

**EXHIBIT A**

**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS.**

**SUPERIOR COURT**

segTEL, Inc.

v.

The University System of New Hampshire,  
New Hampshire Optical Systems, Inc., and  
Waveguide, Inc.

No. 13-CV-023

**ORDER**

The plaintiff, segTEL, Inc., brought this action for damages and equitable relief against the defendants, the University System of New Hampshire (“USNH”), New Hampshire Optical Systems, Inc. and Waveguide, Inc. (collectively “NHOS”). The suit arises out of the defendants’ involvement in the construction of a federally funded fiber optic network in New Hampshire. The plaintiff, a competitor of NHOS, seeks relief based on five counts: (1) declaratory judgment (Count I); (2) violation of NH RSA 358-A (Count II); (3) trespass to chattels (Count III); (4) intentional interference with contract (Count IV); and (5) injunctive relief (Count V). USNH and NHOS filed separate motions to dismiss. Because the plaintiff’s writ did not plead facts susceptible of a construction that supports a finding of an agency relationship between USNH and NHOS and because the New Hampshire Public Utilities Commission (“PUC”) has primary jurisdiction to provide the equitable relief that the plaintiff seeks, the motions to dismiss are GRANTED.

The National Telecommunications and Information Administration (“NTIA”) awards grants through the Broadband Technology Opportunities Program (“BTOP”) to improve broadband infrastructure and promote broadband Internet usage in the United States. In 2010, the

NTIA awarded USNH a BTOP grant for the construction of a 700-mile fiber optic network in New Hampshire known as the Middle Mile Project. Upon receiving the grant, USNH solicited bids for the construction and installation of the new network. New Hampshire Optical Systems, Inc. was the winning bidder. As a result, it was responsible for building, owning, operating and managing the network. New Hampshire Optical Systems, Inc. in turn entered into a contract with Waveguide, Inc., a commonly owned entity, to do the construction work. The plaintiff had previously entered into license agreements with utility pole owners for space to attach its fiber optic cables. NHOS had also entered into license agreements for space on some of the same poles. NHOS asked plaintiff to perform make-ready work by moving its network infrastructure on the commonly shared poles to accommodate NHOS. NHOS and the plaintiff were unable to agree on the scope and terms of the make-ready work.

The plaintiff alleges, *inter alia*, that the defendants relocated and interfered with its infrastructure on utility poles in various towns; interfered with the control, maintenance, and repair of its infrastructure; interfered with its contractual obligations to other companies; and refused to pay its rates for the make-ready work. Writ, ¶¶ 59, 70. USNH asserts that the plaintiff has neither alleged any facts that would give rise to a claim of liability, nor alleged any facts that would permit a finding that an agency relationship exists between USNH and NHOS. USNH's Motion to Dismiss ("USNH Motion"), 5-7. NHOS argues that the plaintiff's writ raises the same work, issues, and disputes that are now being investigated by the PUC. Accordingly, NHOS maintains that primary jurisdiction requires judicial abstention pending the administrative disposition of the issue. NHOS's Motion to Dismiss ("NHOS Motion"), 8-9. The plaintiff objects. It argues that USNH is actively engaged in the construction process and that it enforces regulations as required by the BTOP grant. Plaintiff's Objection to the USNH Motion ("USNH Objection"), 7-8. In re-

response to NHOS's primary jurisdiction argument, the plaintiff asserts that the PUC lacks the authority to govern this dispute and that the PUC proceedings are addressed to issues that are materially different than those raised in this lawsuit. The court agrees with the defendants.

In ruling on the motions to dismiss, the court must determine whether a plaintiff's allegations are "reasonably susceptible of a construction that would permit recovery." *Bohan v. Ritzo*, 141 N.H. 210, 212 (1996). This determination requires the court to test the facts in the complaint against the applicable law. *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 44 (1987). In rendering such a determination, the court must assume the truth of all well-pleaded facts alleged by the plaintiff and construe all inferences in the light most favorable to the plaintiff. *Bohan*, 141 N.H. at 213. "[A] plaintiff must ... plead sufficient facts to form a basis for the cause of action asserted." *Mt. Springs Water Co. v. Mt. Lakes Vill. Dist.*, 126 N.H. 199, 201 (1985). A court "need not accept statements in the complaint that are merely conclusions of law." *Id.*

First, USNH asserts that the plaintiff's writ fails to plead facts that would support a finding of liability, either directly or as a principal of NHOS. The court agrees. The plaintiff pled that USNH acts as a conduit for the BTOP grant to enable the construction of the network and, in return, receives a right to use a portion of the network after its completion. There are no allegations that USNH is directly responsible for attaching cables to utility poles, moving cables, requesting make-ready work, paying for make-ready work, or interfering with the plaintiff's network infrastructure. The occurrences of improper installation alleged in the plaintiff's writ were carried out by NHOS. Additionally, the necessary factual elements to establish agency involve: (1) authorization from the principal that the agent shall act for him or her; (2) the agent's consent to so act; and (3) the understanding that the principal is to exert some control over the agent's actions. *VanDeMark v. McDonald's Corp.*, 153 N.H. 753, 760-61 (2006). The plaintiff's writ at ¶ 53

does assert a legal conclusion of agency; however, there are no factual allegations specifying how USNH controlled or directed NHOS in the construction of the network. *See Dent v. Exeter Hosp. Inc.*, 155 N.H. 787, 792 (2007) (control turns upon the principal manifesting some continuous prescription of what the agent shall or shall not do). Without evidence of control, a principal-agent relationship cannot exist. *Herman v. Monadnock PR-24 Training Council, Inc.*, 147 N.H. 754, 759 (2002).

Additionally, the plaintiff's writ does not plead facts that would support a finding that USNH is vicariously liable for NHOS's actions. An employer is not liable for the negligence of an independent contractor. *Lawyers Title Ins. Corp. v. Groff*, 148 N.H. 333, 336 (2002). There are three exceptions to this general rule: (1) negligence in selecting, instructing, or supervising the contractor; (2) inherently dangerous activities; and (3) instances in which the employer is under a nondelegable duty. *Id.* A duty will be deemed nondelegable "when the responsibility is so important to the community that the employer should not be permitted to transfer it to another." *Kleeman v. Rheingold*, 598 N.Y.S.2d 149, 153 (N.Y. Ct. App. 1993). The rule rests on policy considerations. *Id.* at 152. The plaintiff argues vicarious liability under the third exception—that USNH owes it a nondelegable duty. The plaintiff asserts that that the nondelegable duty exists because USNH is required to "comply, and must require each contractor and subcontractor to comply, with all applicable federal, state and local laws and regulations." USNH Objection, 7; Writ, ¶ 19 (Emphasis omitted). USNH's obligations, however, are to NTIA, not to third parties like the plaintiff. The NTIA imposes these obligations to ensure grants are administered properly, track programmatic and fiscal performance, and to be accountable for the protection of taxpayer investments. USNH's obligations under the grant are important to NTIA, not "so important to the community that the employer should not be permitted to transfer it to another." *Kleeman*,

598 N.Y.S.2d at 153. Consequently, the facts alleged in the plaintiff's writ cannot support the existence of a nondelegable duty assumed by USNH.

Having resolved the USNH motion, it remains to address the issues raised by NHOS. Specifically, NHOS asserts that the court must abstain under the doctrine of primary jurisdiction. The plaintiff's objection argues that the issues raised in this lawsuit do not overlap with the regulatory issues currently being adjudicated before the PUC. The plaintiff's argument is unconvincing.

The rule of deference to primary jurisdiction has been stated as follows:

In order to encourage the exercise of agency expertise, preserve agency autonomy, and promote judicial efficiency, New Hampshire has long recognized the doctrine of primary jurisdiction. The doctrine mandates that a court refrain from exercising its jurisdiction to decide a question until it has first been decided by a specialized agency that also has jurisdiction to do so. *New Hampshire Div. of Human Servs. v. Allard*, 138 N.H. 604, 607 (1994). *See also Konefal v. Hollis/Brookline Coop. Sch. Dist.*, 143 N.H. 256, 258 (1998) ("primary jurisdiction in an agency requires judicial abstention until the final administrative disposition of an issue, at which point the agency action may be subject to judicial review") (citation and internal quotations omitted).

*Pennichuck Corp. v. City of Nashua*, Hills. S. Superior Ct. No. 04-E-0062, Order of August 31, 2004 (2004 WL 1950458, at \*8), *aff'd on other grounds Pennichuck Corp. v. City of Nashua*, 152 N.H. 729 (2005). Here, the PUC has both the expertise and the authority to resolve disputes arising out of pole attachment agreements ("PAAs"). Both the plaintiff and NHOS are parties to New Hampshire PAAs. Indeed, the PUC is actively engaged in the issues raised in the plaintiff's writ—it has opened two dockets: (1) DT 12-107 to investigate the dispute over the make-ready work on the Middle Mile Project; and (2) DT 12-246 to establish the public policy governing pole attachment practices in New Hampshire. The plaintiff is a party (and active participant) in DT 12-107. *See* NHOS Motion, Exh. D, PUC Order #25,407 (September 5, 2012) at 9 (designating the plaintiff—a public utility—as a party).

The plaintiff argues that the claims it has asserted in its writ are different than those being adjudicated by the PUC. The court disagrees. The PUC is examining, *inter alia*, the reasonableness of the plaintiff's rates for make-ready work (Writ ¶¶ 23-24), the plaintiff's responsibilities and the timing of moving its infrastructure to accommodate new licensees like NHOS (Writ ¶¶ 15-17, 23), available remedies for NHOS when existing attachers refuse to perform make-ready work (Writ ¶¶ 18-22), and standards applicable to the attachment of new facilities on utility poles (Writ ¶¶ 9-12). The court acknowledges that the plaintiff's claims for damages in Count II (violation of NH RSA 358-A), Count III (trespass to chattels) and Count IV (intentional interference with contract) may ultimately require adjudication in this court. The resolution of those claims, however, will turn on the whether NHOS has violated the rights and responsibilities of the various participants who install facilities on poles that will be established in the dockets actively being adjudicated by the PUC. Thus, any action taken by this court would be premature. *See Pennichuck Corp. v. City of Nashua, supra*. Consequently, this court declines the plaintiff's invitation to substitute its judgment for the PUC's administrative expertise in the first instance.

Based on the foregoing, the court concludes that the plaintiff's writ is not susceptible of a construction that would permit recovery against USNH and, further, that this court should defer to the PUC's primary jurisdiction to establish make-ready policies and to adjudicate the make-ready dispute. Accordingly, the defendants' motions to dismiss are GRANTED.

**So ORDERED.**

**Date: April 3, 2013**

  
LARRY M. SMUKLER  
PRESIDING JUSTICE

**EXHIBIT B**

# The State of New Hampshire

SUPERIOR COURT

MERRIMACK COUNTY

( ) COURT

(x) JURY

## WRIT OF SUMMONS

segTEL, Inc.  
325 Mount Support Road  
Lebanon, NH 03766

v.

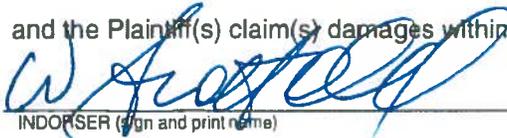
University System of New Hampshire, c/o Lorna H. Jacobsen, Myers Center,  
Durham, NH 03824;  
New Hampshire Optical Systems, Inc., 99 Pine Hill Road, Nashua, NH 03063; and  
Waveguide, Inc., 99 Pine Hill Road, Nashua, NH 03063

The Sheriff or Deputy of any County is ordered to summon each defendant to file a written appearance with the Superior Court at the address listed below by the return day of this writ which is the first Tuesday of February, 2013 .  
YEAR MONTH

The PLAINTIFF(S) state(s):

See Declaration attached hereto and incorporated herein by reference.

and the Plaintiff(s) claim(s) damages within the jurisdictional limits of this Court.

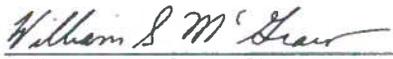
  
\_\_\_\_\_  
INDORSER (Sign and print name)

12/14/12  
DATE OF WRIT

### NOTICE TO THE DEFENDANT

The Plaintiff listed above has begun legal action against you. You do not have to physically appear in Court on the return day listed above since there will be no hearing on that day. However, if you intend to contest this matter, you or your attorney must file a written appearance form with the Clerk's Office by that date. (Appearance forms may be obtained from the Clerk's Office.) You will then receive notice from the Court of all proceedings concerning this case. If you fail to file an appearance by the return day, judgment will be entered against you for a sum of money which you will then be obligated to pay.

Tina L. Nadeau  
Witness, ~~ROBERT LYNN~~, Chief Justice, Superior Court.

  
\_\_\_\_\_  
William S. McGraw, Clerk  
NH Superior Court Merrimack County  
PO Box 2880  
Concord, NH 03302-2880  
(603) 225-5501

  
\_\_\_\_\_  
SIGNATURE OF PLAINTIFF/ATTORNEY  
NIXON PEABODY LLP  
W. Scott O'Connell, Esq. (NH Bar No. 9070)  
\_\_\_\_\_  
PRINTED/TYPED NAME  
900 Elm Street, 14th Floor  
\_\_\_\_\_  
ADDRESS  
Manchester, NH 03101 / (603)628-4000  
\_\_\_\_\_  
PHONE

STATE OF NEW HAMPSHIRE

*MERRIMACK, SS.*

*DOCKET NO.*

segTEL, Inc.

vs.

The University System of New Hampshire,

New Hampshire Optical Systems, Inc., and

Waveguide, Inc.

**DECLARATION TO THE WRIT OF SUMMONS**

NOW COMES segTEL, Inc. (“segTEL”), by and through counsel, and brings this petition for damages and injunctive relief arising from the University System of New Hampshire (“USNH”), New Hampshire Optical Systems, Inc. (“NHOS”), and Waveguide, Inc. (“Waveguide”)’s improper actions with regard to segTEL’s fiber optic infrastructure in New Hampshire.

**INTRODUCTION**

Plaintiff segTEL owns and operates a fiber optic infrastructure in New Hampshire that currently runs more than 500 miles on approximately 20,000 utility poles. segTEL built this physical plant over 8 years after painstaking and costly work to secure all the necessary licenses and approvals from pole owners, paid to make room on the poles and for the relocation of other utilities, and purchased and installed its infrastructure. segTEL invested over \$20 million to build this network, and its customers made substantial investments of millions of dollars as well, in order to ensure that they received a specifically stylized network suited to their needs. segTEL’s customers use its network to serve millions of customer in New Hampshire, including

cellular telephone customers, wireless smartphone customers, and satellite television customers. segTEL is under long-term contractual obligations to its customers and has rigid compliance and maintenance requirements to meet, and is subject to severe penalties for non-compliance.

USNH, as recipient of an approximately \$44 million federal Broadband Technology Opportunities Program (“BTOP”) grant for broadband infrastructure projects, is attempting to build a fiber optic network in New Hampshire (the “Middle Mile Project”). In its haste to collect maximum federal dollars under the Middle Mile Project grant, and to ensure that the strict build timeframe required by the government is met<sup>1</sup>, USNH, NHOS, and Waveguide have ignored and violated numerous applicable legal standards and have inappropriately trespassed on segTEL’s property. Further, the defendants’ improper and unlawful actions are tortiously interfering with segTEL’s contracts with its customers and pole owners. The defendants have, *inter alia*: (1) installed fiber optic cable in violation of the applicable National Electric Code (“NEC”) and the National Electrical Safety Code (“NESC”); (2) installed fiber optic cable in locations that only segTEL is allowed to occupy under governing licenses; (3) installed fiber optic cable in ways that improperly “cross<sup>2</sup>,” “box-in<sup>3</sup>,” “wrap<sup>4</sup>,” and “close connect<sup>5</sup>” the segTEL cables which

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<sup>1</sup> The BTOP program documents state: “While the completion time will vary depending on the complexity of the project, grant recipients must substantially complete projects supported by this Program no later than two years, and projects must be fully completed no later than three years, following the date of issuance of the grant award.” See Recovery Act, Section 6001(d)(3). The award period for USNH extends from July 1, 2010 – June 3, 2013.

<sup>2</sup> “Crossing” wires occurs where a utility attaches to a certain spot on one pole, and then attaches either higher or lower on the next pole, crossing other utility lines in the process. This practice not only violates applicable codes and regulations, such as the Telcordia Blue Book, which requires that clearance between cables anywhere along the span should be at least 4 inches, it also causes damage to the crossed lines because the lines touch and rub each other, creating abrasions and holes. It also makes the lines much more difficult to work on safely and more difficult and expensive to maintain.

<sup>3</sup> “Boxing in” (not to be confused with “boxing a pole” which is a legal, although rarely used, practice) occurs where a utility crosses another utility’s wires repeatedly, placing existing wires between its new wires and the pole line, such that the existing wires cannot be moved without first removing the new wires. When a utility’s cable is boxed in, it is much more difficult to access the cables to perform even routine maintenance and is less safe for the workers working on the line.

<sup>4</sup> “Wrapping” occurs when wires are crossed to the extent that they are intertwined and tangled, and must be  
*(Footnote continued on next page)*

causes wear and degrades the segTEL infrastructure; and (4) installed fiber optic cable in violation of applicable regulations and standards, including attaching too close to power lines<sup>6</sup>, attaching unapproved hardware<sup>7</sup>, attaching so close to other attachments that the pole could be considered defective<sup>8</sup>, attaching too close to the top of a pole<sup>9</sup>, and “trapping” the pole<sup>10</sup>. Not only do these actions violate applicable contractual and legal regulations, they also present a danger to public safety, and the safety of the pole workers, by making the poles more dangerous to work on, and presenting the risk that wires may become electrified.

All of these actions have caused-- or will cause-- segTEL significant monetary damages. Many of these improper installations create unsafe, unstable, unreliable or unnecessarily complicated working conditions for utility personnel called upon to fix portions of the

physically cut in order to become untangled. Wires that are wrapped together rub together and create holes and abrasions in the cables, damaging them and potentially disrupting service. Workers are not able to service wires that are wrapped together without cutting and splicing them back together. Cutting and splicing are highly labor intensive and costly processes which can take more than 24 hours of labor time to complete, require interruptions in service to any customers served by that cable, and can result in long-term outages.

<sup>5</sup> “Close connecting” occurs when attachments on utility poles are placed too close together. Applicable codes and regulations require attachments to be made: (1) at least 12 inches apart, from each other, unless otherwise agreed to by all parties, to avoid crossing and abrading; (2) at least 40 inches from power so that the wires do not become electrified and potentially harm workers and the public; and (3) bolted at least 4 inches apart to protect the integrity of the pole. In addition, when a utility attaches too close to another utility’s wires it makes it much more difficult to work on the wires and perform routine maintenance, such as “lashing,” which is the process of binding two facilities together.

<sup>6</sup> Communications lines are required to be a minimum of forty inches from any ungrounded power lines or equipment, in order to ensure that communications workers do not come into contact with power, and that communications lines do not become energized, which is a public safety hazard.

<sup>7</sup> The NESC, Rural Utility Service (“RUS”) Standards, and the Telcordia Blue Book set specific standards for hardware used on utility poles. Connectors must either screw securely into the pole or be secured with bolts that pass completely through the pole. Connectors not specified for use by the RUS are not authorized for federally funded installations.

<sup>8</sup> The NESC and Telcordia Blue Book do not allow bolts to be installed closer than four inches apart, in order to ensure the integrity of a wooden pole.

<sup>9</sup> The Telcordia Blue Book requires that attachments be made at least eight inches from the top of any pole.

<sup>10</sup> “Trapping” a pole is when the steel messenger strand is placed on the field side of a pole, while the fiber optic cable of the same attachment is placed on the street side, trapping the pole between the two facilities. Not only is such a practice not industry standard and not acceptable under any of the safety standards, it effectively ensures that the attachment can never be moved without cutting the messenger strand which supports the fiber optic cable.

infrastructure damaged or otherwise in need of repair. Further, all of these actions interfere with segTEL's contractual obligations to its clients, who may claim default. Because these actions are being done with one-time subsidies in the form of federal grant monies, it is believed that the defendants will have inadequate resources to restore the infrastructure and pay the resulting damages caused to segTEL. Such a result will cause irreparable harm that can only be remedied by injunctive relief preventing the defendants from further violations of applicable standards, laws and the rights of segTEL and its customers.

### **PARTIES**

1. segTEL, a wholly owned subsidiary of Tech Valley Communications ("Tech Valley"), is a New Hampshire corporation with a principal place of business located at 325 Mount Support Road, Lebanon, New Hampshire. segTEL constructs, owns, and maintains fiber optic facilities in New England, which it uses to provide telecommunication and other services to its customers throughout New Hampshire, Vermont, Massachusetts, Maine, and New York. segTEL is a public utility duly registered and authorized by the Federal Communications Commission ("FCC") and the New Hampshire Public Utilities Commission ("NH PUC" or "Commission").

2. USNH is a body politic and corporate created under RSA 187-A:1 "the main purpose of which shall be to provide a well-coordinated system of public higher education ..." It maintains its executive offices at Dunlap Center, 25 Concord Road, Durham, New Hampshire. It is unclear under what authority USNH is acting to build out a fiber optic network in the state.

