STATE OF MAINE
PUBLIC UTILITIES COMMISSION

January 12, 2018
Docket No. 2017-00247

MAINE PUBLIC UTILITIES COMMISSION
Amendment to Chapter 880 – Attachments
to Joint-Use Utility Poles; Determination
and Allocation of Costs; Procedure

ORDER AMENDING RULE
AND FACTUAL AND POLICY BASIS

VANNOY, Chairman; WILLIAMSON and DAVIS, Commissioners

I. SUMMARY

Through this Order, the Commission amends Chapter 880 of the Commission's Rules pertaining to Attachments to Joint-Use Utility Poles.

II. BACKGROUND

A. Inquiry in Docket No. 2015-00295

On June 29, 2015, the Office of the Public Advocate (OPA) made a filing requesting that the Commission re-examine Chapter 880 of the Commission's Rules.\footnote{The Commission first promulgated Chapter 880 in 1985. The Commission amended Chapter 880 in 1993, and the Commission has not revised the Rule since.} The stated view of the OPA was that Chapter 880, after more than twenty years without amendment, is an imperfect vehicle for the regulation of pole attachments.

On September 28, 2015, in Docket No. 2015-00295, the Commission opened an Inquiry to examine the issues raised by the OPA. In its Notice of Inquiry, the Commission largely agreed with the OPA's view that the regulatory scheme in Maine with regard to utility pole attachments was a subject ripe for reexamination. To that end, the Commission opened an Inquiry to examine the issues raised by the OPA and to explore ways to facilitate the use of utility poles by entities that can deploy and expand broadband throughout the state.

The Commission put forward several specific questions about federal and state law with regard to utility pole attachments, including the rights of non-utility attachers (\textit{e.g.} un-lit ("dark") fiber and broadband-only providers) under both Maine and federal law. In addition, the Commission asked interested persons to comment on the specific suggestions made by the OPA to amend Chapter 880. Over the course of the next several months, the Commission received detailed comments from several parties, including utilities and non-utility attachers.

After receiving the comments, the Commission Staff endeavored to craft a proposed amended Chapter 880 that incorporated the comments of the parties, while
also achieving the goals of the Commission as stated in the Notice of Inquiry regarding the facilitation of broadband expansion via modern, efficient, and flexible pole attachment regulations.

As mentioned above, much of the discussion in the Inquiry centered on the Commission’s statutory authority to prescribe terms and conditions for attaching to utility poles; specifically, the breadth of Commission’s authority, and limitations thereto, contained in 35-A M.R.S. § 711 (Section 711). Section 711, as written at the time of the Inquiry, allowed the Commission to order joint-use of utility poles, and to "prescribe reasonable compensation and reasonable terms and conditions for the joint-use." This authority, however, was granted in the context of disputes regarding a specific utility pole attachments or attachers. Put another way, the authority of the Commission under Section 711 to require pole owners to allow entities to attach to utility poles – and to set the terms and conditions of such attachments – may have only arisen if there was a dispute before the Commission. Given the above, a pole owner could have had grounds to challenge the authority of the Commission to promulgate rules of general, first-instance, applicability regarding pole attachments if the Commission based that authority solely on Section 711.\(^2\) Given this uncertainty, the Commission’s view was that guidance from the Legislature on this point would be helpful.

Further, Section 711, as then written, also specifically defined a limited set of entities that were permitted to bring a utility pole attachment dispute to the Commission: public utilities, voice service providers, one specific dark fiber provider,\(^3\) wholesale

\(^2\) The Commission may also have separate authority to promulgate such rules under its general rulemaking authority in 35-A M.R.S. § 111. Section 111 states: "The commission may adopt rules and may employ assistance to carry out its responsibilities under this Title."

\(^3\) The colloquial use of "dark fiber provider" describes an entity that furnishes fiber optic cable through which no light is transmitted and no signal is being carried. However, "dark fiber provider" is not used colloquially in Maine law. Title 35-A defines "dark fiber provider" as follows:

"Dark fiber provider" means a person, its lessees, trustees, receivers or trustees appointed by any court, owning, controlling, operating or managing federally supported dark fiber that:

A. Offers its federally supported dark fiber on an open-access basis without unreasonable discrimination as confirmed in a schedule of rates, terms and conditions filed for informational purposes with the commission;

B. Is required to conduct its business subject to restrictions established and enforced by the Federal Government
competitive local exchange carriers, and cable television systems. Section 711 excluded modern-day utility pole attachers such as un-lit, or "dark," fiber providers beyond the one defined in Title 35-A, fiber-based broadband-only providers, and fixed wireless providers. Comments submitted in the Inquiry suggested that the entities excluded from Section 711 had a difficult time obtaining permission from utility pole owners to attach to utility poles, and, when they were able to attach, were often subject to costs that exceed those of the entities then included in Section 711.

It was the Commission’s view that these provisions of then-current Maine law raised questions regarding the Commission’s authority to amend Chapter 880 to apply to modern communications technology and encourage the expansion of broadband Internet service in Maine. The relatively narrow bounds set by current Maine statutory provisions at the time of the Inquiry, on the one hand, and the ongoing Legislative interest in the adequacy of Maine’s broadband deployment on the other, suggested to the Commission that the time was ripe for the Legislature to revisit this matter and create a modern, equitable approach to right-of-way access via pole attachment.

Accordingly, the Commission closed the Inquiry and declined, at that time, to commence a rulemaking proceeding to amend Chapter 880. The Commission’s decision, however, was without prejudice to any future inquiry or policy actions by the Legislature.

B. Inquiry in Docket No. 2015-00295

After the Commission’s closure of its Inquiry in Docket No. 2015-00295, the Legislature addressed some of the Commission’s concerns, and amended 35-A M.R.S. §§ 711, 2301, and 2501. P.L. 2017, ch. 199, "An Act to Amend the Law Regarding Joint Use of Certain Utility and Telecommunications Infrastructure" (the Act). The Act expanded the types of entities that may bring pole attachment disputes to the

pursuant to Title VI of the federal American Recovery and Reinvestment Act of 2009, Public Law 111-5, 123 Stat. 115 (2009) and to grant security interests to the Federal Government under that Act; and

C. Does not transmit communications for compensation inside this State.

35-A M.R.S. § 102(4-A). This definition limits "Dark Fiber Provider" to one entity in Maine: Maine Fiber Company. Maine Fiber Company operates the so-called "three ring binder" fiber network. More information regarding Maine Fiber Company can be found at www.mainefiberco.com.

4 It might be possible, in some instances, to classify broadband-only or fixed wireless providers as "voice service providers" depending on the particular service offered by the provider.
Commission, thus, in effect, widening the universe of entities who have a "right" to attach to utility poles in Maine. Those "new" entities include all telecommunications service and information service providers as those terms are defined in Federal Law, as well as un-lit or "dark" fiber providers and broadband-only providers.

Given the amendment of the Maine statutes that control pole attachments, the Commission opened a new Inquiry, in Docket No. 2017-00183, to obtain the initial views of interested persons. To aid in the discussion of the issues at hand, the Commission attached a discussion draft, or "strawman" rule to its Notice of Inquiry. The strawman rule was intended to reflect one possible outcome of a future rulemaking proceeding, among a wide range of possible outcomes. The Commission encouraged the parties to not only comment on the strawman rule, but to also provide comment regarding other possible approaches to reforming Maine's pole attachment rule. To further aid in cooperative discussion, the Commission conducted two workshops to discuss changes to the pole attachment scheme in Maine.

C. Rulemaking Proceeding

1. Notice of Rulemaking and Proposed Rule

On September 27, 2016, based on a review of Chapter 880, as well as the comments received in the Commission's Inquiries in Docket Nos. 2015-00295 and 2017-00183, the Commission issued a Notice of Rulemaking in Docket No. 2017-00247 that proposed modifications to Chapter 880.5

In its proposed Rule, the Commission proposed to add provisions governing the terms and conditions for attachments to joint-use utility poles. These provisions are not currently included in Chapter 880. The proposed provisions were based in large measure on current FCC rules and the provisions of the "strawman" rule in the Inquiry in Docket No. 2017-00183, and were influenced by the comments received by the Commission in that Inquiry.

Many parties in the Inquiry in Docket No. 2017-00183 expressed a preference for procedures to resolve disputes regarding attachments to joint-use utility poles to be included in the Chapter 880. Accordingly, the Commission proposed to add provisions to Chapter 880 that describe the process the Commission will use to resolve such disputes. Additionally, and because of feedback received in the Inquiry, the Commission proposed provisions regarding the licensing of new attaching entities; existing entities would be grandfathered in and not require a license. As with the terms and conditions discussed above, these provisions are not currently included in the Rule.

