”⁶ As a result, except for those very few broadband providers that already own or control an existing network of utility poles, the expansion of broadband networks in Maine will require the attachment of many providers’ facilities to utility poles owned or controlled by other entities.

This effectively makes the control of utility poles in the State a method of controlling “access to customers and therefore the marketplace.”⁷ Because these poles are a “scarce resource . . . [b]oth State and Federal governments have recognized that practices and policies that inhibit competition are most likely to occur where a single entity has control over local exchange facilities.”⁸ Simply described, “these facilities create a bottleneck wherein ILECS can prevent competition” by denying access to other parties.⁹ Maine therefore “has a public policy interest in ensuring that pole space is administered fairly and

⁵ *Re Commission Investigation into Fairpoint’s Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation*, No. 2010-00206, Notice of Investigation at 1 (Me. P.U.C. June 30, 2010).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Re Investigation into Practices and Acts Regarding Access to Utility Poles*, No. 2010-00371, Notice of Investigation at 2 (Me. P.U.C. December 15, 2010).

reasonably and in a manner that does not necessarily impede entry to the market by competitive providers.”¹⁰

II. Regulation of and Disputes Concerning the Joint Use of Utility Poles

The attachment to or “joint-use” of utility poles by entities that neither own nor control the poles is governed by 35-A M.R.S. § 711, the Commission’s Chapter 880 Rules, and a small number of Commission Orders.

35-A M.R.S. § 711 authorizes the Commission to resolve disputes concerning joint-use by issuing an order requiring attachment and determining the reasonable rates for and terms and conditions of such attachment.¹¹ Section 711 also requires the Commission to “adopt a rule governing the resolution of pole attachment rate disputes.”¹²

A. Chapter 880 Rules

Consistent with this directive, the Commission adopted Chapter 880 of its rules, entitled “Attachments to Joint-Use Utility Poles; Determination and Allocation of Costs; Procedure” in 1993. These rules have remained unchanged since then.

As its title implies, “[t]he primary purpose of Chapter 880 is to establish the methods for calculating the rates to be charged for the joint use of utility facilities.”¹³ The rule does not contain any description of reasonable terms and conditions for joint use, such as how requests to attach must be filed, when such requests must be answered, the time for completing the work needed to allow an attachment (“make-ready work”), etc. Nor are such terms and conditions given in any other Maine statute or rule.

¹⁰ *Re Oxford Networks F/K/A Oxford County Telephone Request for Commission Investigation into Verizon’s Practices and Acts Regarding Access to Utility Poles*, Number 2005-00486, Order at 9 (Me. P.U.C. October 26, 2006).

¹¹ 35-A M.R.S. § 711(1).

¹² 35-A M.R.S.A § 711(4).

¹³ *Re Investigation into Practices and Acts Regarding Access to Utility Poles*, No. 2010-00371, Order at 5 (Me. P.U.C. July 12, 2011).

B. The Oxford Order

The Commission has addressed such terms and conditions in the context of disputes between pole owners and attachers. In a 2006 Order resolving a dispute between Oxford Networks and Verizon (the “Oxford Order”) the Commission made specific findings regarding the reasonableness of specific terms and conditions for the joint-use of Verizon’s utility poles by Oxford Networks.¹⁴ In that order, the Commission identified a number of the conditions that Verizon sought to impose on Oxford as unreasonable, including: (1) prohibiting in all cases third-party attachers from placing their cables below Verizon’s; (2) prohibiting the “boxing” of utility poles (*i.e.*, placing cables on both sides of a pole) except in the circumstances in which Verizon boxed poles; and (3) prohibiting the use in all cases of extension arms, including when they would be used to create more space on a pole or avoid make-ready work.¹⁵

The Commission also determined that Verizon’s 180 day maximum for the completion of make-ready work was unreasonable. Instead, the Commission imposed a requirement that Verizon complete all make-ready work in 45 days, unless more than a “limited” number of poles had to be replaced.¹⁶ Finally, the Commission acknowledged that there had been some discussion of whether utilities should use 40 foot utility poles instead of the standard 35 foot poles. The Commission chose not to make a decision on this issue, but noted that it did “expect utilities to act prudently in reasonably anticipating the future needs for attachment space by competitive providers of communications services.”¹⁷

The Commission, after making these findings, then noted that “because pole attachments are to some degree a matter of honest judgments,” disagreements might arise in interpreting its order in “particular cases.” To deal with these disagreements, the Commission created an expedited dispute resolution process where disputes would be decided by the Commission’s Director of Technical Analysis. The Director was expected to

¹⁴ *Re Oxford Networks F/K/A Oxford County Telephone Request for Commission Investigation into Verizon’s Practices and Acts Regarding Access to Utility Poles*, Number 2005-00486, Order at 1 (Me. P.U.C. October 26, 2006).

