

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

NEW HAMPSHIRE OPTICAL SYSTEMS, INC.
DT 12-107

OBJECTION TO MOTIONS TO DISMISS

New Hampshire Optical Systems, Inc. (“NHOS”) hereby objects to the motions to dismiss filed by NECTA and CANNE.¹

A. Nature of Proceedings

1. In arguing that NHOS failed to provide detail to support its “claims” or to allow the Commission to “adjudicate” this matter, NECTA and CANNE badly mischaracterize the nature of this proceeding. This is not an adjudicative hearing. NHOS did not file, and was not directed to file, a complaint under RSA 365:1 and PUC 204.01 setting forth legal “claims” against pole owners and/or third-party attachers.² Instead, this proceeding was initiated by the Commission in response to a request by NHOS pursuant to RSA 365:5 for an investigation into irregularities in the pole attachment process related to the Middle-Mile Project. This Project is of critical importance to the state. It is being constructed by NHOS, USNH and NTIA as part of a public/private partnership supported by a major federal grant designed to bring broadband service to unserved and underserved portions of New Hampshire. NHOS agrees strongly with

¹ FairPoint Communications, which owns many of the 23,000 utility poles along the Middle-Mile route, has not moved to intervene in this matter. Despite this, on August 15, 2012, FairPoint submitted a letter to the Commission in which it purports to join in the CANNE/NECTA Motions to Dismiss. Similarly, on August 16, 2012, New Hampshire Telephone Association (“NHTA”) submitted a letter to the Commission in which it purports to concur with the CANNE/NECTA motions. NHOS submits that if FairPoint and NHTA wish to take a position in this matter, they should seek to intervene and become a party to this proceeding. This is precisely what the University System of New Hampshire (“USNH”) did on August 20, 2012, when it filed a petition to intervene that argued strongly in support of the Commission investigating the refusal of some third-party attachers to perform make-ready work required for the Middle-Mile Project.

² As the Commission observed in its July 3, 2012 Order, the Commission’s current rules do not provide “definitive direction over disputes between prospective and existing attachers.” It is because of the lack of regulatory direction and standards that it is not practicable for a new attacher like NHOS to fashion legal “claims” against existing attachers and pole owners.

USNH that the immediate involvement of the Commission in addressing the problem of third party make ready work on the project is “of the utmost urgency.” See USNH Petition to Intervene, p. 3.

B. Sufficiency of Facts For the Commission to Commence An Investigation

2. NECTA and CANNE do not deny that delays and anticompetitive actions by third-party attachers threaten the Middle-Mile Project.³ As the Commission observed in its July 3, 2012 Order, while demands that NHOS pay excessive fees for unnecessary work is one aspect of the current problem, the “most critical issue” to NHOS is the fact that it is being denied access to utility poles so it can complete its work.

3. Without denying the severity of these issues, NECTA and CANNE argue that NHOS has not provided enough specificity about the problems. To the contrary, NHOS has provided the Commission with sufficient facts to conduct an investigation, as discussed below. But first, it is important to recognize that the core complaint raised by NECTA and CANNE – that the alleged lack of specificity is unfair to the entities responsible for the delays and impasse on Middle-Mile Project – is unfounded. Indeed, segTEL, which NECTA and CANNE each concede has been named as a significant source of delay, certainly is aware of its role in the situation. Yet, segTEL has not seen fit to intervene in this matter or otherwise challenge the specificity in the NHOS pleadings. Similarly, FairPoint, which could have avoided the problem entirely if it had enforced the procedures under its pole attachment agreement (“PAA”) with

³ Neither CANNE nor NECTA dispute that various entities, by treating NHOS and the Middle-Mile Project in a manner different from other projects where pole attachments have been sought, have acted in a discriminatory, anti-competitive manner. This differing treatment is perhaps most recently illustrated by FairPoint Communication’s August 15, 2012 letter to the Commission in this docket, in which it appeared to take a position regarding the enforcement mechanisms under its standard pole attachment agreement that is diametrically opposed to the position it recently took with regard to another project.

segTEL, also is aware of and is closely monitoring this proceeding, as evidenced by its August 15, 2012 letter. Yet FairPoint has not chosen to intervene either.

