

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION
DT 12-107

NEW HAMPSHIRE OPTICAL SYSTEMS, INC.

Petition for Investigation into Proposed Charges for Utility Pole Make Ready

NECTA'S MOTION TO DISMISS WITHOUT PREJUDICE
AND/OR
MOTION TO LIMIT SCOPE OF PROCEEDING

NOW COMES New England Cable & Telecommunications Association, Inc. (“NECTA”), by and through its undersigned counsel, and respectfully moves that the Petition filed by New Hampshire Optical Systems, Inc. (“NHOS”) be dismissed without prejudice to NHOS’s ability to refile a petition identifying the particular party or parties with whom it has actual disputes over make-ready work charges. In the alternative, NECTA respectfully requests that the scope of the instant docket be limited to an adjudication of only those make-ready rate disputes that currently exist between NHOS and specific third party attachers. In support of these motions, NHOS states as follows:

1. Although the Petition filed by NHOS alleges specific complaints against unnamed parties, the relief requested is generic: i.e. an investigation into and establishment of just and reasonable costs and rates for make-ready work that is required for NHOS pole attachments.
2. The Petition, as filed, must be dismissed because the provisions of RSA 374:34-a and the rules promulgated pursuant thereto (N.H. Code Admin. R. Chapter Puc 1300) contemplate that the New Hampshire Public Utilities Commission’s (“the

Commission's") authority relative to pole attachment complaints is limited to adjudicating disputes about particular pole attachments and pole attachment rates, not generic issues relating to make-ready work charges imposed by third party attachers. Moreover, even if such authority exists, strong policy arguments warrant the dismissal of the Petition. The Commission should not become involved in a dispute between pole attachers and other would-be attachers who necessitate the performance of make-ready work by existing pole occupants. The subject matter of this dispute is one that should in the first instance be governed by the contractual terms regarding make-ready work set forth in the applicable pole attachment agreements. The Commission should not be used as a substitute for either party engaging in good faith discussions to negotiate a mutually agreeable resolution of the process by which make-ready work is conducted under such contractual arrangements, but rather should serve as an arbiter only if the parties are unable to reach a resolution after engaging in these good faith discussions. Toward that end, while we believe that NHOS should be required to specifically identify the third party pole attachers who are the subject of its complaint, NHOS should also be required to provide specific instances and details regarding how such third party pole attachers have not been negotiating in good faith. This will allow the Commission to determine whether this docket is truly ripe for adjudication.

3. The Order of Notice issued May 11, 2012 broadly describes the scope of this docket to include broad-ranging issues beyond the specific complaints made by NHOS. For example the order of notice states that the Petition raises, *inter alia*, the issue of "whether the rates and charges applicable to NHOS should apply to all make-ready work in New Hampshire." Order of Notice (May 11, 2012) at 2. However, the scope of the

instant proceeding as a general investigation into rates charged by all third party pole attachers for make-ready work is not appropriate given the facts set forth in the Petition. The Petition goes on at length to describe specific circumstances of a dispute between NHOS and certain unnamed third party pole attachers. The Petition describes as “excessive” rates for work that third party attachers must undertake to make space on utility poles for NHOS’s facilities. (Petition, para.6). The Petition also outlines the attempted and ultimately failed negotiations between the parties. (Petition, para 10). Yet, after defining the term “Third Party Attachees” (sic) the Petition fails to name those attachers. As a matter of fundamental fairness to third party attachers whose rates NHOS does not dispute, the Commission should not move forward with this docket unless and until NHOS names the parties whose make-ready charges NHOS disputes.

4. Third party attachments and payment of make -ready costs are generally within the purview of pole attachment agreements and a determination of the reasonableness of make- ready costs should be determined on a case by case basis. The issues raised by the Petition should not be expanded to examine generic issues such as what formulas, laws or regulations apply to an entire industry group (i.e. those attachers who incur costs for make-ready work). Rather, because the instant matter is a simply a dispute between NHOS and certain unnamed parties regarding the actual costs attributable to moving existing facilities on a pole to make room for NHOS’s facilities, the docket should focus on resolving specific disputes and should not proceed as a generic investigation into make-ready work rates. The Petitioner, therefore, should be required to identify with specificity the party or parties with whom the dispute occurred and to describe the particular problems the Petitioner has encountered. The Commission could then conduct

a fact- specific investigation of the actual costs incurred by the Third Party Attacher to whom the make ready request is made, and determine whether the charges are appropriate.

5. A generic proceeding on make-ready costs in general is inappropriate, as each make-ready event is fact specific to the pole, location and facilities that are required to be moved. A generic investigation would serve only to force utilities and pole attachers into a proceeding that may impact their make ready rates whether or not their practices are at issue here. It would create a larger, more complex proceeding than necessary, wasting both resources of additional parties, the Commission and Staff, as well as over-complicating the actual dispute between NHOS and the unnamed parties referenced in the Petition.

6. For reasons of administrative expedience and prudence, the Commission should dismiss the Petition without prejudice to NHOS's ability to refile a petition identifying the particular party or parties with whom it has actual disputes. In the alternative, the Commission should limit the scope of this proceeding to an adjudication of only those make -ready rate disputes that currently exist between NHOS and specific third party attachers.

WHEREFORE, NECTA respectfully requests that the Commission:

- A. Dismiss the Petition without prejudice to NHOS's ability to refile a petition identifying the particular party or parties with whom it has actual disputes;
- B. In the alternative, limit the scope of this proceeding as indicated above; and
- C. Grant such further relief as is appropriate.

Respectfully submitted,

NEW ENGLAND CABLE AND
TELECOMMUNICATIONS ASSOCIATION, INC.

By its attorneys,
Orr & Reno, P.A.

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Dated: June 5, 2012

Certificate of Service

I hereby certify that on this 5th day of June, 2012, a copy of the within Motion was sent by electronic or U.S. mail to persons listed on the Service List.

Susan S. Geiger
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