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PUBLIC UTILITIES COMMISSION

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March 7, 2017

Honorable David C. Woodsome, Senate Chair
Honorable Seth A. Berry, House Chair
Energy, Utilities and Technology Committee
100 State House Station
Augusta, Maine 04333

**Re: LD 406, An Act to Amend the Law Regarding Joint Use of Certain Utility
and Telecommunications Infrastructure**

Dear Senator Woodsome and Representative Berry:

The Public Utilities Commission testifies in support of LD 406, An Act to Amend the Law Regarding Joint Use of Certain Utility and Telecommunications Infrastructure. The bill would update 35-A M.R.S. § 711, the statute governing joint use of equipment (e.g., utility poles) to reflect action by the Federal Communications Commission (FCC) regarding additional providers that need access to utility poles and clarify the Maine Public Utilities Commission's existing statutory authority in this area.

Background:

FCC Action

In 2015, the FCC determined that broadband Internet access services will be treated as telecommunications services and that 47 U.S.C. § 224, the federal pole attachment statute, applies to providers of broadband access service.¹ In doing so, the FCC stated that "leveling the pole attachment playing field for new entrants that offer solely broadband services also removes barriers to deployment and fosters additional broadband competition."²

¹ *In re Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, ¶¶ 29, 478 (rel. Mar. 12, 2015).
² *Id.* at ¶ 478.

Maine Statute

Maine law, 35-A M.R.S. § 711, provides pole attachment rights to public utilities,³ voice service providers, dark fiber providers,⁴ wholesale competitive local exchange carriers (CLECs) or cable television systems (a copy of the statute is attached to the testimony). Section 711 essentially provides that 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 upon its own motion or upon complaint of an entity identified in the statute, it finds the following: that public convenience and necessity requires the use, that joint use will not result in irreparable injury to the owner or other users, and that the public utilities, voice service provider, dark fiber provider, wholesale CLEC or cable television system have failed to agree upon the use or the terms and conditions and compensation. Section 711(4) provides that the Commission shall adopt a rule governing the resolution of pole attachment rate disputes and Section 711(6) provides that this section applies to a dark fiber provider only with respect to the construction and maintenance of federally supported dark fiber.⁵

The Maine Fiber Company, which installed the Three Ring Binder, is the only provider that meets the statutory definition of "dark fiber provider." Other entities that provide unlit fiber do not meet Maine's "dark fiber provider" definition and, therefore, do not have a statutory right to access utility poles under Maine law.⁶

³ "Public utility" includes traditional telephone utilities. See 35-A M.R.S. § 102(13), (19).

⁴ "Dark fiber provider," as used in Maine law, is a Maine-specific term and is defined in 35-A M.R.S. § 102(4-A) as:

4-A. Dark fiber provider. "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 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.

⁵ Federally supported dark fiber is defined in 35-A M.R.S. § 102(4-B) as:

4-B. Federally supported dark fiber. "Federally supported dark fiber" means one or more strands within a bundle of fiber-optic cable through which an associated light signal or light communication transmission must be provided to provide communications service, but excluding the electronic equipment required in order to render the fiber capable of transmitting communications, the construction of which is financed in whole or in part with funds provided by a grant awarded before January 1, 2010 by the United States Department of Commerce, National Telecommunications and Information Administration pursuant to the federal American Recovery and Reinvestment Act of 2009, Public Law 111-5, 123 Stat. 115 (2009).

⁶ To avoid confusion with the statutorily defined term "dark fiber provider," LD 406, and the Commission's testimony, use the term "unlit fiber." LD 406 contains a definition of "unlit fiber" which means "one or more strands within a bundle of fiber-optic cable through which an associated light signal or light communication transmission must be provided to provide communications

Commission Proceedings

In 2015, following FCC action, the Office of the Public Advocate (OPA) made a filing requesting that the Commission re-examine Chapter 880 of the Commission's Rules - Attachments to Joint-Use Utility Poles; Determination and Allocation of Costs: Procedure.⁷ 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. 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 Inquiry⁸ 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 the status of federal and state law with regard to utility pole attachments, including the rights of non-utility attachers (e.g. un-lit 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. The Commission Staff then crafted a proposed amended rule that incorporated input from the parties, while also achieving the goals of the Commission as stated in the Notice of Inquiry with regard to the facilitation of broadband expansion via modern, efficient, and flexible pole attachment regulations.