4. CANNE and NECTA are not seeking to quash the Commission's investigation out of concern that involved parties have not received notice and an opportunity to be heard (those parties have actual notice and have chosen not to participate). Rather, CANNE and NECTA appear intent on preserving the status quo and creating fictional reasons why the delays and anticompetitive conduct of existing attachers on the Middle-Mile route should not be investigated by the Commission.

5. Regarding the factual record now before the Commission, NHOS has requested that the Commission investigate the third-party make ready process pertaining to a specific project (the Middle-Mile Project); involving specific utility poles owned by identified providers of telecommunications and electrical services (FairPoint Communications, Unitil and PSNH); and involving identified CLECs (like Tech Valley/segTEL and BayRing) that compete directly with NHOS, and have no incentive to cooperate in performing make ready work necessary for NHOS to complete work on the Project. NHOS stands ready to assist the Commission in its investigation by providing any such additional information as the Commission may determine will be useful and relevant to this matter.

C. Urgency of the Commission's Involvement

6. Because a prompt resolution of the issues raised by NHOS is necessary to ensure that the Middle-Mile Project is constructed by the June 2013 project deadline, NHOS has attempted to avoid creating an overly adversarial situation that would lead to extended litigation with charges and counter charges by multiple parties. Instead, NHOS has sought to invoke the Commission's investigative powers, its good offices, and, if necessary, the potential that the

Commission, in a later phase of this proceeding or a separate proceeding, could take action against parties that are found to have acted improperly.

7. In making its request that the Commission conduct an investigation, NHOS has been reluctant to name individual parties that NHOS believes have acted improperly, and has attempted to structure its submittal in such a way as to minimize the risk that this proceeding will compound the delays and impasse on the Middle-Mile Project. NHOS has taken this approach because, under the current rules and regulatory scheme, third party make ready work is completed, if at all, only when existing attachers choose to cooperate. Thus, NHOS has attempted to limit the level of acrimony and adversarial dealings that would cause the Middle-Mile Project to grind to a complete halt, while providing the Commission with information to allow it to exercise its jurisdiction over this matter and play a role in resolving these issues. In fact, contrary to the implication by NECTA and CANNE that NHOS somehow delayed in filing its Amended Petition, the timing of the filing was the direct result of NHOS's continued efforts to reach out to FairPoint, segTEL, and other relevant parties to try to resolve these issues amicably. Only when these efforts – some of which are detailed below – had not succeeded and the 30 day deadline loomed did NHOS file its Amended Petition. In fact, until FairPoint submitted its August 15 letter to the Commission, NHOS continued to believe that progress was being made and that an amicable solution might be found.

D. NECTA/CANNE Cite No Legal Grounds For Dismissing This Proceeding

8. NECTA and CANNE each argue that this proceeding should be dismissed with prejudice, an outcome that would allow the deficiencies observed by the Commission in the current regulatory structure to persist – apparently for the benefit of NECTA and CANNE members, but to the detriment of the public interest. NECTA and CANNE provide no legal basis

for dismissing this matter. The decision to open this investigation, and to keep it open until the matters at issue have been adequately investigated and addressed, is a matter within the discretion of this Commission. In fact, the suggestion that the proceeding should be dismissed “with prejudice” is contrary to the Commission’s statutory authority pursuant to RSA 374:3 that it “shall have the general supervision of all public utilities and the plants owned, operated or controlled by the same...” as well as with the continuing nature of the Commission’s jurisdiction pursuant. See, e.g., RSA 365:28. The Commission’s authority under RSA 365:5, on which this proceeding is premised, is sufficiently broad to conduct an investigation of the nature requested by NHOS.

