

Christopher H.M. Carter
ccarter@haslaw.com
Direct Dial: (603) 545-6104

March 7, 2013

Debra A. Howland
Executive Director and Secretary
NH Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301

Re: DT 12-107 – New Hampshire Optical Systems, Inc.

Dear Ms. Howland:

I am writing on behalf of New Hampshire Optical Systems, Inc. (“NHOS”) and Waveguide, Inc. (collectively “NHOS”) in response to the January 30, 2013 Staff Report and Recommendation issued in Docket DT 12-107. The Staff Report concludes with four specific recommendations: (1) that NHOS and segTEL work with Staff or an independent mediator to reach agreement on a process for completing make-ready work on the Middle-Mile Project; (2) that the Commission open a new docket to investigate rates for make-ready work; (3) that NHOS escrow a reasonable amount to cover the cost of make-ready work, once a determination on rates has been made; and (4) that the Commission consider implementing the pilot program underway in Connecticut for hastening attachments on poles requiring substantial make-ready, by permitting temporary attachments at lower pole positions. Staff Report, p. 7. Please be advised that NHOS fully supports each of these recommendations but suggests that recommendation (4) will provide limited assistance in resolving the issues with segTEL.

Separate from these recommendations, the Staff Report contains a number of statements that are either factually incorrect or incomplete. In addition, portions of the Staff Report could be interpreted to recommend that the Commission adopt the Report as its findings of fact and rulings of law, or make such findings and rulings itself. As discussed below, because of significant limitations in the investigative process giving rise to the Staff Report, it would be improper for the Commission to adopt any of the findings and rulings set forth in it. The purpose of this letter is to briefly address some of the errors and other problems in the Staff Report as a means of illustrating why the Commission should not rely on the Report to make factual findings or legal rulings at this point in this proceeding. These infirmities, however, do not undermine the value of Staff’s overall recommendations set forth on page 7 of the Report.

The Process Followed by Staff Provides an Insufficient Basis to Make Factual Findings and Rulings of Law

As the report notes, Staff obtained the responses that NHOS and three utility pole owners filed, under oath, pursuant to Order No. 25,407. (Order No. 25,407 joined segTEL as a party to this proceeding, but it did not require segTEL to provide responses – under oath or otherwise – to questions relevant to this matter.) In addition, on September 24, 2012, Staff met in the field with individuals representing some of the parties in this case. Furthermore, according to the Report, Staff “gathered additional information” at other times from segTEL, and from NHOS and MetroCast. The Report does not identify the “additional information” or the individuals who provided the same. Of the information gathered by Staff and relied on for the Report, other than the initial information provided by NHOS and the pole owners, none appears to have been provided under oath.

NHOS understands that the Commission regularly relies on informal information gathering processes in deciding when and whether to open an adjudicative action or other proceeding. However, using such an informal process as the basis for making findings of fact or rulings of law here would be improper, as it would deprive NHOS and other interested parties of the ability to know what information is being presented to the Commission, and to respond to the same. Before any findings are made, all information presented for the Commission’s consideration should be identified and placed on the record, the information should be provided under oath and subject to cross-examination and/or further discovery, and the parties should be afforded an opportunity to respond to that information.

NHOS recognizes that the Commission may have had no intention of issuing findings of fact or rulings of law based on the Staff Report. However, because the wording of the Report leaves room for ambiguity on this point, the remainder of this letter addresses some, but not all of the issues raised by the Staff Report that NHOS believes need correction or further explanation.

Examples of Incorrect or Incomplete Statements in the Staff Report

1. The Report states “it is the new attacher’s responsibility to coordinate rearrangement with existing attachers.” Staff Report, p. 2. The Report cites no support for this statement, referring only to the pole owners’ self-serving contentions as to how make-ready work “traditionally” has been coordinated. In fact, the standard Pole Attachment Agreement (“PAA”) used by pole owners refutes this statement. See NHOS Responses pursuant to Order No. 25,407, Exhibit G (sample PAA). Sections 7.1.5 and 7.1.6 of the PAA demonstrate that it is the pole owner’s obligation to coordinate rearrangement with existing attachers. NHOS does not dispute that, as a matter of general practice, attaching parties typically attempt to coordinate rearrangement plans among themselves. However, when informal efforts to manage this process through mutual cooperation fail – leading to the situation that is at issue in this case – a new attacher’s only recourse is through the pole owner under the PAA, which sets forth the process by which the owner coordinates interactions with other attaching parties. This important legal issue is at the heart of the dispute now before the Commission.

