

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 6606

Investigation into tariff filing of Vermont )  
Marble Power Division of OMYA, Inc. re: )  
Proposed Pole Attachment Tariff )

Order entered: 11/22/2004

**I. INTRODUCTION**

The Public Service Board ("Board") opened this docket to investigate the proposed pole attachment tariff of Vermont Marble Power Division of Omya, Inc. ("VMPD") on December 31, 2001. The Board permitted the tariff to become effective, subject to the Board's investigation under the Board's revised Rule 3.700, et seq., which became effective on September 1, 2001. Under Rule 3.711, new pole rental rates were to become effective as of January 1, 2002. Based on the evidence presented in this docket and on the stipulations of the parties, I conclude that the tariff terms and conditions as well as the annual rental rates proposed by the parties are just and reasonable. In support of that conclusion, I adopt the terms and conditions and the substance of the findings contained in two Stipulations, the first dated January 15, 2003 (the "Rate Stipulation"), and the second dated October 14, 2004 (the "T&C Stipulation"), between VMPD and the Vermont Department of Public Service ("Department" or "DPS") and recommend that the Board issue an order approving those Stipulations and closing this Docket.

**II. PROCEDURAL HISTORY**

On December 31, 2001, the Board opened an investigation into VMPD's pole attachment tariff pursuant to 30 V.S.A. §§ 225 and 227, and appointed me as Hearing Officer. I convened a prehearing conference in this matter on January 22, 2002. VMPD was represented by Edward V. Schwiebert, Esq., of Reiber, Kenlan, Schwiebert & Facey, P.C. Alan D. Mandl, Esq., *pro hac vice*, William D. Durand, Esq., *pro hac vice* and Edward A. Miller, Jr., represented the New

England Cable and Telecommunications Association. John J. Cotter, Esq., appeared on behalf of the Department. Richard H. Saudek, Esq., attended the prehearing conference as a representative of various Adelpia entities as an interested person. It was agreed that the Docket would be bifurcated and that the annual rental rates for VMPD would be determined in the initial phase of the proceeding, with all other terms and conditions to be determined in a subsequent phase of the proceeding.

On March 1, 2002, VMPD submitted prefiled direct testimony in support of the rates in its proposed pole attachment tariff. On March 25, 2002, VMPD filed supplemental testimony in support of an upward adjustment to the proposed rates in the tariff based on updated pole data information. Additionally, on March 1, 2002, NECTA issued discovery requests to VMPD and, on March 22, 2002, VMPD responded to those requests.

On January 15, 2003, the DPS and VMPD (together the "Stipulating Parties") filed the Rate Stipulation in which they agreed upon the annual rate for attachment to VMPD's poles and asked the Board to issue an order approving the Rate Stipulation. All other issues were reserved by the DPS and VMPD for resolution in future proceedings in this Docket. NECTA did not join in the Rate Stipulation; however, some 20 months have passed since it was filed and NECTA has not objected to Board approval as requested by the DPS and VMPD. The Board has not yet acted on the Rate Stipulation.

On October 22, 2003, and June 17, 2004, the Board issued Orders in Docket 6553, an investigation into the terms and conditions of the pole attachment tariff of Verizon New England, Inc., d/b/a Verizon Vermont. Following the release of these Orders, I convened a status conference in this Docket, which was held on August 9, 2004. During the status conference, the parties expressed a desire to work towards settlement and committed to filing either a stipulation or a schedule for resolving the Docket by September 30, 2004. Following a request for a brief extension, on October 19, 2004, the DPS and VMPD filed the T&C Stipulation which addressed all remaining terms and conditions in VMPD's tariff, and asked that the Board issue an order approving both the Rate Stipulation and the T&C Stipulation.