In addition, throughout Chapter 880, the Commission proposed several non-substantive and editorial changes. These changes were intended to update the Rule to

5 In addition, and because of the opening of the rulemaking proceeding, the Commission, in the Notice of Rulemaking, closed its Inquiry in Docket No. 2017-00183.
terminology that is currently in use, to correct prior errors in Chapter 880, to clarify certain sections of the Rule, and to import the terms used by the Legislature in the Act. When changes to the Rule are of this nature, the Commission did not specifically describe the change; rather, the Commission referred interested persons to the "legislative edit" of Chapter 880 that was attached to the Notice of Rulemaking.

Finally, the Commission did not propose to substantively alter the current provisions in the Rule with regard to rates and cost of service. Section 4 of the Act directs the Commission to adopt rules to address the terms and conditions of joint use by January 15, 2018. Importantly, the Act does not require the Commission to address rates by that date. Given the compressed time frame for the adoption of rules governing terms and conditions, and the complexity of changes to the portions of the Rule that govern rates, the Commission proposed deferring its consideration of amendments to the rate provisions of Chapter 880 until after the adoption of this iteration of the Rule.

The Commission held a public hearing on its proposed amendments to the Rule on December 6, 2017, and received comments from interested persons on or before December 18, 2017. 6

III. PARTIES

The following entities and individuals actively participated in this rulemaking by testifying at the public hearing, filing comments, or both:

- CTIA–The Wireless Association® (CTIA)
- Bee Line Cable, Time Warner Cable Northeast LLC, Comcast of Maine/New Hampshire, Inc., and Metrocast Cablevision of Newhapshire, LLC (collectively the Cable Operators)
- The Town of Gorham (Gorham)
- The Economic Development Office of Franklin County (Franklin County)
- Sen. Michael D. Thibodeau
- Rep. Seth A. Berry
- The Maine Professional Guides Association (MPGA)
- Pioneer Wireless, Inc. d/b/a Pioneer Broadband (Pioneer)
- Cumberland County
- Biddeford Internet Corporation d/b/a GWI (GWI)
- The Telecommunications Association of Maine (TAM)
- Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (FairPoint)
- Central Maine Power Company (CMP)
- The Maine Municipal Association (MMA)

6 The Commission had originally scheduled the hearing in this matter for November 1, 2017. The major windstorm that occurred on October 29, 2017, however, necessitated a rescheduling of the hearing by the Commission.
The specific changes the Commission is making to Chapter 880 are discussed in detail below; broadly speaking, however, the Rule the Commission is adopting is largely similar to the Rule the Commission proposed in the Notice of Rulemaking. Before engaging in a discussion of each discrete section of the Rule, there are a few overarching issues that bear in-depth discussion up front.

A. Prescriptive vs. Presumptive Rules

A principal issue in this rulemaking is whether terms and conditions in Chapter 880 should be prescriptive or presumptive (i.e., whether the terms in conditions in the rule should be applicable to all attachers in the first instance, or whether, as in the current Rule, the Commission only orders compliance with the terms and conditions in the context of a dispute). The overwhelming majority of commenters in this proceeding (indeed, all but one), expressed their preference that the rules be prescriptive. Those commenters included Maine Senate President Michael Thibodeau and House Co-Chairs of the Energy, Utilities, and Technology Committee Representative Seth Barry, who expressed their opinion that it was the intent of the Legislature in crafting the Act that the terms and conditions in the Rule be prescriptive.

7 The only commenter that expressed a preference for Chapter 880 to remain presumptive was FairPoint, which provided a detailed analysis of the legislative history of the Act. Commenters expressing a preference for a prescriptive Chapter 880 were: Franklin County, GWI, Sen. Thibodeau, Rep. Berry, the Cable Operators, LV/FL/OTT, Sanford, SBA, MFC, and Mr. Clason.

8 Sen. Thibodeau stated that "[t]he rule should prescriptively direct pole owners and pole attachers on what is expected of them and leave little room for interpretation." Rep. Berry stated that the Co-Chairs of the EUT Committee (Rep. Berry and Senator David Woodsome) "believe that the rules should clearly establish the rights and
The Commission also would prefer that the terms and conditions in Chapter 880 be prescriptive. To that end, the Commission proposed legislation that, in its view, would have given the Commission that authority. In the legislation put forward by the Commission, the Commission proposed to amend 35-A M.R.S. § 711(1) & (4) (Section 711) as follows:

1. **Joint use permitted.** The commission may order that joint use be permitted and prescribe reasonable compensation and reasonable terms and conditions for the joint use when, after a hearing had upon its own motion or upon complaint of a public utility, voice service provider, dark fiber provider, wholesale competitive local exchange carrier or cable television system affected, it finds the following:

   A. That public convenience and necessity require the use by one public utility, voice service provider, dark fiber provider, wholesale competitive local exchange carrier or cable television system, unlit fiber provider, telecommunications service provider or information service provider of the conduits, subways, wires, poles, pipes or other equipment, or any part of them, on, over or under any street or highway and belonging to another public utility, voice service provider, dark fiber provider, wholesale competitive local exchange carrier or cable television system, unlit fiber provider, telecommunications service provider or information service provider; and

   B. That joint use will not result in irreparable injury to the owner or other users of the conduits, subways, wires, poles, pipes or other equipment or in any substantial detriment to the service; and

   C. That the public utilities, voice service provider, dark fiber provider, wholesale competitive local exchange carrier or cable television system have failed to agree upon the use or the terms and conditions or compensation for the use.

. . .

obligations of parties . . .” Rep. Berry also referred to a September 25, 2017 letter from the Co-Chairs of the EUT Committee in which the Co-Chairs express their “understanding and intent that [the Act] . . . did contain the authority and directive that the Commission adopt rules which actually govern the conduct of the parties regarding pole attachments.”
4. Rules. The commission shall adopt rules governing the resolution of pole attachment rate disputes. In establishing compensation or rates, the commission shall consider various formulas, including, but not limited to, the formula adopted by the Federal Communications Commission as codified in 47 Code of Federal Regulations, Part 1, Subpart J, as amended.


The proposed amendment to Section 711(1) would, in the Commission's view, have accomplished two things, both of which are described in the summary appended to the originally proposed version of L.D. 406:

1. It changes the conditions under which the commission may order joint use of equipment by eliminating the requirement that a hearing be held upon the commission's motion or that a complaint be filed by an affected entity before the commission may order joint use of equipment. It also eliminates the requirement that the commission find that the parties have failed to agree on the terms and conditions or compensation for the joint use of equipment before the commission may enter an order.

4. It requires the commission to adopt rules governing joint use of equipment.

Id., Summary.

The Legislature subsequently amended L.D. 406, and re-inserted the language in Section 711(1) & (4) that the Commission had proposed removing:9

1. Joint use permitted. The commission may order that joint use be permitted and prescribe reasonable compensation and reasonable terms and conditions for the joint use when, after a hearing had upon its own motion or upon complaint of a public utility, voice service provider, dark fiber provider, wholesale competitive local exchange carrier . . .

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9 The Amendment to L.D. 406 also added language in Section 711(1) that is not relevant to the discussion of prescriptive vs. presumptive rules regarding the financial and technical capabilities of prospective attachers.
or cable television system joint use entity affected, it finds the following:

A. That public convenience and necessity require the use by one public utility, voice service provider, dark fiber provider, wholesale competitive local exchange carrier or cable television system of the conduits, subways, wires, a joint use entity to provide nondiscriminatory access to any poles, pipes or other equipment, or any part of them, on, over or under any street or highway and belonging to another public utility, voice service provider, dark fiber provider, wholesale competitive local exchange carrier or cable television system ducts, conduits or rights-of-way owned or controlled by another joint use entity;

B. That joint use will not result in irreparable injury to the owner or other users of the conduits, subways, wires, poles, pipes, poles, ducts, conduits or other equipment rights-of-way or in any substantial detriment to the service; and

C. That the public utilities, voice service provider, dark fiber provider, wholesale competitive local exchange carrier or cable television system joint use entities have failed to agree upon the use or the terms and conditions or compensation for the use; and

D. That the joint use entity seeking access to the poles, ducts, conduits or rights-of-way owned or controlled by another joint use entity has the technical and financial capabilities to fulfill its obligations related to such joint use.

4. Rules. The commission shall adopt a rules governing the resolution of pole attachment rate disputes. The rules must promote competition, further the state broadband policy set forth in section 9202-A and ensure safe, nondiscriminatory access on just and reasonable terms. The rules must also include a process for ensuring that a new joint use entity seeking access to the poles, ducts, conduits or rights-of-way of another joint use entity meets the requirements of subsection 1, paragraph D. In establishing rates, the commission shall consider various formulas, including, but not limited to, the formula adopted by the Federal Communications Commission as codified in 47 Code of
Federal Regulations, Part 1, Subpart J, as amended. Rules adopted or amended pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.


