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January 20, 2020

VIA Email for Electronic Filing: puc.clerk@vermont.gov

Judith C. Whitney
Clerk of Commission
112 State Street
Montpelier, VT 05620-2701

Re: Cause No. 19-3603-RULE – Proposed Revisions to Vermont Public Utility Commission
Rule 3.706(D)(1)

Dear Ms. Whitney:

On behalf of the CenturyLink Operating Companies, enclosed please find the above-referenced Additional Comments for filing with the Commission.

Please acknowledge receipt and acceptance of this filing. Should you have any questions concerning this filing, please do not hesitate to contact the undersigned.

Respectfully submitted,

Pamela Sherwood
Assistant General Counsel

Enc.

If the Commission truly seeks to set a rule for pole attachment rates that promote the expansion of services to underserved communities in Vermont, then CenturyLink respectfully recommends two further modifications to the proposed Rule. First, CenturyLink continues to maintain that use of one-foot of occupied space in the formula calculation for pole attachments is more consistent with the aim of expanding services to underserved communities in Vermont. While the proposed Rule's single pole-attachment presumption of 1.25 feet is a step in the right direction, entities seeking to attach to utility poles seek competitively attractive pole rates and use of a 1-foot presumption better encourages competitive entities to expand or start operations in such underserved areas of Vermont. The one-foot presumption has been found just and reasonable, remains fully compensatory, and should be adopted by the Commission.¹

Second, if the Commission determines to use a presumption in excess of the one-foot of occupied space, then it is critical for a regulation to contain an explicit provision that neutralizes the bargaining strengths of pole owners in Vermont. The proposed Rule already recognizes that the single pole-attachment rate presumption would not apply in situations controlled by contract. *See*, Proposed Rule 3.706(D)(1). The proposed Rule also explicitly allows pole owners to charge tariff amounts in excess of the Rule's single rate if the pole owner has conducted a study of the space actually occupied by a particular type of attachment on the pole. *See*, Proposed Rule 3.706(D)(1)(a). Whether by contract or tariff, a pole owner's ability to exert bargaining power remains unchecked and without any counter-balancing component set forth in the proposed regulation. In sum, the proposed Rule asymmetrically favors pole owners.

¹ See Level 3 Comments filed on August 18, 2016 in Petition of the CLEC Association of Northern New England to Amend Board Rule 3.706(D)(1) Regarding the Rental Calculation for Pole Attachments, a copy of which is attached hereto.

Accordingly, CenturyLink respectfully submits that the proposed Rule should make clear that the Rule's presumption is rebuttable by the entity seeking to attach to a utility pole. By allowing the entity seeking to attach to utility poles the ability rebut the pole owner's occupied space presumption, the regulation operates in a symmetrical fashion and distempers the inherent bargaining strengths of the pole owner. Moreover, a rebuttable presumption for occupied space in the regulation will foster a reliable and equalized process for both pole owners and attachers alike and, therefore, will encourage the expansion of services to underserved communities in Vermont.

CenturyLink appreciates the opportunity to provide feedback to improve the proposed Rule. The foregoing recommendations to the proposed Rule will minimize delays and provide additional tools for both pole owners and attachers to work cooperatively together to further aid in the timely deployment of broadband network throughout Vermont.

January 20, 2020

Respectfully submitted,

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Gregory M. Kennan
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August 18, 2016

By Federal Express

Ms. Judith C. Whitney, Clerk
Vermont Public Service Board
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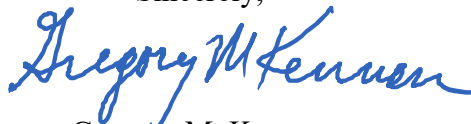
Re: *Petition of the CLEC Association of Northern New England to Amend Board Rule 3.706(D)(1) Regarding the Rental Calculation for Pole Attachments*

Dear Ms. Whitney:

Enclosed for filing are the original and six copies of Level 3's Initial Comments in Support of Rulemaking on the Amendment of Rule 3.706(d)(1).

Please feel free to contact me if you have any questions.

Sincerely,



Gregory M. Kennan

cc: Service List
Paul J. Phillips, Esq.

