

**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 Comments on Staff Recommendation

segTEL, Inc. ("segTEL") thanks the Commission Staff for the time and effort that went into the January 30, 2013 Staff Report and Recommendation. segTEL respectfully comments as follows.

As at the outset, segTEL remains unclear as to the nature and purpose of this docket. The petitioner, New Hampshire Optical Systems ("NHOS"), has consistently refused to bring a direct complaint against segTEL (or any other entity) regarding the matters that NHOS suggests warrant Commission adjudication. In addition, as NHOS has repeatedly admitted, the Commission's authority over the issues that NHOS has raised is murky. Only after the issue of the Commission's authority is resolved, a procedural schedule is adopted, and a proper record is developed should the Commission proceed to adjudicate this matter and prescribe any remedy. Reserving all rights, segTEL offers these comments.

The Staff performed an informal yet thorough analysis and made numerous correct observations demonstrating that NHOS' insinuations regarding segTEL were unfounded. In particular, the Staff's conclusions that NHOS has not been subject to unfair or unreasonable delays and that segTEL has not intentionally manipulated the pole attachment process to delay NHOS are absolutely correct and justified. The true story is the opposite of the one NHOS tells

— NHOS has created numerous issues by violating Commission regulations and industry practices, resulting in potential dangers to the public and to the state’s telecommunications infrastructure. The Staff recognized the problems caused by NHOS on a small sample of utility poles observed in the field, but the Staff’s investigation was limited to that sample. In reality, the magnitude and scope of the issues NHOS has created dwarf those observed by the Staff. While segTEL has filed a civil action against NHOS to address issues that affect segTEL directly, the Commission should be aware of NHOS’ numerous and widespread violations.

Finally, the Staff’s recommendation to allow NHOS to escrow make-ready charges with which it disagrees — and which have *not* been invalidated by the Commission — is improper, discriminatory, and dangerous. The Commission should not adopt that recommendation.

Discussion

I. The Scope of the Proceeding Remains Unclear.

In its Petition, NHOS requested that the Commission undertake 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.” Petition, Apr. 24, 2012, at 1. Based on the Petition, the Commission issued an Order of Notice describing the issues in the case as follows: “The filing raises, *inter alia*, issues related to the rates charged by third party attachers for make-ready work; the scope of make-ready work for which an existing third-party attacher may charge; and 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.

Subsequent to its Order of Notice, a prehearing conference, and decisions on several motions, the Commission issued Order Regarding Scope of Proceeding, Designation of Additional Parties, Granting Motions to Intervene, Denying Motions to Dismiss and Requiring

Further Information. Order No. 25,407, Sept. 5, 2012 (“Order Defining Scope”). In that order, the Commission broadened the scope of the docket, stating:

The Order of Notice originally issued for this proceeding on May 11, 2012 framed the proceeding’s scope in terms of rates and charges assessed for make - ready work required by NHOS as part of its construction efforts. It would appear, on the basis of NHOS’ additional allegations, that timely access for pole attachment work by NHOS is also an issue. We find that clarification of the scope of this investigation is warranted. We hereby rule that the scope of this investigation shall include consideration of whether NHOS has faced unfair or unreasonable delays to access to utility poles during the construction of its “Middle Mile” project, and if so, possible remedies. By this order we are so defining the scope of this docket.

Id. at 9. The Commission went on to note that it would determine how best to proceed once the pole owners and other parties (including NHOS) had responded to discovery propounded with the Order. *Id.* at 10. The Commission also joined segTEL as a party. *Id.*

The Staff has been helpful in highlighting some of the issues in the case.¹ But, there is no evidentiary record, and, therefore, no basis on which the Commission can adjudicate the issues described in the Order of Notice and Order Defining Scope. Only after a proper record is compiled should the Commission contemplate any remedy.

In addition, there remain serious scoping and procedural issues with this docket. Despite that NHOS has never filed a complaint, the Commission has focused on the “rates and charges assessed for make - ready work *required by NHOS*” and “timely access for pole attachment work *by NHOS*.” In both cases, the Commission understood that the make-ready and charges referred to were those of existing attachers, not those of pole owners. But, the Commission’s authority to adjudicate the matters at issue in this docket has never been delineated. While the Commission has authority to regulate the rates and charges of pole owners and to ensure that utilities provide

¹ It is worth noting the Staff’s participation followed a request by segTEL to the Commission Staff regarding six of the poles that appear on Staff’s review. Unsuccessful in trying to cooperatively work out problems discovered in the field, segTEL sought Staff’s assistance. Staff’s review, while filed in this docket, was not requested by NHOS nor made in the context of this docket.

timely access to poles *that they own*, the Commission's authority to regulate CLEC rates and charges in this area or establish benchmarks for make-ready work done by third-party attachers has not been established. Even NHOS has pointed out the "regulatory void" concerning the relationship between non-owner attachers. Transcript of June 7, 2012 prehearing conference, at 9.² Thus, NHOS has gone only so far as to suggest an "investigation." *Id.* at 21. While the Commission has the authority to investigate regulated utility activities, it may not prescribe remedies where there is a "regulatory void."