The Legislature then adopted L.D. 406 as amended, and this amended version became the Act. P.L. 2017, ch. 199. The language of the Act is plain and unambiguous; the reinsertion of the requirement that the Commission hold a hearing or receive a complaint before ordering joint use of utility infrastructure, the reinsertion of the condition that parties fail to agree before the Commission may order joint use of utility infrastructure, and the reinsertion of the requirement that the Commission adopt rules governing pole attachment disputes, prevents the Commission from promulgating prescriptive rules. Accordingly, despite the Commission's preference that its rules in this regard be prescriptive, the terms and conditions expressed in Chapter 880 will remain presumptive, and will be applied by the Commission in any dispute regarding pole attachments. The Commission expects, however, that these rules will become de facto prescriptive in that parties, knowing the rules the Commission will apply in any dispute, will follow the rules as a matter of course.

B. Municipal Use of Joint-Use Utility Poles

Another major issue in this rulemaking is the attachment to joint-use utility poles by municipalities. Chapter 880, in its current form, in Section 7(A) states, with regard to make-ready work, that if "make-ready expenses are caused by a municipality requesting space on the poles, each current user shall be responsible for its own costs for rearranging its facilities." In 1983, when the Commission most recently amended Chapter 880, the Commission cited to a comment by CMP where that company stated that "municipalities do not pay for space that they use on poles and that this space should be considered common space, so that the burden (the lost opportunity cost) is shared by all users." Public Utilities Commission, Re: Proposed Amendment to Chapter 88, Attachments to Joint-Use Utilities Poles; Determination and Allocation of Costs; Procedure, Docket No. 1993-00087, Order Adopting Rule; Policy and Basis Statement at 18 (Oct. 18, 1993) (1993 OAR). The Commission then stated CMP's view that "this nonpayment by the municipalities [is] part of a bargain under which pole owners and users do not pay for use of public rights of way." Id. The Commission then opined that there was "no need for the Rule to say anything about the responsibility for municipal uses; the space used by municipalities is automatically part of the common space." Id. at 19. The parties that commented on this rulemaking did not provide any further insight into the genesis of this particular provision, but the commenters generally agree that municipalities have, historically, been able to attach to poles, sans make-ready charges

10 Chapter 880 was called Chapter 88 in 1993.
or attachment fees, for the purpose of exercising their responsibilities to protect the public health, safety and welfare.\textsuperscript{11}

Broadly, the parties on either side of this issue conform to two categories: municipalities arguing in favor of unfettered free access to poles for their attachments, and pole owners and other commercial attachers arguing that municipalities should not be allowed to compete with commercial users without paying the same make-ready charges and attachment fees as everyone else.\textsuperscript{12}

The municipal free access position was described in the greatest detail by the MMA. MMA contends that all actions by a municipality are, by definition, "non-commercial." \textit{MMA Comments} at 2. MMA characterizes the use of utility infrastructure to provide telecommunications service, or non-discriminatory access to telecommunications service, as "activities which seek to foster an environment conducive to economic development." \textit{Id.} MMA argues that "by directly installing broadband infrastructure themselves," municipalities "are not acting as or directly competing with Internet service providers," and MMA equates the installation of broadband infrastructure to "traditional municipal installation and maintenance activities relating to other necessary infrastructure such as roads, sewers, emergency communications lines, and traffic signals." \textit{Id.} MMA then asks the Commission to replace the term "non-commercial" in the draft Rule with the term "non-discriminatory" because "[l]ike other municipal infrastructure, municipal broadband infrastructure is open for multiple service providers to access." \textit{Id.} at 3.

The opposite side of this issue was described in greatest detail by TAM. As an initial matter, TAM argues that "Municipal Facilities that offer direct service to customers are indistinguishable from any other broadband provider . . ."\textsuperscript{13} \textit{TAM Comments} at 1. TAM argues this is true whether it is the municipality that is providing the Internet service itself, or whether the municipality provides the facilities to third-parties as so-called "middle mile" connectivity. \textit{Id.} In TAM's view, there is a market for each service, and by providing either, a municipality is necessarily competing in those markets. TAM does not argue that municipalities should be barred from competing in those markets, but only that municipalities should be subject to the same make-ready costs and pole attachment fees as other competitors. \textit{Id.}

\begin{itemize}
  \item \textsuperscript{11} FairPoint stated that that company "has always allowed municipal attachment to [its] utility poles at no cost for legitimate, public, protective purpose under its police power." \textit{FairPoint Comments} at 15.
  \item \textsuperscript{12} The one exception to this general arrangement is the Town of Gorham, which stated that it "supports the policy underlying" the language in the draft Rule limiting free access to poles by municipalities to uses that fall within their historic police powers. \textit{Gorham Comments} at 1.
  \item \textsuperscript{13} TAM defines "Municipal Facilities" as "municipally owned facilities that are capable of transporting Internet traffic." \textit{TAM Comments} at 1.
\end{itemize}
Next, TAM takes issue with the suggestion that free use of poles by municipalities is a *quid pro quo* for pole owners and attachers having free access to municipal rights-of-way. TAM explains that the use of rights-of-way for utility infrastructure is mandated by state law in Chapters 23 and 25 of Title 35-A of the Maine Revised Statutes; in essence, municipalities have no choice but to provide permits for infrastructure in their rights-of-way. *Id.* at 2. As TAM puts it, "[w]hen a municipality grants a permit to an attacher or pole owner they are not doing someone a favor, they are complying with state law." *Id.*

Back in 1993, when Chapter 880 was last amended, there was not much concern that municipalities would seek to engage in activities that would compete with the entities that used joint-use utility poles; the primary consideration at the time was to allow, as the Commission stated in the 1993 NOR, "municipal uses." Municipal uses at the time were understood to mean, for example, connections for traffic signals, connections between municipal offices, and connections for emergency communications for police and fire and rescue; municipal activities related to the health, safety, and welfare of its residents. In other words, "police power" activities.14

Today, however, more and more municipalities are seeking to either fill gaps left by the lack of options in their communities for modern telecommunications, such as high-speed broadband, or to provide additional, affordable options for those services. These are laudable goals, and, as highlighted by MMA, goals that Maine Legislature has expressed in statute. 35-A M.R.S. § 9202-A.

The fact that the State and the Commission agree that increased access to broadband in Maine is an unequivocal good does not, however, mean that, in a competitive marketplace, municipalities should somehow have an advantage over other market entrants. The Commission agrees with TAM, FairPoint, the Cable Operators, and others that both the direct provision of Internet service, and the provision of "middle mile" access are in direct competition with other commercial entities that provide these services. Changing "non-competitive" to "non-discriminatory" as suggested by MMA and Franklin County does not alter the fact that municipalities would have a significant advantage over other entities providing identical services.15 In addition, the provision of Internet service or Internet infrastructure is not, in the Commission's view, a police power function.

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14 The police power is "[t]he inherent and plenary power of the sovereign to make all laws necessary to preserve the public security, order, health, morality, and justice," and the right of a state to "establish and enforce laws protecting the public's health, safety, and general welfare." *Black's Law Dictionary* at 534 (2d Pocket Ed. 2001).

15 Indeed, many, if not most, direct Internet and middle mile services are offered to the public on a non-discriminatory basis. Internet service providers such as FairPoint and the Cable Operators offer service to members of the general public, as do middle mile providers such as MFC who make their dark fiber available on an open-access basis.
Accordingly, the Commission declines to provide municipalities with unfettered, free-of-charge access to joint-use utility poles for any competitive services such as the provision of Internet service or Internet infrastructure. The Commission also agrees with TAM, and in contrast to the Commission's statement in 1993, that access to poles by municipalities is not the product of a silent bargain, or *quid pro quo* for the use of rights-of-way; perhaps this was the rationale twenty-five years ago, access to rights-of-way is a matter of state law. Notwithstanding the lack of an informal bargain, the Commission is, however, preserving the ability of municipalities to attach to joint-use utility poles, free of any make-ready charges, for uses consistent with their traditional police power.

V. RULE PROVISIONS

In addition to the discussion above, the Commission is making the following specific amendments to the Rule.

A. Section 1: Definitions

Throughout Section 1, the Commission is amending the definitions in the Rule to utilize more precise terminology, such as substituting the term "joint-use entity" for electric and telephone utilities and cable television systems, consistently using the term "joint-use utility pole," and substituting the term "communications worker safety zone" for "neutral zone." The Commission is not discussing these changes in the subsections below, except to state that the Commission is amending the language to utilize more precise terminology.

Substantive comments received by the Commission are discussed below. In addition, the Cable Operators also suggested several editorial changes to many of the definitions. The Commission has taken these suggestions into consideration when amending the Rule, but does not specifically discuss any editorial changes.