9. NHOS has thus far chosen not to seek a declaratory ruling regarding the rights and obligations of pole owners and attaching parties pursuant to N.H. Code of Admin. Rules Puc 207.01. This is because one of the critical issues to be resolved in this matter relates to the rights and obligations created by PAAs to which NHOS is not a party but in which it has a direct interest. As the Commission is well aware, the multitude of PAAs between the various pole owners in New Hampshire and the many entities with attachments to those poles is the critical means by which the Commission’s Ch. 1300 regulations and its authority under RSA 374:34-a and 47 U.S.C. § 224 are implemented. NHOS, like other entities seeking to attach to utility poles in New Hampshire, relies on the pole owners to enforce their rights against other third party attachers and it relies upon the Commission to ensure that the pole owners are properly enforcing their obligations against such third party attachers. If the parties to those agreements fail to exercise their rights and fulfill their obligations, the entire system will grind to a halt and the public interest will be severely harmed.

10. As noted above, two of the entities that are critical to the resolution of disputes over make ready work on the Middle-Mile Project – FairPoint and segTEL – have opted not to intervene in this matter. If the Commission determines that the participation of these and other pole owners and/or existing attachers is necessary to the Commission’s ability to conduct a full investigation of the issues raised by NHOS, the Commission has the authority to require those entities to appear in this matter.

11. As NHOS has previously stated in this proceeding, it believes that the PAAs between the owners of the relevant utility poles and the other entities with attachments on those poles gives the pole owners the right and obligation to move those other entities’ attachments to make room for NHOS’s cable. However, the pole owners, FairPoint in particular, have asserted they are reluctant to exercise their rights under their PAAs because they fear that they will be subject to potential litigation and liability if they do so. Despite that assertion, and as set forth below, FairPoint did exercise its rights under its PAAs and issued 15 day notice letters to both segTEL and MetroCast. This occurred as a direct result of NHOS’s continued efforts, since filing its Petition, to obtain the cooperation of FairPoint and existing attachers in allowing necessary make-ready work to proceed. Unfortunately, FairPoint has failed to enforce its rights under the PAAs and the make ready work has not been performed.

12. In May 2012, NHOS officials met with FairPoint’s New Hampshire State President and Assistant General Counsel, Patrick McHugh, to urge that FairPoint exercise its right under Article 7.1.5 and 7.1.6 of its PAAs and issue notices directing existing attachers to move their facilities within 15 days. FairPoint advised it was already prepared to do so. On June 11, 2012, FairPoint sent 15 day notices to segTEL and MetroCast. See, e.g., Exhibit A (FairPoint 15-day notice to segTEL). On June 13, 2012, FairPoint confirmed to NHOS that it

had sent the 15 day notices “in order to provide suitable space for [NHOS’s] recently licensed applications.” FairPoint advised that if the existing attachers “have not suitably relocated their facilities” within 15 days, NHOS was authorized to hire a third-party contractor, Eustis Cable, or other approved FairPoint contractor, to have the make ready work performed. See Exhibit B (6/13/12 email from FairPoint to NHOS).

13. As a result of FairPoint’s 15 day notice, MetroCast removed the majority of the roadblocks to moving forward with its make ready work. segTEL, however, failed to perform the necessary make-ready work within the required 15 day period, and FairPoint has refused to exercise its rights under the PAA to ensure that the work was completed promptly. On June 19, 2012, FairPoint informed NHOS that because segTEL purportedly had “committed” to completing the required make-ready work by the end of July, FairPoint was rescinding its prior authorization allowing Eustis Cable to perform the work. Instead, FairPoint advised that “[n]o authorization for the movement of Segtel’s [sic] cable will be given till [the July] time frame has expired.” See Exhibit C (6/19/12 email from FairPoint to NHOS).

14. Finally, on July 6, 2012, in response to NHOS’s continued inquiries into the status of the make-ready process, FairPoint informed NHOS that FairPoint “will not be issuing any more 15-day notices to segTEL or MetroCast on behalf of NHOS.” In addition, FairPoint asserted that it “is not the mediator for disagreements,” and denied having the authority “to authorize relocation of CLEC plant.” Finally, FairPoint advised it would “not accept liability for any unauthorized relocation of CLEC plant,” and that NHOS was required to work out on its own “mutually acceptable arrangements with segTEL and MetroCast.” See Exhibit D (7/6/12 email from FairPoint to NHOS). Since July 6, 2012, segTEL has made no concerted effort to

complete the required make-ready work, and FairPoint has shown no further interest in exercising its rights under the PAA to move segTEL's facilities.

