

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

New Hampshire Optical Systems, LLC —
Petition for an Investigation into Proposed
Charges for Utility Pole Make Ready

DT 12-107

**SEGTEL'S MOTION FOR CLARIFICATION
OF NATURE AND SCOPE OF PROCEEDING
AND SPECIFICATION OF PENDING ISSUES**

segTEL, Inc. (“segTEL”) respectfully requests that the Commission clarify and confirm the nature and scope of this proceeding and specify the issues that are, and are not, pending in this docket. As noted in its March 7, 2013 Comments on Staff Recommendation, segTEL remains unclear as to the nature, scope, and purpose of this docket. The uncertainty also is reflected in a recent order in litigation in Merrimack County Superior Court captioned as *segTEL, Inc. v. University System of New Hampshire, et al.*, Docket No. 217-2013-CV-00023 (the “Superior Court Litigation”). In an April 3, 2013 Order dismissing segTEL’s claims, the Superior Court held that it would defer to the Commission under the doctrine of primary jurisdiction rulings on certain issues which the Court believed to be pending in Docket DT 12-107. A copy of the Superior Court’s Order is attached as Exhibit A.

segTEL respectfully suggests that the Superior Court misunderstood the issues and claims in this docket. Therefore, segTEL asks the Commission for a definitive statement of which issues and claims it is considering as part of this docket, and which it is not. Specifically, segTEL asks the Commission to confirm that:

- (1) Docket DT 12-107 is purely investigatory, rather than adjudicative, in nature;

(2) To the extent that the Commission examines make-ready rates for third party pole attachers,¹ any determination is limited to a prospective conclusion regarding just and reasonable rates; and

(3) The Commission's investigation is limited to addressing whether New Hampshire Optical Systems ("NHOS") has faced unfair and unreasonable delays to access to utility poles during construction of its Middle Mile Project.

More importantly, segTEL asks the Commission to specify what is *not* before the Commission in this docket. segTEL requests that the Commission confirm that Docket DT 12-107 will not:

(1) adjudicate claims for damages sought by segTEL against NHOS;

(2) adjudicate any claim for trespass caused by NHOS' engaging in "self-help" attachments outside of the usual and customary "make-ready" process or any claim for permission to make attachments in violation of the National Electrical Code, National Electric Safety Code, Rural Utility Service Standards and/or the Telcordia Blue Book; or

(3) adjudicate any claim for interference with contractual relations arising from NHOS' attachments made outside of the usual and customary "make-ready" process or attachments made in violation of the National Electrical Code, National Electric Safety Code, Rural Utility Service Standards and/or the Telcordia Blue Book; or

(4) consider claims by segTEL for injunctive relief as the result of NHOS' violations and practices described above.

¹ As segTEL has noted previously (e.g., segTEL's March 7, 2013 Comments on the Staff Recommendation), the Commission's authority over the issues that segTEL has raised is murky; only after the issue of the Commission's authority is resolved should the Commission proceed to any substantive conclusion. segTEL further notes the comments of NECTA on this same issue of the Commission's authority in NECTA's March 7, 2013 comments on the staff recommendation.

Procedural History

NHOS initiated this docket with a petition “to conduct an investigation into the just and reasonable cost of third party make-ready work relating to pole attachments necessary for the construction by NHOS of a statewide fiber-optic cable network.” NHOS Petition for Investigation into Proposed Charges for Utility Pole Make-Ready, April 24, 2012, at 1. By Order No. 25,407, Sept. 5, 2012, in response to an Amended Petition from NHOS, the Commission expanded the scope of the investigation to “include consideration of whether NHOS has faced unfair and unreasonable delays to access to utility poles during construction of its Middle Mile Project, and if so, possible remedies.” Order No. 24,407 at pp. 9-10.

NHOS’ original April 2012 petition specifically invoked the Commission’s authority to conduct an investigation under RSA 365:5. *Id.* The Commission recognized this fact in its July 3, 2012 Order on Petition (Order No. 25,386):

In requesting that the Commission undertake an investigation of make-ready work, NHOS invokes RSA 365:5. That statute provides:

The commission, on its own motion or upon petition of a public utility, may investigate or make inquiry in a manner to be determined by it as to any rate charged or proposed or as to any act or thing having been done, or having been omitted or proposed by any public utility; and the commission shall make such inquiry in regard to any rate charged or proposed or to any act or thing having been done or having been omitted or proposed by any such utility in violation of any provision of law or order of the commission.

RSA 365:5.

Id. at 9.