1. Subsection 1(A): Assigned Space

The Commission is amending Subsection 1(A) of the Rule to utilize more precise terminology. The Cable Operators suggested eliminating this definition; the Commission disagrees and is retaining the definition.

2. Subsection 1(B): Attaching Entity

The Commission amending Subsection 1(B) of the Rule to add a definition for "attaching entity" as a means of making the Rule more precise.
3. **Subsection 1(C): Blue Book**

The Commission is amending Subsection 1(C) of the Rule to add a definition for the Telcordia Blue Book, which is a generally accepted construction manual for telecommunications.

4. **Subsection 1(D): Cable Television System**

The Commission is amending Subsection 1(D) of the Rule to make editorial changes.

5. **Subsection 1(E): Common Space**

The Commission is amending Subsection 1(E) of the Rule to utilize more precise terminology. The Cable Operators suggested eliminating this definition; the Commission disagrees and is retaining the definition.

6. **Subsection 1(F): Communications Space**

The Cable Operators suggested adding a definition to Chapter 880 for the term "communications space" which is used throughout the Rule. The Commission agrees, and is adding this definition as Subsection 1(F) of the Rule.

7. **Subsection 1(G): Communication Worker Safety Zone**

The Commission is amending Subsection 1(G) of the Rule to add a definition for "communication worker safety zone" which replaces the term "neutral zone." This change mirrors the terminology change in the National Electrical Safety Code. The Commission is also removing the definition for "neutral zone" from the Rule. The Cable operators suggested clarifying that the 40-inch zone is 40 vertical inches. The Commission agrees with this clarification.

8. **Subsection 1(H): Electric Utility**

The Commission is amending Subsection 1(H) of the Rule to make editorial changes.

9. **Subsection 1(I): Information Service Provider**

The Commission is amending Subsection 1(I) of the Rule to add "information service provider" as a defined term in Chapter 880 because this term is used in the Act.
10. **Subsection 1(J): Joint-Use Entity**

   The Commission is amending Subsection 1(J) of the Rule to add "joint-use entity" as a defined term in Chapter 880 because this term is used in the Act.

11. **Subsection 1(K): Joint-Use Utility Pole**

   CTIA commented that the Commission should harmonize "utility pole" and "joint-use utility pole" to avoid confusion. The Commission agrees, and is removing the definition of "utility pole" from the Rule as superfluous and using "joint-use utility pole" throughout the Rule. Further, the Commission clarifies that joint-use utility poles do not include poles whose sole purpose is supporting electrical transmission conductors as defined by the Federal Energy Regulatory Commission. However, if the electric utility under-builds the transmission line with distribution, those poles would be considered joint-use. The Commission is also amending Subsection 1(K) of the Rule to utilize more precise terminology.

12. **Subsection 1(L) National Electrical Safety Code**

   For purposes of clarity, the Commission is adding a definition to Chapter 880 for National Electrical Safety Code.

13. **Subsection 1(M): Overlash**

   The Commission is amending Subsection 1(M) of the Rule to add "overlash" as a defined term. The Commission is making this amendment to make the Rule clearer, and because this term is used in Chapter 880 and was not previously defined.

14. **Subsection 1(N): Pole Attachment**

   The Cable Operators suggested adding a definition of "pole attachment" or "attachment" for the sake of clarity. The Commission agrees and is adding the definition to the Rule as Subsection 1(N).

15. **Subsection 1(O): Pole Owner**

   The Commission is amending Subsection 1(O) of the Rule to add "pole owner" as a defined term. The Commission is making this amendment to make the Rule clearer, and because this term is used in Chapter 880 and was not previously defined.

16. **Subsection 1(P): Requesting Party**

   The Commission is amending Subsection 1(P) of the Rule to add "requesting party" as a defined term. The Commission is making this amendment to make the Rule clearer, and because this term is used in Chapter 880 and was not previously defined.
17. **Subsection 1(Q): Responsibility Requirement**

The Commission is amending Subsection 1(Q) of the Rule to utilize more precise terminology. The Cable Operators suggested simplifying this definition. The Commission agrees and has simplified the definition.

18. **Subsection 1(R): Standard Joint-Use Utility Pole**

The Commission is amending Subsection 1(R) to make the definition more precise. GWI and CMP suggested that the Commission change the size of a standard pole to 40 feet. Because this issue is integral to pole attachment rates, the Commission declines to address this issue at this time.

19. **Subsection 1(S): Telecommunications Carrier**

The Commission is amending Subsection 1(S) of the Rule to add "telecommunications carrier" as a defined term in Chapter 880 because this term is used in the Act.

20. **Subsection 1(T): Telecommunications Service Provider**

The Commission is amending Subsection 1(T) of the Rule to add "telecommunications service provider" as a defined term in Chapter 880 because this term is used in the Act.

21. **Subsection 1(U): Telecommunications Service**

The Commission is amending Subsection 1(U) of the Rule to add "telecommunications service" as a defined term in Chapter 880 because this term is used in the Act.

22. **Subsection 1(V): Telephone Utility**

The Commission is amending Subsection 1(V) of the Rule to make editorial changes.

23. **Subsection 1(W): Unlit Fiber**

The Commission is amending Subsection 1(W) of the Rule to add "unlit fiber" as a defined term in Chapter 880 because this term is used in the Act.

24. **Subsection 1(X): Unlit Fiber Provider**

The Commission is amending Subsection 1(X) of the Rule to add "unlit fiber provider" as a defined term in Chapter 880 because this term is used in the Act.
25. **Subsection 1(Y): Usable Space**

The Commission is amending Subsection 1(Y) of the Rule to add "usable space" as a defined term. The Commission is making this amendment to make the Rule clearer, and because this term is used in Chapter 880 and was not previously defined. The Cable Operators suggesting adding a definition for "unusable space." The Commission does not believe this definition is necessary.

26. **Subsection 1(Z): Utility**

The Commission is amending Subsection 1(Z) of the Rule to add "utility" as a defined term. The Commission is making this amendment to make the Rule clearer, and because this term is used in Chapter 880 and was not previously defined.

27. **Subsection 1(AA): Voice Service Provider**

The Commission is amending Subsection 1(AA) of the Rule to add "voice service provider" as a defined term in Chapter 880 because this term is used in the Act.

28. **Subsection 1(BB): Wholesale Local Exchange Carrier**

The Commission is amending Subsection 1(BB) of the Rule to add "wholesale local exchange carrier" as a defined term in Chapter 880 because this term is used in the Act.

B. **Applicability of Rule and Overview of Sections 4, 5, 6, and 7**

The Commission is proposing to eliminate the current Sections 2 and 3 of the Rule, "Applicability of Rule" and "Overview of Sections 4, 5, 6, and 7," respectively, as surplusage.

C. **Section 2: Terms and Conditions**

Section 1 of the Act requires the Commission to adopt rules governing, among other things, the terms and conditions for attaching to joint-use utility poles. In the Inquiry in Docket No. 2017-00183, the Commission put forward a "strawman rule" that contained such terms and conditions. The terms and conditions in the strawman rule were based, in large measure, on the rules currently in effect at the FCC. Many parties in the Inquiry endorsed this approach to setting terms and conditions in Maine. While these terms and conditions are presumptive, and are terms and conditions that the Commission will apply in the context of a dispute or in instances where the parties have failed to agree, the Commission, as stated above, expects that these terms and conditions will become de facto prescriptive in that they will become the standard terms and conditions for joint-use utility pole attachments in Maine. As with Section 1 of the Rule, the Cable Operators suggested several editorial changes to Section 2 of the Rule.
The Commission has taken these suggestions into consideration when amending the Rule, but does not specifically discuss any editorial changes.

1. **Subsection 2(A): Reasonable Terms and Conditions**

   This Subsection sets forth presumptively reasonable terms and conditions for attachments to joint-use utility poles, as described in greater detail below. The amendments adopted by the Commission are substantially similar to those proposed by the Commission in the Notice of Rulemaking, with some exceptions as described below.

   a. **Subsection 2(A)(1): Request**

      The amendments adopted by the Commission in this Subsection require pole owners to provide nondiscriminatory access to joint-use utility poles. In addition, this Subsection allows joint-use entities to install service drops and overlashes without prior authorization of the pole owner. In its Comments, GWI suggested more clarity in the provisions regarding overlashing, and LV/FL/OTT suggested a notice-only requirement for all overlashes, including third-party overlashes. CMP requested ten-day after-the-fact notice for overlashes, and a thirty-day period for pole owners to inspect overlashes for compliance.