2. The Report states that “segTEL is not staffed to do the amount of work required by NHOS and that the lack of rules about requirements for third-party make-ready impeded the ability to complete the work within NHOS’s requirements.” Staff Report at 5. The Report continues that “Staff does not believe there is evidence to find NHOS has been subject to unfair or unreasonable delays or that segTEL has intentionally manipulated the process to delay NHOS,” noting that “the amount of work required to be performed by multiple companies on thousands of poles in a short period of time, is overwhelming.” *Id.* at 6. The Report cites no evidence to support the conclusion that segTEL has been overwhelmed by the number of poles requiring make-ready and therefore cannot fulfill all of the requests from NHOS in a timely fashion. Moreover, the Report fails to note that of NHOS’s requests to approximately 80 other attaching entities for make-ready work relating to nearly 22,000 poles for the Middle-Mile Project, more than 20,000 relocations have been completed by parties other than segTEL. As of the time Staff conducted its investigation, segTEL had not completed the work for a single pole. Nor had it provided a quote for the cost of performing any make-ready work. To date, in the 10 months since segTEL received NHOS’s formal make-ready requests on May 4, 2012, segTEL has completed relocations on fewer than 100 of the approximately 3,000 utility poles requiring segTEL make-ready. At this rate, segTEL would not complete the required work for 25 years. There is no evidence to support the Staff Report’s statement that segTEL lacks the resources to perform the required make-ready work, or that this process is “overwhelming.” Instead, the evidence indicates that segTEL’s true intent is to derail or delay the Middle-Mile Project.

NHOS is prepared to provide additional evidence, under oath, that segTEL has failed to meet commitments it made to NHOS and FairPoint to conduct even a limited number of relocations. Notably, in the past segTEL has been an outspoken advocate of the need for timely pole access, and it has aggressively advocated for a process that would provide quotes in five days, followed by a good faith effort to complete work within 20 days. Here, segTEL has refused to adopt such a process for NHOS’s attachments. It has declined to document the process and timelines it purportedly is following in responding to NHOS’s requests for make-ready. segTEL stands alone in failing to relocate its facilities to accommodate construction of the Middle-Mile Project. The only credible explanation for segTEL not completing make-ready work required by NHOS is that the Middle-Mile Project will increase competition in markets that segTEL currently serves, something that segTEL opposes.

segTEL’s conduct on the Middle-Mile Project stands in stark contrast to comments segTEL submitted to Staff during the development of Puc 1300. During that rulemaking process, segTEL stated: “[T]he time lost when a utility fails to schedule and perform make-ready work results in serious delay to market that rises to the level of a competitive barrier. . . . Utilities must not be permitted to install their own facilities on a different timeline than that for the completion of make ready work. To allow otherwise gives utilities an unfair advantage over competitive attachers.” *See* 3/5/08 Comments of segTEL, Inc. in DRM 08-004, *Rulemaking, PUC 1300 Pole Attachments, Regular Rules*, pp. 10-11 (copy attached). segTEL then argued that the “[a]doption of enforcement mechanisms are also necessary to ensure that make-ready timeframes are followed,” and that “the rules should allow competitive attachers to seek direct damages against a utility that violates make-ready timeframes.” *Id.* at 11. These comments demonstrate that segTEL is well aware of the impact its delays have on NHOS.

3. The Staff Report suggests that lack of payment by NHOS is the reason segTEL has not performed the required make-ready work. See Staff Report at 2. This is inaccurate. NHOS can document that it has requested quotes and invoices from segTEL for more than eight months, but segTEL has refused to provide any. In fact, Staff was present when NHOS requested quotes from segTEL during the field visit in Franklin and Tilton that is referred to in the report. At the time, Staff agreed that NHOS's request for quotes and/or invoices "seems reasonable." The Report discusses none of this, and instead implies, inaccurately, that NHOS has simply refused to pay. Moreover, the Report fails to address the fact that NHOS has paid other parties for make-ready work at rates similar to those demanded by segTEL, relying on appropriate dispute resolution processes to resolve disputes over the reasonableness of the charges. NHOS stands ready to do the same with segTEL, but segTEL refuses to provide quotes or invoices for the required work.

The Staff Report does conclude that segTEL's construction rate "on its face...seems high," and, therefore, recommends that the Commission investigate the rate. Staff Report at 2.¹ segTEL's demand for excessive rates contradicts its position during the development of the Puc 1300 rules:

segTEL additionally proposes that rates charged for other services performed by utilities such as pole surveys and make ready be limited to the actual and *reasonable* expenses associated with providing such services. Utilities should not be allowed to create a profit center for the performance of mandated services simply because a prospective attacher has no other choice but to pay the rates demanded if they wish to attach.

See 3/5/08 Comments of segTEL, Inc. in DRM 08-004, *Rulemaking, PUC 1300 Pole Attachments, Regular Rules*, p. 16 (emphasis in original).