### **III. THE STIPULATIONS**

On January 15, 2003, VMPD and the Department filed the Rate Stipulation and moved for its adoption by the Board. In the Rate Stipulation, VMPD and the Department agreed upon rates for attachment to VMPD's poles, and agreed that the proposed rates are just and reasonable and consistent with Rule 3.700. The Stipulating Parties further agreed that VMPD would implement the stipulated rates for its next bills after entry of a final Board order adopting the Rate Stipulation, and where applicable, to credit in those bills the difference that any attaching entity paid between the pole rental rates in effect since January 1, 2002, and the newly agreed upon rates, retroactive to January 1, 2002.

On October 19, 2004, the Department and VMPD filed the T&C Stipulation and moved for its adoption by the Board. In the T&C Stipulation, the Stipulating Parties agreed upon all other terms and conditions in VMPD's pole tariff which were not previously addressed in the Rate Stipulation. In the T&C Stipulation, which also asked the Board to approve the prior Rate Stipulation, the Stipulating Parties again agreed to waive their rights under 3 V.S.A. § 811 to file exceptions, present briefs, and make oral argument, in the event the Hearing Officer issues a Proposal for Decision substantially consistent with the T&C Stipulation.

### **IV. FINDINGS**

Based upon the evidence of record, I submit the following findings to the Board in accordance with 30 V.S.A. § 8.

1. On November 15, 2001, VMPD filed a proposed new Pole Attachment Tariff to take effect January 1, 2002, in accordance with the requirements of the Board's revised Pole Attachment Rule 3.700, effective as amended September 1, 2001. VMPD's November 15, 2001, filing did not contain any actual proposed attachment rates, but instead contained language that stated that rates for attachment would be calculated according to the formula set forth in Board Rule 3.706. Rate Stipulation at ¶ 1.

2. The Department reviewed VMPD's filing, as did NECTA. Consistent with the Department's recommendation, the Board issued an Order on December 31, 2001, allowing the proposed tariff to become effective, subject to an investigation to be conducted pursuant to

30 V.S.A. §§ 225 and 227. The investigation subsequently was bifurcated, such that the annual rates for attachment would be investigated and resolved first, followed by an investigation of other terms and conditions. Rate Stipulation at ¶ 2.

3. On or about February 28, 2002, VMPD filed prefiled testimony and exhibits in support of an annual attachment rate of \$2.71 based on a foot of occupied space. Rate Stipulation at ¶ 3.

4. On or about March 25, 2002, VMPD filed supplemental prefiled testimony and exhibits in support of an amended annual attachment rate of \$3.17 based on a foot of occupied space. The increase in the proposed rate was grounded in a pole survey, which reduced the total number of poles from 470 to 453 and the average pole height from the default height of 40 feet to an average height of just under 38 feet. Rate Stipulation at ¶ 4.

5. On January 16, 2003, the Stipulating Parties filed the Rate Stipulation. *See generally*, Rate Stipulation.

6. In the Rate Stipulation, the Stipulating Parties jointly recommended that the Board approve an annual rate ("Stipulated Rate") of \$2.90 per foot of occupied space for each attachment, with the rate applied in the following manner:

Cable television attachments, which do not also provide local exchange telephone service, shall be presumed to occupy one (1) foot of pole space.

Attachments of all other Attaching Entities, except incumbent local exchange carriers and electric utilities, shall be presumed to occupy two (2) feet of pole space.

The foregoing presumptions may be rebutted in the case of those Attaching Entities (i) where the Attaching Entity and VMPD agree that the space occupied will be greater than one or two feet of pole space or (ii) for which VMPD has conducted a study of the space actually occupied by the Attaching Entity's attachments, in which case the per foot rate shall be applied to the space to be occupied or actually occupied by the attachment.

For jointly-owned poles, the applicable rate will be adjusted to equate with VMPD's ownership interest in the pole in question.

Rate Stipulation at ¶ 5.

7. The Stipulating Parties agree that the Stipulated Rate is just and reasonable. Rate Stipulation at ¶ 6.

8. Within thirty days after entry of a final Board order approving the Rate Stipulation, VMPD is required to file with the Board tariff pages replacing the affected pages of its pole attachment tariff. Rate Stipulation at ¶ 7.