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**STATE OF VERMONT
PUBLIC SERVICE BOARD**

<p>Petition of the CLEC Association of Northern New England to Amend Board Rule 3.706(D)(1) Regarding the Rental Calculation for Pole Attachments</p>

**LEVEL 3's INITIAL COMMENTS IN SUPPORT OF RULEMAKING
ON THE AMENDMENT OF RULE 3.706(D)(1)**

Level 3 Communications, LLC, Broadwing Communications, LLC, Global Crossing Telecommunications, Inc., Global Crossing Local Services, Inc., TelCove Operations, LLC, and WilTel Communications, LLC (jointly referred to hereafter as “Level 3”) submit these comments in support of the Vermont Public Service Board (“Board”) opening a rulemaking to consider amending Board Rule 3.706(D)(1). As explained below, the proposed amendment is necessary to eliminate the unequal playing field created by the existing rule, which imposes different rates on attachers based solely on whether their attachments carry cable or telecom services without any regard to the reality that those attachments occupy the same amount of usable space on the pole, place an identical burden on the pole, and impose identical costs on the pole owner.

**The Board's Opening of The Rulemaking was Proper and
There Have Been No Procedural or Due Process Violations**

As we explained in our July 27, 2016, letter, the Nine ILECs' arguments in opposition to any change in the existing Board Rule 3.706(D) primarily go to the substance of the proceeding; they argue that no changes to the rule are necessary or appropriate. But that argument does not justify dismissing or deferring the proceeding. To the contrary, the Board may weigh the policy

choice of leaving the rule in its current form at the same time it considers changing the rule as CANNE, Level 3, Comcast, and Charter have suggested.

Relatedly, the Nine ILECs' complaints about lack of notice have no merit. They have the Board's Order Opening Rulemaking of July 15, 2016, responded to it as early as July 19th (two business days after the order was issued), and obviously are aware of the issues specified in it. The Board has ruled that adjudicatory procedures do not apply here, specifically stating that rulemakings are not contested-case proceedings.¹ The Nine ILECs have had ample opportunity to voice concerns, having filed several documents already (although they did not serve their filings on the entire service list developed by the Board and attached to its July 15th order). The rulemaking workshop was delayed from the date specified in the July 15th order to allow the Nine ILECs' counsel to attend and there will be opportunity to discuss relevant issues. There have been no due process violations. The Board should proceed without delay to consider the issues raised by CANNE and echoed by Level 3 and others.

**Pole Attachment Rates Impact Investment and the
Deployment of Broadband Services**

Poles, ducts and conduits are an essential part of the modern information-age infrastructure. The Level 3 operating companies listed above provide advanced broadband and telecommunications services, and to do so, they deploy fiber optics and other facilities within the State. Of necessity, Level 3 attaches these facilities to a large number of poles owned by electric utilities and other telecommunications utilities in the State, and pays substantial charges, including monthly recurring charges, to pole owners under tariffs and agreements subject to regulation under PSB Rule 3.700. These facilities are then used to provide broadband services, voice, unified

¹ Order Opening Rulemaking and Notice of Workshop (7/15/2016).

communications solutions and a comprehensive portfolio of data, security and video services to enterprise customers, carriers, and government customers in Vermont and then used to connect those customers to our global network.

The rates established pursuant to the Board's rules, and in particular through the operation of Rule 3.706(D)(1)(b), directly affect Level 3's cost of doing business in Vermont, in terms of both its ongoing operations and its decisions to invest in and deploy new fiber and broadband facilities in the State. The National Broadband Plan (issued over six years ago) recognized that pole attachments play a vital role in the effective deployment of wireless and wired broadband networks.² A key recommendation in the National Broadband Plan was that the FCC establish pole attachment rental rates that "as low and close to uniform as possible" to eliminate the disparity between pole attachment rates applied to cable operators and the higher rates paid by telecommunications attachers under the FCC's old formulas.³ The FCC did so in 2015, revising its pole attachment formula to create parity by using the lower cable attachment rate, explaining that bringing parity to pole attachment rates would further broadband deployment and competition.⁴

Of course, the FCC formula is not directly applicable in Vermont, so it is up to the Board to implement this crucial policy. Level 3 agrees with and supports the petition of the CANNE

² Connecting America: The National Broadband Plan, Federal Communications Commission, March 17, 2010 ("National Broadband Plan"), Executive Summary, pp. xii, <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf> ("Infrastructure such as poles, conduits, rooftops and rights-of-way play an important role in the economics of broadband networks. Ensuring service providers can access these resources efficiently and at fair prices can drive upgrades and facilitate competitive entry.")