3. NHOS is a New Hampshire corporation with a principal place of business located at 99 Pine Hill Road, Nashua, New Hampshire. NHOS was created solely for the purposes of receiving grant money from the Middle Mile Project. NHOS applied for and was granted status as a public utility in New Hampshire based on the provision of retail Ethernet services. NHOS was the successful bidder in a request for proposals issued by USNH for the build out of the Middle Mile Project.

4. Waveguide is a Massachusetts corporation with a principal place of business located at 14 Kidder Road, Chelmsford, Massachusetts. Waveguide has permission to operate in New Hampshire as a foreign corporation. Waveguide provides engineering, management, construction, and maintenance for fiber optic networks. Waveguide is a contractor for, and agent of, NHOS. Waveguide has the same principal and the same shareholders as NHOS.

#### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over this matter pursuant to RSA 498:1, 491:7 and 491:22.

6. Venue is proper in this court because (1) the actions described herein took place, at least in part, in this county, and, (2) the goods and chattels affected by the defendants' improper actions are located in this county.

#### **FACTS COMMON TO ALL COUNTS**

##### **A. segTEL's New Hampshire Fiber Optic Infrastructure**

7. segTEL owns and maintains fiber optic network infrastructure throughout New Hampshire and has been actively engaged in business in New Hampshire for over a decade. segTEL currently has more than 500 miles of cable attached to approximately 20,000 poles in New Hampshire. segTEL's pole attachments in question in this case have been in place for as long as eight years.

8. segTEL's infrastructure consists in pertinent part of fiber optic cable attached to specific locations on utility poles determined by agreement with, and licenses from, the utility pole owners. The locations of attachments must be in compliance with licenses issued by the pole owners, and must be consistent and identifiable, for a number of reasons, including: (1) safety of the pole and plant for the utility workers that must access the pole and attachments to it;

(2) safety of police and fire officials who must identify utility plant and notify utilities in the event of emergencies; (3) maintenance of the pole by its owners; and (4) maintenance of attached infrastructure such as fiber optic cables by its owners.

9. The integrity of this infrastructure is important to the public because safe and reliable electric and telephone utility service is in the public interest. In evaluating the public good, the NH PUC considers: (1) whether there exists a public need for the service; and (2) whether the applicant has the capability of fulfilling that need by providing safe, adequate, and reliable service. When a franchised utility fails to meet this standard by providing service which is not safe and compliant with applicable codes, and the utility is unwilling or unable to bring its system into compliance with applicable standards, the public good requires that the franchise be suspended or revoked. *See Re Claremont Gas Light Co.*, 68 N.H. P.U.C. 231, April 27, 1983.

10. segTEL has legal, regulatory, and contractual obligations to ensure safe and reliable service to the public. As a public utility licensed by the FCC, segTEL must maintain and update substantial network documentation and licenses that accurately reflect field conditions. segTEL, as well as NHOS, is obligated to comply with the National Electric Safety Code (“NESC”), and the National Electrical Code (“NEC”) as adopted in NH RSA 155A:1(IV), and SR1421, the Blue Book Manual of Construction Procedure issued by Telcordia Technologies (“Telcordia Blue Book”), and Occupational Safety and Health Administration (“OSHA”) Regulations.

11. The NESC establishes the following requirements:
- a. Communications facilities must be not less than thirty inches from a grounded neutral and not less than forty inches from load-carrying power facilities of specific voltage (Rule 235C);

- b. A communication worker safety zone shall be maintained between power space and communications space, and no hardware may be placed in the safety zone (Rule 238);
- c. There must be not less than twelve inches of spacing between communications cables at the pole, and not less than four inches between different communications utilities anywhere in the span (Rule 235H2); and
- d. Utilities must maintain spacing between facilities and correct non-compliant spacing as soon as the utility is aware of its non-compliance (Rule 230I).

12. FairPoint, a significant pole owner in New Hampshire, uses the Telcordia Blue Book, SR-1421, Issue 4, issued December 2007, as its safety and construction standard.

Attachers such as segTEL and NHOS are both subject to the following rules:

- a. Rule 3.2, “Clearances Between Communication Facilities,” requires that the clearance between communication cables be at least 12 inches, and bolt holes “must never” be closer than 4 inches apart. This is because spacing bolts closer than 4 inches from each other compromises the integrity of the pole. Furthermore, the vertical clearance between cables anywhere along the span should be at least 4 inches, ensuring that wires do not cross and touch each other.
- b. Rule 4.5 requires that entities provide sufficient support for cables in order to meet the clearance minimums in Rule 3.2.
- c. Rule 3.2.1 provides a hierarchy for the pole, requiring that heavier metallic plant be located lowest on the pole.

13. The integrity of segTEL’s infrastructure is essential to its customers.

Interruptions, degradation, or impairments of service to customers impose severe monetary and reputational consequences on segTEL, and harm to segTEL's customers. *See infra*, Count IV. segTEL's customer agreements specify rigid advance notice and process requirements for all network modifications, including all non-emergency routine maintenance such as relocating a cable on a utility pole. Due to the business use its customers make of these services, segTEL's customers have demanded and received contract terms that establish severe penalties for any disruptions in service. Penalties include the loss of months of revenues and can lead to a process that can end 5-7 year contracts currently in place. In addition, segTEL is contractually obligated to abide by all applicable legal and regulatory rules mentioned above.

14. In New Hampshire, longstanding practice calls for competitive local exchange carriers such as segTEL to enter into pole attachment agreements with pole owners. segTEL is a party to no fewer than sixteen such agreements, covering approximately 20,000 utility poles in New Hampshire, dating back to 2004. While these agreements vary in rates, terms and conditions, each of these agreements requires segTEL to maintain its attachments in a manner consistent with safety codes and generally applicable engineering practices. In the event that segTEL's plant is out of compliance, it must bring it into compliance at its own expense, or the pole owners have the authority to sever the agreements and require segTEL to remove its attachments. Losing its authorization to maintain pole attachments would mean segTEL could no longer meet its contractual obligations to its customers.

15. When utilities obtain licenses to attach to poles, the existing attachers have the responsibility to move their respective infrastructure to accommodate the new licensee. The process of moving infrastructure is known in the industry as "make-ready" work. The new attacher is financially responsible for the make-ready work incurred by existing attachers. The

cost for make-ready work can be as much as \$20,000 per pole and can be a difficult process to perform without causing customers to lose service. Because poles often have multiple attachers, the make-ready work needs to be sequentially performed. This means that attachers must wait for the make-ready work of others to be performed before their own can be undertaken.

16. Because of the significant obligations it has to its customers, segTEL only permits third party contractors approved and hired by it to perform its make-ready work and all work on its live network. Like most utility companies in the industry, it does not allow other attachers, contractors, or subcontractors to perform its make-ready work. segTEL has repeatedly informed the defendants that they are not authorized to move, relocate, or perform make-ready work on the segTEL infrastructure. The defendants have disregarded this instruction, have tampered with, interfered with, or moved segTEL facilities and property, and have performed make-ready work that is to be done only by segTEL. These improper actions have put segTEL out of compliance with its legal and regulatory obligations, as well as its contractual obligations to pole owners and customers.

17. The process for requesting make-ready from third-party attachers, which must be completed before new attachments can be safely made to a pole, is not regulated in New Hampshire. segTEL and other third-party attachers have historically worked out rates, terms, and conditions for third-party make-ready work cooperatively, either by negotiating agreements or by setting out rates in a publicly-filed rate sheet pursuant to Commission rules. segTEL's rate sheet is not a tariff, but under NH PUC rules, it is presumed to be just and reasonable.

#### **B. USNH's Efforts to Build a Fiber Optic Network in New Hampshire**

18. The Middle Mile Project is funded from an approximately \$4 billion BTOP grant

program administered by NTIA<sup>11</sup> as part of the American Recovery and Reinvestment Act and intended to help bridge the technological divide, create jobs, and improve education, health care, and public safety in communities across the country.

19. Upon information and belief, in 2010, USNH was awarded an approximately \$44 million BTOP grant for the purpose of deploying or enhancing more than 700 miles of fiber to create an open access network enabling local Internet service providers to offer enhanced broadband service. Section 8C of the Special Award Condition document for the BTOP grant addresses construction-related requirements. It states that the grant recipient “shall comply, and must require each contractor and subcontractor to comply, with all applicable federal, state and local laws and regulations.” (emphasis added).

20. Upon information and belief, NHOS is a startup company created in 2010 for the sole purpose of bidding on the work requested by USNH to fulfill the requirements of the BTOP grant made to USNH. After winning bids, NHOS is responsible for building, operating and managing the network, and contracts out construction to its commonly owned entity, Waveguide. At the time of NHOS’s creation, it had no operating history, no credit history, no customers, and no contracts for customers. According to quarterly project filings with the NTIA, USNH reports that the project has no signed agreements with broadband wholesalers or so-called “last mile”<sup>12</sup> providers since the Middle Mile Project’s inception in 2010. Nonetheless, NHOS is purchasing substantial inventory from multiple vendors, and hiring contractors and sub-contractors to perform work. NHOS appears to have no employees independent of its contractor, Waveguide.

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<sup>11</sup> “NTIA” or “National Telecommunications and Information Administration,” located within the Department of Commerce, is the United States Executive Branch agency that is principally responsible by law for advising the President of the United States on telecommunications and information policy issues.

<sup>12</sup> The phrase “last mile” is used by the telecommunications and cable television and internet industries to refer to the final leg of the telecommunications networks delivering communications connectivity to end-user or retail customers; the “last mile” of a network is the part that actually reaches the ultimate beneficiary of the services.

21. It is the duty of every public utility to ensure that its service and facilities are reasonably safe and adequate and in all other respects just and reasonable. RSA 374:1.

22. As federal grantees, the defendants are required to comply with certain regulations set out in 7 C.F.R. 1753, Telecommunications System Construction Policies and Procedures and 7 C.F.R. 1755, Telephone Standards and Specifications. Federal telephone standards require grantees and their contractors and agents to follow the requirements set out in relevant Rural Utilities Service (“RUS”) telecommunications bulletins, including, but not limited to, Bulletin 1753F-152 Form 515c, Specifications and Drawings for Construction of Aerial Plant. RUS regulations incorporate the NESC by reference, and require all grantees to comply with both the RUS regulations as well as all state standards, and to follow the more stringent requirements in the event of any conflict.

**C. Defendants’ Refusal to Pay segTEL’s Published Rates for Necessary Make-Ready Work**

23. The requirements as to how new telecommunications utilities may attach to poles in New Hampshire are well known to the defendants. USNH has recently stated the following in its mandatory filings with the federal government:

In New Hampshire, third party Make-Ready costs and timelines stand as primary roadblocks to constructing broadband networks. **The Make-Ready process requires coordination between the pole owners and the telecommunications firms that are already attached to the poles. In New Hampshire, each third party is responsible for moving its own wires and equipment.** As a result, each third party is free to establish its own pricing and timelines, and no rules or procedures exist to prevent excessive pricing or payment demands that contravene the policies underlying PUC 1300 and the federal and state broadband policies. In addition to meeting with the New Hampshire Public Utilities Commission, NTIA, and Federal and NH state representatives, NHOS continues to work with the utility pole owners and Competitive Local Exchange Carriers (CLECs) to complete Make-Ready for this project. PUC 12-246 was opened last quarter to investigate rules regarding pole access in NH.

USNH Third Quarter 2012 Report to National Telecommunications and Information

Administration (emphasis added).

24. Despite this unambiguous obligation, the Defendants have refused to confirm that they will pay segTEL its published rates for make-ready and other work they have requested that segTEL perform.

#### **D. Defendants' Improper Attachments and Self Help**

25. As part of the Middle Mile Project build out, the defendants have improperly trespassed on, moved, occupied, and otherwise tampered with segTEL's network infrastructure on utility poles, putting segTEL in violation of its legal, regulatory, and contractual obligations. The defendants have failed to exercise due care with segTEL's public utility plant, cable, strand, and attachments.

26. segTEL has discovered that the defendants have attached their fiber optic cable and messenger strand<sup>13</sup> in violation of the applicable codes and regulations resulting in the following non-compliant circumstances all of which improperly interfere with segTEL's infrastructure:

- a. The defendants have improperly bolted attachments within 4 inches of segTEL attachments, a practice which compromises the structural integrity of the pole. segTEL has documented at least 34 instances of this occurring. A picture of this improper practice is attached as Exhibit A;
- b. The defendants have improperly hung their cable and strand within 12 inches of segTEL attachments without permission. segTEL has documented at least 463 places where this is occurring, and at least 83 places where NHOS is installed too close to a utility other than segTEL. A picture of this improper

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<sup>13</sup> "Messenger strand" is a steel cable installed for the purpose of supporting fiber optic cable.

- practice is attached as Exhibit B;
- c. The defendants have improperly “crossed” segTEL’s infrastructure. segTEL has documented at least 96 instances of this occurring. A picture of this improper practice is attached as Exhibit C;
  - d. The defendants have improperly “boxed in” segTEL’s infrastructure. A diagram of this improper practice is attached as Exhibit D;
  - e. The defendants have improperly “wrapped” segTEL’s infrastructure. segTEL has documented at least one instance of this occurring. A picture of this improper practice is attached as Exhibit E;
  - f. The defendants have improperly “trapped” utility poles. segTEL has documented at least five instances of this occurring. A picture of this improper practice is attached as Exhibit F; and
  - g. The defendants have improperly placed their cables too close to power lines. segTEL has documented at least 167 instances of this occurring. A picture of this improper practice is attached as Exhibit G.
  - h. The defendants have otherwise trespassed on, mishandled, and interfered with segTEL’s infrastructure. A picture of an example of this improper practice is attached as Exhibit H.

27. In Boscawen, NHOS applied for licenses to attach to nearly four hundred poles, a large number of which are already occupied by segTEL. Although segTEL has completed field surveys for the purpose of identifying necessary make-ready work at the request of NHOS, NHOS has not yet authorized segTEL to perform make-ready work, despite requests from segTEL for NHOS to provide such authorization. Instead, NHOS has installed plant on poles

without waiting for the requisite make-ready work to be performed by segTEL and other attachers. The defendants installed their facilities in close proximity to segTEL, forcing segTEL out of compliance with the Telcordia Blue Book in 92 locations. Defendants have placed their facilities closer than four inches to segTEL in several locations, and, in at least one instance, crossed segTEL facilities, in violation of all applicable safety standards. The defendants' facilities are in violation of the NESC – creating a public safety hazard – by being placed too close to power on nearly fifteen percent of the poles. In at least one location, defendants moved segTEL facilities without permission. Defendants also used “J-hooks,” for installation of their facilities, in violation of the RUS guidelines.

28. In Bow, NHOS applied for licenses to attach to 150 poles, nearly all of which are occupied by segTEL. After receiving make-ready requests from NHOS, segTEL surveyed and scheduled the make-ready work in Bow and in Hooksett as well. However, although NHOS was aware of segTEL's work schedule, they nonetheless scheduled the installation of their own plant on poles in Bow and Hooksett just days prior to segTEL starting its make-ready work, effectively blocking segTEL from completing its make-ready work. Defendants installed approximately six miles of cable, crossing and blocking segTEL in multiple locations, placing cable below segTEL's on several poles in the location that is assigned to segTEL, and installing too close to segTEL on more than one-third of the poles. This occurred in one instance over a weekend at night. In some instances, the defendants appear to have moved segTEL's cable to an unlicensed location, putting segTEL in violation of its contractual obligations to the pole owners.

29. In Sunapee, on Springfield Road, the defendants placed equipment on segTEL cable, moved, handled, and interfered with segTEL facilities, placed attachments in close proximity in violation of safety codes, and worked with reckless disregard for the integrity and

reliability of segTEL's network. NHOS fiber optic cable was placed so close to segTEL cable that even the most routine operations, such as lashing the cable to the supporting steel strand, will cause damage to segTEL's fiber optic cable.

30. In Concord, on information and belief, installers working on the Middle Mile Project were observed by Concord Fire Chief Rick Wollert moving segTEL cable from its assigned location to another location on a pole. When challenged, one worker told Chief Wollert that his instructions were "to do whatever it takes" to put NHOS's cable in place. Elsewhere in Concord, NHOS cable was installed in an unworkmanlike manner, affecting the integrity of the utility poles, effectively and knowingly placing segTEL and other utility workers in jeopardy, and making segTEL facilities, which were compliant with all applicable codes regulations and licenses, non-compliant with the NESC and the Telcordia Blue Book. These actions put segTEL facilities out of compliance with its legal, regulatory, and contractual obligations.

31. In Lyme, the defendants installed four utility poles by excavating holes next to the existing poles (owned by segTEL) and inserting new poles such that they affect the stability of the existing poles, and come into contact with segTEL's fiber optic cable, inhibiting segTEL's ability to maintain its plant in a safe and reliable manner, and putting segTEL out of compliance with NH PUC rules. Although segTEL's poles have been in place for four years, and are labeled as belonging to segTEL, NHOS made no attempt to request permission to attach as required by state law, instead engaging in self-help by recklessly installing double poles.

32. In Orford, defendants installed facilities above and below segTEL on a pole in an unworkmanlike manner that is not generally accepted industry practice in New Hampshire. Installing cable in such a manner effectively blocks segTEL from performing make-ready work required by the pole owners necessary to allow NHOS to attach safely, and inhibits the ability of

segTEL to maintain or repair its plant in the safe and reliable manner required by state law and regulations. NHOS facilities are installed such that they cross segTEL cable multiple times, making routine maintenance on segTEL cable much more difficult and more hazardous to both workers and the public.

33. In Meredith, the defendants placed its facilities closer to segTEL than allowed by the NESC and without segTEL's permission. NHOS did so even though it had requested make-ready work from segTEL and without waiting for segTEL and other attachers to complete their make-ready, effectively making segTEL's existing compliant attachments non-compliant with the NESC, and putting segTEL out of compliance with applicable laws, rules, and regulations requiring segTEL to maintain its plant to such standards.

34. In Tilton, the defendants improperly installed cable less than six inches above and below segTEL cable, putting both NHOS and segTEL out of compliance with the NESC. In another location in Tilton, the defendants failed to place NHOS cable on two new poles that were placed by the pole owners for defendants' use, instead choosing to attach in close proximity to segTEL on the old poles, degrading the existing utility poles and putting segTEL out of compliance with the NESC and its contractual obligations to the pole owners.

35. In Laconia, the defendants wrapped their strand and cable around segTEL cable. In addition, on Wednesday, May 2, 2012, segTEL discovered non-segTEL fiber-optic cable, which was unmarked and not in service, occupying segTEL's conduit on North Main Street in Laconia. segTEL had not been notified regarding any cable installations and had received no requests for occupation of its solely-owned conduit. segTEL learned from FairPoint that the cable was installed by Waveguide for NHOS. segTEL filed a notice of trespass with the Laconia Police Department and sent a copy by certified mail to NHOS and to Waveguide. When segTEL

removed the cable from the conduit on May 4, segTEL noted that the fiber was unprotected within the conduit, a practice inconsistent with industry standards.

36. In Lebanon, the defendants installed their facilities in close proximity to segTEL, crossing segTEL cable in places, not allowing segTEL to perform make-ready work.

37. In Tilton and Franklin, segTEL installed network on poles where the defendants were licensed but not yet installed. In six locations, segTEL's contracted employees erred and placed segTEL cable in the wrong location. Before segTEL was able to discover and correct the error, the defendants installed cable on those same poles, also installing in the wrong location. NH PUC Staff agreed that the proper resolution to the situation was for both companies to cooperatively move their cables. Despite the fact that both segTEL and NHOS had crews in the area that day, prepared and equipped to do such work, when segTEL expressed its willingness and desire to take care of the problem immediately, NHOS refused to do so, and continues to refuse to do so.

38. Due in part to some of these activities, and in response to a report that Waveguide's subcontractor, Eustis Cable, improperly moved facilities that it did not have authority to move, on July 23, 2012, segTEL sent cease and desist letters to various subcontractors for Waveguide and NHOS notifying them that they were not authorized to move or otherwise disturb segTEL facilities.

39. Despite this notice, Waveguide and NHOS continued to trespass on, relocate, and otherwise interfere with segTEL's infrastructure as described above without prior notice to segTEL. This interference continues to be on-going with no foreseeable end in sight.

**E. Harm Caused to segTEL by USNH, NHOS, and Waveguide's Actions**

40. The conduct of Waveguide, NHOS, and its contractors has caused segTEL and

utility company workers to be in danger while working on the poles and, more importantly, puts the public at risk of death or serious injury due to potentially energized wires.

41. The defendants' conduct has prevented segTEL from performing necessary and agreed upon make-ready work, costing segTEL time and money.

42. Furthermore, NHOS has installed facilities that violate applicable codes, regulations, NHOS applications for licenses, NHOS's own commitments and promises, explicit instructions from pole owners, and have generally disrupted a pole attachment and make-ready process that the remainder of the industry has indicated (with unusual unanimity) has worked effectively for the past decade.