      The Commission is eliminating the language regarding overlashing to an attacher's own facilities. The assumption being, that one party would not overlash their facilities to another party's existing facilities without the permission of the existing facility owner, so there is no need for a "notification" requirement for the existing facility owner. The Commission also agrees with CMP's thirty-day inspection window, and has incorporated that into the Rule.

   b. **Subsection 2(A)(2): Survey**

      This Subsection requires pole owners to complete surveys and respond to attachment requests within 45 days (or 60 days for large orders). The Cable Operators suggested reducing those time frames to 30 and 45 days, respectively. The Commission disagrees with this suggestion, and finds that 45 and 60 days are reasonable and fair to all parties.

   c. **Subsection 2(A)(3): Denial**

      This Subsection sets forth the conditions under which a pole owner may deny access to its poles, and the time period and method by which such a denial may be conveyed. The Cable Operators suggested adding language restricting the ability of electric utilities to "reserve" space on poles to cases where the utility has a plan to use such space and needs the space "for the provision of core electric service." This was not an issue raised by any other party, and the Commission finds that any disputes over "reserved" space on poles can be resolved using the expedited complaint process in the Rule and, thus, declines to add this language.
d. Subsection 2(A)(4): Estimate

The Commission’s proposed Rule allowed pole owners to withdraw an outstanding estimate if 14 days had passed with no response from the prospective attacher.

GWI and the Cable Operators proposed increasing the minimum timeframe that a pole owner may withdraw their estimate from 14 to 30 days to provide attachers with sufficient time to evaluate whether to accept the estimate and move forward. LV/FL/OTT proposed increasing the time a pole owner could withdraw an estimate to 180 days. Emera suggested that there be additional flexibility in the Rule for situations with multiple attachers or unforeseen circumstances.

The Commission agrees with GWI and LV/FL/OTT, generally, that the timeline should be extended. The Commission believes, however, that the 180-day estimate suggested by LV/FL/OTT is excessive. The Commission finds that a 60-day period for attachers to evaluate whether to move forward after being provided with an estimate is sufficient and fair to all parties. As to Emera’s suggestion about additional flexibility in the Rule, it is the Commission’s view that any such unforeseen circumstances can be adequately addressed using the waiver provisions in the Rule.

e. Subsection 2(A)(5): Make-Ready

This Subsection governs the terms for make-ready work. In general, each entity attached to a joint-use utility pole in the communications space has 15 days in which to complete the make ready-work of their facilities (30 days for large orders). These 15 (or 30) day periods are sequential, in the order determined by the pole owner. The proposed language also specifies time periods for the completion of work above the communications space (90 days, or 135 days for large orders).

In its comments, FairPoint argued that the make-ready provisions of the rule as proposed by the Commission are unclear, and that the Commission should clarify the intent of the provision, particularly when make-ready work requires the replacement of joint-use utility poles. The Commission believes FairPoint’s concerns are addressed by Subsection 2(A)(8) of the Rule, which highlights that a pole owner or attaching entity may deviate from the time limits specified in this section if good and sufficient cause renders it infeasible for the pole owner or attaching entity to complete the make-ready work within the prescribed time frame. As discussed below, Subsection 2(A)(8) now clarifies that an example of sufficient cause could be replacement of a joint-use utility pole.

FairPoint also argues that the timelines in Subsection 2(A)(5) are quite aggressive, and may prove unworkable without the implementation of a state-wide notification system for joint-use utility pole attachments. The Commission does not necessarily disagree with the concept of a state-wide notification system; indeed, such a system was suggested by other commenters, including GWI, the Cable Operators, and
LV/OX/OTT. In the context of this specific proceeding, however, it was not possible for the Commission to sufficiently examine this matter. The Commission intends to examine this issue at a later date.

In its comments, CMP observed that for attachments above the communications space, it may not be possible for electric utility crews to complete the necessary work within the stated time frames. CMP suggested a provision allowing the electric utility to authorize the use of a third-party contractor to complete the work in such instances, under the supervision of a utility-provided project manager. In the alternative, CMP suggested that the Commission acknowledge that an electric utility could utilize the waiver provisions of the Rule to authorize a third-party contractor. The Commission agrees with CMP that an electric utility could seek a waiver of the Rule to allow for the use of third-party contractors for work above the communications space.

f. Subsection 2(A)(6): Attachments Above the Communications Space

This Subsection requires pole owners to ensure that make-ready work above the communications space is completed within the specified time periods. CTIA, Emera, and CMP all commented on pole-top attachments generally, but did not make specific comments regarding the timeline for completing work above the communications space. Those concerns are discussed below. The Commission is adopting Subsection 2(A)(6) as originally proposed in the NOR.

g. Subsection 2(A)(7): Compliance with Time Periods

This Subsection sets forth the conditions for compliance with the make-ready time periods in the Rule. Emera suggested that compliance with time periods may be difficult due to multiple simultaneous attachment applications, or due to an emergency or critical electricity service requirements. The Commission agrees, in part, that additional accommodations may need to be made in certain circumstances such as an ice storm or major weather event. For these "force majeure" events, the Commission is adding language to Subsection 2(A)(7) which provides an additional 45 days on top of the normal make-ready time periods to accommodate such situations.\textsuperscript{16}

h. Subsection 2(A)(8): Deviation from Time Periods

This Subsection sets forth the conditions by which a pole owner may deviate from the prescribed make-ready time periods. As noted above, the Commission has added language to this Subsection clarifying that the replacement of joint-use utility poles may require deviation from the prescribed time limits.

\textsuperscript{16} A "force majeure" event is one whose "effect can be neither anticipated nor controlled." \textit{Black's Law Dictionary} at 287 (2d Pocket Ed. 2001). Force majeure "includes both acts of nature (\textit{e.g.} floods and hurricanes) and acts of people (\textit{e.g.} riots, strikes, and wars)." \textit{Id.}
i. **Subsection 2(A)(9): Contractors**

This Subsection allows for an attaching entity to use a third-party contractor in the communications space if a pole owner fails to respond within the prescribed time periods for survey and make-ready work. This Subsection also sets forth the conditions for the use of third-party contractors.

In its Comments, Emera asked that the Commission clarify that Subsection 2(A)(9) applies only to work in the communications space. That is the Commission’s intent. However, electric utilities may, as discussed above, request a waiver of the Rule to allow third-party contractors to work above the communications space if the electric utility so chooses.

j. **Subsection 2(A)(10): Approved Contractors for Survey and Make Ready**

The Commission adopts Subsection 2(A)(10) of the Rule as proposed in the Notice of Rulemaking. Subsection 2(A)(10) allows prospective attachers to use third-party (i.e., non-utility) contractors to complete the survey and make-ready work in the communications space that is required by subsections 2(A)(2) and 2(A)(5) of the rule. Subsection 2(A)(10) essentially adopts the rules promulgated by the FCC for the use of outside contractors in the communications space when the pole owner or any other current attacher has failed to meet the timing requirements for completion of survey and make-ready work. The Rule, as amended, will allow prospective attachers to select from a list of contractors approved by the pole owner. We expect the pole owner to maintain a list of approved contractors, or to have a procedure in place that will allow for a relatively rapid approval of any contractor proposed by the requesting attacher. This provision does not apply to any survey and make-ready work that involves proposed attachments above the communications space on a pole; that is, for any attachments proposed in the electric space. Above the communications space, the pole owner is expected to meet its obligation for completing the survey and necessary make-ready work within the time frames provided in the rule, as specified in Subsection 2(A)(6) of the rule. As stated above, the electric utility may request a waiver of the Rule to allow a third-party contractor to complete the work.

FairPoint opposed inclusion of the provision allowing outside contractors to perform work in the communications space, because it believes such provision increases the risk of damage to telecommunications facilities already on poles, which in turn could lead to service interruptions. Customers would then, in FairPoint’s view, place the blame on the incumbent telephone utility. FairPoint asserts that any prospective attacher should utilize the expedited complaint process in the Rule if it encounters a significant delay in the completion of survey and/or make-ready work by the pole owning utility.

The Cable Operators assert that many incumbent utilities currently maintain a list of approved contractors, and the proposed rule matches the approach adopted by the
FCC, and so they endorse the rule as proposed. Emera also endorses the proposed language because it basically mirrors the FCC’s rule. CMP agrees with the proposed language, but, as discussed above, it believes that the electric utility should have the option of using an outside contractor when the electric utility cannot complete any required work within the timelines of the rule.

Subsection 2(A)(10) as adopted comports with the views expressed by the Cable Operators, Emera, and CMP. The Commission finds that survey and make-ready work in the communications space should be completed within the time frames specified in Subsections 2(A)(2) and 2(A)(5) of the rule, and that failure of the pole owner (or another current attacher) to meet these time frames should allow the prospective attacher to employ what are essentially "self-help" measures by employing outside contractors to complete the work, with appropriate notice to the utility, pursuant to Subsection 2(A)(9). The Commission finds that the use of approved contractors largely mitigates any risk that FairPoint alleges may occur.