¹⁵ *Id.* at 11-17.

¹⁶ *Id.* at 18.

¹⁷ *Id.* at 19.

issue a decision on a dispute within “a matter of days,” and that decision could be appealed to the Commission.¹⁸

The Oxford order was not explicit as to whether the Commission’s determination that certain terms and conditions concerning pole attachment, as well as the expedited dispute resolution process, applied to all parties involved in pole attachments in Maine or just to the two parties in that case. The scope of the Oxford order was raised as an issue in the Commission’s investigation of a pole attachment dispute between GWI and Fairpoint, Verizon’s successor.¹⁹ But, because GWI later withdrew the letter containing the allegation against Fairpoint, the Commission closed its investigation on November 20, 2010 without reaching the merits of the dispute or making any decision on the applicability of the Oxford order to other attachers.²⁰

C. 2010 Pole Attachment Inquiry

Less than a month later, in December of 2010, the Commission opened an investigation into pole attachment issues on its own initiative, and did provide some observations and guidance in this area.²¹ In its order concluding the investigation, the Commission noted in regard to its jurisdiction over pole attachment disputes that “on its face, Section 711 requires that the Commission make discreet findings based upon the dispute before it before it makes any order regarding the terms of joint use of the facilities in question.”²²

At the same time, the Commission realized that it would be inefficient if the basic principles underlying just and reasonable terms and conditions would need to be developed

¹⁸ *Id.* at 19-20.

¹⁹ *Re Commission Investigation into Fairpoint’s Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation*, No. 2010-00206, Notice of Investigation at 2-3 (Me. P.U.C. June 30, 2010) (Biddeford did business as “GWI”).

²⁰ *Re Commission Investigation into Fairpoint’s Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation*, No. 2010-00206, Order at 2-3 (Me. P.U.C. June 30, 2010).

²¹ *Re Investigation into Practices and Acts Regarding Access to Utility Poles*, No. 2010-00371, Notice of Investigation at 1 (Me. P.U.C. December 15, 2010).

²² *Re Investigation into Practices and Acts Regarding Access to Utility Poles*, No. 2010-00371, Order at 6 (Me. P.U.C. July 12, 2011).

in each dispute brought before the Commission.²³ To avoid this, the Commission determined that although it found the Oxford order to have only decided a specific dispute between two parties, that order would have “substantial precedential weight in the consideration of future disputes.”²⁴ But this did not mean that the Oxford Order precluded the “consideration of legal and factual issues on a case by case basis.”²⁵

The Commission also used its investigation as an opportunity to expand the expedited dispute resolution process created in the Oxford order to all pole attachment disputes, and provide more detail concerning that process. For an expedited review of a dispute, a complaint may be filed with the Director of Telecommunications and Water Industries. The Director must issue an order on the dispute within seven business days of the filing of the complaint, unless the parties and Commission staff agree that more time is necessary. Such orders may be appealed to the Commission by filing a complaint pursuant to 35-A M.R.S.A. § 711. This expedited process is not mandatory, but its use is “highly encouraged” by the Commission.²⁶

The Commission’s order in its Investigation clarified some important issues concerning its authority under § 711 and the effect of its Oxford Order. Nevertheless, parties negotiating pole attachment agreements, or those in pole attachment disputes, are left without guidance on what the Commission would find to be just and reasonable concerning: (1) how requests for pole attachments should be made; (2) how and by when utilities must respond to requests; (3) the timeline for completing make-ready work, and how those timelines may differ depending on the size of a request for attachment; (4) the use of contractors for make-ready work; and (5) the attachment rates, terms and conditions that would be reasonable for voice service providers, dark fiber providers, and wholesale competitive local exchange carriers, all of which are referenced in § 711 but not mentioned in Chapter 880.

²³ *Id.* at 6-7.

²⁴ *Id.* at 7.

²⁵ *Id.*

²⁶ *Id.*

A lack of guidance on these issues means that for many parties, especially broadband providers seeking to attach their facilities to utility poles controlled by their competitors, the only way to challenge the reasonableness of a condition imposed on them is to initiate a proceeding before the Commission. Even with the expedited review process, this can be an expensive undertaking, and one that risks damaging any working relationship the provider may have with the entity controlling the poles at issue.