43. The NHOS installations impair segTEL's ability to extend, build, modify, maintain, and repair its network. segTEL is unable to determine the extent of the damage, due to the widespread nature of NHOS's reckless, careless, and negligent installations that were made with wanton neglect to industry standards. Waveguide and NHOS have profited and continue to profit from these bad acts.

44. Any failure to maintain exclusive control and custody of segTEL's network devalues and diminishes segTEL's network, its ability to provide service to its customers, its ability to fulfill its representations and warranties, and its ability to maintain and repair its network. segTEL's network spans hundreds of miles and repeated or continuing physical examination of every part of its network is extraordinarily difficult and expensive.

45. Under its regulatory obligations to the NESC, NEC, and Telcordia Bluebook, segTEL will be required to perform maintenance, at significant cost of personnel, expense, and time, to offset and reverse the harm done by NHOS. This work is expensive for segTEL to perform, and should not be necessary in the first instance because NHOS has no right to interfere

with or commit trespass against segTEL's property.

46. Under its contractual agreements with customers, segTEL is subject to steep and severe penalties for failing to restore service within defined intervals and for failure to maintain its service and network within stringently defined parameters.

47. As a result of NHOS's recent improper and unlicensed deployments, segTEL has been impeded from seeking the benefits of its contracts. segTEL has lost business due to cancelled contracts directly due to delays deliberately caused by NHOS. Even when notified of problems and issues, the defendants have failed to mitigate, minimize, avoid, or cease causing or attempting to cause damage.

48. segTEL has been harmed by the improper interference with its infrastructure in an amount within the jurisdictional limits of this Court and to be proved at trial.

49. segTEL will be irreparably harmed if the defendants continue to displace and otherwise interfere with segTEL's infrastructure.

**COUNT I  
(Declaratory Judgment)**

50. segTEL incorporates by reference and realleges the foregoing allegations as if fully set forth herein.

51. Pursuant to RSA 492:22, I, "any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive."

52. segTEL has present legal and equitable rights, and indeed obligations, to occupy its specifically contracted for attachment locations on utility poles and to freely and safely access its infrastructure on utility poles.

53. USNH, and its agents NHOS and Waveguide, are adversely claiming segTEL's rights of occupancy and safe access by, *inter alia*:

- a. relocating and interfering with segTEL's infrastructure on utility poles in towns including but not limited to Bow, Boscawen, Concord, Lyme, Laconia, Orford, Meredith, Franklin, Hooksett, Lebanon, Sunapee and Tilton;
- b. interfering with segTEL's control, maintenance and repair of its infrastructure;
- c. "crossing," "wrapping," "close connecting," and "boxing in" segTEL's infrastructure;
- d. demanding that segTEL perform large amounts of make-ready work while simultaneously interfering with segTEL's ability to complete the requested work and refusing to pay segTEL's rates for the work performed; and
- e. demanding that segTEL perform work far in excess to NHOS's financial capacity to pay, as evidenced by their budget reports.

54. Accordingly, segTEL seeks a declaration from this Court that segTEL has the exclusive right to occupy its contracted for pole attachment locations and that segTEL is entitled to safe and unfettered access to its infrastructure without interference from USNH, NHOS, or Waveguide.

55. segTEL further seeks a declaration from this Court that USNH, NHOS, and Waveguide have improperly claimed or interfered with segTEL's rights of occupancy and access to its infrastructure.

**COUNT II**  
**(Violation of RSA 358-A)**

56. segTEL incorporates by reference and realleges the foregoing allegations as if fully set forth herein.

57. Pursuant to RSA 358-A:2, it is “unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state.”

58. Waveguide and NHOS are engaged in trade and commerce in New Hampshire.

59. Waveguide and NHOS have engaged in unfair and deceptive practices by, *inter alia*:

- a. relocating and interfering with segTEL’s infrastructure on utility poles in towns including but not limited to Bow, Boscawen, Concord, Lyme, Laconia, Orford, Meredith, Franklin, Hooksett, Lebanon, Sunapee and Tilton;
- b. interfering with segTEL’s control, maintenance and repair of its infrastructure;
- c. “crossing,” “wrapping,” “close connecting,” and “boxing in” segTEL’s infrastructure;
- d. demanding that segTEL perform large amounts of make-ready work while simultaneously interfering with segTEL’s ability to complete the requested work and refusing to pay segTEL’s rates for the work performed; and
- e. demanding that segTEL perform work far in excess to NHOS’s financial capacity to pay, as evidenced by their budget reports.

60. Waveguide and NHOS’s violations of RSA 358-A:2 were knowing and willful.

61. As a direct and proximate result of Waveguide’s and NHOS’s conduct, segTEL has suffered actual and consequential damages within the jurisdictional limits of this Court.

62. As a result of Waveguide’s and NHOS’s knowing and willful violation of RSA chapter 358-A, segTEL seeks, and is entitled to, treble damage, attorneys’ fees, and costs.

**COUNT III**  
**(Trespass to Chattels)**

63. segTEL incorporates by reference and realleges the foregoing allegations as if fully set forth herein.

64. NHOS and Waveguide have intentionally used or intermeddled with segTEL's infrastructure as described above.

65. Due to NHOS's and Waveguide's actions, segTEL's infrastructure has been impaired as to its condition, quality, and value, and segTEL has been deprived of use of the chattel.

66. As a direct and proximate result of Waveguide and NHOS's conduct, segTEL has suffered actual and consequential damages within the jurisdictional limits of this Court.

**COUNT IV**  
**(Intentional Interference With Another's Performance of His Own Contract)**

67. segTEL incorporates by reference and realleges the foregoing allegations as if fully set forth herein.

68. segTEL maintains a contractual relationship with several companies, including FairPoint, through multiple Pole Attachment Agreements, dating back to July 30, 2004.

69. Pursuant to the Pole Attachment Agreements, segTEL is required to, "at its own expense, construct and maintain its attachments and facilities on [FairPoint's] poles in a safe condition and in a manner acceptable to [FairPoint]. [segTEL] shall construct and maintain its attachments and facilities so as not to conflict with the use of [FairPoint's] poles by [FairPoint] or by other authorized users of [FairPoint's] poles, nor electrically interfere with [FairPoint's] facilities attached thereto." Upon information and belief, NHOS is operating under a similar agreement with FairPoint.

70. By relocating and otherwise interfering with segTEL's infrastructure as alleged above NHOS has intentionally and improperly interfered with segTEL's ability to meet its contractual obligations to FairPoint by preventing segTEL from performing the contract and by making performance much more expensive and burdensome. Because of NHOS's actions, significant portions of segTEL's network infrastructure are currently in an unsafe and illegal condition, through no fault of segTEL, and often in a manner that cannot be reversed or mitigated by segTEL alone, causing segTEL to be in breach of its agreement with FairPoint through no fault of its own.

71. NHOS's conduct has tortiously interfered with segTEL's customer agreements as well. NHOS's actions have caused segTEL to become out of compliance with state and local regulations and laws, and accordingly, be out of compliance with its customer service contracts and subject to default under those agreements. Due to the extent of the damage and harm caused to segTEL, if segTEL were to take the time required to repair NHOS's mistakes, segTEL would be in breach of the provisions of its customer service contracts that prohibit chronic disruptions in service.

72. For example, one national carrier requires that segTEL ensure that cable will be "engineered, designed, constructed, installed, and maintained in compliance with applicable building, construction and safety codes" and "perform in accordance with industry accepted standards and practices." Furthermore, this agreement requires segTEL to comply "with all applicable laws and regulations" including "regulations of the FCC, and all local and state rules and regulations." The agreement also contains detailed specifications regarding standards for construction, including minimum depths and distances for the placement of conduit and aerial wires, and specific space specifications and construction practices that segTEL is required to use.

All work is required to be done “in strict accordance with federal, state, local and applicable private rules and laws regarding safety and environmental issues” and “all work and the resulting fiber system will comply with the current requirements of all governing entities (FCC, NEC, DEC, and other national, state, and local codes).” Furthermore, the agreement requires that scheduled maintenance which is “reasonably expected to produce any signal discontinuity must be coordinated between the Parties,” and “should be scheduled after midnight and before 6:00 a.m. local time.”

73. If this customer complains about segTEL’s failure to maintain cable in compliance with applicable regulations and industry standards, and segTEL is unable to cure within 30 days, segTEL would be in default under the agreement.

74. segTEL is also party to a second agreement with a national wireless provider. This agreement requires segTEL to represent and warrant “that all Service rendered hereunder will be designed, produced, installed and furnished and in all respects provided and maintained in conformance and compliance with applicable federal, state and local laws.” This agreement provides certain remedies to this customer in the event of excessive service outages, including, *inter alia*, the right to terminate the contract, the right to require segTEL extend credit, move the impacted service to a temporary route, move the impacted service to a new permanent path, or provide replacement service as necessary. This contract provides for severe monetary penalties in the event of a service outage which start at one month’s worth of revenue per circuit suffering from a service outage, and increase with time.

75. segTEL also has a third agreement with national provider of communications services. This agreement also requires segTEL to “design, produce, install, furnish and in all material respects provide and maintain the Services in conformance and compliance with

applicable federal, state, and local laws, administrative and regulatory requirements and any other authorities having jurisdiction.” Furthermore, “[b]oth Parties must give notices and comply with laws bearing on safety of persons and property and their protection from damage, injury or loss.” “Each party will perform its obligations under this Agreement in a manner that complies with all applicable federal, state and local laws, rules, regulations, ordinances, orders and judicial administrative law decisions,” and “[segTEL] will comply with all applicable laws and regulations.” The agreement also contains a service window of between 4-6 hours for repairs, and requires fifteen calendar days prior written notice before any maintenance is performed. There cannot be more than four continuous hours of “Service Impacting Planned Maintenance” in a given calendar month, unless otherwise agreed in writing. If such maintenance exceeds 24 cumulative hours in one month, the customer has the right to cancel service without penalty. The customer also has remedies in the event of chronic interruption to service or a mean time to repair of greater than 4-6 hours in 2 out of 3 consecutive months, including requiring segTEL to reroute services, or terminating the services without liability.

76. If this customer complains about segTEL’s failure to maintain cable in compliance with applicable regulations and industry standards, and segTEL is unable to cure within 30 days, segTEL would be in default under the agreement.

77. Due to the defendants’ conduct, segTEL is out of compliance with applicable codes, and therefore subject to liability and default under its customer contracts.

78. As a direct and proximate result of the defendants’ conduct, segTEL has suffered actual and consequential damages within the jurisdictional limits of this Court.

**COUNT V**  
**(Injunctive Relief)**

79. segTEL incorporates by reference and realleges the foregoing allegations as if

fully set forth herein.

80. The defendants' actions have caused and, if not enjoined, will continue to cause, immediate and irreparable harm to segTEL for which segTEL has no adequate remedy at law.

81. Pursuant to RSA 358-A:10, segTEL is also permitted to seek injunctive relief to restrain the respondents' unfair, unreasonable, and deceptive practices.

82. segTEL should be awarded, preliminary and permanent orders as to the defendants as follows:

- a. preventing the defendants from relocating, crossing, wrapping, boxing in, or otherwise interfering with segTEL's infrastructure;
- b. preventing the defendants from installing infrastructure to utility poles without appropriate make-ready work performed by segTEL;
- c. preventing the defendants from directing others to relocate, cross, wrap, box in, or otherwise interfere with segTEL's infrastructure;
- d. preventing the defendants from directing others to install infrastructure to utility poles without appropriate make-ready work performed by segTEL; and
- e. instructing defendants to remove or fix all non-code compliant installations of NHOS facilities, or which have caused segTEL installations to be non-code complaint.

WHEREFORE, segTEL respectfully requests that this Court:

- A. Issue Orders of Notice;
- B. Enter a preliminary injunction following a hearing;
- C. Enter a permanent injunction following trial;
- D. Award segTEL damages resulting from the defendants' conduct;

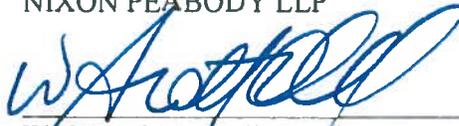
- E. Award segTEL enhanced damages resulting from the defendants' knowing and willful conduct;
- F. Award segTEL its costs and attorneys' fees; and
- G. Award such further relief as this Court deems just, equitable, and proper.

Respectfully submitted,

segTEL, Inc.,

By its Attorneys,

NIXON PEABODY LLP



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N.H. Bar No. 9070

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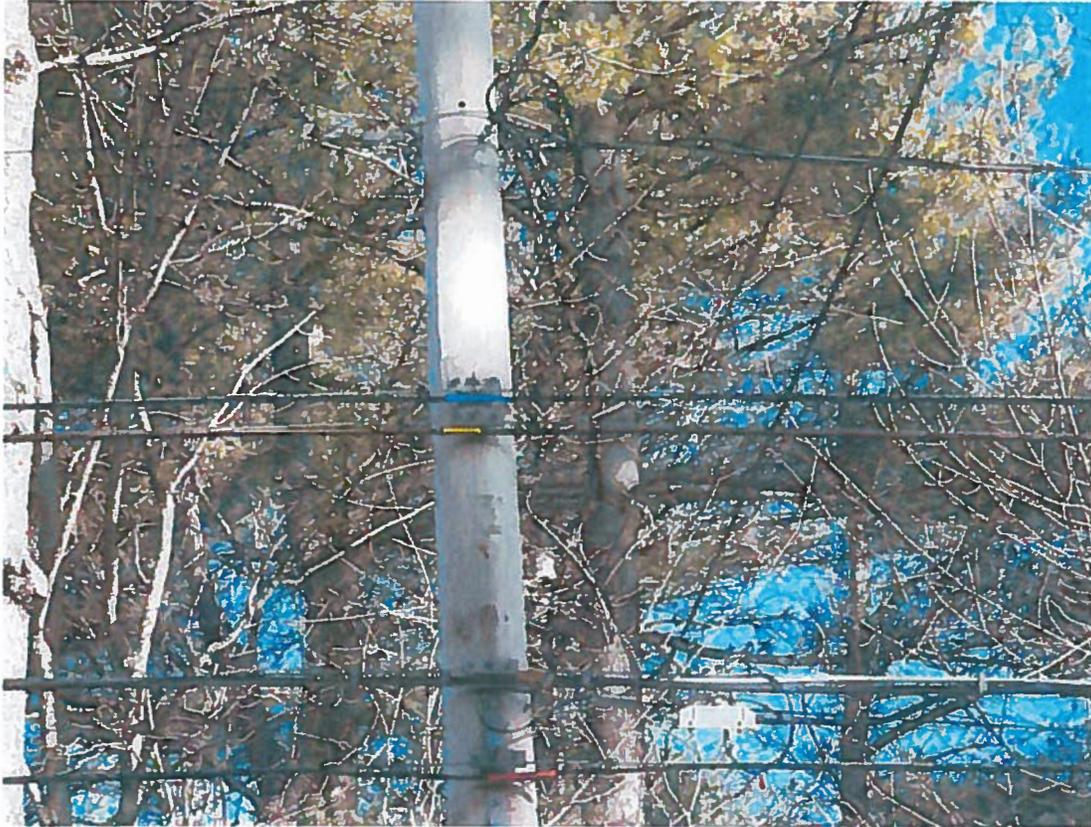
900 Elm Street

Manchester, NH 03101

(603) 628-4000

Dated: December 14, 2012

**EXHIBIT A**



BOSCAWEN NH  
Photo 1 of 2

POLE TDS 3/48 ELCO 225  
11/30/2012

Route 3  
Betty Hackett

Showing NHOS cable and strand (blue label) attached immediately above segTEL cable (yellow label), failing to maintain the requisite 12" of space between communications attachments, and failing to keep the absolute minimum 4" of space between attachments.



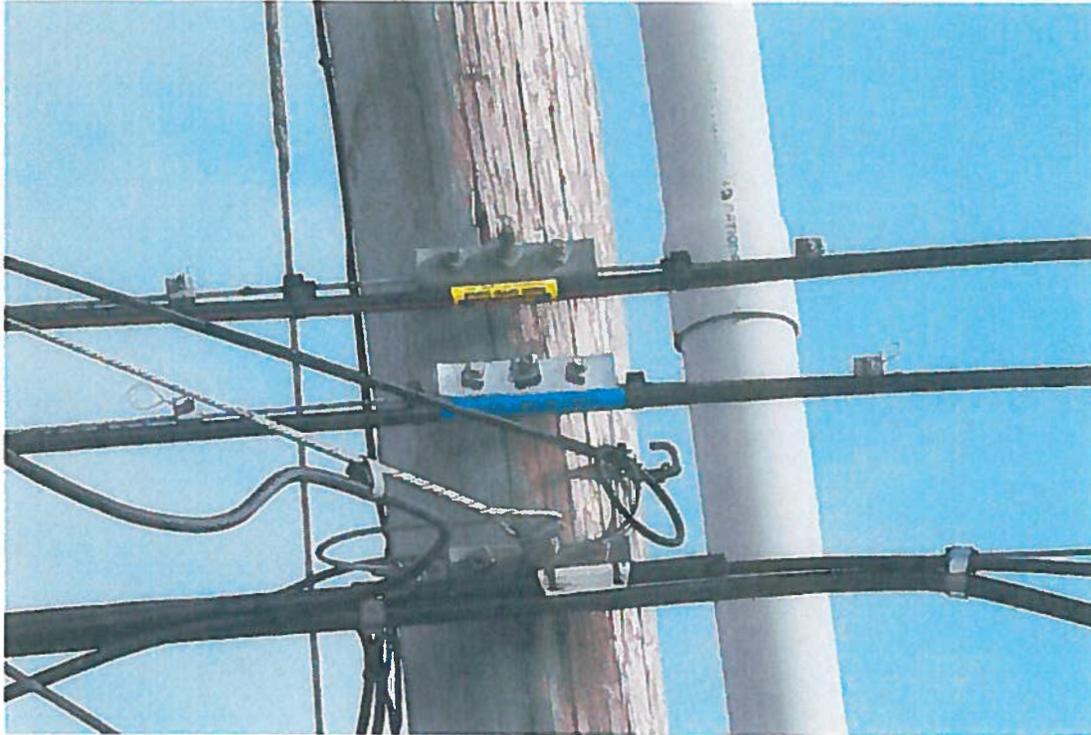
BOSCAWEN NH  
Photo 2 of 2

POLE TDS 3/48 ELCO 225  
11/30/2012

Route 3  
Betty Hackett

Showing NHOS cable and strand (blue label) attached immediately above segTEL cable (yellow label), failing to maintain the requisite 12" of space between communications attachments, and failing to keep the absolute minimum 4" of space between attachments.

**EXHIBIT B**



Bow NH  
Photo 1 of 1

POLE FP 36 UES 127  
11/30/2012

Route 3A  
Kevin Shea

segTEL cable and strand (yellow label; orange stripe on the black cable) was licensed and installed 12" above the next attacher (white label; two black cables). NHOS (blue label) installed its cable between segTEL and the other attacher, closer than the requisite 12" that is to be maintained between communications attachers under the NESC.