15. As for NECTA's allegation that "third-party attachments have been occurring in New Hampshire without incident for over fifty years," this is incorrect. To the contrary, the process places an enormous burden on project budgets and timelines even when attached parties choose to cooperate. When those parties choose not to cooperate, the process can be manipulated to their benefit and provide a significant roadblock to a competing attacher. New attachers are reluctant to bring these issues to the attention of the pole owners due to concern that this would not provide timely resolution, and instead would further damage critical relationships. Left with no alternative, new attachers are more likely to either take it upon themselves to move existing attachments or simply attach without completing the required make ready.

16. This case concerns the difficulties that NHOS has encountered in obtaining the assistance of pole owners in enforcing their rights under pole attachment agreements relating to utility poles along the Middle-Mile Project. While it may bring to light areas in which New Hampshire's regulatory scheme governing pole attachments should be improved, such an investigation is a separate matter, as the Commission has already recognized by opening a separate docket. Similarly, the supposed "fifty years" of history of pole attachments claimed by NECTA is not at issue in this case.

17. Having first argued that the Commission should dismiss the investigation it has opened to consider NHOS's concerns, NECTA then argues that DT 12-246 "should not proceed unless and until the issues in the instant docket are resolved." NECTA Motion to Dismiss at 4. The goal of NECTA and CANNE is clear – avoid a Commission inquiry into pole attachment processes that might give the Commission a better understanding of the gaps in its regulations,

the issues on which attaching parties and pole owners need additional guidance, and the steps that need to be taken so the Commission can better carry out its oversight role pursuant to RSA 374:34-a and 47 U.S.C. § 224.

WHEREFORE, NHOS respectfully requests that the Commission:

- A. Deny NECTA's and CANNE's Motions to Dismiss;
- B. Schedule a procedural conference and technical session, to allow the parties to assist the Commission in determining the proper scope of this proceeding;
- C. Order such other and further relief as it may determine to be just, reasonable, and consistent with the public interest.

Respectfully submitted,

NEW HAMPSHIRE OPTICAL SYSTEMS, INC.

By its Attorneys,

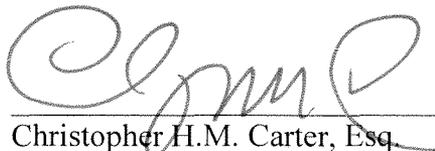


Christopher H.M. Carter, Esq. (#12452)
Hinckley Allen & Snyder, LLP
11 South Main Street, Suite 400
Concord, NH 03301
Tel: 603.225.4334
Email: ccarter@haslaw.com

Date: August 23, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the above date I have forwarded a copy of the foregoing to the persons listed on the service list via electronic mail, and U.S. mail for those unable to be served electronically.



Christopher H.M. Carter, Esq.

Exhibit A

REQUEST FOR TRANSFER/REARRANGEMENTS

Date: **June 11, 2011**

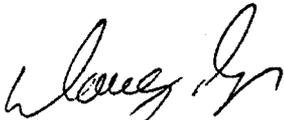
From: **FairPoint Communications**

To: **Segtel Inc.**

Attn: **Jeremy Katz**

This is a fifteen (15) day written notice from FairPoint Communications requesting rearrangement and/or transfers of Segtel Inc. attachments on Utility Poles listed on attached spread sheet. This request is to accommodate New Hampshire Optical Systems Inc. licensed attachments.