4. The Staff Report correctly notes that "segTEL independently surveys each pole and sometimes identifies more work than that identified on the Form 3 which in segTEL's assessment needs to be done in order to maintain compliance with codes and standards. This practice introduces extra work and a great deal of additional time into the attachment process for NHOS." Staff Report at 5. The Report then poses the question: "should the existing attacher follow the pole owner's instructions without question or ensure that once it moves its attachments, the attachment is code compliant?" Staff Report at 6. NHOS agrees with the Staff's conclusion that "it would be unreasonable for segTEL to expect NHOS to wait for and pay to correct existing segTEL violations." Id.

There would be serious and potentially catastrophic consequences to a process that permitted each existing attacher to conduct its own survey that potentially conflicted with the pole owners' engineering study, and to then demand that additional make-ready be conducted to meet the attacher's own interpretation of standards. The entire pole attachment process would grind to a

¹ The statement in the Report that Staff did not receive any information about the cost of the work overlooks that NHOS's responses to Order No. 25,407 included, at Exhibit D, price quotes received by Waveguide in response to an industry-wide RFP for relocations, surveys, and other make-ready work.

halt, as it has for NHOS in segTEL's regions. segTEL's construction practices in Laconia, documented in Exhibit H to NHOS's responses to Order No. 25,407, demonstrate segTEL's lack of concern for code compliance when building its own plant, and show that segTEL's arguments regarding the need to redo the pole owners' engineering studies is a pretext for delay.

The FCC has recognized that a procedure which allowed existing attachers to veto previous engineering decisions could be manipulated to deny access to a competitor. In FCC 11-50, issued April 7, 2011, the FCC observed "that no matter how rigorous a survey is carried out, disputes over interpretation or changed circumstances can arise in the field." FCC 11-50 at ¶ 59. However, because existing attachers "may view other attachers as rivals," the FCC declined to give even incumbent local exchange carriers ("LECs") "veto power" over engineering judgments, and warned that "objections from incumbent LECs based on alleged engineering concerns will be scrutinized very carefully, particularly when the parties are in a competitive relationship." *Id.* at ¶ 60. segTEL is using the survey process for the anticompetitive purposes that the FCC sought to avoid.

5. With regard to the specific dispute in Tilton and Franklin that arose while the Staff was conducting its investigation, the Staff Report focuses on the end state of 12 poles involved, rather than the history of how the dispute came about. Had the Commission had an opportunity to conduct a full evidentiary process, it would have seen that segTEL ignored NHOS's rights under its existing license to attach to the poles and instead placed segTEL facilities in the space NHOS had invested considerable time and money to develop. As Staff concluded, although segTEL's "make-ready instructions indicated an NHOS attachment needed to be relocated, it appears *segTEL failed to contact NHOS about make-ready in this location.*" Staff Report at 4 (emphasis added). This is not a minor matter. By not informing NHOS that the pole owners' updated engineering documents require NHOS to relocate to accommodate segTEL's new attachment, and then selectively conducting make-ready work along the route, segTEL created a situation where NHOS could not install its cable in accordance with the license issued to it by the pole owners, and the engineering documents supplied to the NHOS field crews no longer matched the field conditions. These actions directly violate the notification requirements of Puc 1303.06 and Article 7.1.5 of the PAA.

Conclusion

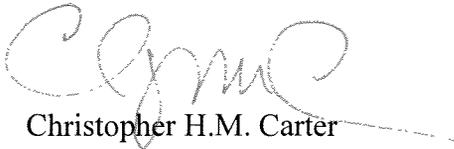
NHOS recognizes that this proceeding presents a number of fact intensive and potentially complex issues for the Commission to resolve. The recommendations for next steps set forth in the Staff Report are constructive proposals if they are pursued expeditiously. However, the information set forth in the Staff Report is incomplete in numerous regards, and is flawed because the investigative process undertaken by Staff was limited in many respects, and lacks evidentiary safeguards of an adjudicative proceeding.

NHOS believes that the Commission, rather than issuing an order with factual findings and legal rulings at this stage, should direct the parties to select a mediator and report to the Commission within 60 days regarding the outcome of their efforts to resolve their disputes. NHOS further supports the proposal that it pay into escrow a reasonable amount necessary for segTEL to

Debra A. Howland
March 7, 2013
Page 6

complete all outstanding make-ready work for the Middle Mile Project and that the Commission open a proceeding as soon as possible to determine what rates and charges are reasonable for such make-ready work.

Sincerely,

A handwritten signature in cursive script, appearing to read "CHMC", with a horizontal line extending to the right.

Christopher H.M. Carter
CHMC/smc

Cc: Client
Service List

#51457538