Only after the issue of the Commission's authority is resolved, a procedural schedule is adopted, and a proper record is developed should the Commission proceed to adjudicate this matter and prescribe any remedy.

II. The Staff Correctly Observed that NHOS Is Responsible for the Problems at Issue.

The Staff correctly pointed out that, contrary to the picture that NHOS has been painting in this case from the beginning, it is NHOS, not segTEL or other third parties, that is the source of the problems cited in this docket.

First and foremost, the Staff correctly noted that NHOS has not been subject to unfair or unreasonable delays and that segTEL has not intentionally manipulated the pole attachment process to delay NHOS. Staff Recommendation at 6. To the contrary, NHOS itself has caused the problems about which it complains. The Staff correctly confirmed that the pole attachment process worked fairly smoothly until NHOS arrived on the scene. In particular, as the Staff

² Among the statements by NHOS regarding the Commission's lack of authority are: "There is no dispute that the particular issue in front of the PUC, which is the ability of third party attachers to charge whatever rates or to impose whatever conditions they choose on make-ready work, that is not currently regulated." *Id.* "We don't believe that the current PUC rules or the statutory framework within New Hampshire covers that issue." *Id.* at 13. "[T]here is not, at this time, a comparable set of standards that apply to new attachers in the area of third party make-ready work that already exist with respect to the pole owners and their relationship and interactions with the new attachers. That relationship is regulated." *Id.* at 22.

noted, many pole attachments have been made since 1996 and the issue whether pole owners are obligated to ensure the timely relocation of existing third-party attachments has not been raised before now. Staff Recommendation at 3. segTEL and others have been placing attachments for years and have successfully cooperated and coordinated in the performance of make-ready and installation of pole attachments.

Instead, NHOS has created numerous problems, beginning with its massive pole attachment applications. NHOS claims to have requested that segTEL perform make-ready on 3600 poles. segTEL's actual experience in the field had shown that NHOS substantially undercounts the number of poles requiring make-ready to accommodate NHOS' facilities, so that the actual number likely is much higher, perhaps exceeding ten thousand. As the Staff noted, even under the pole attachment agreement NHOS has with pole owners FairPoint and PSNH, the pole owners would not be obligated to address a make-ready application of that size. Staff Recommendation at 6. The Staff correctly remarked, "[T]he amount of work required to be performed by multiple companies on thousands of poles in a short period of time, is overwhelming especially when every detail is not precise and there are no rules which govern the process." *Id.* Further, the Staff Recommendation does not indicate that the Staff investigated the actual time frames that pole owners have taken to address similar pole attachment applications over the relevant time period. segTEL believes that such an investigation would reveal that timeframes typically exceed the periods contemplated by the applicable rules. NHOS' attempt to hold unregulated third-party attachers to more stringent standards than pole owners is evidence of how unreasonable NHOS' position is.

A second factor is NHOS' failure to cooperate in measures to resolve issues in a reasonable, practical manner. The Staff accurately points out that during the Franklin/Tilton

field inspections, the Staff recommended that the parties work together to resolve discrepancies, since both segTEL and NHOS had crews in the field and could have cleared up the problems that day. Tellingly, however, and despite that the field inspections took place after NHOS had sought the Commission's aid in this docket, NHOS refused to agree to the Staff's suggestion. *Id.* at 4. NHOS' intransigence resulted in significant delay in resolving the problems and unnecessarily higher costs to both parties.

The most important problem, which the Staff correctly observed, is that NHOS did not follow industry standard construction practices. One such practice calls for placing strand and hardware together along a pole line, followed by installation of fiber along the strand. *Id.* at 3. NHOS' failure, coupled with its failure to label its attachments in accordance with PUC Rule 1303.08, prevented segTEL from properly identifying NHOS' attachments and attachment space. *Id.* at 4. The result was unnecessary confusion and additional effort and expense to ensure proper location of the facilities and to correct inappropriate acts or conditions.