NHOS has consistently characterized this proceeding as an “investigation” and has consistently refused to bring a direct complaint against segTEL (or any other entity) regarding

the matters that NHOS suggests warrant Commission examination. Indeed, in amending its petition in response to the Commission's July 3, 2012 order, NHOS definitively stated:

NHOS understands from the [July 3] Order that NHOS has been requested to supplement its pleadings so that the Commission may conduct the investigation requested by the NHOS pursuant to RSA 365:5, and so that the "actors" involved can receive notice and an opportunity to respond to this matter. NHOS does not interpret the Order as directing NHOS to file a complaint under RSA 365:1 and Puc 204.01.

NHOS Amendment to Petition for Investigation, Aug. 2, 2012, at 1.

In light of the statements by both the Commission and NHOS that this proceeding was investigatory in nature, on December 14, 2012, segTEL initiated the Superior Court Litigation, alleging that NHOS has engaged in various improper actions which have, *inter alia*: damaged segTEL's physical plant, *see* Complaint ¶¶ 56-61 (alleging that NHOS has, *inter alia*, wrapped, crossed, boxed-in, or relocated segTEL's facilities); interfered with segTEL's ability to maintain and repair its physical plant, *see id.* ¶¶ 63-66; and interfered with its contractual obligations to customers, *see id.* ¶¶ 67-78 (describing how NHOS' actions have placed segTEL in violation of contracts with its customers). The complaint further alleges that NHOS has moved or interfered with segTEL's facilities, and installed its own facilities, in numerous locations in a manner that violates the National Electric Safety Code, Rural Utility Service Standards and/or the Telcordia Blue Book. Complaint at pp. 2-3. A copy of segTEL's Complaint is attached as Exhibit B. Specifically, segTEL asserted the following claims and requested the following relief:

(1) A declaration that NHOS has improperly claimed or interfered with segTEL's rights of occupancy of its pole attachment space and access to segTEL's infrastructure (Count I);

(2) Unfair and deceptive trade practices under RSA 358-A:2, and resulting damages, treble damages, and attorney's fees (Count II);

(3) Trespass to chattels, *i.e.*, segTEL's infrastructure, and resulting damages (Count III);

(4) Intentional interference with segTEL's contractual arrangements with pole owners and with segTEL's customers, and resulting damages (Count IV);

(5) Injunctive relief (Count V).

On February 15, 2013, NHOS moved to dismiss segTEL's Complaint on the basis that the Commission had primary jurisdiction in this docket over the issues raised in the complaint. In its motion, Attached as Exhibit C, NHOS represented to the Superior Court that all of segTEL's claims against NHOS, including claims as to whether NHOS had a right to a self-help remedy for alleged make-ready delays, "already are being considered by the PUC" and were being "investigated and resolved" by the Commission in this docket:

segTEL's Writ concerns the same work, issues, and disputes that are now being investigated and resolved by the PUC. The Writ addresses make-ready work on the Middle-Mile project, specifically work segTEL must perform to make room for NHOS's attachments. segTEL's allegations reformulate questions that already are being considered by the PUC, including: (a) the reasonableness of rates demanded by segTEL as a condition of performing make-ready work, see segTEL Writ, ¶¶ 23-24; (b) the remedies available to a new attacher like NHOS when an existing attacher refuses to perform required make-ready, and whether the new attacher may, in the face of such refusal, perform the make-ready itself, see id., ¶¶ 18-22; and (c) standards applicable to the attachment of new communications facilities on utility poles, see id., ¶¶ 9-12.

NHOS Motion to Dismiss at 8, attached as Exhibit C. NHOS further argued to the Superior Court that in this docket, "The PUC first must determine the legal standards applicable to third-party make-ready work, and, second, whether a party has breached a legal duty owed under those standards." *Id.* at 14. NHOS made this argument despite the fact that it had explicitly refused to bring a complaint for adjudication against segTEL or any other party, despite multiple invitations by the Commission to do so.

segTEL objected to NHOS' motion arguing that the issues before the Commission were profoundly different from the claims in segTEL's Superior Court complaint. On April 3, 2013, over segTEL's objection, the Superior Court dismissed the complaint under the mistaken belief that all of segTEL's claims for relief were pending before the Commission. Exhibit A at p. 6.

segTEL has moved for reconsideration of the dismissal order arguing that the Superior Court has misapprehended the nature of Docket DT 12-107. *See* Exhibit D. segTEL has pointed out to the Superior Court (among other things) that Docket DT 12-107: (1) is an investigative and not adjudicatory proceeding;² (2) focuses on whether NHOS has faced unfair or unreasonable delays to access utility poles; (3) is prospective in nature with a focus on further work to be done rather than on remedying retrospective harm; and (4) does not address NHOS' self-help, tortious conduct, and harm to segTEL's facilities and contractual arrangements, and resulting damages. *Id.* at. 2-5.

