

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

CANNE'S RESPONSE TO
(1) NECTA'S MOTION TO DISMISS AND
(2) NHOS' STATEMENT OF POSITION

The CLEC Association of Northern New England, Inc. ("CANNE") respectfully responds to NECTA's Motion to Dismiss Without Prejudice and/or Motion to Limit the Scope of This Proceeding, filed by the New England Cable & Telecommunications Association, Inc. on June 5, 2012 ("*NECTA Motion*"), and the NHOS Statement of Position Regarding Charges for Utility Pole Make-Ready, filed by the petitioner, New Hampshire Optical Systems, LLC,¹ on June 6, 2012 ("*NHOS Statement*").

Introduction

CANNE is a not-for-profit association of facilities-based CLECs in Maine, New Hampshire and Vermont. Members of CANNE are among the earliest post-Telecommunications Act entrants into the telecommunications market in New Hampshire, several having been authorized to provide services as early as 1997.² In addition to providing innovative and high-

¹ The petitioner identifies itself as New Hampshire Optical Systems, LLC in its April 24 petition but as New Hampshire Optical Systems, Inc. in its June 6 Statement of Position.

² See, e.g., *In re Freedom Ring Communications, LLC*, DE 96-165, Order No. 22,530 (Mar, 24, 1997) (granting authority to operate as a competitive provider); *In re CTC Communications Corp.*, DE 97-203, Order No. 22,791 (Nov. 19, 1997) (same); *In re Business Communications Networks, d/b/a Lightship Telecom — Petition for Authority to Provide Local Telecommunications Services*, DE 98-072, Order Nisi Granting Authorization, Order

value telecommunications and broadband services to New Hampshire customers, members of CANNE have participated in numerous Commission proceedings that have established rights, obligations, rules, procedures, policies, and practices governing the functioning of the wholesale and retail telecommunications markets in the State.³ Thus, for over fifteen years, members of CANNE have contributed to the development, shaping, and operation of the State's telecommunications marketplace and to the economic development of the State.

Certain CANNE members that operate in New Hampshire own and operate their own utility poles, attach facilities to poles owned by electric and incumbent telephone utilities, and move their existing attachments to accommodate attachment by other attachers. CANNE's primary interest at this stage of the docket is to ensure that any proceeding is fair, nondiscriminatory, and protective of the rights of its members and all participants, and that any proceeding is properly scoped and scheduled to ensure that it economically, efficiently, and in a way that best utilizes the limited resources of the Commission and participants, addresses issues that most significantly affect the public interest and the general good of the State.⁴

No. 23,009 (Sept. 1, 1998); *In re New England Voice and Data LLC — Petition for Authority to Provide Local Telecommunications Services*, DE 98-094, Order Nisi Granting Authorization, Order No. 23,010 (Sept. 2, 1998); *In re segTEL, Inc. — Petition for Authority to Provide Local Telecommunications Services*, DT 99-048, Order Nisi Granting Authorization, Order No. 23,208 (May 3, 1999).

³ See, e.g., *In re Bell Atlantic — Petition for Approval of Statement of Generally Available Terms Pursuant to the Telecommunications Act of 1996*, DE 97-171, Order Granting in Part and Denying in Part, Order No. 23,738 at 9 (July 6, 2001) (BayRing was granted intervenor status on November 4, 1997).

⁴ As the precise issues and nature of the claims in this proceeding are unclear and unsettled, at this juncture CANNE and its members take no position on any legal or factual issue beyond those raised in this response, and reserve all rights with respect to any such issue.

Discussion

I. The Scope of the Proceeding Is Unclear and Confused.

NHOS' filings and its statements at the prehearing conference and technical session paint a very confused picture as to the nature of its submissions and the relief it requests. NHOS appears to have two goals in this proceeding. At times, it complains about the rates, terms, conditions, or practices of particular — but unnamed — third-party attachers. At other times, it requests that the Commission establish generic standards and policy regarding make-ready work that would be applicable to all entities attached to poles, both at present and in the future. These two goals are distinct and require very different types of proceeding before the Commission.

A. Is This a Complaint Proceeding?

NHOS' April 24, 2012 Petition for Investigation Into Proposed Charges for Utility Pole Make-Ready ("*NHOS Petition*") alleges that certain "Third Party Attachees have demanded that their make ready work be performed at excessive rates" and that NHOS pay make-ready in advance. *NHOS Petition* at 2. At the prehearing conference, NHOS cited an allegedly excessive rate charged by one third-party attacher, but made no claim that *every* attacher charged that rate or that *all* third parties' rates were unreasonable.