III. The Need for More Guidance on the Joint-Use of Utility Poles

Notwithstanding these efforts, disputes concerning issues such as access, make-ready work, and timing continue to hamper the expansion of broadband service in Maine. In both its 2012 and 2013 Annual Reports the ConnectME Authority found that:

An ongoing challenge for broadband service providers, especially fixed-wireless providers, is obtaining access to existing towers, bridges, high points, roadways for conduit and public buildings for the location of equipment. The issue of access to existing utility poles and the cost and time of make-ready work is a major challenge for independent wired broadband service providers, both for last-mile and middle-mile facilities. These two issues cause unnecessary delay and higher cost for the expansion of infrastructure to serve the most unserved areas of the state.²⁷

In addition, the Broadband Infrastructure Deployment Working Group, in its 2014 report to the Maine Legislature's Joint Standing Committee on Energy, Utilities and Technology and the Joint Standing Committee on Transportation, observed that:

There are many ways the owner of a pole can obstruct or slow down others who wish to attach to the pole. The owner can claim that the pole is fully used and deny access; the owner can charge a high make-ready fee for moving wires around; the owner can simply be slow to respond and negotiate, thus stretching out time and costs for the requesting organization. These are not common problems in Maine; most pole negotiations are efficient and cooperative. Still, the potential for obstacles or unexpected costs and delays figures into the business plans of new broadband providers, and it discourages

²⁷ ConnectME Authority, *Annual Report on the Activities of the ConnectME Authority*, at 16 (January 1, 2014); ConnectME Authority, *Annual Report on the Activities of the ConnectME Authority*, at 19 (January 1, 2013); both available at: <http://www.maine.gov/connectme/about/reports.shtml>.

new investment. Additionally, existing regulations in Maine don't provide sufficient clarity on pole attachments for wireless broadband providers, an important emerging technology that may play an important role in providing ubiquitous broadband access, particularly in rural Maine.

The Working Group observed that this problem was not unique to Maine, and that the FCC had recently taken steps to address this issue in those states where it retained jurisdiction.

In 2011, the Federal Communications Commission (FCC) issued an order to revise federal pole attachment rules to accommodate broadband buildout. The new FCC rules created timelines for utilities to respond to pole attachment requests and identify necessary "make-ready" work, and also reduced rate disparities and encouraged negotiated resolution procedures for pole attachment disputes.²⁸

The Working Group recommended that to address this broadband bottleneck created by access to utility poles the Legislature should direct the Commission to make what changes it could to its pole attachment rules to facilitate the deployment of broadband, while considering whether Maine's approach is in harmony with the FCC rules.²⁹ As described below, the proposed revisions to Chapter 880 adopt this recommendation.

The FCC's experience is instructive for the need for further reform in Maine. In its National Broadband Plan, the FCC observed that:

[L]ack of reliable, timely, and affordable access to physical infrastructure – particularly utility poles – is often a significant barrier to deploying wireline and wireless services. There are several reasons for this. First, the process and timeline for negotiating access to poles varies across utility companies that own this key infrastructure. The absence of fixed timelines and the potential for delay creates uncertainty that deters investment. Second, if a pole owner does not comply with applicable requirements, the party requesting access may have limited remedies; because of time constraints, cost, or the need to maintain a

²⁸ Broadband Infrastructure Deployment Working Group, *Report to the Joint Standing Committee on Energy, Utilities and Technology, and the Joint Standing Committee on Transportation*, at 12-13 (February, 2014), available at: <http://www.maine.gov/connectme/digonce/docs/Dig%20Once%20Workgroup%20Report%201-31-14%20Final.pdf>.

²⁹ *Id.* at 13.

working relationship with the pole owner, it may not wish to pursue the enforcement process³⁰

The FCC’s experience with pole attachment issues such as these led it to find that its historical reliance on negotiations between private parties and resolving disputes on a case by case basis was inadequate, and hampering the expansion of broadband networks.³¹ In response, it developed comprehensive rules concerning the terms and conditions of pole attachment.³²

In its testimony before the 127th Legislature, the Commission also acknowledged the need to revisit its pole attachment rules, observing that:

. . . the Commission's rule governing pole attachments, Chapter 880, was last amended in 1993 and is addressed largely to the apportionment of costs among telephone utilities, electricity distribution and transmission utilities, and cable television providers. More recently, in 2011, the FCC updated the pole attachment rules that it applies in jurisdictions that have not, like Maine, undertaken the regulation of pole attachments. We believe that a fresh look at Maine's pole attachment rule, in light of both the FCC's recent consideration of the topic and the likely increasing demand in Maine by non-traditional providers for space on utility poles, is warranted.³³

The OPA agrees with the Commission that it is time for a “fresh look” at the Commission’s Chapter 880 pole attachment rules, to address these concerns and facilitate the expansion of broadband in Maine.

³⁰ *In the Matter of Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, 26 F.C.C. Rcd. 5240, ¶ 3 (2011).

³¹ *See id.* at ¶ 4.