Additionally, CTIA commented that there is an apparent inconsistency between this Subsection and the dispute resolution procedures the Commission is adopting as Section 11 of the Rule. CTIA’s concern is that allowing a consulting representative of an electric utility to make a "final determination" regarding sufficient capacity to accommodate a proposed attachment could usurp the Commission’s authority to adjudicate a dispute in this area. This was not the Commission’s intent, and the Commission clarifies that parties may bring a dispute to the Commission regarding attachments to joint-use utility poles or arising under any provision of these Rules. To that end, the Commission is removing the word "final" from the originally proposed language in this Subsection.

**k. Subsection 2(A)(11): Non-Compliant Poles and Attachments**

Several parties commented about the need for a policy on the replacement of joint-use utility poles that were out of compliance or required maintenance, or bringing existing attachments into compliance. Pioneer commented that if maintenance issues are discovered at the time of the joint survey, then those issues should be dealt with by the pole owner. Pioneer concluded that if the pole is not safe, "out of specification," or deviates from "acceptable published criteria" prior to the attachment of a third party, then that maintenance item should be corrected at the expense of the pole owner(s), not the third party. **Pioneer Comments at 3**

GWI also commented that new attachers should not be required to pay to bring non-compliant poles and attachments up to code. This requirement, GWI argues, shifts the costs of proper pole maintenance from the pole owners to companies like GWI "that are trying to expand broadband service and increase competition." **GWI Comments at 4.** GWI provided a broad set of criteria that could define an out-of-compliant pole such as:
• Existing attachments that are lower than current minimum clearance standards;
• Existing poles that do not meet standards governing spans between poles;
• Existing poles that lack the structural integrity to support new attachments;
• Existing poles that are shorter than current standards;
• Existing attachments (e.g., cable providers) that do not meet spacing standards.

GWI also argued that if a pole owner is going to require the use of standards other than the NESC, then the pole owner should publish those standards on its website or make available upon request.

MFC also commented that pole owners should be prohibited from using make-ready charges to pass the costs of maintenance or bringing a pole into compliance along to an applicant seeking to attach to the "non-compliant" or unsafe pole. MFC argued that the practice of "grandfathering" attachment issues should not require a third-party license applicant to bear the cost of bringing the pole into compliance. Similarly, the SBA shared a similar view that there needs to be a specific procedure for determining pole replacement. If a pole is out of compliance before a new attacher puts in a request, then it should not be the responsibility of the new attacher to replace that already out of compliance pole.

The Cable Operators commented that their pole-access costs are unreasonably inflated because pole owners force them to correct pre-existing violations on the poles caused by others. The Cable Operators contend that it is illegal to require attachers like them to pay for pre-existing violations. The Cable Operators also submitted draft language for the Rule that would address this concern.

LV/FL/OTT agreed that new attachers often incur the cost of bringing non-compliant pole into compliance, usually through replacement of the pole. LV/FL/OTT added that these requirements not only cause burdensome costs and delays, but may also lead to the abandonment of a project by the new attacher. Although the companies share the concerns about non-compliant pole replacement costs being borne by third-party attachers, LV/FL/OTT concede this is a complex problem that requires additional thought and analysis. LV/FL/OTT did, however, provide some guidance as to some solutions applied by other states such as New Hampshire17.

17 The New Hampshire Public Utilities Commission has addressed this concern in its Rules with an explicit requirement:

Where a pole or existing attachment is not in compliance with applicable standards and codes and must be brought into compliance before a new attachment can be added, the cost of bringing that pole or existing attachment into
The Commission agrees with the parties that more guidance is required here and is inclined to follow the approach of the New Hampshire Public Utilities Commission. Third-party pole attachers should not be saddled with the costs of paying for new joint-use utility poles that are in disrepair or non-compliant, or rearranging non-compliant facilities to bring those facilities into compliance. It is the Commission's view that these costs, which are essentially maintenance costs, should be funded by the ongoing pole attachment fees paid by attachers. Accordingly, the Commission has added language to the Rule in Subsection 2(A)(11) that addresses this issue. The Commission's language is based on the language suggested by the Cable Operators. Attachers must recognize, however, that the measure of pole or attachment compliance is based on the year the pole or attachment was constructed and put in service; compliance is not measured on current NESC or Blue Book standards. Put another way, a pole that would be non-compliant under current standards, may actually be compliant if it was constructed or installed using then-current standards. As stated above, however, if a pole that was compliant when installed must be replaced because it is at the end of its useful life, or must be replaced due to disrepair, damage, or sub-standard maintenance, the replacement cost is the responsibility of the pole owner.

I. Subsection 2(A)(12): Notice

This Subsection sets forth notice requirements for pole attachment rate changes and maintenance. The Commission did not receive any substantive comments regarding Subsection 2(A)(12), and adopts this Subsection as proposed in the Notice of Rulemaking.

m. Additional Matters

The Cable Operators suggested adding a subsection to Section 2(A) addressing make-ready responsibilities. It is the Commission's view that the concern addressed by the suggested language—the ability to engage third-party contractors—is adequately addressed elsewhere in the Rule.

2. Subsection 2(B): Unreasonable Terms and Conditions

This Subsection sets forth terms and conditions for attachments to joint-use utility poles that the Commission considers to be presumptively unreasonable. The Commission is adopting provisions in Section 2(B) that differ in some respects from the proposed version of Chapter 880 contained in the Notice of Rulemaking.

The Commission finds that it is presumptively unreasonable for any pole owner to attempt to include the terms and conditions enunciated in Section 2(B) in any joint-use compliance shall not be shifted to the entity seeking to add a new attachment.

N.H. Code R. PUC 1303.7(c).
use utility pole agreement, as those terms would impede the reasonable, efficient and
safe use of joint-use utility poles. No comments were filed opposing the adoption of this
section of the Rule, although, as described below, several commenters suggested some
changes to this section of the proposed Rule, and the Commission has included many
of those changes in the final Rule that it adopts in this Order.

The provisions of Subsection 2(B)(1) "Boxing" and Subsection 2(B) 2 "Extension
Arms" have been modified from the proposed rule to mirror the principles endorsed by
the Commission in its Order in Oxford Networks f/k/a Oxford County Telephone;
Request for Commission Investigation into Verizon’s Practices and Acts Regarding
Access to Utility Poles, Docket 2005-00486, Order (Oct. 26, 2006) and Order on
Reconsideration (Feb. 28, 2007) (the Oxford Orders). The principles set forth in the
Oxford Orders are generally referred to as the "Oxford Rules."

In the proposed rule, Subsection 2(B) contained limiting provisions that stated,"to the extent that the pole owner uses, or allows requesting parties to use, such
attachment techniques in the communications space of the pole owner’s poles.” As
pointed out in several comments, most notably in comments filed by LV/FL/OTT, that
restriction did not appear in the Oxford Orders. Many commenters supported the
adoption of the Oxford Rules as the Commission expressed them in the Oxford Orders;
the Commission agrees with those commenters, and is incorporating the Oxford Rules
into Chapter 880.18

Several commenters also noted that one provision of the Oxford Rules, related to
the lowest pole position, had been removed from the proposed rule after it had been
included in the earlier "strawman" proposal from the Inquiry in Docket No. 2015-00295.
The Commission is restoring this provision to the final Rule as Subsection 2(B)(3)
"Lowest Pole Position.”19 To be consistent with the principles expressed in the Oxford
Rules, the final Rule allows new attachers to attach to the lowest available position on
the pole, provided that space is not available above existing facilities along all, or most,
of the proposed route.20

18 Commenters that urged the Commission to fully incorporate the Oxford Rules into
Chapter 880 include: GWI, FCED, Pioneer, Sen. Thibodeau, Rep. Berry, the Cable
Operators, LV/FL/OTT, OPA, Emera, DED, SBA, MFC, and Mr. Clason. FairPoint was
the only commenter expressing opposition to the incorporation of the Oxford Rules, as
expressed in the Oxford Orders, into the Rule.

19 "Pole Top Extensions," which the Commission included as Subsection 2(B)(3) in the
proposed Rule has been renamed "Pole Top Attachments" and is included, with
modification, in the final Rule as Subsection 2(B)(4).