Sincerely,



Douglas Cyr

License Administration Group

Exhibit B

From: Cyr, Douglas [mailto:Douglas.Cyr@fairpoint.com]
Sent: Wednesday, June 13, 2012 8:38 AM
To: Steve Janko; Jay Dunn; Bequeath, Aaron; Polyot, Stephen; McHugh, Patrick
Subject: 15 day letter

Hi,

FairPoint Communications is sending a 15 day request to existing third party attachees to transfer or lower their cable(s) in accordance with the terms and conditions of Article 7.1.5 of the Pole Attachment Agreement. This is being done in order to provide suitable space for New Hampshire Optical System's recently licensed applications. At the end of the 15 day interval, if the third parties have not suitably relocated their facilities, then New Hampshire Optical Systems, under Articles 7.1.6 & 7.1.7 has agreed to hire Eustis Cable or an approved FairPoint contractor to perform this make ready work. New Hampshire Optical systems has agreed to pay any damages or related expenses associated with the use of a contractor to perform this work.

Thanks

Douglas Cyr - License Administration Group

FairPoint Communications | 645 Odlin Rd, Bangor, ME 04401 | dcyr@fairpoint.com
www.FairPoint.com | 207.991.6731 office | 207.217.0142 cell | 207.941.1952 fax

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Exhibit C

From: Cyr, Douglas [mailto:Douglas.Cyr@fairpoint.com]
Sent: Tuesday, June 19, 2012 11:46 AM
To: Steve Janko; Jay Dunn
Cc: Bequeath, Aaron; Freeman, Steven
Subject: NHOS/SEGTEL make ready work

Hi Jay & Steve,

On a conference call with Segtel about the transfer/move requests in dispute, Segtel has committed to survey, write the work orders and finish this work by the end of July. FairPoint believes this to be a reasonable time frame and commitment from Segtel for this amount of work. No authorization for the movement of Segtel's cable will be given till this time frame has expired and then will be re-addressed by FairPoint prior to any approval for NHOS to move cables that belong to other companies.

Thanks

Douglas Cyr - License Administration Group

FairPoint Communications | 645 Odlin Rd, Bangor, ME 04401 | dcyr@fairpoint.com
www.FairPoint.com | 207.991.6731 office | 207.217.0142 cell | 207.941.1952 fax

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Exhibit D

From: Freeman, Steven [mailto:Steven.Freeman@fairpoint.com]
Sent: Friday, July 06, 2012 9:09 AM
To: Steve Janko
Cc: Rob Carmichael; Jay Dunn; McHugh, Patrick; Kushnir, Michael E.; Bequeath, Aaron; Taylor, Ryan
Subject: RE: Quick Call

Steve,

FairPoint will not be issuing any more 15-day notices to SegTEL or MetroCast on behalf of NHOS. Both companies have agreed to meet a 60-day window for moves. NHOS is required to work with all other third parties directly in resolving schedules, site surveys and appropriate compensation for the moves.

FairPoint is not the mediator for disagreements. After various discussions with these CLECs' representatives, FairPoint is satisfied that both SegTEL and MetroCast are acting in good faith. FairPoint has no authority to authorize the relocation of CLEC plant, especially when the CLECs have agreed to relocate the plant in conformance with the NHPUC's administrative rules. Final coordination and payment terms is between the various third parties. We will not accept any liability for any unauthorized relocation of CLEC plant, and doing so is at your own risk. We will reiterate our position that NHOS work out mutually acceptable agreements with SegTEL and MetroCast.

Thanks,
Steve

Steven W. Freeman - Director of Network Engineering
FairPoint Communications | 875 Holt Ave, Manchester, NH 03109 | steven.freeman@fairpoint.com
603.695.1989 office | 603.703.9761 cell | 603.695.5656 fax

From: Steve Janko [mailto:sjanko@waveguidefiber.com]
Sent: Monday, July 02, 2012 5:07 PM
To: Freeman, Steven; Bequeath, Aaron
Cc: Rob Carmichael; Jay Dunn; McHugh, Patrick; Kushnir, Michael E.
Subject: RE: Quick Call

Steve,

Thanks for getting back to me. Do you have a position regarding the MetroCast make ready? I spoke with Moira Campbell, Regional Manager for MetroCast, last week and asked when she could have the work completed. All should could say is they are working on it. Have they provided FairPoint with a real schedule? Is FairPoint willing to let Eustis begin doing MetroCast make ready after the holiday?