In addition, the Staff's field inspection revealed that NHOS violated other applicable regulations and standards, including the National Electrical Safety Code. As the Staff found, on two out of twelve poles that the Staff surveyed, NHOS placed its attachments "in close proximity to the [preexisting] segTEL attachment with less spacing than that required by the National Electrical Safety Code." *Id.*³ In so doing, NHOS violated the Commission's rules. N.H. Code Admin. Rules Puc 433.01(a); 1303.07(a).⁴

³ The Staff also correctly found that segTEL has not relocated any NHOS bolts on the twelve surveyed poles. *Id.*

⁴ "A facilities-based CLEC shall construct, install and maintain its plant, structures, equipment, and lines in accordance with the National Electrical Safety Code, 2002 edition, and the National Electric Code as adopted by RSA 155-A:1, IV." N.H. Code Admin. Rules Puc 433.01(a). "All attachments shall be installed in accordance with the National Electrical Safety Code, 2007 edition, the National Electrical Code as adopted in RSA 155-A:1, IV, and the SR-1421 *Blue Book – Manual of Construction Procedures, Issue 4, Telcordia Technologies, Inc. (2007)*, and in accordance with such other applicable standards and requirements specified in the pole attachment agreement." *Id.* § 1303.07(a).

While the Staff noted numerous issues caused by NHOS on a sample of twelve poles in Franklin and Tilton, this is but the tip of the iceberg. NHOS has committed literally hundreds of violations of applicable regulations, standards, and codes as it has built out its system in the state. NHOS' violations have adversely affected segTEL and segTEL's ability to provide safe and adequate service to its customers. More importantly, NHOS' violations of applicable safety codes and industry-standard construction practices have jeopardized the integrity of utility poles and facilities in numerous locations, adversely affecting public safety and the state's utility infrastructure.

These violations are documented in a complaint that segTEL has filed against NHOS and others in New Hampshire Superior Court. *segTEL, Inc. v. The University System of New Hampshire et al.*, Merrimack County Superior Court, Dkt. No. 217-2013-cv-00023, Declaration to the Writ of Summons ("Declaration") (copy attached). As set forth in the Declaration, the numerous violations of codes and standards by NHOS include improperly:

- Bolting attachments within four inches of segTEL attachments, which compromises the structural integrity of the pole;
- Hanging cable and strand within 12 inches of segTEL facilities;
- Crossing, boxing in, and wrapping segTEL facilities;
- Trapping utility poles;
- Placing facilities too close to power lines; and
- Otherwise trespassing on, mishandling, and interfering with segTEL's infrastructure.

Declaration at 12-13.

These improper actions by NHOS and its contractors have resulted in numerous and extensive actual and potential harms to segTEL and the public at large. NHOS' improper acts

and practices have potentially endangered utility workers and the public due to potentially energized wires. NHOS' acts also have prevented segTEL from performing necessary and agreed-upon make-ready work, costing segTEL time and money. Further, NHOS' actions have impeded segTEL's ability to extend, build, modify, repair, and maintain its network. *Id.* at 17-19.

Based on segTEL's documentation in support of its Declaration, NHOS has threatened the safety of utility workers, utility infrastructure, and the general public, and the integrity of the state's telecommunications networks, while it simultaneously sought investigations, rulemakings, and other vague relief from the Commission. The Commission should take note of the widespread and extensive problems caused by NHOS in any further proceedings in this docket.

III. The Staff Is Correct That Make-Ready Is a Complicated Matter That Requires Cooperation Among All Involved Parties.

As the result of its field inspections and other investigations regarding attachment issues in Franklin and Tilton, the Staff identified a number of remedial measures that it believes segTEL and NHOS should take to resolve issues on certain specified poles. segTEL does not concede that it is responsible for the discrepancies identified by the Staff or that it bears operational or financial responsibility for correcting the issues.

Nonetheless, in a spirit of cooperation and without waiving any rights, segTEL undertook the remedial measures that the Staff suggested were the responsibility of segTEL. segTEL's attachments now comply with Staff's recommendations. Further review would be required to determine if NHOS has done the same.

One message that comes through loud and clear from the Staff's recommendation is that coordinating multiple pole attachments and associated make-ready is a complicated matter that

requires cooperation among all involved parties. When a party like NHOS fails to cooperate, the result will be problems like those described above.

IV. The Commission Should Not Permit NHOS to Escrow Make-Ready Charges.

In contrast to the Staff's factual observations, which were largely correct, the Staff's recommendation that NHOS be allowed to escrow make-ready charges is seriously flawed and problematic. There has been no determination that the Commission has the authority to order such action, and in any event the Commission should decline the Staff's recommendation. Instead, the Commission should make clear that unless and until the Commission disallows any make-ready charge (after determining that it has the authority to do so and after an appropriate proceeding), such charges are fully payable and enforceable.