**EXHIBIT C**



ORFORD NH  
Photo 1 of 4

POLE FP 98 PSNH 41/90  
10/12/2012

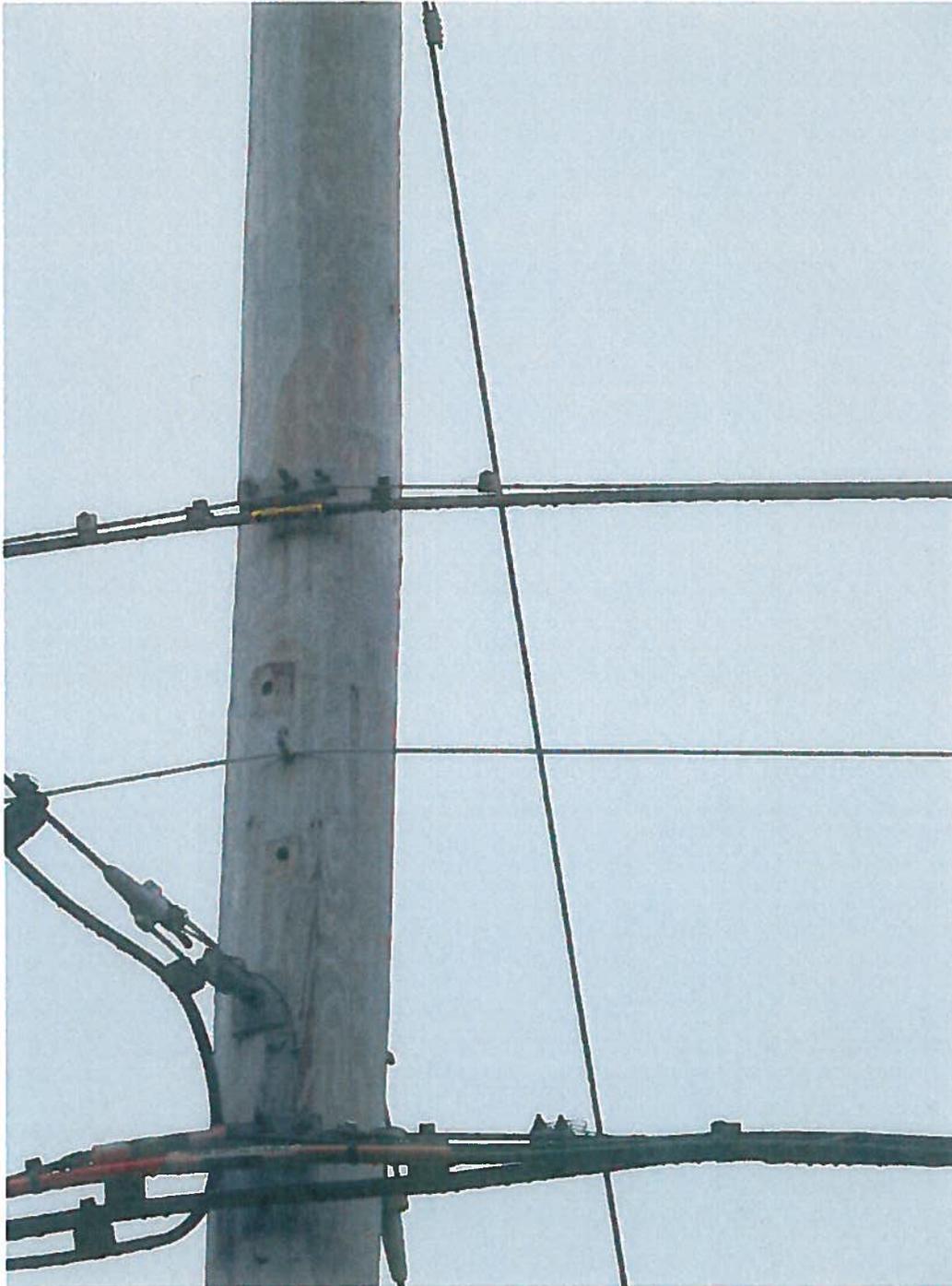
State Route 10  
T Parssinen



ORFORD NH  
Photo 2 of 4  
Showing pole identification tags

POLE FP 98 PSNH 41/90  
10/12/2012

State Route 10  
T Parssinen



ORFORD NH  
Photo 3 of 4

POLE FP 98 PSNH 41/90  
10/12/2012

State Route 10  
T Parssinen

Top cable has yellow segTEL fiber optic cable ID label. The unidentified cable below segTEL's is NHOS cable. Note J-hook attachment. Note unlicensed position between holes properly spaced 12" apart.



ORFORD NH

Photo 4 of 4

POLE FP 98 PSNH 41/90

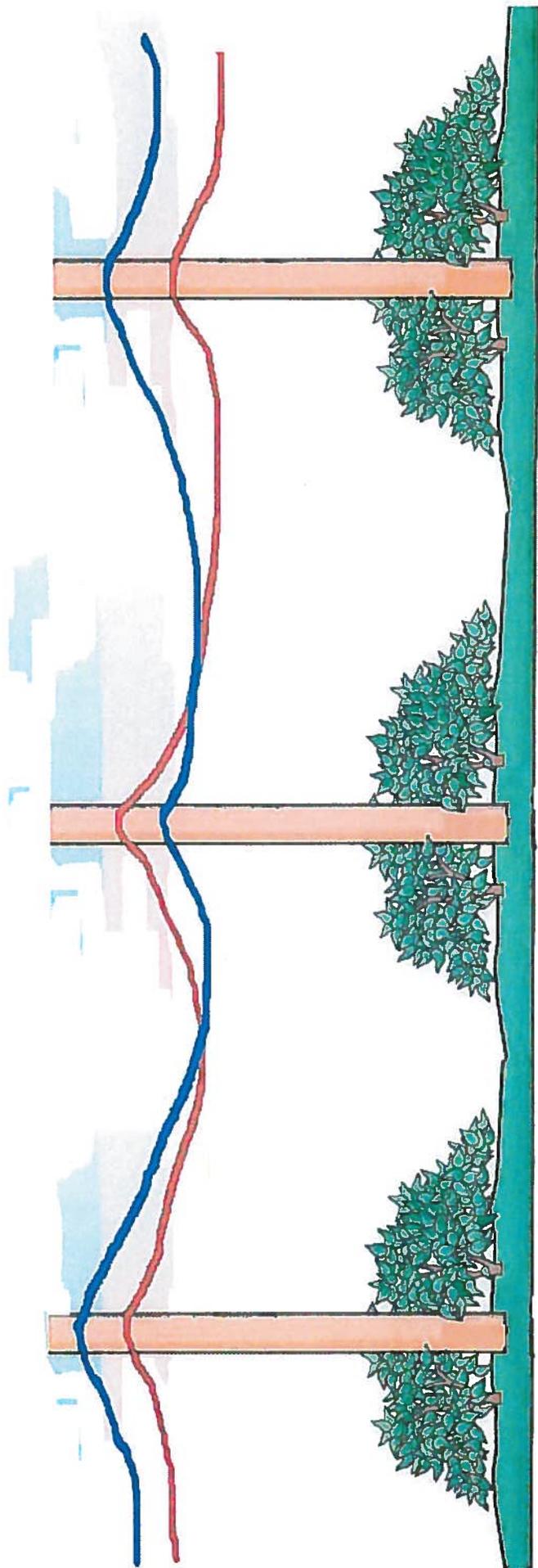
10/12/2012

State Route 10

T Parssinen

Span to next pole shows NHOS strand crossing segTEL cable with no cable guard or other protection to avoid damage.

**EXHIBIT D**



**EXHIBIT E**



Laconia NH  
Photo 1 of 3

In the vicinity of GPS 43.5474, -71.4858  
11/30/2012

North Main St, Route 106N  
Kath Mullholand

This pole has four communications attachments. The second one from the bottom is NHOS (blue label); the third from the bottom is segTEL (yellow label).



Laconia NH  
Photo 2 of 3

In the vicinity of GPS 43.5474, -71.4858  
11/30/2012

North Main St, Route 106N  
Kath Mullholand

The previous photo is of the pole on the right, which has four communications attachments. The second one from the bottom is NHOS; the third from the bottom is segTEL. If you follow the lines from the pole towards the center of the photo, you can see the two lines cross in midspan and then separate again. The lines cross and stay crossed because they are entwined; NHOS cable is wrapped around segTEL's cable.



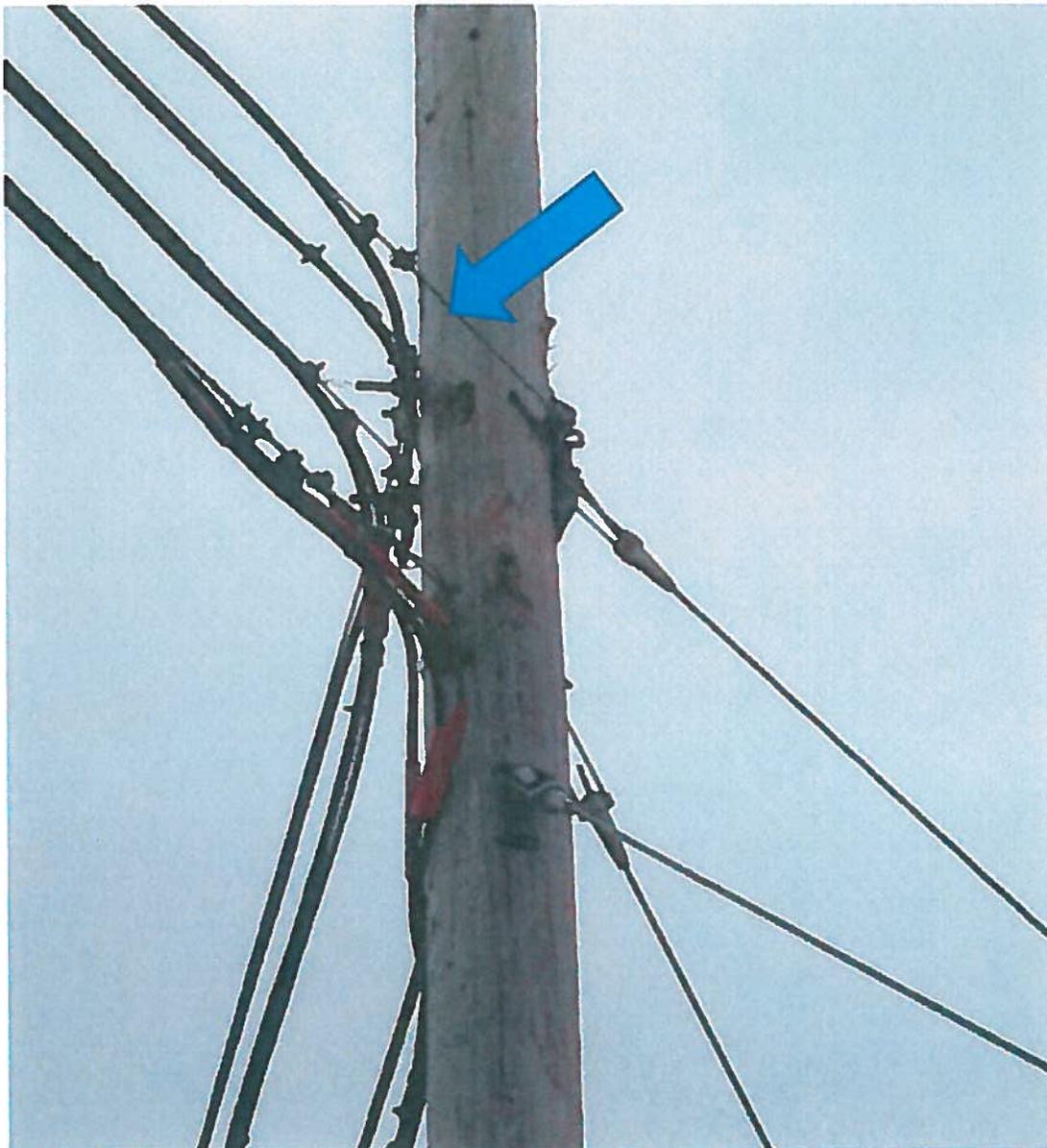
Laconia NH  
Photo 3 of 3

In the vicinity of GPS 43.5474, -71.4858  
11/30/2012

North Main St, Route 106N  
Kath Mullholand

This photo is a close-up of where the two cables come together. The bluish-black cable (NHOS) rises to meet the orange-shaded cable (segTEL). The NHOS cable passes behind the segTEL cable, and then goes over the top of it before going down to its original spot. The NHOS cable is completely wrapped around the segTEL cable. This entwining cannot be undone without cutting one cable or the other, which would put one of the networks out of service on this route until the cable can be unentangled, checked for damage, and spliced back together. The spliced cable would then have to be reinstalled.

**EXHIBIT F**

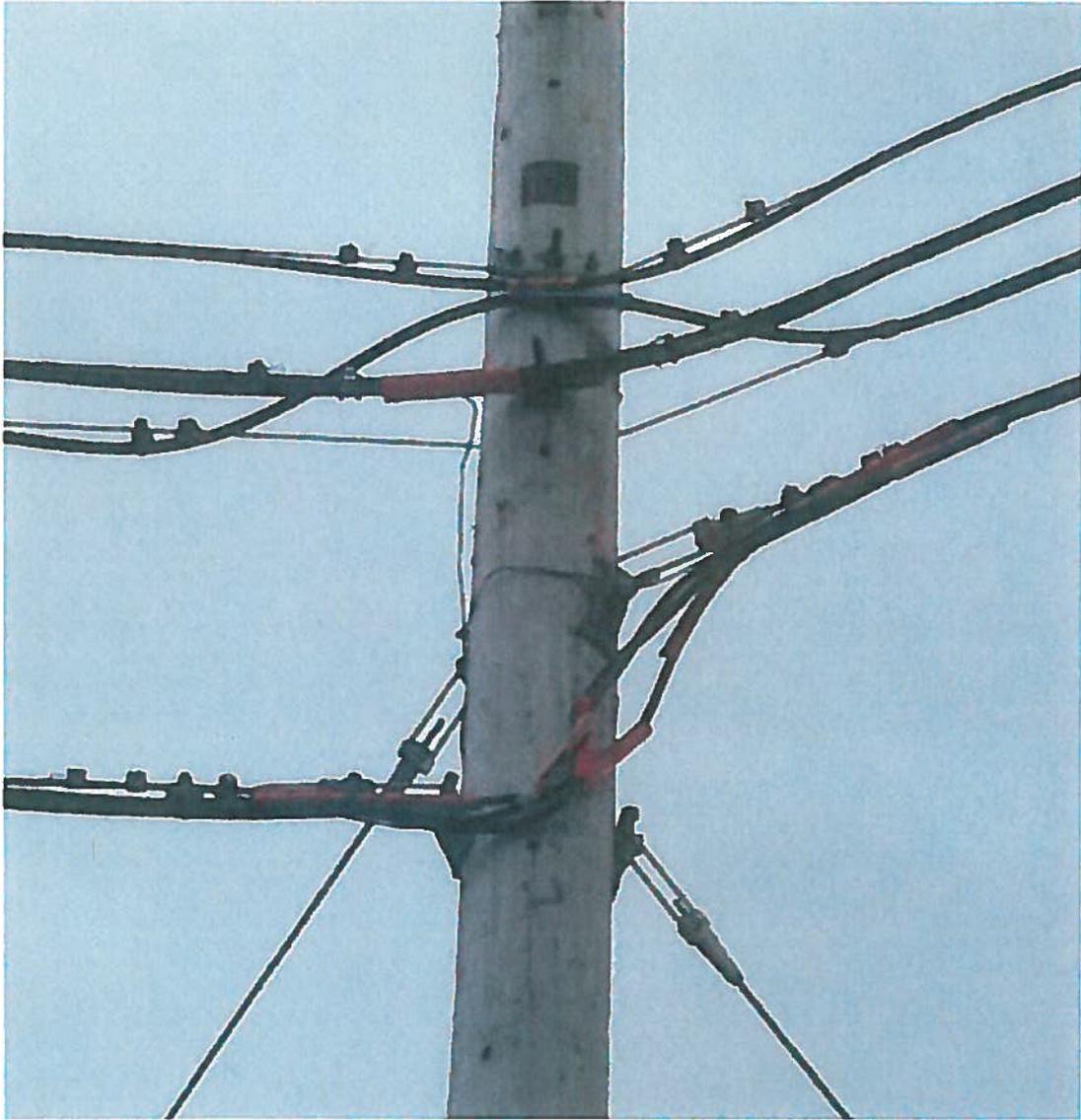


Tilton NH  
Photo 1 of 2

FP 171  
11/30/2012

Route 3  
Kath Mullholand

This NHOS attachment traps the pole, making the pole much harder to replace, and making it harder to move attachments as necessary. Notice that the messenger strand (the steel cable that supports the fiber optic cable) goes around the back of the pole, and is the only cable or strand that does so.



Tilton NH  
Photo 2 of 2

FP 171  
11/30/2012

Route 3  
Kath Mullholand

This is another angle of the same instance as the previous picture. The NHOS attachment (blue label) messenger strand (the steel cable that supports the fiber optic cable) goes around the back of the pole; the fiber optic cable is on the front of the pole. This attachment is not to code because it passes on both sides of the pole, is at the same level as another attachment (the one with the orange label), and is not properly bolted to the pole.

**EXHIBIT G**



Milford NH  
Photo 1 of 1

FP 47 PSNH 4/127  
11/12/2012

Elm Street  
T Parssinen

NHOS's attachment (blue label) is approximately 24 inches from power (blue arrow) in violation of the NESC.

**EXHIBIT H**



SUNAPEE NH

POLE FP 17 ELCO 21

Springfield Rd

Photo 1 of 5

11/26/2012

T Parssinen

Following photographs show NHOS / Todd Cable Construction installation activity in the area of this pole.



SUNAPEE NH  
Photo 2 of 5

POLE FP 17 ELCO 21 (vicinity)  
11/26/2012

Springfield Rd  
T Parssinen

Shows device attached to segTEL fiber, pulling and bending the fiber optic cable. The top of the device is hanging from NHOS messenger strand.



SUNAPEE NH  
Photo 3 of 5

POLE FP 17 ELCO 21 (vicinity)  
11/26/2012

Springfield Rd  
T Parssinen

Overview picture of area of work. Note device attached to segTEL fiber, pulling and bending the fiber optic cable. The top of the device is hanging from NHOS messenger strand.



SUNAPEE NH

POLE FP 17 ELCO 21 (vicinity)

Springfield Rd

Photo 4 of 5

11/26/2012

T Parssinen

Todd Cable Construction vehicle including placard showing NHOS and Waveguide logos.



SUNAPEE NH  
Photo 5 of 5

POLE FP 17 ELCO 21 (vicinity)  
11/26/2012

Springfield Rd  
T Parssinen

Showing Todd Cable Construction worker and vehicle placing the devices.

**EXHIBIT C**

MERRIMACK, SS.

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Docket No. 217-2013-cv-00023

segTEL, Inc.  
*Plaintiff*

v.

The University System of New Hampshire,  
New Hampshire Optical Systems, Inc.,

and

Waveguide, Inc.  
*Defendants*

**DEFENDANTS' MOTION TO DISMISS**

Defendants New Hampshire Optical Systems, Inc. and Waveguide, Inc. (collectively “NHOS”) move to dismiss the Writ of Summons filed by Plaintiff segTEL, Inc. segTEL’s Writ concerns a dispute between segTEL and NHOS over the attachment of fiber optic cable to utility poles during the construction of a federally-funded broadband network throughout New Hampshire. These issues are within the primary jurisdiction of the New Hampshire Public Utilities Commission (“PUC”), and the segTEL–NHOS dispute is the subject of pending administrative proceedings before the PUC. This Court should defer to the PUC’s statutory authority to resolve those issues, and the segTEL Writ should be dismissed.

**I. INTRODUCTION**

This case concerns third-party “make-ready work,” which is the surveying, engineering, and construction work that must be performed by utilities, such as segTEL and NHOS, with existing utility pole attachments (“existing attachers”), so that there is space to attach the cable of newly-licensed entities (“new attachers”). segTEL’s Writ alleges disputes with NHOS and the

University System of New Hampshire (“USNH”) over make-ready work performed by NHOS on the “Middle-Mile” project, a federally-funded project which entails the construction of a 750 mile fiber-optic cable network throughout New Hampshire.

The specific issues raised by segTEL’s Writ include: the timing for completing make-ready required for NHOS’s attachments; the rates segTEL can charge for that work; whether segTEL can require NHOS to pay for work that was not identified by the pole owner’s engineering and is unrelated to NHOS’s attachments; and the recourse available to NHOS given segTEL’s refusal or inability to perform required make-ready. segTEL’s Writ fails to disclose that the resolution of the make-ready dispute between segTEL and NHOS, and the examination of make-ready practices generally in this state, are the subject of administrative proceedings pending before the PUC.<sup>1</sup>

In May 2012, the PUC opened administrative proceedings to investigate complaints by NHOS that a number of existing attachers, including segTEL, have exploited ambiguities over the regulation of make-ready work to stifle competition and impede completion of the Middle-Mile project. The PUC ordered that segTEL be joined as a party in this administrative proceeding. The issues being examined by the PUC are the same issues underlying segTEL’s claims in this case, including: the reasonableness of segTEL’s rates for make-ready work; the time within which make-ready work must be performed; the scope of work that can be charged to NHOS; and NHOS’s recourse if segTEL fails to perform the required work. The PUC has primary jurisdiction over these matters. Further, in January 2013, the PUC staff recommended

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<sup>1</sup> NHOS attaches entries from the PUC dockets as exhibits to this Motion, and requests that this Court take judicial notice of their contents. See N.H. R. Evid. 2011; see also Le Page v. St. Johnsbury Trucking Co., 97 N.H. 46, 52 (1951) (taking judicial notice of docket); Kamasinski v. McLaughlin, No. 2001-E-0386, 2003 N.H. Super. LEXIS 7, at \*13 (N.H. Super. Jan. 30, 2003) (same); Furthermore, a “[a] court may consider judicially noticed documents without converting a motion to dismiss into a motion for summary judgment.” See Menominee Indian Tribe v. Thompson, 161 F.3d 449, 456 (7th Cir. 1997).

that while the PUC completes its investigation, segTEL and NHOS are to work with the staff or independent mediator to reach agreement over make-ready work on the Middle-Mile project.

## **II. BACKGROUND**

### **A. PUC Authority Over Pole Attachments**

Under New Hampshire law, the PUC has broad authority to regulate public utilities and utility pole attachments, and to adopt rules and standards needed for the exercise of this authority. RSA Chapter 374 requires the PUC to ensure that rates, charges, terms and conditions for pole attachments are “just and reasonable.” RSA 374:34-a, II.