9. The Rate Stipulation requires that VMPD implement the Stipulated Rate in its next bills following the Board's final order approving the Stipulated Rate and, in conjunction with such implementation, to promptly credit to each affected Attaching Entity, the difference between any charges paid by or billed to such Attaching Entity for pole attachments from January 1, 2002, to the date of implementation, and the charges each such Attaching Entity would have paid under the Stipulated Rate for the same services during the same period. The rates established under the Rate Stipulation do not apply to or supersede the rates established and defined by any contract, with an effective date prior to January 1, 2002, between VMPD and any Attaching Entity until such contract expires according to its terms. Any renewal or extension of such contracts shall be subject to Board review and approval pursuant to 30 V.S.A. § 229. Rate Stipulation at ¶ 8.

10. The Stipulating Parties consented to the Board issuing a final order approving the Stipulated Rate and acknowledged that the Rate Stipulation and any Board order approving it relate only to the amount of the annual rental rates for attaching to poles owned by VMPD, and that all other issues implicated by the November 15, 2001, filing would remain open for resolution in further proceedings to be scheduled in this Docket. Rate Stipulation at ¶ 9.

11. NECTA did not join in the Rate Stipulation but has not objected to its approval. T&C Stipulation at ¶ 3.

12. On October 19, 2004, the Stipulating Parties filed the T&C Stipulation. *See generally*, T&C Stipulation.

13. In the T&C Stipulation, the Stipulating Parties jointly recommend that the Board approve all remaining terms and conditions in VMPD's pole attachment tariff as amended. A copy of the amended tariff was attached to the T&C Stipulation as Attachment A. T&C Stipulation at ¶ 5.

14. The Stipulating Parties agree that the terms and conditions of VMPD's pole attachment tariff as amended and reflected in Attachment A to the T&C Stipulation are just and reasonable. T&C Stipulation at ¶ 6.

15. Within thirty days after entry of a final Board order approving the T&C Stipulation, VMPD is required to file with the Board an amended pole attachment tariff reflecting the

agreed-upon terms and conditions contained in Attachment A to the T&C Stipulation, as well as the agreed-upon rates as set forth in the Rate Stipulation. T&C Stipulation at ¶ 7.

16. The Stipulating Parties consent to the Board issuing a final order approving both the T&C Stipulation and the Rate Stipulation as final resolution of the issues in this Docket. T&C Stipulation at ¶ 8.

17. The Stipulating Parties made compromises in order to reach their Stipulations. Accordingly, by agreement of the Stipulating Parties, the Stipulations cannot be construed by any party or tribunal as having precedential impact on any future proceedings involving the Stipulating Parties, except to enforce the Stipulations or the Board's order approving the Stipulations. The Stipulating Parties reserved the right in future proceedings to advocate positions that differ from the positions set forth in the Stipulations, and the Stipulations may not be used in any future proceeding against any of the Stipulating Parties, except for enforcement of the Stipulations or the Board's order adopting the Stipulations. Rate Stipulation at ¶ 10; T&C Stipulation at ¶ 9.

18. The Stipulating Parties, in accordance with 3 V.S.A. § 811, agreed to waive the opportunity to file exceptions and present briefs and oral arguments with respect to a proposal for decision to be issued in this case, provided that the proposal for decision is consistent in all material respects with the Stipulations. Rate Stipulation at ¶ 11; T&C Stipulation at ¶ 10.

19. The Stipulations are expressly conditioned upon the Board's acceptance of all of their provisions, without material change or condition. If the Board does not accept the Stipulations in their entirety without material change or condition, the Stipulations shall be deemed to be null and void and without effect, and shall not constitute any part of the record in this proceeding and shall not be used for any other purpose. In the event any material modification or condition is made to the Stipulations, each party to the Stipulations is to be placed in and retain the position that it enjoyed in this proceeding before entering into the Stipulations. Rate Stipulation at ¶ 12; T&C Stipulation at ¶ 11.

