

**BEFORE THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

Case No. DT 12-107

**NHOS STATEMENT OF POSITION REGARDING CHARGES
FOR UTILITY POLE MAKE-READY**

In connection with the June 7, 2012 pre-hearing conference in the above-captioned matter, New Hampshire Optical Systems, Inc. (“NHOS”), by its counsel, Hinckley, Allen & Snyder LLP, respectfully submits this Statement of Position regarding the need for rulemaking to ensure that charges for third party make-ready work are just and reasonable, and will not lead to delays and excessive cost demands which could impede the establishment of a statewide fiber-optic cable network consistent with the State of New Hampshire’s broadband initiative plan.

A. THE FCC HAS IDENTIFIED THE NEED FOR RULES TO LOWER THE COST OF POLE ATTACHMENT MAKE-READY PROCESS

The Federal Communications Commission’s (“FCC”) National Broadband Plan, released March 2010, identifies the expansion and increased availability of broadband services as a key to the nation’s economic growth and global competitiveness. With respect to the utility pole make-ready process, the National Broadband Plan addresses the precise issues now before the PUC, namely, the consequences of having no statutory oversight to regulate: (a) the scope, nature and amount of charges that third party attachers may demand to complete make-ready work required to accommodate new attachers; and (b) the time period within which owners of existing attachments must respond to requests for make-ready work. Specifically, the National Broadband Plan observes:

- “[O]btaining access to poles and other infrastructure is critical to deployment of telecommunicates and broadband services.”
- When “access to poles is more burdensome or expensive than necessary, it creates a significant obstacle to making services available and affordable.”

- “Rearranging existing pole attachments or installing new poles – a process referred to as “make-ready” work – can be a significant source of cost and delay in building broadband networks.”
- “Make-ready work frequently involves moving wires or other equipment attached to a pole to ensure proper spacing between equipment and compliance with electric and safety codes. The make-ready process requires not only coordination between the utility that owns the pole and a prospective broadband provider, but also the cooperation of communications firms that have already attached to the pole. Each attaching party is generally responsible for moving its wires and equipment meaning that multiple visits to the same pole may be required simply to attach a new wire.”
- “Delays can also result from existing attachers’ action (or inaction) to move equipment to accommodate a new attacher, potentially a competitor. As a result, reform must address the obligations of existing attachers as well as the pole owner.”
- “An evaluation of best practices at the state and local levels reveals ample opportunities to manage this process more efficiently. Yet, absent regulation, pole owners and existing attachers have few incentives to change their behavior.”

See National Broadband Plan, Recommendation 6.2, at p. 111.

To address these problems, and to “lower the cost of the make-ready process and speed it up,” the FCC recommended rulemaking to:

- “Establish a schedule of charges for the most common categories of work (such as engineering assessments and pole construction).”
- “Allow prospective attachers to use independent, utility-approved and certified contractors to perform all engineering assessments and communications make-ready work, as well as independent surveys, under the joint direction and supervision of the pole owner and the new attacher.”
- “Ensure that existing attachers take action within a specified period (such as 30 days) to accommodate a new attacher. This can be accomplished through measures such as mandatory timelines and rules that would allow the pole owner or new attacher to move existing communications attachments if the timeline is not met.”

- “Link the payment schedule for make-ready work to the actual performance of that work, rather than requiring all payment up front.”

See National Broadband Plan, Recommendation 6.2, at p. 111.

B. THE PUC SHOULD INTERPRET PUC 1300 AND IMPLEMENT RULES DESIGNED TO LOWER THE COST OF THIRD MAKE-READY WORK FOR POLE ATTACHMENTS

While New Hampshire elected not to implement Section 224 of the Communications Act of 1934, the State has recognized the need to establish broadband services in rural parts of New Hampshire. This goal is articulated, for example, in an April 5, 2010 letter from the New Hampshire Congressional Delegation to the NTIA, supporting the BTOP grant application submitted by the University of New Hampshire (NHOS’ business partner). The Delegation observed:

“[C]urrently, New Hampshire ranks in the bottom tier of states in broadband capacity and capability...The statewide broadband proposal titled Network New Hampshire Now will address the most critical barriers to the deployment of broadband throughout the state.”

The PUC has issued and made effective rules and regulations implementing its regulatory authority over pole attachments. See Chapter PUC 1300 of the New Hampshire Code of Administrative Rules (“PUC 1300”). Nevertheless, PUC 1300 fails to impose a standard for a fair and reasonable schedule of charges for third party make-ready work, and does not establish timeframes with which existing attachers must respond to request for third party make-ready work. As a result, without appropriate state regulation, some third party attachers have attached unreasonable demands and demanded that their make-ready work be performed at excessive rates that contravene the policies underlying PUC 1300.

In New Hampshire, third party make-ready cost and timelines stand as primary roadblocks to building broadband networks. The make-ready process requires coordination between the pole owners and the telecommunications firms that have already attached to the

pole. In New Hampshire each third party is responsible for moving its own wires and equipment. As a result, each third party is free to establish its own pricing, and no rules or procedures exist to prevent excessive pricing or payment demands that contravene the policies underlying PUC 1300 and the federal and state broadband policies.