On January 17, 2008, the PUC rules governing pole attachments, set forth in Chapter Puc 1300, became effective. At that time, the PUC certified to the Federal Communications Commission (“FCC”) that New Hampshire “has issued and made effective rules and regulations implementing its regulatory authority over pole attachments, including a specific methodology for such regulation which has been made publically available in the state.”<sup>2</sup> See Exhibit A, WC Docket No. 07-245 (1/23/2008 Letter from PUC Chairman Thomas B. Getz to FCC Secretary Marlene A. Dortch).

The Puc 1300 rules regulate make-ready work required by pole-owners to accommodate new attachments. Puc 1303.01 provides that pole owners “shall provide attaching entities access to such pole on terms that are just, reasonable and nondiscriminatory.” The principal means by

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<sup>2</sup> In 1978, Congress enacted the Pole Attachment Act of 1978 (the “Pole Attachment Act”) to ensure that telephone companies and electric utilities would not stifle the growth of the telecommunications industry by charging excessive rates for essential pole attachments. The Pole Attachment Act added a new Section 224 to the Communications Act of 1934 to authorize the FCC to regulate the rates that utilities could charge telecommunications systems for pole attachments. The Pole Attachment Act, however, provided an important exception. In Section 224(c), Congress authorized states to preempt federal regulation by electing to regulate pole attachments themselves. Nineteen states and the District of Columbia subsequently did so and exercised this type of “reverse preemption” by certifying that they directly regulate utility-owned infrastructure in their regions. New Hampshire became one of these states in January 2008 when the PUC certified that the state regulates pole attachments through the Puc 1300 rules.

which this rule is implemented is through the standard pole attachment agreement (“PAA”) between the pole owners and third-party attachers. See segTEL Writ, ¶ 14. The PAA requires that a pole owner “make commercially reasonable efforts” to complete make-ready work required by the owner within six months of receiving payment for the same from the new attacher. See PAA Article 5.4.

With respect to make-ready work to be performed by existing attachers (as opposed to pole owners), segTEL concedes that “existing attachers have the responsibility to move their respective infrastructure to accommodate the new licensee.” See segTEL Writ, ¶ 15. segTEL’s refusal to move its facilities to make space for NHOS’s cable has impeded NHOS’s ability to construct the Middle-Mile project, and is the subject of the pending proceedings before the PUC, and discussed below.

While the Puc 1300 rules may not adequately address make-ready requirements of third party attachers, the PUC does have the authority to resolve the related disputes. Accordingly, the PUC has the authority to resolve disputes over make-ready on the Middle-Mile project, and, as detailed below, the PUC already is exercising this authority.

Under RSA 374:3, the PUC “shall have the general supervision of all public utilities . . . so far as necessary to carry into effect the provisions of this title.” (Emphasis added.) RSA 374:34-a, VII states that the PUC “shall have the authority to hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments.” (Emphasis added.) RSA 374:34-a, II further specifies that, “[w]henever a pole owner is unable to reach agreement with a party seeking pole attachments, the [PUC] shall regulate and enforce rates, charges, terms, and conditions for such pole attachments.” (Emphasis added.) In addition, the PUC “shall retain its authority to regulate the

safety, vegetation management, emergency response, and storm restoration requirements for poles, conduits, ducts, pipes, pole attachments, wires, cables, and related plant and equipment of public utilities and other private entities located within public rights-of-way and on, over, or under state lands and water bodies.” RSA 374:34-a, VIII. segTEL and NHOS, as competitive local exchange providers registered with the PUC, are both public utilities under New Hampshire law and as such are subject to the PUC’s regulatory authority. In fact, it is their status as CLECs that underlies their right to attach their facilities to utility poles in New Hampshire. Puc 1302.01.

Puc 1304.02 outlines the procedure for addressing disputes concerning pole attachments: “A person requesting a pole attachment and entitled to access under these rules and unable, through good faith negotiation, to reach agreement with the owner or owners of a pole or poles subject to this chapter, may petition the [PUC] . . . for an order establishing the rates, charges, terms and conditions for the pole attachment or attachments.” Further, “[a] party to a pole attachment agreement . . . may petition the [PUC] . . . for resolution of a dispute arising under such agreement.” Puc 1304.03. In addition, “[a] pole owner may . . . petition the [PUC] . . . for an order directing the removal of facilities that are attached to a pole without authorization.” Puc 1304.04. “Upon receipt of a petition,” the PUC “shall conduct an adjudicative proceeding . . . to consider and rule on the petition.” Puc 1304.05.

**B. Pending PUC Proceedings**

**1. DT 12-107**

In May 2012, the PUC opened an administrative proceeding, docket DT 12-107, to investigate the same matter that is the subject of segTEL’s Writ – disputes between segTEL and NHOS over make-ready work on the Middle-Mile project. DT 12-107 was convened in response

to a petition filed by NHOS pursuant to RSA 365:5.<sup>3</sup> See 4/24/2012 NHOS Petition for an Investigation into Proposed Charges for Utility Pole Make Ready (DT No. 12-107) [copy attached as Exhibit B]. In its petition and subsequent filings in DT 12-107, NHOS alleges that segTEL has blocked NHOS's work by refusing to perform make-ready work in a timely fashion; by demanding – as a pre-condition to performing make-ready work – that NHOS correct existing defects with segTEL's facilities; and by demanding that NHOS agree to pay segTEL's grossly inflated rates for make-ready work, while refusing to provide cost quotes or invoices. While other existing attachers on the Middle-Mile project have been completing make-ready required for NHOS to perform its work, segTEL stands alone in refusing to perform the make-ready needed to accommodate NHOS's attachments. It is segTEL's refusal to relocate that is the root cause of segTEL's Writ, and is the focus of DT 12-107 and other proceedings before the PUC.

In a May 11, 2012 Order of Notice issued in DT 12-107, the PUC summarized the issues raised by NHOS's petition as: "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." See PUC Order of Notice (copy attached as Exhibit C), p. 2. In a later Order issued September 5, 2012, after NHOS had amended its petition, the PUC clarified that the scope of its investigation also "shall include whether consideration of whether NHOS has faced unfair or unreasonable delay to access to utility poles during the construction of its 'Middle Mile' project, and if so, possible remedies." See PUC Order #25-407 (copy attached as Exhibit D), pp. 9-10.

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<sup>3</sup> RSA 365:5 provides that for the PUC, "on its own motion or upon petition of a public utility, may investigate or make inquiry in a manner to be determined by it as to any rate charged or proposed or as to any act or thing having been omitted or proposed by any public utility."

In its September 5, 2012 ruling, the PUC also ordered that segTEL join the proceeding as a party. See PUC Order #25-407, p. 10. Having been brought before the PUC to resolve the issues raised by NHOS, segTEL is now seeking to move the dispute to this Court.

The PUC's investigation in DT 12-107 is ongoing. In September and October 2012, NHOS and three pole owners – FairPoint, PSNH and Unitil – responded to PUC requests for information concerning pole attachments, make-ready work, and the Middle-Mile project. On January 30, 2013, the PUC staff members issued a report and recommendation to the PUC, setting forth staff findings from their initial investigation of make-ready work problems on the Middle-Mile project. See Exhibit E (1/30/2013 Staff Report and Recommendation Regarding NHOS Complaint In DT 12-107). The staff report is based on the staff members' review of the NHOS and pole owner responses to the PUC information requests, on a single field visit, and on information gathered informally by the staff. In the report, the staff offered their opinion on the cause for delays in completing make-ready work, and recommended a list of issues for the PUC to resolve relating to the timing, scope and cost of segTEL make-ready. In addition, the staff recommended that "segTEL and NHOS be required to work with Staff or an independent mediator to form an agreement outlining a process by which the remaining work can be accomplished." Finally, the staff recommended the PUC consider a pilot procedure adopted in Connecticut "to hasten pole attachments on poles requiring substantial make-ready," by allowing a new attacher to "make a temporary attachment beneath the lowest attachment" on the poles.

**2. DT 12-247**

The PUC convened the second proceeding, docket DT 12-246, in response to concerns that the absence of rules for make-ready had created a "Wild West" regulatory environment in

New Hampshire, in which existing attachers have free reign to deny timely pole access to new attachers, charge excessive fees, and engage in other anti-competitive conduct.

In a July 3, 2012 Order issued in DT 12-107, the PUC ruled that it would open a separate docket – DT 12-246 – “for the purpose of considering issues relating to pole attachment access, including practices that “could pose barriers to effective competitive entry.” See PUC Order #25,386 (copy attached as Exhibit F), p. 11.<sup>4</sup>

**C. segTEL’s Writ**

segTEL’s Writ concerns the same work, issues, and disputes that are now being investigated and resolved by the PUC. The Writ addresses make-ready work on the Middle-Mile project, specifically work segTEL must perform to make room for NHOS’s attachments. segTEL’s allegations reformulate questions that already are being considered by the PUC, including: (a) the reasonableness of rates demanded by segTEL as a condition of performing make-ready work, see segTEL Writ, ¶¶ 23-24; (b) the remedies available to a new attacher like NHOS when an existing attacher refuses to perform required make-ready, and whether the new attacher may, in the face of such refusal, perform the make-ready itself, see id., ¶¶ 18-22; and (c) standards applicable to the attachment of new communications facilities on utility poles, see id., ¶¶ 9-12.

**III. ARGUMENT**

**A. Legal Standard**

A Superior Court must dismiss an action when an administrative agency has exclusive or primary jurisdiction over the subject matter alleged in the action. Konefal v. Hollis/Brookline

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<sup>4</sup> On January 3, 2013, the PUC issued an order staying additional proceeding in DT 12-246, until after the issues raised in DT 12-107 are fully investigated and resolved. See PUC Order #25,449 (copy attached as Exhibit G). The PUC observed that “the record developed and the determinations made in Docket No. DT 12-107 may aid the Commission and the parties in better understanding at least some of the issues that need to be addressed in a general investigation of pole access issues.”

Coop. Sch. Dist., 143 N.H. 256, 258 (1998) (affirming dismissal of teacher's claims against school district because the agency at issue – the Public Employees Labor Relations Board – had “primary jurisdiction” over the dispute).

“Primary jurisdiction in an agency requires judicial abstention until the final administrative disposition of an issue, at which point the agency action may be subject to judicial review.” Konefal, 145 N.H. at 258. Abstention is required regardless whether an agency enjoys exclusive jurisdiction over a particular matter or shares such jurisdiction with the superior court. See New Hampshire Div. of Human Servs. v. Allard, 138 N.H. 604, 606-07 (1994) (“If we assume the agency has exclusive jurisdiction, an agency proceeding is a definitional prerequisite to any superior court proceeding. Even assuming concurrent jurisdiction, we have long recognized the doctrine of ‘primary jurisdiction’; namely, that ‘a court will refrain from exercising its concurrent jurisdiction to decide a question until it has first been decided by a specialized agency that also has jurisdiction to decide it’”) (internal citation marks omitted); American Auto. Mfrs. Assoc. v. Massachusetts Dep't of Env'tl. Protection, 163 F.3d 74,86 (1st Cir. 1998) (invoking the primary jurisdiction doctrine where issues clearly within the EPA's competence were essential to a proper resolution of this case); Himmelman v. MCI Communs. Corp., 104 F. Supp. 2d 1 (D.D.C. 2000) (invoking doctrine where FCC had the authority and expertise to determine whether defendant's current procedures for implementing the directory-assistance tariff was unjust or unreasonable).

Therefore, when a plaintiff does not pursue administrative proceedings or remedies that can eliminate or narrow the parties' dispute, the doctrine of primary jurisdiction requires that court proceedings be dismissed so that the plaintiff's claims should be resolved before an agency in the first instance. Konefal, 145 N.H. at 258. This “rule requiring administrative remedies to

be exhausted prior to appealing to the courts is based on the reasonable policies of encouraging the exercise of administrative expertise, preserving agency autonomy and promoting judicial efficiency.” Id.

For example, in Pennichuck Corp. v. City of Nashua, No. 04-E-0062, 2004 N.H. Super. LEXIS 5 (Aug. 31, 2004), aff'd on other grounds, 152 N.H. 729 (2005), the City of Nashua began an eminent domain proceeding before the PUC pursuant to RSA Chapter 38, which empowers municipalities to take by eminent domain privately-owned water utilities in order to operate the same as publically-owned facilities. In the PUC action, the City sought to acquire property owned by Pennichuck to establish a water utility. In response, Pennichuck filed suit in superior court. Pennichuck sought a declaratory judgment that the City's proposed taking was not authorized under RSA 38, because the property at issue was not necessary to provide water services within the City. The City moved to dismiss the lawsuit, arguing that under the doctrine of primary jurisdiction the PUC, not the Superior Court, had jurisdiction to determine whether the taking was in the public interest. The Superior Court (Lynn, C.J.) agreed, holding that RSA 38 charged the PUC with responsibility for determining if the taking was in the public interest. The Court reasoned that “[g]iven the myriad of economic factors and other considerations which are likely to be entailed in making this decision, there is no question that the expertise possessed by the PUC makes it the logical forum to grapple with these issues in the first instance.

**B. The PUC Has Primary Jurisdiction Over This Dispute and segTEL's Writ Should Be Dismissed**

Here, the applicable statutes and administrative rules provide the PUC with primary jurisdiction over the issues raised in the segTEL Writ. The PUC has the authority and responsibility to regulate public utilities and utility pole attachments, and to adopt rules and standards needed for the exercise of this authority. This broad authority covers the claims and

disputes alleged in the segTEL Writ. segTEL has raised issues concerning the timing for completing make-ready required for NHOS's attachments; the rates segTEL can charge for that work; whether segTEL can require NHOS to pay for existing construction defects and other work unrelated to NHOS's attachments; and the remedies available to NHOS if segTEL refuses to perform required make-ready work. These are the same issues that are being addressed by the PUC.

The PUC has the jurisdiction and authority to resolve these matters. Due to the numerous factual issues and other considerations involved in the PUC's investigation and in any decision it reaches, there is no question that the PUC is the logical forum within which to address and consider these issues in the first instance. segTEL should, therefore, be required to exhaust its administrative remedies and allow the PUC to exercise its expertise and complete its investigation.

Accordingly, the Court should dismiss this lawsuit. See Konefal, 143 N.H. at 258 (affirming dismissal of claims by teacher and her husband against school district and various administrators because the Public Employees Labor Relations Board had "primary jurisdiction" over the dispute); Pennichuck Corp, 2004 N.H. Super. LEXIS at \*20-\*22 (granting motion for summary judgment on claim concerning condemnation of property because PUC had primary jurisdiction over dispute and proceeding addressing dispute was pending before PUC).

As explained above, when the PUC adopted the Puc 1300 rules, it certified to the FCC that New Hampshire regulates rates, terms and conditions for pole attachments, and has "issued and made effective rules and regulations implementing its regulatory authority over pole attachments, including a specific methodology for such regulations which has been made publicly available in the state." Although the Puc 1300 rules do address pole attachments, the

issues that have arisen in this area since the enactment of the rules are complex. As a result of DT 12-107, opened as a result of segTEL actions, the PUC has concluded that “the existing regulatory structure [defined in Puc 1300] may be in need of further standards.” See PUC Order #25,386, p. 11.<sup>5</sup>

The issues alleged by segTEL’s Writ are a direct result of segTEL’s actions and inactions related to its refusal to relocate to accommodate a potentially competitive pole attacher.

Protecting new attachers, such as NHOS, from anti-competitive practices and ensuring service providers such as NHOS timely access to utility poles is the primary purpose of Puc 1300. In addition to the PUC’s clear jurisdiction over these issues, the allegations raised in the segTEL Writ should be resolved before the PUC because:

- The PUC has the best understanding of the rules and regulations they drafted.
- The PUC best understands the complex factual record that led to the promulgation of Puc 1300, as well as the record established by other states and FCC relating to pole attachments.
- The PUC has two open dockets addressing the root cause of segTEL’s Writ.
- The ruling that will result from this dispute will likely set precedent for disputes brought before the PUC involving other parties seeking to attach their equipment to utility poles.

segTEL implicitly concedes that this is a paradigm case for the Superior Court to defer to an administrative agency’s jurisdiction and authority. As segTEL admits, the core issues raised in its Writ – namely, the “rates, terms, and conditions for third-party make-ready” – currently are

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<sup>5</sup> The FCC, which regulates pole attachments in 29 states, recognized similar limitations to its regulations and as a result built a record which reviewed tens of thousands of pages of comments, convened public workshops, and participated in many ex parte meetings before it issued a 144 page Report and Order, FCC 11-50, to address many of the same concerns.

not regulated in New Hampshire. See segTEL Writ, ¶ 17. While alleging that third-party attachers have “historically worked out” these issues “cooperatively,” segTEL fails to identify what legal standard this Court should or could apply to adjudicate these issues here. Id. Again, these same issues are being addressed by the PUC, and fall squarely within the regulatory authority that the legislature has conferred on the PUC. The Court should decline segTEL’s request to interfere with the PUC’s authority over these matters.

segTEL may argue that the Superior Court should retain jurisdiction over this matter because its Writ demands a jury trial and recovery of damages, neither of which is available in proceedings before the PUC. In Pennichuck, however, then Chief Justice Lynn rejected similar arguments in concluding that the PUC had primary jurisdiction over Pennichuck’s claims, which challenged the City’s attempt to condemn Pennichuck’s property, and the constitutionality of the condemnation statute, RSA 38. The Court recognized that under RSA 38, if the PUC concluded that the proposed taking was necessary, the PUC – not a jury – would decide the issue of the damages to be awarded Pennichuck. The Court also recognized that, in this respect, RSA 38 potentially violated Pennichuck’s equal protection rights, since all other condemnation statutes confer a right to a jury trial. Nonetheless, the Court concluded it was unnecessary to decide the equal protection issue, since the PUC had not yet made a decision on the necessity of the proposed taking. If the PUC reached the issue of damages and rendered a decision adverse to Pennichuck, the Court held, the company could “then press its claim” that it was entitled to a jury decide the issue of damages. Id. Accordingly, while the Court applied the doctrine of primary jurisdiction to dismiss Pennichuck’s claims, it held the ruling was “without prejudice to Pennichuck’s ability to reassert its claimed right to a jury trial” on the issue of damages.” Id.

Likewise here, the question of whether segTEL (or NHOS) is entitled to damages as a result of make-ready disputes on the Middle-Mile project cannot and should not be addressed now. The PUC first must determine the legal standards applicable to third-party make-ready work, and, second, whether a party has breached a legal duty owed under those standards. To the extent segTEL demands that a jury decide the issue of damages, it can bring that issue to the Superior Court after the PUC concludes its proceedings.

WHEREFORE, NHOS respectfully requests that this Honorable Court:

- A. Dismiss the Writ of Summons; and
- B. Grant any other relief deemed necessary.

Respectfully submitted,

NEW HAMPSHIRE OPTICAL SYSTEMS,  
INC.

By its attorneys,

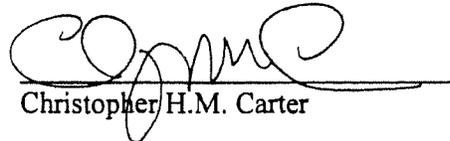
Dated: February 15, 2013



Christopher H.M. Carter, Esq. (#12452)  
Robert M. Fojo, Esq. (#19792)  
Hinckley, Allen & Snyder LLP  
11 South Main Street, Suite 400  
Concord, NH 03301-4846  
Tel. (603) 225-4334

**CERTIFICATE OF SERVICE**

I hereby certify that on this date a copy of the foregoing has been delivered to all counsel of record.



Christopher H.M. Carter

#51253730-3

# **Exhibit A**

THE STATE OF NEW HAMPSHIRE

CHAIRMAN  
Thomas B. Getz

COMMISSIONERS  
Graham J. Morrison  
Clifton C. Below

EXECUTIVE DIRECTOR  
AND SECRETARY  
Debra A. Howland



PUBLIC UTILITIES COMMISSION  
21 S. Fruit Street, Suite 10  
Concord, N.H. 03301-2429

Tel. (603) 271-2431

FAX (603) 271-3878

TDD Access: Relay NH  
1-800-735-2964

Website:  
www.puc.nh.gov

RECEIVED & INSPECTED

JAN 31 2008

FCC-MAILROOM

January 23, 2008

Ms. Marlene A. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Re: Certification of State-Law Regulation of Utility Pole Attachments Pursuant to  
47 U.S.C. § 224(c) and 47 CFR § 1.1414

Dear Secretary Dortch:

The New Hampshire Public Utilities Commission (NH PUC) hereby certifies to the  
Federal Communications Commission pursuant to 47 U.S.C. § 224(c) and 47 CFR §  
1.1414(a) that the State of New Hampshire, via authority delegated to the NH PUC by  
2007 N.H. Laws Ch. 340 (codified as N.H. Rev. Stat. Ann. 374:34-a),

- (1) regulates rates, terms and conditions for pole attachments,
- (2) in so regulating, has the authority to consider and does consider the interests  
of the subscribers of cable television services as well as the interests of the  
consumers of the utility services, and
- (3) has issued and made effective rules and regulations implementing the State of  
New Hampshire's regulatory authority over pole attachments, including a  
specific methodology for such regulation that has been made publicly  
available in New Hampshire.

