

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 MOTION TO DISMISS

The CLEC Association of Northern New England, Inc. (“CANNE”) moves to dismiss the amended petition filed by New Hampshire Optical Systems, Inc. (“NHOS”) on August 2, 2012 (“Amended Petition”). The amended petition does not satisfy the Commission’s clear instructions that NHOS “provide greater clarity and specificity about the particular acts or actors that NHOS claims are improperly impeding its work.” Order on Petition, Order No. 25,386, at 11-12 (July 3, 2012). To the contrary, the Amended Petition is merely a restatement of the same nonspecific allegations that the Commission found insufficient to justify Commission action on NHOS’ complaints.¹ Accordingly, the Commission should dismiss NHOS’ petition with prejudice and close this docket without further action.

In support of its motion, CANNE states:

1. The Commission found that NHOS’ Initial Petition lacked specificity necessary for the Commission to adjudicate. In the Order on Petition, the Commission ruled, “Upon review of the information and arguments presented by NHOS, . . . we lack sufficient information to complete an adjudication that would provide the timely relief NHOS seeks.” Order on Petition at

¹ CANNE incorporates by reference its Response to (1) NECTA’s Motion to Dismiss and (2) NHOS’ Statement of Position, filed June 15, 2012, to the extent applicable.

9. In explaining its decision, the Commission cited numerous instances of indefinite language in NHOS' Initial Petition:

- “‘some’ third-party attachers”;
- “in ‘certain instances’”;
- “in ‘many instances’”.

Id. at 9. The Commission found, “Based on upon these allegations, it is not clear how many entities have rates, charges or make-ready practices that are troubling to NHOS.” *Id.* at 9-10. The Commission properly noted that NHOS' allegations were overly broad and made an investigation impracticable. “[G]iven the nonspecific assertions, if we are to meet NHOS' request, we are left with no way to limit an investigation to anything less than every pole owner and third-party attacher in New Hampshire.” *Id.* at 10. The Commission further determined that “it is still not clear what relief NHOS is pursuing.” *Id.*

Although the Commission found that it could not proceed on the basis of the allegations in NHOS' initial petition, it gave NHOS a chance to cure its defective pleading by submitting more specific allegations. “[R]ather than dismiss NHOS' petition, we will allow NHOS an opportunity to revise its filings in order to provide greater clarity and specificity about the particular acts or actors that NHOS alleges are improperly impeding its work.” *Id.* at 11-12.

In so doing, however, the Commission emphasized that the sort of vague, generic allegations in NHOS' Initial Petition were not acceptable. To the contrary, the Commission instructed NHOS to be specific in any revised filing. “We make clear that to the extent NHOS revises its filings to seek an adjudication of particular practices by particular entities, NHOS must identify the offending entities and the offending practices.” *Id.* at 12.

2. NHOS's Amended Petition fails to comply with the Commission's order. Instead of following the Commission's instructions, NHOS filed another generalized petition containing only vague assertions of misdoing on the part of multiple third-party attachers. The Amended Petition makes virtually the same nonspecific allegations that the Commission found fatal to the Initial Petition. In particular, NHOS has not provided specifics regarding its complaints or the parties against which it is complaining. For example, NHOS still refers generically to:

- “certain third-party attachers” (Amended Petition, ¶ 6);
- “existing third-party attachers” (¶ 15);
- “these attachers” (¶ 16); and
- “third-party attachers” (¶¶ 16, 17).

Moreover, NHOS does not refer to specific acts or practices, only that the third-party attachers “have refused to perform the make-ready work” (¶ 15) and “have demanded that NHOS agree to pay for make-ready work that is unrelated to new attachments, unreasonable in scope, and charged at excessive rates” (¶ 16). “Further, these attachers have deliberately delayed the start of that work” (¶ 16).

These statements are no different than the vague and nonspecific language the Commission found lacking in the Initial Petition. The Amended Petition contains none of the details that the Commission clearly expected, and instructed, NHOS to provide. The Amended Petition simply does not “provide greater clarity and specificity about the particular acts or actors that NHOS alleges are improperly impeding its work.” Order on Petition at 11-12.² Further,

² In its amended petition NHOS mentions by name only one alleged third-party attacher, Tech Valley/segTEL, Inc. Presumably NHOS means segTEL, Inc., but even if NHOS had gotten the name right, listing one name does not provide any greater specificity than was contained in the Initial Petition. NHOS has not provided any information particular to segTEL or any charge or practice attributable to segTEL. It does not distinguish the entity it named from any other unnamed third-party attacher. Instead, other than mentioning one (inaccurate) name, NHOS

NHOS has done nothing “to limit an investigation to anything less than every pole owner and every third party attacher in New Hampshire.” *Id.* at 10.

3. NHOS has failed to specify the relief it seeks. Additionally, “it is still not clear what relief NHOS seeks.” *Id.* In particular, NHOS does not seek any specific relief from third-party attachers, individually or collectively. Instead, NHOS now appears to be complaining that pole owners (apparently, all of them) are failing to act according to the terms of a single, unexecuted pole attachment agreement. NHOS goes on to “demand” that the Commission take some action to force (unidentified) pole owners require that (unnamed) third-party attachers perform make-ready work. Amended Petition, ¶ 20. Here again, however, the Amended Petition does not identify the particular pole owners at issue, but paints all pole owners with the same broad brush.

4. NHOS has failed to show any urgency to its request. NHOS has not identified any date, time frame, deadline, schedule, or commitment under statute, regulation, or agreement that any third-party attacher has failed to meet. As with its other allegations, it has provided no specifics to support its conclusory allegations of “unreasonable delay” or who might be causing such delay (other than, apparently, all third-party attachers in the state). This information is unquestionably within NHOS’ possession but NHOS continues, inexplicably, to refuse to provide it. The Commission should disregard NHOS’ allegations of delay and all consequences alleged to result from such delay.

Further, NHOS’ own actions belie its claims that resolution of pole attachment issues is time-critical to the success of its project. Despite its claims that it was eager for immediate relief, NHOS took more than the full month of July to file its five-page Amended Petition —

characterizes segTEL in exactly the same vague and indefinite terms as all other third-party attachers. It would be unfair and discriminatory to proceed against one entity alone when the allegations of the Amended Petition bundle NHOS’ claims against that entity along with identical complaints that it attributes to multiple other third-party attachers.

nearly 10 percent of the remaining time before NHOS claims to be at risk for losing its federal funding (see Amended Petition ¶ 4). The Commission should disregard any NHOS claim that the timing of this proceeding is urgent.

Conclusion. The Commission stated that if NHOS wished “to seek an adjudication of particular practices by particular entities, NHOS must identify the offending entities and the offending practices” so that complained-against parties would have a fair opportunity to respond and the Commission could develop a complete record. Order on Petition at 12. NHOS specifically declined to file a complaint (see Amended Petition at 1) and provided no additional, particular facts to assist the Commission in developing a record.

The Commission previously advised NHOS, “If no [revised] filing is made, we will close this docket without further action.” Order on Petition at 12. In fact, no revised filing that complies with the Commission’s order has been made. Instead, NHOS has wasted the Commission’s and parties’ time and resources with another filing that provides no concrete information about what NHOS is complaining about and against whom it is complaining. In short, NHOS has failed to cure the fatal defects in its Initial Petition. The Commission should dismiss the petition with prejudice and close this docket.

August 13, 2012

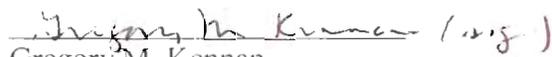
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