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, in Section 711. The statute allows 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, is granted in the context of a dispute before the Commission regarding a specific utility pole attachment or attacher. As it stands currently, a pole owner could have grounds to challenge the authority of the Commission to promulgate rules of general, first-instance, applicability with regard to pole attachments if the Commission based that authority solely on Section 711.⁹

Section 711 also specifically defines a limited set of entities that are permitted to bring a utility pole attachment dispute to the Commission: public utilities, voice service providers, one specific dark fiber provider, wholesale competitive local exchange carriers, and cable television systems. Section 711 excludes modern-day utility pole attachers such as unlit fiber providers beyond the one defined in Title 35-A, fiber-based broadband-only providers, and fixed wireless providers. Comments submitted in the Inquiry indicated that the entities not identified in Section 711 have faced some difficulty obtaining permission from utility pole owners to attach

service, but excluding the electronic equipment required in order to render the fiber capable of transmitting communications."

⁷ The Commission first promulgated Chapter 880 in 1985. The Commission amended Chapter 880 in 1993, and the Commission has not revised the Rule since.

⁸ MPUC Inquiry into Amendment of Chapter 880 of the Commission's Rules, Notice of Inquiry, Docket No. 2015-00295 (Sept. 28, 2015).

⁹ 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."

to utility poles, and, when they are able to attach, are often subject to costs that exceed those of the entities included in Section 711.

These provisions of Section 711 may raise 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 in the statute, on the one hand, and the Legislative interest in the adequacy of Maine's broadband deployment on the other, may suggest the time is indeed ripe for the Legislature to revisit this matter and create a modern, equitable approach to right-of-way access via pole attachment.

On December 20, 2016, the Commission closed the Inquiry. In its Order the Commission stated that the Commission made no finding with regard to the extent of the Commission's authority to regulate pole attachments in Maine, and the Commission's decision to close this Inquiry in no way foreclosed the ability of the Commission to promulgate and enforce regulations in this area.

LD 406:

The Commission believes legislative guidance on this issue would be helpful and therefore introduces LD 406. The bill would update section 711 to reflect action by the FCC regarding additional providers that need access to utility poles and clarify the Commission's existing statutory authority in this area.

The Commission proposes to update Section 711 with respect to entities with a statutory right to attach to utility poles and otherwise engage in joint use of utility facilities. LD 406 would add unlit fiber providers, as discussed above, telecommunications service providers, and information service providers. The terms "telecommunications service" and "information service" are taken from federal law.¹⁰

As discussed above, until recently, the FCC had characterized internet service as an "information service" under federal law. In 2015, the FCC changed course and now characterizes internet service as a "telecommunications service." In the Commission's view, adding providers of both telecommunications service and information service to the list of entities entitled to joint use of utility equipment, along with providers of unlit fiber, ensures that, however broadband and other advanced communications technologies are categorized at a federal level, either now or in the future, those entities will be able to efficiently expand their businesses and infrastructure in Maine.

LD 406 also clarifies that the Commission may promulgate rules of general applicability with regard to the joint use of utility equipment, not just rules for matters that may arise in the context of a dispute regarding that equipment.

¹⁰ Title 47 U.S.C. § 153(53) defines telecommunications service as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used. Title 47 U.S.C. § 153(24) defines information service as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."

March 7, 2017

The Commission looks forward to working with the Committee on LD 406 and I would be happy to respond to any questions the Committee has at this time. The Commission will also be present at the work session should the Committee have any additional questions in its consideration of this bill.

Sincerely,

A handwritten signature in black ink, appearing to read "Paulina McCarter Collins". The signature is fluid and cursive, with the first name "Paulina" being the most prominent.

Paulina McCarter Collins, Esq.
Legislative Liaison

Attachment

cc: Energy, Utilities and Technology Committee Members
Deirdre Schneider, Legislative Analyst