Likewise, in its Statement of Position, NHOS alleged:

- 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. 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.

NHOS Statement at 6-7 (emphasis added). Clearly, these allegations by NHOS refer to only one, particular third party.⁵

Further, in its petition, NHOS cited RSA 365:5 as the authority under which the Commission may investigate this matter. *NHOS Petition* at 4. That statute gives the Commission the authority to “investigate or make inquiry . . . 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.” To do so, however, the Commission must know the identity of the public utility that is the subject of the complaint.

Inexplicably, NHOS has failed to identify any public utility about which it is complaining, instead referring to such utility or utilities generically or categorically. NHOS apparently wants the Commission to undertake a blanket investigation to determine, first, which are the potentially offending utilities and, once that is determined, whether those utilities’ practices are, indeed, improper. NHOS’ request is unrealistic and places an unnecessary burden on the Commission to uncover alleged facts that clearly are in NHOS’ possession.

NHOS’ posture also is fundamentally unfair to affected parties. Faced with NHOS’ vague and unspecific allegations against unnamed “Third Party Attachees,” other utilities must guess whether they are the targets at which NHOS is aiming, and must try to figure out if they need to interrupt their daily business activities of providing telecommunications and broadband services to the State’s citizens and businesses in order to defend their rates and practices. They then are forced, in essence, to identify and incriminate themselves in order to defend themselves.

⁵ At the prehearing conference, at least two parties (including CANNE) objected to NHOS’ attempts to introduce unsworn testimony as to the make-ready rates and practices of various attachers, contractors, or other entities. CANNE wishes to emphasize that there currently is no evidence in the record in this case, and that any Commission action must be based on a properly developed record.

It hardly need be said that self-incrimination is contrary to the fundamental principles of due process.

Why NHOS has taken this course is perplexing. It would not explain its stance at the prehearing conference. NHOS knows who the allegedly offending parties are, and it would be a simple matter for NHOS to identify them. NHOS thus easily could narrow the issues, make it possible for an accused party to have its day in court and defend itself, and permit the Commission to adjudicate a concrete dispute before it. NHOS can do so simply by identifying the party or parties about which it is complaining, setting forth specific allegations as to the rates, charges, acts, and/or omissions complained of, and specifying the specific ways why they are unjust and unreasonable. But, to date, NHOS has refused to do so, creating the procedural muddle that the Commission and parties face today.

B. Or Is It a Request for Rulemaking?

At other times, NHOS has stated that it wanted the Commission to adopt general requirements, standards, methods, and policies for make-ready work. In its Statement of Position, it “recommends” that the Commission “[a]dopt a policy” regarding pole access and “[e]stablish methods, standards, and definitions” regarding make-ready rates. *NHOS Statement* at 7. At the prehearing conference, NHOS explicitly requested that the Commission “establish rules.”

The results requested by NHOS — generic rules, requirements, and standards applicable to all pole attachers — are rules within the meaning of the New Hampshire Administrative Procedure Act.

“Rule” means each regulation, standard, form as defined in paragraph VII-a, or other statement of general applicability adopted by an agency to (a) implement, interpret, or make specific a statute enforced or administered by such agency or (b) prescribe or interpret an agency policy, procedure or practice

requirement binding on persons outside the agency, whether members of the general public or personnel in other agencies.

RSA 541-A:1, XV. Thus, despite its protestations at the prehearing conference that it was not requesting a rulemaking, NHOS is doing exactly that to the extent it seeks to impose general requirements on all pole attachers.

A rulemaking involves a very different set of procedures under the Administrative Procedure Act than does a complaint against a specific alleged offender. These procedures are set forth in RSA 541-A:3 and Puc 205. Among other requirements are a fiscal impact statement, public hearing before the Commission, and review and approval by the Joint Legislative Committee on Administrative Rules. RSA 541-A:3, I, IV; 541-A:11; 541-A:13.

However, there may be many other issues involving make-ready work besides the narrow set of issues of particular interest to NHOS. To initiate a rulemaking solely to address NHOS' issues carries the real risk that other, important issues will be left unresolved, only to require another rulemaking at a later date. Such piecemeal attempts at rulemaking would be time-consuming and inefficient.