Discussion

Unless the Superior Court reconsiders its order, it will defer adjudication on all claims asserted by segTEL, believing that the Commission has undertaken to adjudicate these claims in this docket. While the Superior Court's deferral of the issues it believes the Commission is addressing is only temporary – the Superior Court acknowledged that segTEL's claims “may ultimately require adjudication in this court,” Exhibit B at p. 6 – segTEL believes that the Superior Court mistakenly deferred adjudication on a number of issues based on a misunderstanding of the issues and claims actually pending before the Commission (resulting, in turn, from NHOS' sweeping representations to the Court concerning what was at issue in this

² A separate general investigation of pole access issues has been stayed. *See* Docket No. DT 12-246, Order No. 25,449, Jan. 3, 2013.

docket). As a result of this misunderstanding, segTEL's claims before the Superior Court are in an indefinite limbo.

The Commission can assist in determining what issues will be resolved and in which forum by clarifying and confirming the parameters of Docket DT 12-107 — including, specifically, which issues are, and are not, before the Commission — and segTEL respectfully requests such clarification. Without it, segTEL's Superior Court claims will remain in an indefinite suspension and segTEL will be left with no ability to seek timely relief (including the requested injunction) on matters that, in fact, are not before the Commission at all.

The Commission did just this in analogous circumstances in *Time Warner Entertainment Co., L.P. — Petition for Resolution of Dispute with Public Service of New Hampshire*, DT 12-084, Order on Jurisdiction, Scope, Interventions, and Schedule, Order No. 25,387 (July 3, 2012). In that docket, Time Warner Cable, a pole attacher, alleged that the pole owner, PSNH's, attachment rates, pursuant to a contract between PSNH and TWC executed prior to the enactment of NH Code of Administrative Rules Chapter Puc 1300, were excessive. PSNH had filed breach of contract claims against TWC in state court in early 2012. TWC then filed a petition with the Commission to seek resolution of its dispute with PSNH, including a determination as to the proper rates for TWC's pole attachments. At about the same time, TWC removed the state court case to the United States District Court for the District of New Hampshire where it filed a petition to dismiss or stay the court proceedings pending resolution of the matter before the Commission.

In response to TWC's petition, and PSNH's comments on the Commission's jurisdictional limitations, the Commission stated that it "accepts and will assert jurisdiction over the prospective rate setting issues in this case, but will not do so for the retrospective contract

portions of the case.” *Id.* at 10. In doing so, the Commission acknowledged that its jurisdiction “is not exclusive, nor is it necessarily coextensive with that of the courts.” *Id.* at 11.

segTEL asks the Commission to issue a similar order here. Indeed, the issues in this case are more straightforward. Here, the question is not whether the Commission should exercise jurisdiction over an identical claim pending in Superior Court, but simply whether claims for trespass, interference with contract, unfair trade practices, retrospective damages, and injunctive relief, are being or will be adjudicated in this docket. segTEL believes that such claims are not being, and will not be, adjudicated here. Due to the confusion on the issues, however, segTEL respectfully requests that the Commission clarify the nature, scope, and purpose of this proceeding, and specify which issues are, and are not, before it in this docket, as outlined herein.

Conclusion and Request for Relief

segTEL’s ability to obtain timely relief on claims that are not before the Commission is in doubt because of the Superior Court’s misunderstanding of this docket. Accordingly, segTEL respectfully requests that the Commission clarify that:

- (1) Docket DT 12-107 is purely investigatory, rather than adjudicative, in nature;
- (2) To the extent that the Commission examines make-ready rates for third party pole attachers, any determination is limited to a prospective conclusion regarding just and reasonable rates; and
- (3) The Commission’s investigation is limited to addressing whether NHOS has faced unfair and unreasonable delays to access to utility poles during construction of its Middle Mile Project.

segTEL further requests that the Commission confirm that this proceeding will not:

(1) adjudicate claims for damages sought by segTEL against NHOS;

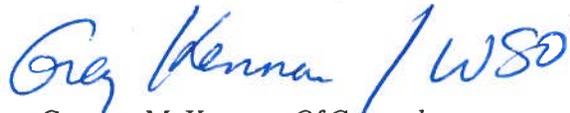
(2) adjudicate any claim for trespass caused by NHOS' engaging in "self-help" attachments outside of the usual and customary "make-ready" process or any claim for permission to make attachments in violation of the National Electrical Code, National Electric Safety Code, Rural Utility Service Standards and/or the Telcordia Blue Book; or

(3) adjudicate any claim for interference with contractual relations arising from NHOS' attachments made outside of the usual and customary "make-ready" process or attachments made in violation of the National Electrical Code, National Electric Safety Code, Rural Utility Service Standards and/or the Telcordia Blue Book; or

(4) consider claims by segTEL for injunctive relief as the result of NHOS' violations and practices described above.

April 24, 2013

Respectfully submitted,



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