## V. DISCUSSION AND CONCLUSION

The Board opened this investigation into VMPD's proposed pole attachment tariff pursuant to 30 V.S.A. Sections 225 and 227. The standard for review of rates, under these sections, is whether the rates are just and reasonable. Additionally, all rates, terms and conditions of VMPD's pole attachment tariff must be consistent with the Board's Pole Attachment Rule, including Rules 3.703 and 3.706.

VMPD and the Department agree that the rental rate embodied in the Rate Stipulation results in a reasonable determination of VMPD's annual rental rates and annual rental rates that are just and reasonable. VMPD and the Department have further agreed that the terms and conditions represented in Attachment A to the T&C Stipulation are just and reasonable. I have reviewed both Stipulations and the evidence provided in support thereof. Based on my review of the evidence, I concur with the Stipulating Parties' position that the rental rates presented in the Rate Stipulation are just and reasonable in accordance with Rule 3.706, and that the other terms and conditions of VMPD's pole attachment tariff as set forth in Attachment A to the T&C Stipulation are also just and reasonable and in accordance with Rule 3.700 generally. No other party or interested person has objected to either of the two Stipulations.

In concluding that the rates, terms, and conditions proposed by the Stipulating Parties are just and reasonable, and therefore consistent with Rule 3.700, I rely in part upon the expertise and judgment of the Department's staff, and their depth of knowledge about VMPD's accounting data and pole rental rate justifications. The Department reviewed VMPD's accounts applicable to the pole rental rate calculation as well as the other terms and conditions of the tariff. Additionally, Department staff was very involved in the development of the amended Rule 3.700 and are familiar with the underlying policy considerations that resulted in the new Rule, and participated extensively in the investigation of Verizon's pole attachment tariff in Docket 6553. I have also relied upon the prefiled testimony and accompanying support and the discovery responses of the various parties. Based upon the foregoing, I recommend that the Board adopt the substance of the parties' agreement as embodied in the Rate Stipulation and the T&C Stipulation and that this Docket be concluded.

The Stipulating Parties have waived the opportunity to file exceptions, present briefs, and make oral argument on this Proposal for Decision in accordance with the provisions of 3 V.S.A. § 811, in the event that this Proposal is substantially in the form proposed by the parties. This Proposal is consistent with, and adopts the substance of, the parties' proposal. NECTA did not join in execution of either the Rate Stipulation or the T&C Stipulation, but has filed a letter stating that it does not object to the Board's approval of them. Accordingly, this Proposal for Decision need not be served on the parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 17<sup>th</sup> day of November, 2004.

s/John P. Bentley

John P. Bentley, Esq.  
Hearing Officer

**VI. ORDER**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

- 1. The findings and recommendations of the Hearing Officer are adopted, and his recommendations and conclusions are affirmed.
- 2. The Stipulations between VMPD and the Department dated January 15, 2003, and October, 14, 2004, are hereby approved.
- 3. VMPD shall file a revised tariff incorporating the rates contained in the Rate Stipulation and the terms and conditions set forth in Attachment A to the T&C Stipulation within 30 days from the date of this Order.
- 4. VMPD shall implement credits for the period between January 1, 2002, and the date when the rates contained in the Rate Stipulation become effective, as prescribed in the Rate Stipulation.
- 5. In all other respects, the parties shall comply with the terms and conditions of the Stipulations.

Dated at Montpelier, Vermont, this 22<sup>nd</sup> day of November, 2004.

s/Michael H. Dworkin )  
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s/David C. Coen )  
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s/John D. Burke )

PUBLIC SERVICE  
 BOARD  
 OF VERMONT

OFFICE OF THE CLERK

FILED: November 22, 2004

ATTEST: s/Susan M. Hudson  
 Clerk of the Board

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)*

*Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.*