In the NHOS submission for the BTOP grant, specific representations were made regarding the costs of attaching new fiber facilities to the poles. The awards approved by the NTIA were based on the premise that make-ready costs would not be in excess of actual out pocket costs. This has not been the case, and as a result, the NTIA has expressed concern that New Hampshire has among the highest third party make-ready costs in the nation. For example, in New Hampshire, the make-ready associated with a single uncooperative third party attacher, as described below, equate to \$6000 per mile, increasing a project's construction budget by 20%. The absence of a regulatory framework to control charges for third party make-ready work jeopardizes project budgets and timelines for new attachers, as well as the ability of NHOS to implement the BTOP grant as intended by the NTIA and to carry out the objectives of federal and state broadband policies.

Without cost efficient access to the poles, a new attacher is essentially precluded from gaining access to the poles. This effectively prevents the new attacher from conducting business and ensuring economic growth in New Hampshire. "Businesses cannot grow and new businesses do not take root in communities without broadband connectivity." See April 5, 2010 letter from the New Hampshire Congressional Delegation to the NTIA.

Often, a competitor of the new attacher is the provider of the make-ready services, resulting in the manipulation of the make-ready system and creating what is ultimately a monopoly. Absent regulation and oversight, competitors are able to use make-ready as a roadblock to competitive attachments. They also may attempt to reap a financial windfall from

competitive attachments, in violation of the directive under RSA 374:2 that charges demanded “shall be just and reasonable.”

New attachers often are not completing third party make-ready prior to attaching, due to the fact that these services are too burdensome and costly. Instead, they are attaching wherever they can, thus compounding the required make-ready work and associated expenses for future attachers.

Reform must address the obligations of existing attachers. With an absence of regulations, existing attachers have no incentive to change their behavior or monitor their costs.

C. CURRENT PRACTICES ARE NOT JUST AND REASONABLE

Under current practices in New Hampshire, existing attachers are demanding payment from prospective attachers for make-ready work that is not related to new attachments, is unreasonable in scope, is being charged at excessive rates, and is frequently demanded to be paid prior to the performance of the services. These practices include the following:

- Survey fees are being charged for poles where make-ready is not required by the new attachment.
- Third parties are charging survey fees where they have no attachment.
- Fees are being charged for make-ready work that is required for reasons unrelated to new attachments. Prospective attachers are being billed for work needed for general maintenance, or upgrades, or for previous projects that were not completed and should not be billed to the new attacher.
- Third party make-ready work is being charged at rates which far exceed industry construction rates. For example, third party rates as high as \$214.50 per lower (single strand – single fiber) are being charged. These rates do not include pre- and post-construction survey, travel, and traffic management.
- The excessive and unreasonable nature of charges being demanded for third party make-ready work is illustrated by responses received by Waveguide, Inc. in March 2012 to an RFP for construction contractors.

- All 9 responses documented an industry average of \$54.28 per lower with travel and traffic management

- All 5 responses from regional contractors averaged \$33.90 per lower with travel and traffic management
- A low bid of \$22.00 per lower was received with travel and traffic management included.¹

Third party make-ready charges and procedures should be consistent with the third party's own construction practices, and should not exploit the new attachers's need for make-ready services. For example, third parties should not be permitted to cite the high cost of using in-house crews to justify rates, when outside contractors are consistently used. In addition, third parties should not be permitted to add expensive network rebuilds to make-ready when the rebuilds are not required and/or are inconsistent with typical construction practices.

Third parties have argued that they may appropriately charge the same rates as pole owners for make-ready work. This argument ignores that the third party cost structure is far different, and lower, than the cost burden on pole owners. Among other things, pole owners are burdened with high operating costs from unions; they must conduct comprehensive surveys of all poles on a route; they must engineer make-ready for all attachers; they are ultimately responsible for condition of the pole line; and they are responsible for issues caused by uncooperative attachers.

NHOS's recent experience in trying to reach agreement over the cost of third party make-ready work required for a federally-funded project to establish broadband access throughout New Hampshire, illustrates how current practices affect make-ready costs and timelines.

- NHOS has been actively negotiating with one third party for more than 6 months with no work completed;
- Third party demanded recovery of survey charges for poles not requiring make-ready and in some cases where they have no facilities.

¹ These rates relate to lowering a facility, which is the most prevalent type of third party make-ready work. However, the responses to the RFP produced rates reflecting similar cost trends.

- Many of the charges demanded are related to make-ready where NHOS is not the cause.
- The third party invoiced NHOS for \$35,000 for rebuilds, when only approximately \$1,000 of the charge was for valid work.
- Invalid charges related to these issues added 70% to the make-ready cost.

D. NHOS RECOMMENDATIONS

NHOS agrees with the FCC that third party make-ready reform is critical to achieving the policies underlying the federal and state broadband policies. NHOS recommends that the PUC:

1. **Access:** Adopt a policy to ensure access is not denied or delayed due to disputes related to scope and/or costs of third party make-ready.
2. **Rates and Charges:** Establish methods, standards and definitions to ensure that rates for third party make-ready are just and reasonable.

Respectfully submitted,

NEW HAMPSHIRE OPTICAL SYSTEMS,
INC.

By its attorneys

Dated: June 6, 2012



Christopher H.M. Carter, Esq. (#12452)
Hinckley Allen & Snyder, LLP
11 South Main Street, Suite 400
Concord, NH 03301
Tel: 603.225.4334
ccarter@haslaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2012, I have forwarded a copy of the foregoing Statement of Position Regarding Charges For Utility Pole Make-Ready to all counsel of record via electronic mail and U.S. Mail.



Christopher H.M. Carter, Esq.

#50735796