20 The language the Commission is adopting for lowest pole position differs slightly from
the Oxford Rules, in that Chapter 880 makes no specific reference to the facilities of the
ILEC. In the Commission’s view, the intent of the Oxford Rules was that if there is
The Commission has modified Subsection 2(B)(4) "Pole Top Attachments" from the proposed Rule by removing the phrase "when a pole owner has used similar space on their own pole facilities for a wireless use." This modification reflects the Commission’s intent that attachments should be allowed in the electric space on poles if they are done safely and comply with the NESC and any other applicable codes. The Commission also finds that electric utilities should not be able to restrict attachments in the electric space to only those instances where the utility itself has such attachments. The Commission finds that it is in the public interest to make as much use as possible of the limited amount of space that exists on all joint-use utility poles, provided the space is used safely and in compliance with applicable codes. Allowing this use is particularly timely as several wireless entities have recently expressed interest in placing their facilities in the electric space on utility poles to provide next generation wireless services.

The Commission's approach was endorsed by CTIA and the Cable Operators. CMP suggested a limitation on pole top attachments to poles with secondary power under 600 volts, or sub poles. The Commission finds that such a restriction would be unduly burdensome, and that there is no support for this position in the NESC. Emera preferred to prohibit pole top attachments outright, or, in the alternative, allow electric utilities to remove any pole top attachment if the utility decided to use that space. As stated above, the Commission finds that allowing pole top attachments is in the public interest. Further, allowing electric utilities to "bump" other attachers from pole tops would go against this public interest consideration.

a. **Subsection 2(B)(1): Boxing**

This Subsection allows boxing (i.e. placing cables on both the road side and the field side of a pole) of joint-use utility poles to the extent that the boxing complies with applicable codes, and facilities can be safely accessed by emergency equipment and bucket trucks or ladders.

b. **Subsection 2(B)(2): Extension Arms**

This Subsection allows the use of extension arms on joint-use utility poles to the extent that the extension arms comply with applicable codes.

c. **Subsection 2(B)(3): Lowest Pole Position**

This Subsection allows attachments below existing attachments on joint-use utility poles, provided that there is available space below those existing attachments, and to the extent that space is not available above existing attachments for all or most of the route of the proposed new attachments.

available space below the lowest attachment on the pole, that space should be available for use, regardless of who owns the attachments directly above that space.
d. **Subsection 2(B)(4): Pole Top Attachments**

This Subsection allows pole top attachments to joint-use utility poles to the extent that the attachments comply with the NESC.

D. **Section 3: Approval of Attaching Entities**

Section 3 of the Rule is new to Chapter 880. Section 1 of the Act amended 35-A M.R.S. § 711(1) to add a requirement that the Commission determine that joint-use entities seeking access to joint-use utility poles have the technical and financial ability to fulfill their joint-use obligations. As described in greater detail below, Section 3 of the Rule sets forth the parameters of the Commission’s review and issuance of a license to operate as an attaching entity. Section 3 also "grandfathers" all joint-use entities that are attached to joint-use utility poles in Maine on the effective date of the Rule.

CTIA opposed, in part, the Commission's proposal in this Section, but only made a specific recommendation with regard to Subsection 3(A)(8). CTIA observed that the licensing requirements were "overly broad and capture not only newly-eligible providers, but also providers that were previously eligible, including existing wireless providers that are currently operating in Maine, and have operated in Maine for many years, but that had no pole attachments at the time of the rule’s effective date." *CTIA Comments* at 11. CTIA also added that the process as proposed is unduly burdensome. Furthermore, CTIA expressed concern that the proposed rule raises jurisdictional concerns if it is intended to apply to wireless providers.

The Commission disagrees with CTIA's observations. The process put forward by the Commission is minimally burdensome, and is designed to capture the minimum of information necessary for the Commission to determine competency. Further, the process is equally applicable to all new prospective attachers, and is non-discriminatory. Finally, given the jurisdiction of the Commission over attachments to joint-use utility poles in Maine, the Commission disagrees with the premise that one category of attachers (wireless) is somehow jurisdictionally off limits by virtue of the regulatory scheme that applies to the service the attacher provides. Taking CTIA's argument to its logical extreme, the Commission would similarly be unable to regulate the attachments of broadband providers, as the service those providers furnish is regulated at the federal level. The Commission is regulating attachments, not service, and is treating all new attachers equally.

LV/FL/OTT commented that the provisions in Section 3 of the proposed Rule are reasonable, and seek to assure that new attaching entities are "good citizens." As such, LV/FL/OTT generally support the provision in the proposed Rule.

The Commission agrees with LV/FL/OTT that the proposed rule change requiring a licensing requirement is reasonable to all new attaching entities. The Commission finds that the licensing process is not overly burdensome and captures the intent of the statutory requirements in 35-A M.R.S. § 711(1) that a joint-use entity has the technical
and financial capabilities to fulfill its obligations related to such joint-use. Accordingly, the Commission adopts Section 3 as proposed in the Notice of Rulemaking.

1. **Subsection 3(A): Application Requirements for Attaching Entities**

   This Subsection sets forth the application requirements for new attaching entities.

   a. **Subsection 3(A)(1): Evidence of Financial Capability**

   This Subsection requires prospective attaching entities to disclose pertinent financial information to the Commission.

   b. **Subsection 3(A)(2): Evidence of Technical Capability**

   This Subsection requires prospective attaching entities to provide sufficient indicia to the Commission of the entities technical ability to attach to joint-use utility poles.

   c. **Subsection 3(A)(3): Authorization to Conduct Business in Maine**

   This Subsection requires prospective attaching entities to show that the entity is legally entitled to do business in Maine.

   d. **Subsection 3(A)(4): Application Requirements**

   This Subsection sets forth the minimum required information for license applications.

   e. **Subsection 3(A)(5): Commission Review**

   This Subsection provides for Commission review of a license application within 30 calendar days, with an additional 30 days for review if necessary.

   f. **Subsection 3(A)(6): Issuance Criteria**

   This Subsection sets forth the standard for the issuance of a license to a prospective attaching entity.

   g. **Subsection 3(A)(7): Term of License**

   This Subsection provides that licenses are valid until revoked or abandoned.

   h. **Subsection 3(A)(8): Transfer of License**

   This Subsection sets forth the terms for transfer of a license. CTIA added that, as written, this provision may have the unintended consequence of requiring that any
wireless carrier with pole attachments in Maine and a Commission-issued Pole Attachment License would need Commission approval to transfer its Pole Attachment License prior to or contemporaneously with transferring its FCC wireless license. The Commission disagrees that it would have any part in the transferring of wireless licensing authority at the FCC. The Commission's only concern and authority would be in transferring of a Pole Attachment License from one joint-use entity to another, and disagrees that this would somehow burden the transfer of federally-granted licenses

i. Subsection 3(A)(9): Abandonment of License

This Subsection sets forth the criteria for abandonment of a license.

E Section 4: Determination of Total Cost of Service for a Standard-Size Joint Use Utility Pole

Except as specifically discussed below, the Commission's amendments to Section 4 of the Rule are editorial or non-substantive in nature, or are intended to update the Rule to include current terminology or to reflect the current state of the telecommunications industry. The Commission is also amending Section 4 to solely refer to 35-foot poles as "standard joint-use utility poles."

CTIA and the Cable Operators urged the Commission to substantively address rates in this Rulemaking, and advocating for wholesale adoption of the FCC's rules in this regard, thus removing Sections 4 through 10 of the Rule. Given the January 15, 2018 deadline imposed by the Legislature in the Act, however, substantively addressing rates is not feasible at this time. As the Commission explained in the Notice of Rulemaking, the Act does not require the Commission to address rates by the statutory deadline. Given the compressed time frame for the adoption of rules governing terms and conditions, and the complexity of changes to the portions of the Rule that govern rates, the Commission is deferring its consideration of amendments to the rate provisions of Chapter 880 until after the adoption of this iteration of the Rule. To that end, the Commission intends to commence an Inquiry shortly after the conclusion of this Rulemaking to address rates.

1. Subsection 4(D)(2): Excluded Investments

The Commission is adding language to Subsection 4(D)(2), as Subsection 4(D)(2)(b), that would exclude the use of joint-use utility poles that are solely used by the pole owner from the investments that may be used to determine the cost of service for joint-use utility poles.

2. Subsection 4(E): Cost of Capital

The Commissions' amendments to Subsection 4(E) are intended to recognize the fact that telecommunications providers, and specifically telephone utilities, are largely unregulated and may no longer have general rate cases.
F. **Section 5: Assignment and Allocation Among Joint Users of Joint-Use Utility Poles**

The Commission's amendments to Section 5 of the Rule are editorial or non-substantive in nature, or are intended to update the Rule to include current terminology or to reflect the current state of the telecommunications industry. The Commission is also amending Section 5 to solely refer to 35-foot poles as "standard joint-use utility poles." Beyond the recommendation of CTIA and the Cable Operators to remove all the rate sections of the Rule and replace them with a reference to the FCC's Rules, the Commission did not receive any specific comments regarding this Section.