³ National Broadband Plan, p. 110 (Recommendation 6.1: The FCC should establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, to promote broadband deployment.")

⁴*In the Matter of Implementation of Section 224 of the Act A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order on Reconsideration (11/24/15) (Reconsideration Order on National Broadband Plan), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-151A1.pdf.

CLECs⁵ for a narrow rulemaking proceeding, the objective of which is to amend Rule 3.706(D)(1)(b) so as to eliminate the current artificial, arbitrary, and harmful disparity that is similar to the disparity in the FCC's old, discarded formula. Vermont should take steps similar to those undertaken at the FCC to eliminate the disparity in its rule, by revising the presumptive "space occupied by attachment" — and, therefore, rates paid — as between competitive telecommunications providers and cable providers. Eliminating the current doubling of the rate that CLECs must pay will reduce telecom providers' cost of doing business, promote competition, and benefit consumers in Vermont and establish parity of rates paid among providers without arbitrary distinguishing between the types of service provided over the attachment.

Significant Changes Warrant This Limited Rule Revision

As CANNE CLECs explain in their Petition for a Rulemaking, changes in technology and in the telecommunications marketplace warrant revision of the rule to establish a simplified, uniform occupancy presumption of one foot of space (consistent with the FCC's space presumptions for ALL attachments) for CLECs and cable operators alike. Contrary to the implication made by the Nine ILECs⁶ that the Board denial of Comcast's petition to amend the rule in April 2014 was based a substantive decision that nothing has changed in the marketplace and that the same conclusion is warranted here, the Nine ILECs' characterization is wrong and irrelevant. That rulemaking petition was dismissed due to defects in the filing and because the

⁵ Sovernet Fiber Corp. ("Sovernet"), TVC Albany, Inc. d/b/a FirstLight Fiber along with segTEL, Inc. d/b/a FirstLight Fiber ("FirstLight") individually and as members, along with the other competitive local exchange carrier members, of the CLEC Association of Northern New England, Inc. ("CANNE").

⁶ The Nine ILECs claim in their July 28, 2016 letter opposing the opening of the rulemaking that "The costs and other administrative burdens of conducting a rulemaking can be avoided if such comments demonstrate that the rulemaking is not needed. Such was the case in April 2014 when the Board denied Comcast's petition to amend Board Rule 3.700." However, that rulemaking petition was dismissed on procedural grounds.

Board interpreted it as requesting a declaratory ruling on the treatment of VOIP attachments and therefore not procedurally proper. The Board went on to state:

[t]he adoption of unified rates has the potential to significantly impact the expansion of broadband service in Vermont as well as the ratepayers of Vermont. While the Board has rejected Comcast's specific proposal at this time, the Board believes that further investigation of this issue is warranted and the Board plans to conduct such proceedings as necessary prior to instituting a formal rulemaking to amend Board Rule 3.700.⁷

The Board has now undertaken that formal rulemaking to unify rates. The CANNE CLECs' Petition for a Rulemaking is procedurally proper and does set forth factual and legal grounds for the proposed modification to the rule. Those factors include significant changes to the marketplace and a realignment of regulatory rules to incent broadband deployment.

1. When Distinctions Based on Types of Services are Blurred, Disputes Arise.

Changes in the telecommunications marketplace have blurred what was once a clear distinction between cable, broadband, and telecommunications service. States that have adopted a single rate formula have concluded that having a single rate reduces the confusion and potential for litigation over which rate to apply: cable, telecom, broadband, or information services. For example, the California Public Service Commission stated that application of a uniform rate to all attachments would "avoid potential disputes over whether our adopted rules apply to a particular service offered over an attachment used to provide multiple services. By applying our rules in this manner, we seek to minimize potential litigation which may threaten to impede the growth of the local exchange competitive infrastructure."⁸

⁷ April 9, 2014 letter from Chairman Volz responding to the Comcast request to initiate a rulemaking served on Rule 3.700 Service List.