First, the Staff recommendation is vague. It is unclear whether the recommendation only allows NHOS to escrow make-ready charges imposed by segTEL, or whether the recommendation is broader. If so, how broad? Does the recommendation apply across the board to all make-ready charges imposed by any entity? For instance, would the recommendation allow prospective attachers to escrow the make-ready charges imposed by FairPoint or other pole owners if the attacher thought the charges were too high? If every carrier were allowed to escrow make-ready charges it does not care to pay, all make-ready work throughout the state would come to a screeching halt.

On the other hand, if the Staff intends its recommendation for an escrow to apply exclusively to segTEL's charges for make-ready done for NHOS' attachments, the recommendation raises many, serious concerns. First, the Commission's legal authority to relieve NHOS of its obligation to pay segTEL's make-ready charges is unclear. NHOS did not seek such relief. The Staff cites no statute or regulation that would permit the Commission to

take this action. There has been no briefing on the issue. The Commission should not implement the Staff's recommendation without a full evaluation of the Commission's legal authority with appropriate input from affected parties.

Second, the Staff recommendation is unjustly discriminatory. As the Staff correctly noted, the rates about which NHOS complains are identical to FairPoint's rates for the same make-ready activities. NHOS agreed to pay FairPoint those rates, and so far as the record shows, has actually paid those rates without challenge. Staff Recommendation at 2. On information and belief, NHOS has paid other pole owners for the make-ready work those utilities have done, and several pole owners in the state have make-ready rates that are higher than FairPoint's. The Staff suggests no basis why the identical charges for identical activities that NHOS willingly paid FairPoint do not have to be paid when charged by segTEL or other third-party attachers. Further, the rates charged by pole owners like FairPoint are subject to Commission regulation. Even though third-party attachers' make-ready charges have not been regulated (and the Commission's authority to regulate third-party attachers' rates has not been established), segTEL's adoption of FairPoint's regulated rates should be considered *per se* reasonable.

The Staff recommendation also discriminates against entities that perform make-ready later in time. As noted, NHOS has paid FairPoint's charges. The Staff recommendation would permit NHOS to pick and choose whom it wishes to pay for performing identical services at identical rates. The recommendation also would allow FairPoint to retain the benefit of the make-ready charges already paid to it, but would deny segTEL the benefit of payments at identical rates for identical services. There is no rational or reasonable basis to discriminate in this regard. The potential for arbitrariness and abuse should be obvious.

Another way in which the Staff recommendation discriminates is that it disadvantages smaller carriers. Even if the recommendation were applied even-handedly such that NHOS could escrow all make-ready charges imposed by all pole owners and third-party attachers, major utilities like FairPoint and PSNH have much greater financial resources than smaller carriers like segTEL. Whatever the ability of the larger carriers to withstand the losses in revenue that would result from the escrows, smaller carriers lack the deep pockets necessary to fund NHOS' make-ready work, incurring the expenses of such work while not realizing any corresponding revenues for indeterminate periods of time.

For the same reasons, the Staff recommendation would have anti-competitive effects. The recommendation would force segTEL and other competitive carriers to incur the expense of make-ready work while denying them revenues needed to fund those activities. At the same time, the recommendation would allow FairPoint — which, because of its larger size, is more able to withstand the revenue losses that would result from the escrow proposal — to retain the make-ready revenues it has already received.

If it is determined that the Commission has the authority to regulate the make-ready charges of third-party attachers, the Legislature has provided under RSA 365:29 the remedy of reparations for illegal or unjustly discriminatory rates (as found “after hearing and investigation”). That remedy does not include or justify permitting a party to escrow disputed charges before Commission makes the specified findings after a proper hearing.

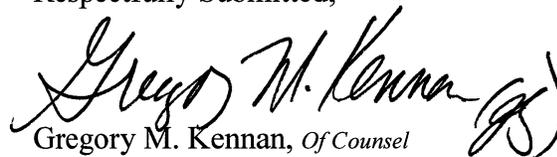
The Staff undoubtedly did not intend the many discriminatory and harmful consequences to its recommendation for an escrow, but those consequences exist nonetheless. The Commission should decline the escrow proposal.

Conclusion

segTEL thanks the Commission for the opportunity to comment on the Staff recommendation. As set forth above, the Staff has correctly identified numerous problems caused by NHOS, but the Staff's limited investigation has only scratched the surface of the serious and harmful results of NHOS' habitual violations of regulations, standards, and good industry practice. The Commission should be mindful of NHOS' actions as it determines any future activities in this docket. In addition, the Commission should not adopt the Staff's recommendation to permit NHOS discriminatorily to escrow make-ready charges it does not care to pay.

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Respectfully Submitted,



Gregory M. Kennan, *Of Counsel*
Fagelbaum & Heller LLP
20 North Main St., Suite 125
P.O. Box 230
Sherborn, MA 01770
508-318-5611 Tel.
gmk@fhllplaw.com