G. **Section 6: Calculation of Rates or Responsibility Requirements for Standard Joint-Use Utility Poles**

The Commission's amendments to Section 6 of the Rule are editorial or non-substantive in nature, or are intended to update the Rule to include current terminology or to reflect the current state of the telecommunications industry. Beyond the recommendation of CTIA and the Cable Operators to remove all the rate sections of the Rule and replace them with a reference to the FCC's Rules, the Commission did not receive any specific comments regarding this Section.

H. **Section 7: Separate Charges**

The Commission's amendments to Section 7 of the Rule are editorial or non-substantive in nature, or are intended to update the Rule to include current terminology or to reflect the current state of the telecommunications industry. In addition, the Commission's proposed amendments to Section 7 clarify that its provisions apply to all attaching entities, not just cable television systems. Beyond the recommendation of CTIA and the Cable Operators to remove all the rate sections of the Rule and replace them with a reference to the FCC's Rules, the Commission did not receive any specific comments regarding this Section.

I. **Section 8: Joint Responsibility Agreements**

The Commission's amendments to Section 8 of the Rule are editorial or non-substantive in nature, or are intended to update the Rule to include current terminology or to reflect the current state of the telecommunications industry. Beyond the recommendation of CTIA and the Cable Operators to remove all the rate sections of the Rule and replace them with a reference to the FCC's Rules, the Commission did not receive any specific comments regarding this Section.

J. **Section 9: Rate or Responsibility Requirements for Cable Television Systems to Electric and Telephone Utilities Serving the Same Area**

The Commission's amendments to Section 9 of the Rule are editorial or non-substantive in nature, or are intended to update the Rule to include current terminology
or to reflect the current state of the telecommunications industry. Beyond the recommendation of CTIA and the Cable Operators to remove all the rate sections of the Rule and replace them with a reference to the FCC’s Rules, the Commission did not receive any specific comments regarding this Section.

K. Phase In of Rates or Responsibility Requirements

The Commission is eliminating the current Section 10 of the Rule, "Phase In of Rates or Responsibility Requirements" as superfluous. Beyond the recommendation of CTIA and the Cable Operators to remove all the rate sections of the Rule and replace them with a reference to the FCC’s Rules, the Commission did not receive any specific comments regarding this Section.

L. Section 10: Revenue-Neutral Rate Adjustments

The Commission’s amendments to Section 10 of the Rule are editorial or non-substantive in nature, or are intended to update the Rule to include current terminology, delete references to Rule sections the Commission proposes to eliminate, or to reflect the current state of the telecommunications industry. Beyond the recommendation of CTIA and the Cable Operators to remove all the rate sections of the Rule and replace them with a reference to the FCC’s Rules, the Commission did not receive any specific comments regarding this Section.

M. Section 11: Resolution of Disputes

Several commenters in the Inquiry in Docket No. 2017-00183 recommended that the Commission include in the Rule the "rapid response" procedures for joint-use pole attachment disputes formulated by the Commission in its July 12, 2011 Order in Docket No. 2010-00371. Accordingly, the Commission is proposing to amend Section 11 to promulgate those procedures.

CTIA raised a concern about a conflict between this Subsection and Subsection 2(A)(10)(d) of the Rule. The Commission addressed this potential conflict in its discussion of Subsection 2(A)(10)(d).

N. Section 12: Negotiated Agreements

Based on comments and feedback received by the Commission in the Inquiry in Docket No. 2017-00183, the Commission is adding Section 12 to the Rule to clarify that nothing in the Rule shall be construed to restrict parties from negotiating mutually acceptable rates, terms, or conditions that differ from those contained in Chapter 880. The Commission’s proposed Section 12 also makes clear, however, that in resolving any dispute regarding attachments to joint-use utility poles, the Commission will apply the rates, terms, and conditions in Chapter 880.
O. Applicability of Rule and Compensation Orders to Prior Periods

The Commission is eliminating the current Section 13 of the Rule, "Applicability of Rule and Compensation Orders to Prior Periods" as superfluous. The Commission did not receive any specific comments regarding this Section.

P. Procedure for Section 711 Proceedings

Given the Commission's proposed incorporation in Section 11 of the Rule of the dispute resolution procedures in the Commission's July 12, 2011 Order in Docket No. 2010-00371, the Commission is eliminating the current Section 14 of the Rule, "Procedure for Section 711 Proceedings" as superfluous. The Commission did not receive any specific comments regarding this Section.

Q. Section 13: Waiver

The Commission is amending Section 13 of the Rule to update the list of individuals who may grant waivers from Chapter 880, and to remove a superfluous section reference. The Commission did not receive any specific comments regarding this Section.

R. Additional Matters

1. Notification of Subsequent Attachers

FairPoint raised an issue regarding notification of subsequent attachers in the context of make-ready work. FairPoint opined that it should be the attaching entities that are responsible for notifying the next-in-line attacher. The Commission is not unsympathetic to FairPoint's concern, however individual attachers may not know who other attachers on the pole may be, or may not have contact information for other attachers; pole owners, presumably, have this information. Additionally, this is a topic for discussion when the Commission addresses one-touch make-ready in the future.

2. Emergency Response Plans

CMP has suggested that any non-utility attacher be required to develop, and maintain, emergency response plans (ERP) and submit them to the pole owner and the Commission to ensure coordinated and timely responses during emergencies.

CMP cites its concern with the growing challenges of coordinated responses with non-utility attachers during emergency situations. CMP states that ERPs should detail how attachers will respond to damage or failures on/to the distribution system. Specifically, CMP believes the ERPs should address emergency communication, should specify that employees or contractors be on call to respond as needed and that the response plans should be updated and reviewed by the commission annually. CMP
states that they intend to incorporate such requirements into their pole attachment application process.

The Commission has reviewed the input that has been provided by pole owners and others at technical conferences, workshops, and hearings that have been held on the pole attachment issue over the past few years. It is evident that pole owners have contracts with upwards of 100 different attaching entities. CMP stated that they also negotiate pole attachment provisions with utility associations (e.g. Telecommunications Association of Maine and the New England Cable Television Association), and highlighted the fact that it is rare that disputes in the negotiations process with requesting attachers are not amicably resolved. Further, CMP emphasized that it is important that it maintain the spirit of negotiation and collaboration between parties. Further, pole owners and attaching entities alike have underscored the importance of preserving the ability of parties to voluntarily negotiate contract provisions.

As noted above, CMP intends to incorporate key ERP elements into their pole attachment application process. The Commission supports that concept and encourages CMP, other pole owners, and attaching entities to review and update their contracts to ensure that current and accurate information is readily available, at a moment’s notice, that optimizes the communication and collaboration between pole owners and attaching entities that is so critical during emergencies.

Pole owners and attaching entities are best positioned to ensure that emergency situations are addressed and resolved in an efficient and effective manner. The Commission does not believe, however, that a requirement in the Rule for what would likely be 100 or more separate ERPs, to include an annual review by the Commission, would enhance the interactions that commenters have indicated are working well.

3. Pole Maintenance

CMP suggested that attachers be responsible for ongoing maintenance of their equipment including transfer, reconstruction, or relocation of their equipment or facilities caused by road work/maintenance, accidents, system improvements, or changes requested by a Right of Way authority, and that, if an attacher fails to perform that maintenance, the pole owner be able to conduct such work or hire suitable contractors to conduct such work and charge the attaching entity.

CMP states that the intent of its proposal is to ensure that attachers maintain their equipment, and respond to emergency situations or required relocations, and that there be no cost-shifting to electric customers.

As is the case with ERPs, pole owners and attaching entities are best positioned to ensure that maintenance issues are handled in a timely and efficient manner. The Commission encourages CMP and the other pole owners to include appropriate provisions in their contracts in this regard, but declines to add such provisions to the Rule.
IV. ORDERING PARAGRAPHS

In light of the foregoing, the Commission

ORDERS

1. That Chapter 880 – Attachments to Joint-Use Utility Poles; Determination and Allocation of Costs; Procedure, is hereby amended as described in the body of this Order and as set forth in the amended Rule attached to this Order;

2. That the Administrative Director shall file the amended Rule with the Secretary of State;

3. That the Administrative Director shall notify the following of this rulemaking proceeding:
   a. all known providers of telecommunications operating in the State;
   b. all electric utilities in the State;
   c. All persons who have filed with the Commission within the past year a written request for Notice of Rulemaking; and
   d. the Office of the Public Advocate; and

4. That the Administrative Director shall send a copy of the amended rule to the Executive Director of the Legislative Council.

Dated at Hallowell, Maine, this Twelfth Day of January, 2018

BY ORDER OF THE COMMISSION

/s/ Harry Lanphear

Administrative Director

COMMISSIONERS VOTING FOR: Vannoy
Williamson
Davis