³² The FCC rules do not apply to Maine because the State has certified under 47 U.S.C. § 224 that it regulates the terms, rates and conditions of pole attachments.

³³ Maine Public Utilities Commission, Testimony on LD 1185, An Act to Establish the Municipal Gigabit Broadband Network Access Fund (Apr. 21, 2015).

IV. The Proposed Revisions to Chapter 880 Will Facilitate Pole Attachment and Broadband Expansion

The OPA drafted the revised Chapter 880 with the intent of providing parties involved in the joint-use of utility poles with clear guidance on what terms and conditions placed on pole attachment will be considered as reasonable in the majority of circumstances. To develop this guidance, we incorporated into the existing Chapter 880 the pole attachment standards in the rules developed by the FCC in 2011. These standards address: (1) requests for and denials of pole attachment; (2) timelines of activities required for pole attachment; and (3) the use of contractors. The FCC standards also have the advantage of being widely known by entities involved in providing broadband and internet services. We anticipate that there will be less uncertainty, fewer disputes and a faster timeline for pole attachments if both the parties requesting attachment and those owning or controlling utility poles have the same understanding of what terms and conditions are normally considered to be reasonable.

At the same time, the revised Chapter 880 only establishes a rebuttable presumption that the standards taken from the FCC rules are reasonable. A party may overcome this presumption by showing by clear and convincing evidence that the dispute involves unique circumstances that would make applying the FCC standards unreasonable. This rebuttable presumption preserves the 35-A M.R.S. § 711 instruction that the Commission retain the ability to address poles attachment issues on a case-by-case basis. Thus, the rebuttable presumption informs parties engaged in pole attachment negotiations of the standard by which the Commission will normally review the reasonableness of their actions if they do bring a dispute. In effect, this embeds in rule the Commission's statement in its 2011 Order that it would give "substantial precedential weight" to prior findings regarding reasonable terms, conditions and practices. Further, the parties may still argue that their dispute presents unique circumstances and the Commission is then free to find that the standards normally presumed to be reasonable should not apply in that case.

The revised Chapter 880 also preserves and codifies the expedited review process that originated in the Oxford order and was expanded to all pole attachment disputes in the

order resolving the Commission's investigation into pole attachment issues.³⁴ This process has proven to be popular with parties involved in the joint-use of utility poles and should continue to be available.

Finally, the revised chapter 880 does not significantly amend the rule's existing provisions concerning the costs of and rates for pole attachment and pole space allocation, other than: (1) adding references to the other entities identified in 35-A M.R.S. § 711(1) as being eligible for the joint-use of utility poles (*i.e.*, voice service providers, dark fiber providers, and wholesale local exchange carriers); and (2) making the reasonableness of rates calculated under chapter 880 to also be a rebuttable presumption. These changes update Chapter 880 to reflect the entities the Legislature has granted the ability to attach their facilities to utility poles and allows the Commission greater discretion in reviewing rates in pole attachment disputes.

VI. Further Changes and Notice of Inquiry

The changes included in the proposed revisions to Chapter 880 represent modest changes to the existing rules, consistent with national standards and the Commission's previous findings and current practice. Our hope is that these changes could be adopted relatively quickly, while laying the groundwork for further reform.

Chapter 880's existing provisions on costs, rates, and pole space allocation have not been reviewed in more than twenty years. They have not kept pace with any of the dramatic intervening changes in telecommunications technology and the larger marketplace for these services. For example, the current rules include substantial disparities in attachment rates between cable companies and telephone companies, even though they offer essentially the same services to consumers. It includes no rates or provisions for attachment by wireless companies, who offer similar services. There are likely other areas for potential reform, but making specific recommendations concerning these topics will require gathering and analyzing data and insights from affected parties. The OPA therefore requests that the

³⁴ *Re Investigation into Practices and Acts Regarding Access to Utility Poles*, No. 2010-00371, Order at 7 (Me. P.U.C. July 12, 2011).

Commission also examine these topics and request comments that address them as part of its rulemaking procedure for Chapter 880, or as a separate notice of inquiry.

V. Conclusion

Ensuring that broadband providers have reasonable access to utility poles is a crucial component of expanding access to broadband service in Maine, something the state critically needs. But the current lack of guidance on what terms and conditions are reasonable for pole attachments creates uncertainty and potential disagreements, which can delay or even prevent the expansion of broadband networks. The proposed revisions to Chapter 880, which describe terms and conditions presumed to be reasonable, would provide this guidance and speed the pole attachment process in a manner consistent with 35-A M.R.S. § 711. The OPA therefore requests that the Commission initiate a rulemaking process to revise its Chapter 880 consistent with these proposed changes.

Respectfully submitted,



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