II. The Commission Should Dismiss NHOS' Petition, Require NHOS to File a Proper Request for Relief, and Scope and Schedule the Docket Accordingly.

NHOS has confused matters with its inconsistent and contradictory filings and statements. CANNE respectfully suggests that the Commission's first order of business should be to dismiss NHOS' petition and require NHOS, by a procedurally proper filing, to restate with specificity its claims and clarify the relief it seeks and the parties from which it seeks that relief. Once the scope of the proceeding is clarified, the Commission in its discretion may determine what (if any) further proceedings are appropriate and how to develop a legally proper evidentiary record to support any decision that will result.

A comprehensive rulemaking under the circumstances presented here may be overkill and would result in substantial expenditures of time, money, and resources by the Commission and the numerous other parties that necessarily would have to get involved in such a proceeding. NHOS' filings and statements allege that one or a few third-party attachers are their principal concern. NHOS obviously knows who these parties are. The Commission should require NHOS to file a proper complaint, specifically identifying the putative respondent(s) and the specific rates and acts complained of. Resolving complaints against a handful of entities can be accomplished without an expansive rulemaking proceeding, which will involve many other parties and open up many other issues. CANNE therefore agrees with NECTA that the Commission should require NHOS "to identify with specificity the party or parties with whom the dispute occurred and to describe the particular problems the Petitioner has encountered." *NECTA Motion* at 3. Upon the filing of a properly specific complaint, the Commission may proceed to issue an appropriately specific order of notice. *See* RSA 365:2.

However, if the Commission decided to proceed with a rulemaking proceeding regarding make-ready work, it should do so in a manner that would avoid piecemeal, repetitive rulemaking proceedings as described in Part I.B above. The Commission also must ensure that the interests of all concerned parties are treated in a neutral, nondiscriminatory manner, regardless of whether the party is a new entrant or one that has been serving the State for a decade, and regardless of the source of the party's funding. The Commission should proceed only after determining the most important issues from the perspective of the overall good of the State. The most important issues might not be confined to the issues NHOS raised. The Commission should solicit input from all entities that do, or may, attach to poles, including existing attaching entities. By compiling a comprehensive list of all relevant issues, the Commission can set priorities, in the

exercise of its judgment as the expert regulatory authority, regarding which issues are the most important to the overall good of the State and the order and manner in which they should be addressed in a rulemaking proceeding.

Conclusion

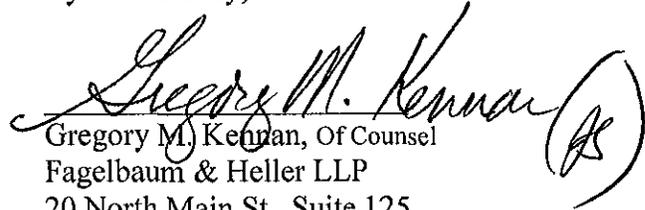
As discussed at the prehearing conference, this proceeding is at a fork in the road and can take either the complaint path or the rulemaking path. On its present course, it will crash into the trees between the two paths with nothing accomplished. The Commission should dismiss NHOS' petition and require NHOS to clarify the relief it seeks and the parties from which it seeks such relief. Since NHOS appears to have a disagreement with only a few, specifically identifiable third parties, a rulemaking at this stage likely is unnecessary overkill. Instead, the Commission should require NHOS to identify the particular party or parties with which it is in dispute, with the objective of resolving such dispute in an appropriately focused proceeding without involving numerous parties in a massive, generic rulemaking. If the Commission were to proceed with a rulemaking, however, it should solicit information from all affected parties and, based on that information, address the issues that are the most important for the overall good of the State.

June 15, 2012

Respectfully Submitted,

CLEC Association of Northern New
England, Inc.

By its Attorney,

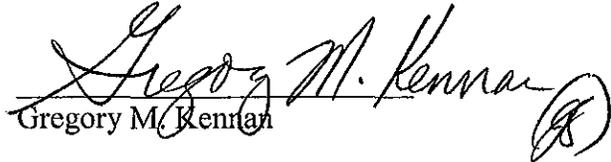


Gregory M. Kennan, Of Counsel
Fagelbaum & Heller LLP
20 North Main St., Suite 125
PO Box 230
Sherborn, MA 01770
508-318-5611
gmk@fhllplaw.com

Certificate of Service

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June 15, 2012


Gregory M. Kennan