⁸ Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Services, et. al, Docket No. R95-04-043, Decision No. 98-10-058 (Cal. PUC 10-22-98), 1998 Cal. PUC LEXIS 879 *37; 82 CPUC2d 510 (Cal. Pole Attachment Order).

This is the exact type of confusion that resulted in a dispute that culminated in Docket 8470 about whether the cable or telecom pole attachment rate should apply to attachments that carry interconnected voice over internet protocol services (VOIP). The particular issues among the parties to that docket were resolved in two special contracts approved by the Board in April 2016.⁹ Parties to those special contracts now have different — and secret — cost structures than similarly situated providers and the underlying dispute regarding the application of the rate has not been resolved for non-parties to the contracts. Indeed, differential treatment has increased, in that different rates now apply as between parties and non-parties to those contracts as well as between telecom and cable attachers.¹⁰ The disparate treatment is easily remedied, however, by developing a single rate uniform space occupied presumption of one foot for all attachments (focusing on the burden the attachment imposes on the pole) instead of focusing on the type of service provided over the attachment.¹¹ The Board should modify its current rule to remove the arbitrary allotment of twice the space for telecom attachments.

⁹ *Complaint of Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications, for Relief to Recover Unpaid Charges for Pole Attachments under FairPoint's PSB VT Tariff No. 26*, Docket No. 8470, Order dismissing complaint, 4/7/2016; *Special Contract Approval*, S.C. #1010, at 2 (Apr. 7, 2011); *Special Contract Approval*, S.C. #1011, at 1 (Apr. 7, 2011).

¹⁰ Likely for that reason, both special contracts expressly contemplate that they could be superseded by a change in law such that all attachers, regardless of their classification or service offerings, pay the same rate. *See Special Contract Approval*, S.C. #1010, at 2 (Apr. 7, 2011); *Special Contract Approval*, S.C. #1011, at 1 (Apr. 7, 2011).

¹¹ The Nine ILECs claim that CANNE Petition fails to refute the sound policies that are embodied in the Board's present pole attachment rate provisions. To the contrary, CANNE's Petition in pages 5-16 explained in compelling detail why the adoption of a single one foot presumption for "space occupied" should apply to all attachments regardless of the nature of service provided. The Nine ILECs fail to justify why in the current telecommunications marketplace it makes sound economic sense to charge a higher rate to one provider just because of type of service offered by allotting twice as much space to its attachments when the attachment places no greater burden on the actual pole to which it is attached than a cable attachment would.

2. When Rate Structures Differ Between States and Types of Providers, Broadband Investment Decisions are Influenced.

The FCC recognized the changing technology and marketplace and took steps to shift the focus away from the regulatory distinctions based on the identity of the provider to a similar rate structure for all attachers. The FCC's pole attachment rule was revised in 2011 and further clarified and revised in 2015 to eliminate the cable/telecom disparity for states where the FCC regulates the rates, terms, and conditions for pole attachments. The FCC explained in its 2015 order its goal to keep pole attachment rates **unified and low** to address its concern that differential rates results in discouraging investment in states.

4. We additionally act to support incentives for deployment of broadband facilities, particularly in rural areas, and to *harmonize regulatory treatment* between states where the Commission regulates the rates, terms, and conditions for pole attachments and states where such matters are regulated by the state. Subjecting cable operators to higher pole attachment rates merely because they also provide telecommunications services, such as broadband Internet access, could deter investment in states subject to Commission pole regulation, which would undermine the Commission's broadband deployment policy. *By keeping pole attachment rates unified and low, we further our overarching goal to accelerate deployment of broadband by removing barriers to infrastructure investment and promoting competition.*¹²

In that order, the also FCC explained that the different rates can impose a disincentive to investment in states where the telecom rate is higher than the cable rate. The FCC stated:

22. We also are concerned that unless we close what one commenter refers to as the "telecom formula loophole," the resulting *rate disparity* would, more broadly, frustrate the Commission's policy goals by *artificially and incrementally deterring investment in states subject to Commission pole regulation in favor of investment in areas with more favorable state-regulated pole attachment regimes*. As the Commission previously has observed, "[c]ommenters report that *many [states that have elected to exercise jurisdiction over pole attachments in lieu of the Commission] apply a uniform rate for all attachments used to provide cable and telecommunications services, and have done so by establishing a rate identical or*

¹²In the Matter of Implementation of Section 224 of the Act A National Broadband Plan for Our Future, WC Docket No. 07-245, GN Docket No. 09-51, Order on Reconsideration, ¶ 4 (11/24/15) (Reconsideration Order on National Broadband Plan), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-151A1.pdf (emphasis added).

similar to the Commission's cable rate formula." Thus, if the Commission's telecom rate frequently yielded rates materially above the cable rate, *telecommunications service providers that operate in multiple states or are deciding where to enter the marketplace, would have an artificial disincentive to invest in states governed by the Commission's 2011 telecom rate rule relative to states that established a uniform rate identical or similar to the Commission's cable rate formula.* Although our action in this Order will not guarantee complete state-to-state uniformity, seeking to address artificial marketplace distortions in the manner that we do here, rather than via a higher telecom rate, accords with our broadband mandate and our overall policy balancing in this context.¹³

The Board should take similar steps to now address the disparate treatment that Rule 3.706(D) creates for companies that are making critical broadband investment in the state.

3. Other States Have Moved to a Unified Rate for Pole Attachments, to Avoid Unreasonable Rate Discrimination and Provide for Parity Among Providers.

As the FCC specifically pointed out, most states have already implemented a single rate at or near the lower cable rate. Of the states exercising their reverse preemption right and prescribing specific rate formulas, the following have adopted a uniform rate: Alaska,¹⁴ California,¹⁵

¹³ *Id.*, ¶ 22 (emphasis added).

¹⁴ See e.g., Alaska Admin Code Title 3, Section 52.900 *et seq.*, <http://www.legis.state.ak.us/basis/aac.asp#3.52.900>. 3 AAC 52.920(a)(1) provides the presumption for occupied space for telecommunications attachments is one foot); See Also *In the Matter of the Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations*, 3 AAC 52.940, Docket No. R-00-5, Order No. 4, at 6-7 (RCA, 10-2-02), <http://rca.alaska.gov/RCAWeb/ViewFile.aspx?id=61196740-74AD-4D50-A5CF-8BBC62A292C4>, ("We conclude that the CATV formula is reasonable and should be the default formula for calculating pole attachment rates [for all attachers] if the pole owner and the attachers cannot negotiate their own agreement.").

¹⁵ Cal. Pub. Util. Code Section 767.5 (http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PUC&division=1.&title=&part=1.&chapter=4.&article=3.) and Cal. Pole Attachment Order, *182-183 ("Requiring telecommunications carriers and cable operators that provide telecommunications services to pay more for pole and conduit attachments than cable operators that do not provide telecommunications services when their attachments are made in the identical manner and occupy the same amount of space would subject such carriers and cable operators to prejudice and disadvantage, would deter innovation and efficient use of scarce resources, and would harm the development of competition in California's telecommunications markets.")

Delaware,¹⁶ Illinois,¹⁷ New Jersey,¹⁸ New York,¹⁹ Oregon,²⁰ Utah,²¹ and Ohio.²² And as the CANNE CLECs explained in their petition, a number of states have explicitly declined to impose higher pole attachment costs on broadband providers: Oregon, Connecticut, California, Alaska, New York, and New Hampshire.²³

States have also found that a single rate avoids unreasonable rate discrimination. For instance, Kentucky's Public Service Commission found pole attachments provided to a telecommunications carrier is "a like service under the same or substantially the same conditions" as attachments provided to a cable system.²⁴ Accordingly, that Commission concluded it would be a violation of its non-discrimination statute for the utility to charge for attachments based on a

¹⁶ Del. Admin. Code, Title 26, Section 1004 (known as "PSC Pole Attachment Regulation"), Section 7.2 (pole attachment rates for any entity attachment must be 'just and reasonable' based on the formula set forth in Section 7.2.2) (<http://regulations.delaware.gov/AdminCode/title26/1000/1004.shtml#TopOfPage>).