For the record. segTEL asked us to participate in their extremely time consuming make ready surveys. To date they have completed the survey for one application and the next survey isn't scheduled until Friday 7/7. At this pace they will have no make ready completed in July. Their agenda for these walkouts does not appear to be the expeditions completion of

make ready. They have made many comments that the make ready engineering (completed by the pole owners) is not adequate to provide NHOS safe access to the poles.

Steve

From: Freeman, Steven [mailto:Steven.Freeman@fairpoint.com]
Sent: Monday, July 02, 2012 4:36 PM
To: Steve Janko; Bequeath, Aaron
Cc: Rob Carmichael; Jay Dunn; McHugh, Patrick
Subject: RE: Quick Call

Steve,

We are working on providing an official position on the 15-day notices. At this time we will not be issuing any more to SegTel as they have agreed to move within a reasonable timeframe. We will provide that response by end of week due to the heavy vacations around the 4th of July.

Thanks,
Steve

Steven W. Freeman - Director of Network Engineering
FairPoint Communications | 875 Holt Ave, Manchester, NH 03109 | steven.freeman@fairpoint.com
603.695.1989 office | 603.703.9761 cell | 603.695.5656 fax

From: Steve Janko [mailto:sjanko@waveguidefiber.com]
Sent: Friday, June 29, 2012 4:35 PM
To: Bequeath, Aaron; Freeman, Steven
Cc: Rob Carmichael; Jay Dunn
Subject: RE: Quick Call

Gentlemen,

Is there any update with regards to FairPoint's position on this?

Steve

From: Steve Janko [mailto:sjanko@waveguidefiber.com]
Sent: Tuesday, June 26, 2012 10:43 AM
To: 'Bequeath, Aaron'
Cc: 'Freeman, Steven'
Subject: RE: Quick Call

Thanks for getting back to me on your day off. A few thoughts for your meeting with legal.

- Pat McHugh suggested that FairPoint was concerned about Rule PUC 1303.06 providing third parties 60 days after written notice to conduct make ready. There is nothing in this rule that suggest that the third party needs to have a clear path to do this work when they are notified. Providing them with a list of pending make ready gives them an understanding of the scope and the ability to make the appropriate arrangements needed to get the work done when they have clear path. As such, our ask is to have FairPoint send the challenging third parties all form 3s where make ready engineering is complete so that this 60 day clock starts ticking now.

- We forwarded FairPoint additional make ready where segTEL has clear path. I would like to have that work sent to segTEL with a 15 day notice as soon as possible.

On a slightly different topic, we have not heard anything regarding the status of the MetroCast's moves, please keep us updated so that we can make the appropriate arrangements.

Enjoy your day off.

Steve

From: Bequeath, Aaron [<mailto:Aaron.Bequeath@fairpoint.com>]
Sent: Tuesday, June 26, 2012 9:55 AM
To: Steve Janko
Cc: Freeman, Steven
Subject: RE: Quick Call

Hi Steve –

I am off today, however, we are conferring with legal and we will schedule a call to discuss this further.

Aaron Bequeath - Manager - NNE License Administration Group and Reimbursable Construction
FairPoint Communications | 645 Odlin Road, Bangor ME 04401 | aaron.bequeath@fairpoint.com
207.377.1989 office | 207.712.1486 cell |

From: Steve Janko [<mailto:sjanko@waveguidefiber.com>]
Sent: Tuesday, June 26, 2012 9:52 AM
To: Bequeath, Aaron
Subject: Quick Call

Aaron,

I spoke with Doug yesterday about how we are going to proceed with the notices to third parties and he suggested that the conversation may be above him at this point. I would really appreciate a few minutes of your time to discuss.

I'm available today until 1:30 and after 4:30 if you could give me a call.

Thanks,

Steve

Steve Janko | Chief Technical Officer
Waveguide Inc. sjanko@waveguidefiber.com
14 Kidder Road, Chelmsford, MA 01824
C: 978.846.0336 F: 978.256.8908

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