

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

Case No. DT 12-107

NHOS' OBJECTION TO MOTION TO DISMISS

New Hampshire Optical Systems, Inc. ("NHOS"), by its counsel, Hinckley, Allen & Snyder LLP, submits this Objection to the Motion to Dismiss filed by New England Cable & Telecommunications Association, Inc. ("NECTA").

I. THE COMMISSION HAS THE AUTHORITY TO INVESTIGATE THIRD PARTY MAKE-READY PROCESS

NECTA does not dispute the central problem framed in the NHOS Petition: the lack of standards over the third party make-ready process has produced a situation in New Hampshire where prospective attachers are being denied access to utility poles unless they agree to pay for make-ready work that is unrelated to new attachments, is unreasonable in scope, and is being charged at excessive rates. Nor does NECTA dispute that this situation, if left unaddressed, will impede the establishment of a statewide fiber-optic cable network consistent with the State of New Hampshire's broadband initiative plan.

Instead, NECTA argues the Commission's authority is "limited to adjudicating disputes about particular pole attachments and pole attachment rates." Objection, P. 2. NECTA cites no support for this argument, which is refuted by RSA 365:5. This statute states unequivocally that the Commission may, on its own motion or upon the petition of a public utility, "investigate or make inquiry in a manner to be determined by it as to *any rate charged or proposed.*" RSA 365:5 provides the Commission with the power necessary to enforce the mandate under RSA 374:1 and RSA 374:34-a that the rates, charges, terms, and conditions of pole attachments are "just and reasonable."

No provision of RSA Chapter 374 or Puc 1300 confine the Commission's authority to officiating isolated disputes over particular pole attachments. The Commission's duties and powers are much broader. They extend to investigating far-reaching problems, such as that identified by NHOS, which threaten to hinder the expansion of broad band services in this state. Contrary to NECTA's Objection, no "policy arguments" exist which should cause the Commission to turn a blind eye to this problem and dismiss the NHOS Petition.

NECTA also argues, again without citation to any legal or factual support, that the "subject matter of this dispute is one that should in the first instance be governed by the contractual terms ... set forth in the applicable pole attachment agreements." Objection, p. 2. In fact, as confirmed by counsel for Unitil at the June 7 prehearing conference, the applicable pole attachment agreements are between the pole owners and third party attachers; they do not govern the rights and obligations between existing attachers and prospective attachers with respect to the rates, terms and conditions that may be demanded for third party make-ready work.

II. THE COMMISSION HAS THE AUTHORITY TO TAKE ACTION IN RESPONSE TO ITS INVESTIGATION

Although not raised in NECTA's Motion to Dismiss, the question arose at the June 7 prehearing conference as to whether a petition for rulemaking is the appropriate mechanism to address the problem of existing attachers imposing unjust and unreasonable rates and conditions on the third party make-ready process. As a threshold matter, the Commission is not required to promulgate rules because RSA 374:34-a specifically authorizes the Commission to investigate and order relief with respect to any rate, charge, term or condition imposed or proposed to be imposed. See Nevins v. N.H. Department of Resources and Economic Development, 147 N.H. 484, 487 (2002). Furthermore, the rulemaking process and the Commission's authority to investigate are not mutually-exclusive or contradictory.

The legislature may delegate to state agencies the authority to promulgate administrative rules. Appeal of Mays, 161 N.H. 470, 473 (2011). This rulemaking authority enables agencies to “fill in details to effectuate the purpose of the statute.” Id. In conferring on the Commission the authority to supervise and regulate pole attachments, the legislature has delegated to the Commission the authority to promulgate rules governing such pole attachments. See RSA 374:34-a, III.

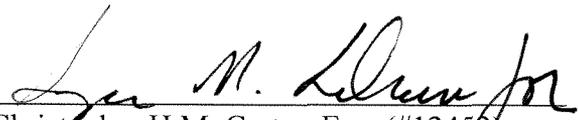
Here, if the Commission’s investigation confirms that rules are needed to govern the third party make-ready process, the Commission has the ability to promulgate rules to address this issue. Unless or until the Commission investigates this area, however, it will not have a factual basis to begin the rulemaking process.

Respectfully submitted,

NEW HAMPSHIRE OPTICAL SYSTEMS,
INC.

By its attorneys

Dated: June 15, 2012


Christopher H.M. Carter, Esq. (#12450)
Hinckley Allen & Snyder, LLP
11 South Main Street, Suite 400
Concord, NH 03301
Tel: 603.225.4334
ccarter@haslaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2012, I have forwarded a copy of the foregoing Statement of Position Regarding Charges For Utility Pole Make-Ready to all parties listed on the Service List.


Christopher H.M. Carter, Esq.