¹⁷ Ill. Admin. Code Title 83, Section 315.20,
<http://www.ilga.gov/commission/jcar/admincode/083/08300315sections.html>

¹⁸ N. J. Admin Code Section 14:18-2.9 (sets forth one foot presumption for occupied space for cable and third party attachers) (<http://www.lexisnexis.com/hottopics/njcode>).

¹⁹ See Proceeding on Motion of Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Establish Pole Attachment Rental Rate, Case 01-E00026, p. 5 (N.Y. PSC July 16, 2002) ("Currently there is one pole attachment rate, which applies to all attachments regardless of the type of company.") <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=01-00026&submit=Search+by+Case+Number>

²⁰ Or. Admin. R. Section 860-028-0000, et seq.,; see § 860-028-0110(2) (default rates apply to any entity requiring pole attachments to serve customers). http://arcweb.sos.state.or.us/pages/rules/oars_800/oar_860/860_028.html,

²¹ Utah Admin. Code Section 746-345, et. seq.,; R746-345-2(A) provides that attaching entities include cable and communications companies and R746-345-5 sets forth a rate formula for just and reasonable rates, which includes a presumption that telecommunications and cable television pole attachments each occupy 1.0 foot. (<http://www.rules.utah.gov/publicat/code/r746/r746-345.htm>).

²² Ohio Admin. Code Section 4901:1-3-04, 3 (adopting the default FCC formula as revised to provide for parity in telecom and cable rates) (<http://codes.ohio.gov/oac/4901%3A1>).

²³ See CANNE CLECs Petition, pp.14-15.

²⁴ *Ballard Rural Telephone Cooperative vs. Jackson Purchase Energy Corp.*, Case No. 2004-00036 (Ky. PSC 8-2-2007). KRS 278-170(1) prohibits a utility from giving any "unreasonable preference or advantage" or making any "unreasonable difference" as to rates among customers who received a "like and contemporaneous service under the same or substantially the same conditions." http://psc.ky.gov/pscscf/2004%20cases/2004-00036/PSC_Final%20Order_080207.pdf.

different method that it uses to calculate the rate charged to cable customer attachments. California followed the same approach, applying a single pole attachment formula, to ensure that telecom providers, including those not affiliated with a cable operator, were assured access to poles under nondiscriminatory rates, terms and conditions.²⁵

Just as other states have been pursuing similar reforms to eliminate disparities between cable and telecom providers, especially given the technology and market changes where historic cable companies now offer telecom services over the same attachments, Vermont should pursue similar reforms. The Board should expeditiously remove the discriminatory rate application between different pole attachment customers.

4. A Single Rate Based on the Cable Rate Formula is Just and Reasonable and Has Been Found to be Compensatory.

The states have also concluded that a single rate based on the cable rate formula appropriately allocates the benefit of attachments provided to telecommunications carriers and cable systems. State laws authorizing state regulation of pole attachment rates generally require that pole attachment rates be “just and reasonable.”²⁶ To achieve this outcome, state commissions have generally mandated that pole owners follow the cable rate formula, because it most appropriately allocates the costs between the pole owners and attachers. Michigan’s regulatory commission stated the principle most clearly:

The Commission finds that [the cable formula] is a more reasonable approach to allocation than those proposed by the utilities because it achieves a better

²⁵ Cal. Pole Attachment Order at *182-183.