Specifically, Chapter Puc 1300 of the New Hampshire Code of Administrative Rules  
became effective on January 17, 2008. A copy of these rules is attached.

Please note that, although the Puc 1300 rules are designated as "interim" rules pursuant to  
the New Hampshire Administrative Procedure Act, N.H. Rev. Stat. Ann. Ch. 541-A;  
section 3 of the relevant enabling legislation, 2007 N.H. Laws Ch. 340:3, specifies that  
these interim rules may be effective for up to two years. A copy of the enabling  
legislation is attached. In the opinion of the NH PUC, these rules meet the certification

Ms. Marlene A. Dortch  
Secretary, Federal Communications Commission  
January 23, 2008  
Page 2

standard of 47 CFR § 1.1414(a) notwithstanding their formal designation as interim rules. The NH PUC is in the process of commencing a rulemaking proceeding for the purpose of promulgating regular (as opposed to interim) Puc 1300 rules within the meaning of the New Hampshire Administrative Procedure Act. It is expected that the regular rules will become effective well before the expiration of the interim rules in 2010.

Finally, please note that the "specific methodology . . . that has been made publicly available" as required by 47 CFR § 1.1414(a)(3) is the methodology currently in use by the Federal Communications Commission pursuant to 47 CFR § 1.1409. The NH PUC adopted this approach at the specific direction of the enabling legislation. *See* 2007 N.H. Laws Ch. 340:2 (providing that, for a period of at least two years after the legislation's effective date of July 16, 2007, "the rules shall be consistent with the regulations adopted by the Federal Communications Commission . . . including the formulae used to determine maximum just and reasonable rates"). The NH PUC is aware that the FCC has opened a rulemaking proceeding to consider possible changes to these regulations, but the Puc 1300 rules will *not* automatically change to reflect any revisions by the FCC to the Code of Federal Regulations. Further rulemaking under New Hampshire law would be required to implement any such changes.

Any questions concerning the foregoing should be directed to the NH PUC's general counsel, Donald M. Kreis, who can be reached at 603.271.6006. Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas B. Getz". The signature is fluid and cursive, with a large initial "T" and "G".

Thomas B. Getz  
Chairman

Cc: Service List in NH PUC Docket No. DRM 07-119

Encl.

CHAPTER Puc 1300 UTILITY POLE ATTACHMENTS

Statutory Authority: RSA 374:34-a

PART Puc 2501 PURPOSE AND APPLICABILITY

Puc 2501.01 Purpose. The purpose of Puc 1300, pursuant to the mandate of RSA 374:34-a, is to provide for the resolution of disputes involving the rates, charges, terms and conditions for pole attachments.

Puc 2501.02 Applicability. Puc 2500 shall apply to

(a) Public utilities within the meaning of RSA 362, including rural electric cooperatives for which a certificate of deregulation is on file pursuant to RSA 301:57, that own, in whole or in part, any pole used for wire communications or electric distribution.

(b) Other persons with facilities attached to such poles, or seeking to attach facilities to such poles.

PART Puc 1302 DEFINITIONS

Puc 1302.01 "Commission" means the New Hampshire public utilities commission.

Puc 1302.02 "FCC" means the federal communications commission.

Puc 1302.03 "Pole" means "pole" as defined in RSA 374:34-a, namely "any pole, duct, conduit or right-of-way that is used for wire communications or electricity distribution and is owned in whole or in part by a public utility, including a rural electric cooperative for which a certificate of deregulation is on file with the commission pursuant to RSA 301:57."

PART Puc 1303 ACCESS TO POLES

Puc 1303.01 Access Standard. The owner or owners of a pole shall provide access to such pole on terms that are just, reasonable and nondiscriminatory. Notwithstanding this obligation, the owner or owners of a pole may deny a request for attachment to such pole when there is insufficient capacity on the pole or for reasons of safety, reliability and generally applicable engineering purposes.

Puc 1303.02 Owner Obligation to Negotiate. The owner or owners of a pole shall, upon the request of a person seeking a pole attachment, negotiate in good faith with respect to the terms and conditions for such attachment.

Adopted Interim Rule 1/11/08

Puc 1303.03 Requestor Obligation to Negotiate. A person seeking a pole attachment shall contact the owner or owners of the pole and make a reasonable effort to negotiate an agreement for such attachment.

Puc 1303.04 Voluntary Agreements. Any pole attachment agreement entered into voluntarily under this part shall be presumed to be just, reasonable and nondiscriminatory. The commission shall not alter the terms of any such agreement.

PART Puc 1304 DISPUTE RESOLUTION

Puc 1304.01 Lack of Agreement. A person unable to reach agreement with the owner or owners of a pole or poles subject to this chapter may petition the commission pursuant to Part Puc 203 for an order establishing the rates, charges, terms and conditions for the pole attachment or attachments. Such a petition shall include the information required for complaints to the FCC made pursuant to the terms of 47 CFR § 1.1404(d) through (m) in effect on July 16, 2007.

Puc 1304.02 Dispute Following Agreement or Order. A party to a voluntary pole attachment agreement entered into pursuant to this chapter, or a party subject to an order of the commission establishing rates, charges, terms or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order.

Puc 1304.03 Procedure. Upon receipt of a petition pursuant to this part, the commission shall conduct adjudicative proceedings pursuant to Puc 203 for the purpose of considering and ruling on the petition. The commission shall issue its order resolving the complaint within 180 days of the receipt of a complete petition under this part.

Puc 1304.04 FCC Standard Applicable. In determining just and reasonable rates under this chapter, the commission shall apply the standards and formulae adopted by the FCC in 47 CFR § 1.1409(c) through (f) in effect on July 16, 2007.

Puc 1304.05 Remedies. When the commission determines just and reasonable rates under this Part that differ from the rates paid by the petitioner, the commission shall order a payment or refund, as appropriate. Such refund or payment shall be the difference between the amount actually paid and the amount that would have been paid under the rates established by the commission, plus interest, as of the date of the petition.

PART Puc 2505 CERTIFICATION TO FCC

Puc 2505.01 Certification. Within 10 days of the effective date of these rules, the commission shall certify to the FCC that the commission regulates the rates, terms and conditions for pole attachments in a manner sufficient to supersede FCC jurisdiction pursuant to 47 U.S.C. § 224 in effect on July 17, 2007 or any successor federal statute.

# Exhibit B

**BEFORE THE STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION  
Case No. \_\_\_\_\_**

**PETITION FOR INVESTIGATION INTO PROPOSED CHARGES  
FOR UTILITY POLE MAKE READY**

New Hampshire Optical Systems, LLC ("NHOS"), by its counsel, Hinckley, Allen & Snyder LLP, hereby petitions the State of New Hampshire Public Utilities Commission (the "Commission") to conduct 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.

NHOS has been awarded a contract to construct a federally-funded project to establish affordable broadband access throughout New Hampshire. To complete this work, NHOS will attach fiber-optic cable to approximately 23,000 utility poles which include cable attachments owned by utilities other than the pole owners ("Third Party Attachees"). Despite good faith efforts, NHOS has been unable to reach agreement with certain Third Party Attachees over the cost of make-ready work required for the NHOS pole attachments. In order to prevent this disagreement from further derailing NHOS' work on the project, NHOS requests pursuant to RSA 365:5 that the Commission investigate the matter, and establish the just and reasonable cost for third party make-ready work that is required to accommodate pole attachments, such as proposed to be made by NHOS.

**FACTS**

1. NHOS is a registered CLEC based in Nashua, New Hampshire.
2. NHOS is installing approximately 750 miles of fiber-optic cable through a region extending generally from the New Hampshire seacoast to the southwest part of the state, and then north to the Lakes Region and the North Country (the "Middle Mile Project").

3. Construction will require NHOS to attach fiber-optic cable to approximately 23,000 utility poles that are primarily joint-owned / joint use and in the public right-of-way. Transmission facilities owned by various Third Party Attachees, such as other CLECs and Cable TV providers have previously been installed on certain of these poles.

4. The pole owners have not objected to NHOS undertaking the pole attachments necessary for the construction of the Middle-Mile Project. To make room for the NHOS attachment, the pole owners have directed the Third Party Attachees to rearrange existing facilities.

5. Some of the Third Party Attachees have demanded that their make-ready work be performed at excessive rates, and that NHOS pay, in full, their stated cost of this work prior to performing their make-ready work.

6. By way of example, NHOS has received a quoted rate of \$214.50 (exclusive of pre- and post- construction survey fees and travel costs) from Third Party Attachees for lowering a single facility, however, in connection with a recent request for proposal conducted by an NHOS' affiliate, the documented industry average quoted for the same services was \$54.28, with a low cost of \$22.00. In addition, NHOS is aware that similar Third Party Attachees have negotiated contract rates of less than \$23.00 plus traffic management for the same work.

#### **APPLICABLE STATUTES AND REGULATIONS**

7. Under RSA 374:2, all charges demanded by any public utility for any service "shall be just and reasonable." Any charge that is unjust or unreasonable, or in excess of that allowed by law, is prohibited. Id.

8. Under RSA 374:34-a, the Commission has the authority to regulate the rates, charges, terms, and conditions of pole attachments. Further, under RSA 365:5, 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.”

9. Here, although the pole owners may require that Third Party facilities be relocated under no circumstances may the Third Party Attachees require NHOS, or any potential attachee, to pay a premium for the facility relocation costs. Only the actual costs may be charged for this work, and the charges must be just and reasonable.

10. During the past four months, NHOS has attempted to reach agreement with the Third Party Attachees over the completion of the make-ready work required for the NHOS pole attachments, the costs of that work, and the allocation of those cost.

11. Despite good faith efforts, NHOS has not been able to reach agreement with the Third Party Attachees over the cost of the make-ready work. To date, the Third Party Attachees have demanded reimbursement at rates that far exceed the just and reasonable cost of the work, in some cases defending their cost position on the argument that their pricing is consistent with the costs charged by the pole owners. Nevertheless, this position is misguided, as costs associated to the pole owner are significantly higher than to the Third Party Attachees, and as such, the added cost should not be passed on to NHOS. Further, the actions of these Third Party Attachees threatens to bar the NHOS pole attachments unless or until NHOS agrees to pay the costs demanded, and Third Party Attachees have rejected NHOS's offer to perform the make-ready work itself at no cost and with their oversight.

12. The ongoing disagreement over the cost of make-ready work threatens to interfere with NHOS's ability to complete the Middle-Mile Project, an outcome which could prevent Network New Hampshire Now (“NNHN”) from meeting the June, 2013 deadline established as a condition of receiving federal funds for the state-wide broadband project, and further, provide a

means for Third Party Attachees to financially benefit from or delay any competitive attachments such as NHOS.

13. The Vermont Public Service Board has stated in Rule 3.700 of its regulations, that “In completing make-ready work, a utility should pursue reasonable least-cost alternatives . . . currently relied upon by that utility”. While obviously the Vermont statute is not applicable in New Hampshire, ensuring reasonable low cost alternatives for third party make-ready services should be shared commitment by New Hampshire. In this instance, certain of the Third Party Attachees have claimed they will use in-house crews to complete make-ready in an attempt to justify their rates. The same Third Party Attachees are known to outsource much of their construction and should be expected to do so to complete make-ready and not attempt to hide true cost by claiming in-house cost well above industry norm. In addition, make-ready work should be conducted consistent with the Third Party Attachees’ typical construction practices and adopting higher cost practices because the cost burden can be passed on to potential attachees should not be considered just and reasonable.

14. In certain instances, Third Party Attachees are charging make-ready survey fees for all poles on the applications submitted to the pole owners by NHOS. In many instances, these Third Party Attachees have no make-ready on the majority of the poles and often do not even have facilities on these poles. This practice should not be considered just and reasonable.

#### **REQUEST FOR INVESTIGATION AND RELIEF**

15. Pursuant to RSA 365:5, NHOS requests that the Commission investigate this matter, and establish the just and reasonable cost for third party make-ready work that is required to accommodate the NHOS pole attachments.

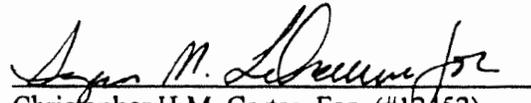
16. In addition, NHOS request that the Commission establish the just and reasonable charges Third Party Attachees can charge for make-ready work required to accommodate the NHOS pole attachments.

Respectfully submitted,

NEW HAMPSHIRE OPTICAL SYSTEMS,  
LLC

By its attorneys

Dated: April 24, 2012



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

#50681711

# Exhibit C

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

**DT 12-107**

**NEW HAMPSHIRE OPTICAL SYSTEMS, LLC**

**Petition for Investigation into Proposed Charges for Utility Pole Make Ready**

**ORDER OF NOTICE**

On April 24, 2012, New Hampshire Optical Systems, LLC (NHOS) filed a petition for investigation into proposed charges for utility pole make-ready work with the Commission. The petition and subsequent docket filings, other than information for which confidential treatment is requested of or granted by the Commission, will be posted to the Commission's website at <http://www.puc.nh.gov/Regulatory/Docketbk/2012/12-107.html>.

NHOS, a registered competitive local exchange carrier, is in the process of installing approximately 750 miles of fiber-optic cables throughout New Hampshire. As part of that installation, NHOS estimates it will need to attach its cables to approximately 23,000 utility poles. To make room on the poles for NHOS' attachments, the owners of the poles have directed existing third-party attachers to complete the necessary make-ready work by rearranging their facilities. According to NHOS' petition, some of the existing third-party attachers have demanded that their make ready work be performed at excessive rates and that NHOS pay the costs of the work in full prior to the work being performed. NHOS states that despite efforts to reach agreements with these existing third-party attachers no agreements on the costs have been reached and NHOS states that the disagreement over costs for make-ready work threatens its ability to complete its project.

According to NHOS' petition, the costs it has been required to pay are above the actual costs of performing the work, and are not just and reasonable. NHOS' petition also states that some existing third-party attachers are charging fees for services related to poles upon which those attachers have no attached facilities. Accordingly, NHOS requests that "the Commission investigate this matter, and establish the just and reasonable cost for third party make-ready work that is required to accommodate the NHOS pole attachments."

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. Each party has the right to have an attorney represent the party at the party's own expense.

**Based upon the foregoing, it is hereby**

**ORDERED**, that a Prehearing Conference, pursuant to N.H. Code Admin. Rules Puc 203.15, be held before the Commission located at 21 S. Fruit St., Suite 10, Concord, New Hampshire on June 7, 2012 at 10:00 a.m., at which each party will provide a preliminary statement of its position with regard to the petition and any of the issues set forth in N.H. Code Admin. Rules Puc 203.15 shall be considered; and it is

**FURTHER ORDERED**, that, immediately following the Prehearing Conference, NHOS, the Staff of the Commission and any Intervenors hold a Technical Session to review the petition and allow NHOS to provide any amendments or updates to its filing; and it is

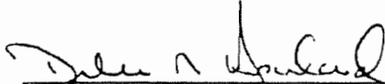
**FURTHER ORDERED**, that pursuant to N.H. Code Admin. Rules Puc 203.12, NHOS shall notify all persons desiring to be heard at this hearing by publishing a copy of this Order of Notice no later than May 24, 2012, in a newspaper with general circulation in those portions of

the state in which operations are conducted, publication to be documented by affidavit filed with the Commission on or before June 7, 2012; and it is

**FURTHER ORDERED**, that pursuant to N.H. Code Admin. Rules Puc 203.17, any party seeking to intervene in the proceeding shall submit to the Commission seven copies of a Petition to Intervene with copies sent to NHOS and the Office of the Consumer Advocate on or before June 5, 2012, such Petition stating the facts demonstrating how its rights, duties, privileges, immunities or other substantial interest may be affected by the proceeding, as required by N.H. Code Admin. Rule Puc 203.17 and RSA 541-A:32,I(b); and it is

**FURTHER ORDERED**, that any party objecting to a Petition to Intervene make said Objection on or before June 7, 2012.

By order of the Public Utilities Commission of New Hampshire this eleventh day of May, 2012.

  
\_\_\_\_\_  
Debra A. Howland  
Executive Director

Individuals needing assistance or auxiliary communication aids due to sensory impairment or other disability should contact the Americans with Disabilities Act Coordinator, NHPUC, 21 S. Fruit St., Suite 10, Concord, New Hampshire 03301-2429; 603-271-2431; TDD Access: Relay N.H. 1-800-735-2964. Notification of the need for assistance should be made one week prior to the scheduled event.

# **Exhibit D**

STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

SEP - 7 2012

DT 12-107

NEW HAMPSHIRE OPTICAL SYSTEMS, LLC

**Petition for Investigation into Proposed Charges for Utility Pole Make Ready**

**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**

**September 5, 2012**

**I. PROCEDURAL BACKGROUND**

On April 24, 2012, New Hampshire Optical Systems, LLC (NHOS), filed a petition with the Commission requesting, pursuant to RSA 365:5, that the Commission undertake an investigation of practices related to pole-attachment work required for the construction of NHOS' statewide "Middle Mile" fiber-optic communications network project. In order to accommodate the inclusion of NHOS' attachments, the status of the existing attachments must be surveyed and, in many instances, the existing attachments must be rearranged or otherwise amended to allow the new attachment. (This rearrangement for a new attachment is referred to as "make-ready work.") On June 6, 2012, the Commission granted petitions to intervene of the New England Cable and Telecommunications Association (NECTA), the CLEC Association of Northern New England (CANNE), and Unitil Energy Systems, Inc. (Unitil) at a pre-hearing conference held for this proceeding. On July 3, 2012, the Commission issued Order No. 25,386, allowing NHOS an opportunity to revise its filings in order to provide specificity regarding its pole attachment work-related disputes within 30 days of the Order's issuance. (A summary of



the procedural history of this docket through July 3, 2012 may be found within Order No. 25,386).

On August 2, 2012, NHOS submitted an amended petition for an investigation pursuant to RSA 365:5. In response, on August 13, 2012, NECTA and CANNE each filed motions to dismiss NHOS' petition, as revised. On August 15, 2012, Northern New England Telephone Operations LLC (commonly known as "FairPoint") filed a letter stating that, though FairPoint was not a party to this proceeding, as a pole owner and incumbent carrier, it shared NECTA's and CANNE's concerns, and supported their motions to dismiss NHOS' petition. On August 16, 2012, the New Hampshire Telephone Association (NHTA), a trade association representing small local exchange carriers in this State, also filed a letter indicating NHTA's support for NECTA's and CANNE's motions to dismiss, and concurrence with FairPoint's letter. (NHTA, like FairPoint, is not a party to this proceeding).

On August 20, 2012, the University System of New Hampshire (USNH), which contracted with NHOS to construct the Middle Mile network system, filed a petition to intervene in this proceeding and on August 22, 2012, the Northern Community Investment Corporation (NCIC) also filed a petition to intervene. On August 23, 2012, NHOS filed an objection to NECTA's and CANNE's motions to dismiss, and provided additional details in connection with its petition. USNH filed a letter in support of NHOS' objection to the motions to dismiss on August 23, 2012.

## II. POSITIONS OF THE PARTIES

### A. New Hampshire Optical Systems, LLC

NHOS, in its amended petition of August 2, 2012, restates much of its initial petition and names TechValley/segTEL as an example of a third-party attacher with which NHOS has had difficulties. Amended Petition of NHOS at 2. NHOS reiterates its continuing allegations that certain third-party attachers have “refused to perform the make-ready work that must occur before NHOS can attach its fiber optic cable” *Id.* at 4. NHOS further alleges that “the third-party attachers 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. Further, these attachers have deliberately delayed the start of that work, even after NHOS assented to their unreasonable payment demands.” *Id.* NHOS also alleges that pole owners “have declined to enforce the provisions [of Pole Attachment Agreements] to require that third-party attachers perform the make-ready work necessary for NHOS to install its fiber optic cable.” *Id.* at 5. NHOS alleges that these failures have led to serious delays that may jeopardize the Middle Mile network project’s viability, given the Federally-imposed completion deadline of June 2013. *Id.* at 2. To avoid such an outcome, NHOS requests “that the Commission investigate third-party make-ready practices on the Middle-Mile Project, and demand that pole owners employ their contractual right under the [Pole Attachment Agreement] to require third-party attachers to perform make-ready work in a timely fashion, and under terms that are fair and reasonable.” *Id.*

In its objection to NECTA’s and CANNE’s motions to dismiss, NHOS defends the veracity of its allegations, repeats the need for prompt Commission action to provide make-ready/pole attachment-related relief, and points to its desire to avoid direct confrontation with

pole owners, and third-party attachers, with which NHOS seeks cooperation. Specifically, NHOS states: "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. .... 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." NHOS Objection to Motions to Dismiss, 8/23/2012, at 4. NHOS summarizes its request for relief in its objection to the Motions to Dismiss by asking "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...." *Id.* at 3.

In addition to the utilities cited above, NHOS mentions MetroCast as one of the CLECs to which FairPoint provided a 15 day notice to move an existing attachment and states that as a result, MetroCast "removed the majority of the roadblocks to moving forward with its make ready work." *Id.* at 7.