²⁶ See e.g. Del. Admin. Code. Title 26, Section 1004, Pole Attachment Regulation Section 7.1.3, providing that “Such [pole attachment] rates, terms and conditions: (7.1.3.1.) shall be just and reasonable; (7.1.3.2) shall not, with respect to common use purpose, be unduly preferential or unjustly discriminatory...”); see also Utah Admin. Code Section 746-345-1(A)(2) (“Pursuant to these rules, a public utility must allow any attaching entity nondiscriminatory access to utility poles at rates, terms and conditions that are just and reasonable.”)

approximation of the benefit that each user of a pole receives relative to the other users.²⁷

The Regulatory Commission of Alaska similarly held that, “We are not convinced from the record that alternative formulas before us are any more accurate and reasonable than the existing CATV formula.”²⁸ Oregon’s PUC also provided explicit comment on the fairness of the cable rate formula, concluding that “the cable formula has been found to fairly compensate pole owners for use of space on the pole.”²⁹ The Connecticut Department of Utility Control (now the Public Utility Regulatory Authority) concluded that: “the record is far from clear as to whether the price differential between the cable and telecommunication attachment fee is due to any real reflection of increased costs to [the electric company] and its ratepayers. . . . [The electric company’s] expert witness Kowalski testified that there is no additional cost burden.”³⁰ The California Commission explained that, “There is generally no difference in the physical connection to the poles or conduits attributable to the particular service involved.”³¹

The Ohio Commission agreed, and took steps to advance broadband deployment by updating and unifying its pole attachments rules, adopting a single, unified pole attachment rate formula based on the FCC’s cable rate formula. The Ohio Commission noted that “the cost incurred by the pole owner to provide attachment space is not affected by the services being

²⁷ *Consumers Power Co., et al.*, Case No. U-10741; Case No. U-10816; Case No. U-10831, 1997 Mich. PSC LEXIS 26, 36 (Mich PUC 2-11-97), affirming establishment of single statewide rate as “just and reasonable” 1998 Mich. App. Lexis 832 (MI Ct. App. 11/24/98), aff’d 461 Mich. 853, 602 N.W.2d 386 (1999 Mich. LEXIS 3252 (MI S.Ct. 1999)).

²⁸ See *In the Matter of the Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations*, 3 AAC 52.940, Docket No. R-00-5, Order No. 4, at 6-7 (RCA, 10-2-02).

²⁹ *Rulemaking to Amend and Adopt Rules in OAR 860*, Docket Nos AR 506, AR 510, Order No. 07-137 (Or. PUC 4-10-07) <http://apps.puc.state.or.us/orders/2007ords/07-137.pdf>.

³⁰ See *Petition of the United Illuminating Company for a Declaratory Ruling Regarding the Availability of Cable Tariff Rate for Pole Attachments*, Docket No. 05-06-01 (Conn. DPUC 12-14-05).

³¹ Cal. Pole Attachment Order at 53.

provided by the attaching entity.”³² The Ohio Commission further found that the FCC’s cable rate formula “has been deemed compensatory by the courts” and adopted the presumptive inputs into the formula, including the occupancy of one foot of space for all providers. Id.

The objections from the Nine ILECs likely mirror the objections raised by Ohio electric utilities who argued that electric users would be “cross subsidizing” attaching entities by electricity users. That assertion did not persuade the Ohio Commission. Instead, the Ohio modified its rule, ordered the regulated pole owners to submit pole attachment tariffs and rates in compliance with its revised pole attachment formula and reviewed those tariffs for approval.

The time has come for Vermont to do the same by establishing a standard uniform presumption of one foot of “space occupied” for all attachments.

³² Case No. 13-579-AU-ORD (<http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=77536568-5068-44dc-bac6-6519b49a8f10>).

Conclusion

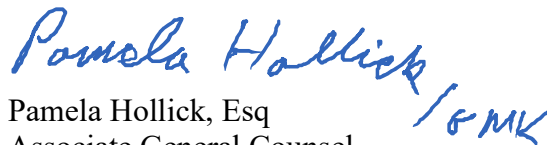
As proposed by CANNE and seconded by Level 3 and others, the Board should proceed immediately to consider the straightforward amendment to Rule 3.706(D)(1) that would eliminate the disparate presumption in pole space occupied — and, therefore, rates paid — as between cable and telecom providers by establishing a uniform, one-foot presumption for telecom and cable operators alike.

August 18, 2016

Respectfully submitted,



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Rule 3.706(D) Petition SERVICE LIST

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