**B. New England Cable and Telecommunications Association**

NECTA, in its motion to dismiss, argues that NHOS, despite the Commission's directive in Order No. 25,386, failed to properly state the specific facts giving rise to NHOS' prayer for

relief in its amended petition, thereby making NHOS' petition vague, deficient, and subject to dismissal.

**C. CLEC Association of Northern New England, Inc.**

CANNE, in its motion to dismiss, argues that NHOS' amended petition was so vague as to prevent the Commission from investigating and adjudicating the allegations brought forth by NHOS. CANNE also argues that NHOS' amended petition does not comply with the terms of Order No. 25,386, due to its vagueness and failure to specify the relief NHOS seeks from the Commission, thereby warranting dismissal.

**D. University System of New Hampshire**

USNH, the recipient of the Federal grant of up to \$44.5 million for the construction of the Middle Mile network, hired NHOS to engage in the construction of the project, and to coordinate all make-ready work. USNH seeks intervention in this proceeding, stating that USNH's rights, duties, privileges, immunities, and other substantial interests are likely to be affected by this proceeding, given NHOS' status as USNH's contractor and agent.

**E. Northern Community Investment Corporation**

NCIC, an organization involved in supporting businesses located in the North Country region of New Hampshire, seeks to intervene in this proceeding. NCIC states that completion of the Middle Mile fiber network is of the utmost importance to the success of its own local wireless data infrastructure project, and for the future economic development of the North Country. In light of this, NCIC expresses its concern with the allegations of pole-attachment related delays in the construction of the Middle Mile project.



### **III. COMMISSION ANALYSIS**

#### **A. Motions to Dismiss; Commission Request for Additional Information**

The progression of this docket has not followed a normal pathway, despite efforts to expedite a resolution. The initial NHOS petition sought investigation of rates and charges imposed by unnamed third party attachers. In its statement of position filed before the prehearing conference, NHOS also suggested that the adoption of rules regarding access to poles and rates for third party make-ready work would be an appropriate vehicle to resolve the issues. At the close of the pre-hearing conference NHOS changed its position and no longer requested resolution through rulemaking. Despite allegations of impropriety, the petition provided no specific conduct to investigate and no pole locations, pole owners or third party attachers on which to focus our investigation. The Middle Mile project involves approximately 23,000 poles, and numerous pole owners and third party attachers. Without specifics, we could not conduct a meaningful investigation. Rather than dismissing the petition, however, in Order No. 25,386 we permitted NHOS to revise its filing and identify particular acts or actors impeding its progress. In its amended petition NHOS again asserted that the conduct of others was improper, focusing not on rates and scope of make-ready work as originally petitioned, but on timely access to poles. NHOS did provide a reference to difficulties with "CLECs like segTEL", without specifically identifying which poles are at issue and which third-parties are causing specific delays. NHOS also argued for the first time that the Commission should compel pole owners to exercise contractual terms in their various Pole Attachment Agreements with pole attachers to require

third-party attachers to perform make-ready work in a timely fashion.<sup>1</sup> NHOS Amended Petition at 4.

The amended petition still left the Commission with an impractical task – investigate all CLECs, of whom there are 106 registered to do business in the state, regarding all 23,000 pole attachments on the Middle Mile project, with all pole owners. Clearly this was an untenable request and it is not surprising that NECTA and CANNE moved to dismiss for failure to establish specific acts or actors to be investigated. In its objection to the motions to dismiss, NHOS narrowed its request to review of third-party make ready practices on its project, on the poles owned by FairPoint, PSNH or Unitil and involving CLECs segTEL and BayRing. NHOS included BayRing here for the first time, as a CLEC to be included in the investigation, but without any specific allegations of improper conduct on the part of either named CLEC. NHOS provided information about one additional CLEC, MetroCast, but conceded that the majority of roadblocks attributable to MetroCast have been resolved. It is still not clear whether NHOS has unresolved issues with any CLEC other than segTEL.

Although we now understand NHOS' reluctance to be more precise about its disputes, we cannot investigate NHOS' particular problems without more detailed information. It is unfortunate that four months have passed and we have not received the most basic information to evaluate at the start of a Commission investigation. This docket must be a fact specific inquiry, rather than a more generic rulemaking proceeding such as the one currently underway in docket No. DT 12-246. Rather than dismiss the amended petition, however, we will require NHOS to provide direct answers, under oath, to a series of questions set forth in the Appendix to this order.

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<sup>1</sup> FairPoint objected to this argument stating that NHOS was intimating "that pole owners should be conscripted as agents for resolution and enforcement of third party rights."

to establish a factual framework for further investigation of this matter pursuant to RSA 365:5. We urge NHOS to answer these questions forthrightly, with the understanding that only complete disclosure of the facts involved in its pole-attachment disputes can offer the means for effective resolution of this matter. Further we urge NHOS to respond to the questions as quickly as possible so that our investigation and resolution of the issues identified may proceed expeditiously.

**B. Motions to Intervene**

RSA 541-A:32, I, provides for mandatory intervention when a party has demonstrated that "rights, duties, privileges, or other substantial interests may be affected by the proceeding." RSA 541-A:32, I. We hereby grant USNH intervention under RSA 541-A:32, I, because its role in retaining NHOS as its contractor for the construction of the Middle Mile network gives it substantial interests in this proceeding.

RSA 541-A:32, II provides for discretionary intervention when "such intervention would be in the interests of justice and would not impair the prompt and orderly conduct of the proceeding." RSA 541-A:32, II. We hereby grant NCIC intervention under RSA 541-A:32, II.

**C. Designation of Additional Parties and Incorporation of Additional Parties into Commission Request for Additional Information**

This investigation arises from a dispute among NHOS, one or more pole owners, and one or more third-party attachers. Current parties include two trade organizations that have CLEC members, NECTA and CANNE, but no CLECs themselves, and only one of the many pole owners in the state, Unitil. Because the scope of the investigation appears to involve specific

CLECs and pole owners, the record would be unreasonably limited if we were to proceed only with the parties who have sought intervention.

Pursuant to RSA 541-A:1, XII, and RSA 541-A:31, therefore, and in the interest of orderly resolution of issues brought forward in this docket, we find that the pole owners and CLECs named by NHOS in its pleadings and related materials, all of which are public utilities, should be included as parties in this investigation, so as to ensure full disclosure of required information and to protect these entities' procedural rights. We designate the following additional entities as parties to this proceeding: FairPoint, PSNH, segTEL, BayRing Communications, and MetroCast. FairPoint, PSNH and Unitil must reply to a series of questions labeled "Questions for Pole Owners" in the Appendix, and the answers to these questions shall be made under oath. Upon review of answers provided by NHOS and the pole owners, we direct our Staff to prepare questions for any identified CLECs and in turn, expect prompt responses from the CLECs, similarly made under oath.

**D. Examination of Scope of Proceeding; Pre-Hearing Conference; Ongoing NHOS Construction Efforts**

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.

Once factual evidence is received in response to the questions appended hereto, as well as any follow-up thereto, we will determine how best to proceed. We remind all parties that the requirements of RSA 374:34-a and Chapter Puc 1300 governing pole attachments remain in force during the pendency of this investigative docket, and stress that the possible existence of a dispute among the parties does not give any party license to block or otherwise delay any pole-attachment installation work by NHOS or others.

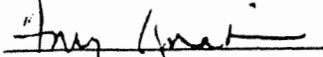
**Based upon the foregoing, it is hereby**

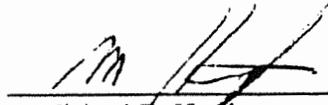
**ORDERED**, that NECTA's and CANNE's motions to dismiss are DENIED; and it is **FURTHER ORDERED**, that USNH's and NCIC's petitions to intervene are hereby GRANTED; and it is

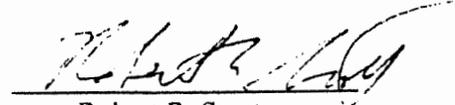
**FURTHER ORDERED**, that FairPoint, PSNH, segTEL, BayRing Communications, and MetroCast are hereby joined to this proceeding as parties; and it is

**FURTHER ORDERED**, that NHOS, FairPoint, PSNH and Unitil provide responses, under oath, to the questions listed in the Appendix of this Order as soon as possible.

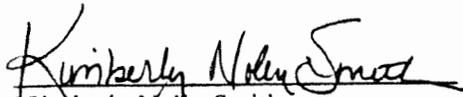
By order of the Public Utilities Commission of New Hampshire this fifth day of  
September, 2012.

  
Amy D. Ignatius  
Chairman

  
Michael D. Harrington  
Commissioner

  
Robert R. Scott  
Commissioner

Attested by:

  
Kimberly Nolin Smith  
Assistant Secretary

**APPENDIX**

NOTE: All answers to these discovery questions are to be made under oath.

Questions for NHOS:

1. Provide a specific list of entities with which NHOS currently has outstanding disputes related to pole attachments in connection with its "Middle Mile" construction project.
2. For each entity with which NHOS has a pole-attachment dispute, please list the specific poles involved, including the town or city in which they are located, the road on which they are located, the owner of each specific pole, and the existing third-party attachments made to the pole. State the specific nature of the dispute (amount of excessive make ready charges, whether advanced payment of make ready charges is required, delayed make ready by third-party attacher, etc.) by location, or group of poles.
3. For each location of poles for which a delay has occurred, provide:
  - a. A dated copy of the notice you provided to the third-party attacher to arrange the make-ready work
  - b. The date on which the third-party attacher provided you with an estimate of the project cost and schedule
  - c. The date on which you provided any pre-payment charged by the third-party attacher
  - d. The date by which you expected the third-party attacher to be moved
  - e. The date on which the third-party attacher reported completion of the make-ready work
  - f. Any and all correspondence between NHOS and the third-party attacher relative to the poles in dispute
  - g. Whether you believe the processing of this third-party make-ready work violated New Hampshire law, New Hampshire rules, or the Pole Attachment Agreement. If so, provide specific citations of law, rule, or agreement sections.
4. What is the total number of poles for which NHOS has submitted a request for license to the pole owners? Of this number, on how many poles have NHOS been unable to make attachment due to third-parties to date?
5. For each of the entities listed in response to question 1, identify separately the number of poles involving each entity. (e.g. if segTEL, BayRing and MetroCast are identified in response

to question 1, how many of the poles in the project involve segTEL attachments, how many poles involve BayRing attachments and how many poles involve MetroCast attachments?)

6. For each of the entities listed in response to question 1, identify separately the number of poles requiring make ready by the entity, for which NHOS has requested the entity perform make ready.
7. For each of the entities listed in response to question 1, identify separately the number of poles requiring make ready which have been completed.
8. For each location or group of poles in dispute, please state what actions NHOS has taken to communicate its concerns with the pole owners.
9. For each instance where NHOS believe charges for third-party make ready are unjust, unreasonable or unfair, identify the relevant pole location or group of poles and provide a copy of the charges received from the third-party attacher.
10. Refer to your Petition of April 24, 2012, Paragraph 14. Provide a copy of each application NHOS submitted to a pole owner, for which a third-party attacher assessed survey fees for poles on which it had no facilities. Identify those poles, the attacher assessing survey fees, and the amount involved.
11. Refer to your Amendment to NHOS Petition for Investigation of August 2, 2012, Paragraph 16. Describe each instance in which a third-party attacher has demanded that NHOS pay for "make-ready work that is unrelated to new attachments." Provide town, pole location, and pole numbers. Identify the third-party attacher and the make-ready work which the third-party attacher claimed was necessary and the related changes that the attacher demanded. For each such instance provide a copy of the make ready survey provided by the pole owner.
12. Refer to your Petition of April 24, 2012, Paragraph 6. Provide a copy of those pages of the Request for Proposal (RFP) describing the make-ready work on which you received bids, and provide all bids received in response to the work statement.

**Questions To Be Answered Separately by FairPoint, PSNH, and Unitil:**

For all answers, provide information regarding only New Hampshire projects and attachments.

1. Provide copies of the PAA's you have in place with the following attachers: NHOS, segTEL, MetroCast, and BayRing.

Refer to the example Pole Attachment Agreement (PAA) of Exhibit A attached to the Amendment to NHOS Petition for Investigation of August 2, 2012; Section 4.2:

2. Provide an estimate of the number of pole attachment applications that you received from Jan 1, 2011 through June 30, 2012:
  - a. In total
  - b. Of under 200 poles
  - c. Over 200 poles that you rejected
  - d. Over 200 poles that you accepted
3. Provide an estimate of the highest number of poles with applications pending (from all parties) but not yet approved at any one time during this period.
4. Provide an estimate of the highest number of poles with applications pending (from any single CLEC) but not yet approved at any one time during this period.
5. During this period, did you exercise your option to limit applications pending approval by a licensor, to no more than 2,000 poles within a Planning Manager's Area at one time?
6. In deciding whether to invoke the 2,000 pole limit, do you consider:
  - a. The work involved in modifying your own facilities,
  - b. The work required of other attachers to modify their own facilities;
  - c. Other factors (identify)

For the following questions, refer to Sections 7.1.5 and 7.1.6 of the Pole Attachment Agreement.

7. After a new licensee pays for make-ready work if applicable, when do you issue written notice to existing licensees that they must move their facilities? Is written notice always issued?

8. If no make-ready work is required by the pole owner, but existing licensee attachments must be moved to accommodate a new licensee, how is notice provided to existing licensees?
9. In its notice to existing licensees, does the pole owner specify a date by which the facilities must be moved?
10. Estimate how often, between Jan. 1, 2011 and June 30, 2012, you issued such notices.
11. Estimate how often, between Jan. 1, 2011 and June 30, 2012, notice to existing licensees included instructions that facilities were required to be moved in 15 days.
12. Estimate how often, between Jan. 1, 2011 and June 30, 2012 you were notified by the new licensee or the existing licensee that the existing licensee would not complete its make ready work within the 15 day period.
13. Estimate how often, between Jan. 1, 2011 and June 30, 2012, you invoked your option to move an existing licensee's facilities.
14. What factors do you weigh in determining whether to invoke this option to move?

# **Exhibit E**

# STATE OF NEW HAMPSHIRE

Inter-Department Communication

DATE: January 30, 2012  
AT (OFFICE): NHPUC

FROM: Kate Bailey *KMB*  
SUBJECT: Staff Report and Recommendation regarding NHOS Complaint in DT 12-107  
TO: Commission  
Executive Director

## Introduction

On September 5, 2012, the Commission issued Order No. 25,407 providing an opportunity for New Hampshire Optical Systems (NHOS) who was contracted by the University System of NH to construct the so called Middle Mile project, funded in part by the American Recovery and Reconstruction Act, to identify specific issues preventing it from attaching to utility poles. The order directed NHOS to answer 12 questions in an attempt to narrow the issues about access to utility poles. In addition, the order directed pole owners to answer a different set of questions. The Commission defined the scope of the investigation to include consideration of whether NHOS has faced unfair and unreasonable delays to access to utility poles during the construction of its Middle Mile project, and if so, a possible remedy. The order went on to state that once factual evidence is received it would determine how best to proceed.

Staff has reviewed answers received from NHOS, FairPoint, PSNH, and Unitil to the Commission's questions. On September 24, 2012, Staff conducted a field visit in Franklin and Tilton with NHOS and segTEL and gathered additional information from segTEL, NHOS and MetroCast. This report summarizes the information gathered, provides Staff's analysis of certain disputes, whether NHOS has faced unfair and unreasonable delays, and a recommendation on how to proceed.

## Summary of Issues and Analysis

NHOS filed its response to the Commission's questions on October 2, 2012. It identified segTEL, BayRing, TelJet and FairPoint as entities with which it has outstanding disputes related to pole attachments.

In response to the Commission's first question, NHOS stated its understanding that incumbent telephone companies, primarily FairPoint, manage the communications space

on the poles and *assume responsibility for communications with other attaching entities.* (emphasis added). According to pole owners' responses, this is not the case. Once FairPoint issues a pole attachment license, on a Form 3, which includes make-ready necessary by existing attachers, it is the new attacher's responsibility to coordinate rearrangement with existing attachers. FairPoint, as pole owner, notifies attachers when it replaces a pole, to transfer facilities to the new pole, but does not take responsibility for notifying existing attachers when rearrangement of facilities for a new attacher is necessary. (FP response 7 and 8). PSNH and Unitil provided responses similar to FairPoint. These companies issue notice to existing attachers when the pole owner sets a new pole and attachments need to be transferred to the new pole. However, both PSNH and Unitil state that coordination for rearranging existing attachments for a new attacher has traditionally been performed by the new attacher. (PSNH and Unitil responses 7 and 8)

NHOS' response to the Commission's second question reports that it has pole attachment disputes with segTEL, BayRing and TelJet. The dispute with BayRing and TelJet is limited to the rate both are charging NHOS to move their facilities. NHOS has the same dispute over rates with segTEL, but also alleges segTEL is intentionally manipulating the process to delay completion of the work. Lastly, NHOS includes the pole owners in its complaint as having a responsibility, but not meeting it, for ensuring reasonable access and management of third-party make-ready.

NHOS argues segTEL's, BayRing's and TelJet's rates are heavily inflated and do not reflect the cost of performing make-ready. NHOS cites a construction rate for lowering a segTEL attachment of \$214.50. It claims BayRing's rates are nearly identical to segTEL's. This rate is identical to the rate in Attachment 1 of the Pole Attachment Agreement between FairPoint, PSNH and NHOS, (Attachment 1 to PSNH responses) which would be charged by the pole owner if the pole owner transferred, moved, raised or lowered a cable. Staff has not investigated the reasonableness of this rate, but points out that NHOS agreed to pay the pole owner this rate when it signed the pole attachment agreement. NHOS argues the pole owner should rearrange existing attachments if the existing attacher does not timely rearrange its attachments. In the event the pole owner performs this work, it would charge NHOS the same rate NHOS is disputing with segTEL and BayRing. It seems illogical to argue on one hand the rates charged by segTEL and BayRing are preventing attachments, and on the other hand, that the pole owners should remedy the timeliness issue, by performing the work for the same rate. Staff, without any information about the cost of this work agrees, on its face, the rate seems high and recommends the rate be investigated in a separate proceeding. The Commission could require NHOS to put money in escrow while the rate dispute is litigated and require BayRing, segTEL and TelJet to account for the costs of performing the work and to provide detailed copies of invoices for this work.

NHOS argues the pole owners have responsibility to ensure reasonable access to their poles and should manage third-party make-ready. The pole owners disagree. PSNH stated it only moves others facilities in the case of emergency or storm restoration where public safety and service restoration are overriding factors. PSNH does not move and has not moved third-party attachments to accommodate new attachers for several reasons.

According to PSNH among other things, it does not own the facilities, the pole attachment agreement does not obligate pole owners, but provides the right, to perform this work; it does not have the time or resources to perform this work; its work force is not trained to handle telecommunications facilities; it is concerned about liability claims for damage or loss and cost recovery for the work; and it is not beneficial to the core electric service business. Until agrees with PSNH that it has the right to make such transfers but that deciding whether to invoke the option to move another licensee's facilities would include evaluation of the potential liability for damage to the facilities; the risk of being unable to recover the cost of the work and the risk of protracted litigation over rate disputes; and the difficulty in determining facts in dispute between two attachers. FairPoint responded that it has never relocated an existing attacher's facilities to accommodate a new attacher and objected to the remainder of the question because, according to FairPoint, it presupposes a legal conclusion.

It is clear pole owners have not previously interpreted the pole attachment agreements to obligate them to ensure timely relocation of existing attachments to accommodate new attachers. Many third-party attachments have been made to incumbent utility poles since 1996 and this issue has not previously been raised. Staff believes the pole owners' reasons for choosing not to perform this work are reasonable and agrees with the pole owners' interpretation of the pole attachment agreement that the language in the agreements upon which NHOS relies, does not obligate pole owners to rearrange existing third-party attachments.

NHOS made various allegations against segTEL about poles in Laconia and Franklin. Staff met with NHOS and segTEL in Franklin and reviewed 12 poles along a route between Franklin and Tilton. Both companies had crews in the area and NHOS provided a police detail. After the field visit, Staff analyzed licenses from the pole owners (Form 3s) to determine what make-ready was required for each attachment; daily worksheets from both segTEL and NHOS construction contractors, to determine the date on which attachments were made; and information from MetroCast about when it performed its required make-ready for these attachments. In some cases, Staff was able to determine when various activities occurred on these poles and who caused the discrepancy. In other cases, Staff could not definitively reconstruct what happened. Attached is a report of the facts, observations, conclusions and recommended action for each of the 12 poles, numbered sequentially for reference. As a result of the analysis, Staff notes the following.

In Franklin and Tilton, NHOS did not follow industry standard construction practices. Standard construction practice for pole attachments is to place strand and hardware together along a pole line followed by installation of fiber on the strand. According to the daily worksheets, NHOS' construction contractor initially "framed" the poles. As explained by NHOS, "framing" the pole means installation of a bolt which holds the strand. In Franklin and Tilton, NHOS bolts had been placed in some of the poles in June, but strand was not attached. After investigation, Staff concluded this may have been due to a dispute with MetroCast over charges for the make-ready work needed by NHOS. The dispute was resolved on August 27, but subsequently, when NHOS went to

place the bolts in the poles which had required work by MetroCast, segTEL had begun its attachment process.

Approximately 3 months after NHOS was licensed, segTEL was licensed in the same location with make-ready instructions to relocate NHOS attachments. If NHOS were attached, it would have been clear to segTEL that it was required to make arrangements with NHOS to relocate the NHOS attachments. In some cases, segTEL make-ready instructions included a requirement to have NHOS rearrange its attachment to a lower position on the pole. In other cases, there was no indication NHOS was required to move. When segTEL began to make its attachments, in some cases it found unmarked bolts with no strand or fiber in its assigned location and in other cases, the attachment space was vacant, without even a bolt in place. Although some make-ready instructions indicated an NHOS attachment needed to be relocated, it appears segTEL failed to contact NHOS about make-ready in this location. segTEL claims its construction contractor did not move any NHOS bolts. Of the 12 poles analyzed by Staff, there is no evidence to contradict this. There is however, evidence that NHOS installed a bolt on 2 poles, after segTEL made its attachment, in close proximity to the segTEL attachment with less spacing than that required by the National Electrical Safety Code. (See staff analysis numbers 3 and 12).

NHOS argued it should be allowed to make all of its attachments in its originally licensed location and then segTEL should be required to pay NHOS to relocate to its new attachment height. If NHOS had paid MetroCast for the required make-ready and attached to all the poles in this location in June with strand, consistent with standard industry practice, it would have been clear to segTEL when it began its attachment process in August, that NHOS would need to relocate. segTEL argued in its experience, some licensed carriers subsequently choose not to attach. In such cases, segTEL occupies the licensed space without relocation expenses. In this area, NHOS had placed bolts in some of the poles. Because segTEL's make-ready instructions included relocation of NHOS attachments, segTEL should have contacted NHOS to investigate the significance of bolts in the segTEL assigned location on some poles but not others.

NHOS was not willing to concede its position that it had the right to install all of its attachments before segTEL could begin its attachments. On the day of the field visit, Staff observed several instances (See staff analysis numbers 2, 7, 8, 9) where both parties were attached in the wrong location or where segTEL was incorrectly attached (See Staff analysis number 6, 11) and suggested the parties work together since both had crews in the area to rearrange and correct them that day. Staff believes this would have cleared up the discrepancies in the area preventing both parties from proceeding without interference, but NHOS was unwilling. This would not, however, have cleared up other violations such as attachments that were too close.

On the twelve poles staff analyzed, it appears segTEL and NHOS are almost equally at fault. On five of the poles reviewed, Staff concluded that both segTEL and NHOS failed to accurately follow make-ready instructions, or there was not enough evidence to determine what happened. On 4 of the poles, it appears segTEL is responsible for the

problems and should remediate. NHOS is responsible for the problems on the remaining 3 and should remediate.

NHOS Exhibit Y contains 132 pages of e-mail correspondence between NHOS and or Waveguide (NHOS's construction contractor) and segTEL. Although it does not appear to be a complete record of correspondence and some e-mails are out of order, the frustration about the amount of work and timeliness is evident. The e-mails are generally about coordination of segTEL make-ready work for NHOS. After reviewing all the e-mails, it does not seem that segTEL is intentionally delaying make-ready, but rather, segTEL is not staffed to do the amount of work required by NHOS and that the lack of rules about requirements for third-party make-ready impeded the ability to complete the work within NHOS's expectations.

NHOS provided segTEL's proposed Reciprocal Make-Ready Agreement in Exhibit K. Although the agreement was not signed by NHOS, NHOS refers to it as segTEL's "documented process." The agreement requires the party requesting make-ready, to put specific details about required work in writing with a statement that all other make-ready has been completed to allow for the requested work to be done. The agreement also states that a completed TELCO make-ready Form 3 shall be presumed reasonable for the purposes of making the request.

In November 2011, NHOS began sending copies of FairPoint Form 3s to segTEL as a request to perform required make-ready. Form 3s are the form FairPoint uses to license attachments. As part of the FairPoint licensing process, a survey of the poles is performed by the pole owners and requesting attacher. During the survey, make-ready work required by the pole owners and third parties is determined and documented on the Form 3s. Existing third-party attachers do not participate in the pole owner survey.

Much of the e-mail correspondence has to do with NHOS submitting Form 3s as a request for make-ready. There were disputes about whether all other parties' make-ready had been completed. This information is necessary because other attachments have to be moved to make space available for segTEL to move its attachment. Since, according to the pole owners, NHOS is responsible for coordination of all third-party make-ready necessary before it can attach, it is not unreasonable for a third party like segTEL to require a clear path so that it can complete all of the rearrangements required by NHOS in an area, at one time. Some of the later e-mails contain correspondence requesting that segTEL complete the portion of work that can be done, with a recognition that segTEL would be required to subsequently dispatch workers to complete the remainder of work in the area at a later time.

Additional correspondence has to do with coordination between a segTEL employee and Waveguide scheduling times to meet in the field to survey a requested route and agree on work that needs to be done. segTEL independently surveys each pole and sometimes identifies more work than that identified on the Form 3 which in segTEL's assessment needs to be done in order to maintain compliance with codes and standards. This practice introduces extra work and a great deal of additional time into the attachment process for

NHOS. It also raises a question about whose responsibility it is to maintain code compliance on the pole.

If an existing attacher believes the pole owner has failed to identify work required to maintain code compliance in instructing the existing attacher to rearrange its facilities, should the existing attacher follow the pole owner's instructions without question or ensure that once it moves its attachment, the attachment is code compliant? Or, if a pole owner has concluded that no make-ready work is needed should the existing attacher have the right to force costs on the new attacher by requiring an existing code violation be corrected before the new attacher can attach<sup>1</sup>? There are no rules governing rearrangement of third-party attachments, but there are rules requiring utilities, both pole owners and attachers, to maintain their facilities according to the National Electrical Safety Code. It is not unreasonable for segTEL to ensure its attachments are and remain code compliant. However, it would be unreasonable for segTEL to expect NHOS to wait for and pay to correct existing segTEL violations, in the event such violations are discovered. This process significantly adds to the time to complete third-party make-ready, which was unexpected by NHOS.

NHOS also provided several pictures in Exhibits H and I which depict multiple segTEL attachments which do not appear to comply with the NESC<sup>2</sup>. If the point of this is to demonstrate that segTEL should not be allowed to ensure its attachment rearrangements will comply with code because segTEL has other existing non-compliant attachments, Staff would not recommend additional non-compliant attachments be made.

### **Conclusion and Recommendation**

Based on its review, Staff does not believe there is evidence to find NHOS has been subject to unfair or unreasonable delays or that segTEL has intentionally manipulated the process to delay NHOS. The attachment process has clearly taken longer than NHOS expected, based on its interpretation of existing rules and the pole attachment agreement. However, the 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. During the review, Staff observed actions from both segTEL and NHOS that delayed accomplishment of the work.

According to NHOS Exhibit A, approximately 3600 poles require segTEL make-ready identified on 82 Form 3s. Staff notes that pole attachment agreements made by pole owners generally set a maximum of 2,000 poles in process at one time, among all attachers: if segTEL had the clearer and stronger obligations of a pole owner, this project would still be outside the scope of such agreements. In order to accomplish this work efficiently, expectations should be outlined and agreed upon containing precise

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<sup>1</sup> An example of where this may have occurred is in the Staff analysis of Pole 2 where fire alarm is 3 inches too close to neutral and neither the NHOS nor segTEL Form 3 includes any make-ready instructions for fire alarm.

<sup>2</sup> Staff has not investigated whether these attachments comply or do not comply with the NESC.

requirements for both parties in order to complete the work. Issues to be settled should include, but not necessarily be limited to:

1. whether segTEL should perform its own independent survey to verify what make-ready work segTEL needs to accomplish or whether it should only perform make-ready identified on the pole owner's Form 3;
2. If segTEL survey is performed, a schedule to get the surveys completed which takes into account both parties resources;
3. Dates by which segTEL can commit to completing make-ready work for each of the 82 areas identified on the Form 3s, once NHOS has confirmed a clear path;
4. Primary and secondary points of contact for coordination from each company;
5. Consequences if either party violates the agreement; and
6. Other issues identified by either segTEL or NHOS necessary to set forth an efficient process.

Staff recommends segTEL and NHOS be required to work with Staff or an independent mediator to form an agreement outlining a process by which the remaining work can be accomplished. Additionally, Staff recommends the Commission open a separate proceeding to review the rates to be charged for make-ready, and require NHOS to escrow a reasonable amount to ensure third parties will be reimbursed once a determination on rates has been made.

Finally, Staff is aware of a pilot underway in the state of Connecticut to hasten pole attachments on poles requiring substantial make-ready. In such instances, the new attacher is allowed to make a temporary attachment beneath the lowest attachment if there is enough space to maintain vertical clearance to the roadway, required by the NESC. The temporary attachment is permitted for a limited period of time, and the attachment must be relocated once make-ready above is completed. This practice allows a new attacher to attach more timely, but requires the extra expense of moving the attachment once make-ready is complete. Staff recommends this idea be considered with interested CLECs and the pole owners and reported back to the Commission.



Poles Reviewed at NHOS' request on School Street in Franklin

1. Pole T-2/4, E-11/4

NHOS

Survey 9/30/11

PSNH License issued April 5, 2012

MR -none, attach 12 above CATV

FP license 12/16/2011

MR: Fire Alarm raise to 40, NHOS attach at 52

ATTACH DATE: 6/13/12 Waveguide Daily work sheet shows 32 poles were "framed" (bolt inserted) starting with pole 2/4 and ending with pole 116/19 and 10 cables were raised or lowered which corresponds with the same number of raise or lowers required by fire alarm on these poles. License indicates 47 poles between these two points. No details to identify which specific poles were framed, however, e-mail from Steve Janko indicates poles which required MetroCast make ready were not framed on this date.

segTEL

Survey 12/28/11

PSNH license not provided

FP license 3/8/12

MR: CATV lower to 76, NHOS lower to 64, ST attach at 52

ATTACH DATE: 8/23/12 Daily worksheet indicates strand and hardware installed.

MetroCast lowered to 76 on 8/2/12, notified segTEL MR was complete on 8/10/12

*Field observations: no measurements taken, NHOS bolt appears to be very close to an existing hole, evidence by marks on pole that bolt may have been moved. segTEL denies it moved NHOS bolt and NHOS denies installing bolt in current location.*

*Conclusions: No MetroCast make ready was needed for NHOS attachment. NHOS bolt was likely attached on 6/13 and should have been at 52 inches (if MetroCast instructed to lower to 76 for segTEL, it must have originally been at 64 and NHOS would have framed at 52). MetroCast lowered to 76 inches on 8/2/12, leaving 24 inches between NHOS and MetroCast. segTEL should have requested NHOS lower to 64 before attaching at 52.*

*RECOMMENDED ACTION: No proof or finding of who moved bolt; both parties deny. segTEL did not contact NHOS to perform make ready. segTEL should pay for remediation.*

## 2. Pole T-2/5, E-11/5

### NHOS

Survey 9/30/11

PSNH License issued April 5, 2012

MR: CATV move down to 12 above telephone, attach at 12 above CATV

FP license 12/16/2011

MR: CATV lower to 12 above telephone, attach above CATV

ATTACH DATE: After 8/27/12. 6/13/12 Waveguide Daily work sheet shows 32 poles were framed (bolt inserted) starting with pole 2/4 and ending with pole 116/19. License indicates 47 poles between these two points. No details to identify which specific poles were framed, however, e-mail from Steve Janko indicates poles which required MetroCast make ready were not framed on this date.

MetroCast MR completed per segTEL instructions to lower to 76 on 8/2/12; notified of completion on 8/27.

### segTEL

Survey 12/28/11

PSNH license not provided

FP license 3/8/12

MR: tel lower to 88, CATV lower to 76, NHOS lower to 64, segTEL attach at 52.

ATTACH DATE: 8/23/12 Daily worksheet indicates strand and hardware installed.

MetroCast lowered to 76 on 8/2/12; notified of completion on 8/10.

*Field Observations: NHOS attached 20 ft 10 in, sT attached 21 ft 3.5 in, muni attached 22 ft 10 in, neutral 25 ft 11 in. Spacing between NHOS and sT is 5.5 inches, spacing between sT and muni is 18.5 inches, spacing between muni and neutral is 37 inches.*

*Conclusion: Based on information from NHOS, it would not have placed a bolt on this pole until after MetroCast notified NHOS make ready was complete on August 27. segTEL attached on 8/23.*

*Both parties attached at incorrect height. CATV would have been lowered when segTEL and NHOS attached. Muni (fire alarm) is attached 3 inches too close to neutral and there were no make-ready instructions for muni. segTEL instructions were to attach at 52 below neutral. segTEL attached at 55. NHOS instructions were to attach at 12 above CATV. It apparently attached 2 feet below muni. Assuming neutral is located at 311 inches as measured, NHOS should be at 20 ft 7 inches and sT should be located at 21 ft 7 inches and CATV should be attached at 19 ft 7 inches. NHOS is 3 inches too high, segTEL is 3.5 inches too low, muni is 3 inches too high. If these corrections are made, spacing would be correct.*

*RECOMMENDED ACTION: Each party should move their attachment to comply.*

### 3. Pole T-2/6, E11/6

#### NHOS

Survey 9/30/11

PSNH License issued April 5, 2012

MR: CATV move down to 12 above telephone, attach at 12 above CATV

FP license 12/16/2011

MR: CATV lower to 12 above telephone, attach above CATV

ATTACH DATE: After 8/27/12. 6/13/12 Waveguide Daily work sheet shows 32 poles were framed (bolt inserted) starting with pole 2/4 and ending with pole 116/19. License indicates 47 poles between these two points. No details to identify which specific poles were framed, however, e-mail from Steve Janko indicates poles which required MetroCast make ready were not framed on this date.

MetroCast make ready completed on 8/26, notified of completion 8/27.

#### segTEL

Survey 12/28/11

PSNH license not provided

FP license 3/8/12

MR: electric move street light 12 inches, fire alarm attach at 40, segTEL attach at 52.

ATTACH DATE: 8/23/12 Daily worksheet indicates strand and hardware installed.

*Field observation: segTEL is attached at 52 inches below neutral. NHOS bolt is also located approximately 52 inches below neutral. According to segTEL no NHOS bolt was on this pole when it attached. segTEL make ready instructions do not include instructions about NHOS from this pole through the next 6 poles. NHOS claims this pole was framed (bolt inserted) when segTEL attached.*

*Conclusion: NHOS did not frame this pole until after MetroCast make ready was complete on or after August 27, corroborating segTEL's assertion that no NHOS bolt was in place when segTEL attached. NHOS attached after August 27 and therefore after segTEL. segTEL attached where it was licensed and there was no indication from make ready that work needed to be performed by NHOS at this location.*

*RECOMMENDED ACTION: If there is adequate room, NHOS should move its attachment to 12 inches above CATV. NHOS should pay for remediation.*

4. Pole T-2/7, E-11/7

NHOS

Survey 9/30/11

PSNH License issued April 5, 2012

MR: attach at 12 above CATV

FP license 12/16/2011

MR: double pole; telephone transfer 2 cables, 1 PMT, 6dw, NHOS attach 12 over CATV

ATTACH DATE: 6/13/12 Waveguide Daily work sheet shows 32 poles were framed (bolt inserted) starting with pole 2/4 and ending with pole 116/19. License indicates 47 poles between these two points. No details to identify which specific poles were framed.

MetroCast was not required to perform make ready on this pole for NHOS.

segTEL

Survey 12/28/11

PSNH license not provided

FP license 3/8/12

MR: fire alarm raise to 40, segTEL attach 24 inches above CATV

ATTACH DATE: 8/23/12 Daily worksheet indicates strand and hardware installed.

*Field observation: NHOS is attached 20 inches above CATV. No field notes about segTEL. NHOS map in DT 12-107 indicates no segTEL violations on this pole.*

*RECOMMENDED ACTION: NHOS should relocate to 12 inches above CATV*

**5. Pole T-9/30, E-1/72 on Route 3 by Carwash in Franklin**

NHOS

Survey 9/30/11

PSNH License issued April 5, 2012

MR: Fire alarm raise to 40, NHOS attach 52.

FP license 12/16/2011

MR: Fire alarm raise to 40, NHOS attach 52.

ATTACH DATE: 6/14 Waveguide Daily worksheet indicates 12 of 31 poles between T-116/20 and T-92/1 were framed. 31 poles included T-9/30, but no indication which 12 poles were framed. Also indicates 4 fire alarm cables moved. Make ready indicates 13 fire alarm moves needed in this run. 5 poles needed only fire alarm move before NHOS attachment. Cannot determine which poles were framed.

segTEL

Survey 12/28/11

PSNH license not provided

FP license 3/8/12

MR: NHOS attach at 64, segTEL attach at 52.

ATTACH DATE: 8/21/12

*Field observations: sT attached at 46 inches. NHOS asserted segTEL had moved NHOS bolt on this pole, as evidenced by markings on back of pole. segTEL denies.*

*Conclusion: Cannot determine from NHOS daily worksheet if pole was framed when segTEL attached. segTEL make ready instructions were to have NHOS attach at 64 below neutral. segTEL should have informed NHOS attachment height had been relocated whether NHOS was attached or not. Only work required on this pole was either by NHOS (who performed work for fire alarm) or segTEL. No factual evidence on who placed NHOS bolt in current location. segTEL is attached at incorrect height.*

*RECOMMENDED ACTION: segTEL is incorrectly attached at 46 and should move its attachment to correct height of 52" below neutral. Because NHOS will need to attach strand and fiber here, NHOS should move its bolt to 64, if necessary, when running strand. Not enough evidence to determine who should pay, so each party should perform its own necessary work.*

**Poles reviewed at segTEL's request in Franklin and Tilton**

**6. Pole E-1/39 (PSNH solely owned) at the corner of Prospect and Central Street, Franklin**

**NHOS**

Survey 9/30/11

PSNH License issued April 5, 2012

MR: attach at 40

FP license 12/16/2011

MR: no instructions, PSNH pole

ATTACH DATE: 6/13/12 Waveguide Daily work sheet shows 32 poles were framed (bolt inserted) starting with pole 2/4 and ending with pole 116/19 which includes this pole. License indicates 47 poles between these two points. No details to identify which specific poles were framed.

**segTEL**

Survey 12/28/11

PSNH license not provided

FP license 3/8/12

MR: identified as pole 1/30 with no instructions because it is a PSNH pole.

ATTACH DATE: 8/20/12 Daily worksheet indicates strand and hardware installed

MetroCast: Not attached

*Field observation: segTEL is attached below NHOS. Wires will cross, so fiber cannot be installed. segTEL did not have instructions on where to attach or what make ready was required. It appears segTEL incorrectly attached under NHOS.*

*Conclusion: As no make ready was required of MetroCast, NHOS probably installed its bolt before segTEL attached. segTEL did not have make ready instructions on this pole and installer should have noticed it was not attaching directly under neutral as on previous poles. In this case, where bolt was installed in location where segTEL would have logically attached, and segTEL had no attachment instructions, segTEL should have investigated further.*

*RECOMMENDED ACTION: Attachments need to be reversed. segTEL should pay NHOS make ready to move bolt.*

**7. Pole T-15/56, E-63/79 Route 3 near Smitty's, Tilton**

NHOS

Survey FP: 9/20/11, PSNH: 9/30/11

PSNH license issued 8/1/12

MR: attach 12 inches above CATV

FP license issued 2/8/12

MR: attach 12 inches above CATV

ATTACH DATE: 6/11/12 Waveguide Daily worksheet indicates 59 poles along route were framed starting with T-15/58 ending with T-15/6. License indicates 51 poles between these points.

segTEL

Survey 12/19/11

PSNH license not provided

FP license 8/8/12

MR: No FRP make ready work required. LTS raise neutral 12 inches. Attach 24 inches above CATV

ATTACH DATE: 8/23/12 Daily worksheet indicates strand and hardware installed.

*Field observations: NHOS bolt is installed 24 inches over CATV. sT bolt and messenger attached 12 inches above CATV. This location had recent sawdust in mulch indicating unexplained activity on this pole.*

*Conclusion: Since there was no CATV make ready, CATV would not have moved down. NHOS appears to have incorrectly attached in June, at 24 inches above CATV. sT had no make ready instructions relevant to NHOS, and apparently incorrectly attached in the open spot at 12 inches over CATV.*

*RECOMMENDED ACTION: Attachments need to be reversed. Since both parties are attached in the incorrect location, neither should pay the other make ready.*

**8. Pole T-15/57, E-63/80 Route 3 near Smitty's, Tilton**

NHOS

Survey 9/20/11

PSNH license issued 8/1/12

MR: attach 12 inches above CATV

FP license issued 2/8/12

MR: attach 12 inches above CATV

ATTACH DATE: 6/11/12 Waveguide Daily worksheet indicates 59 poles along route were framed starting with T-15/58 ending with T-15/6. License indicates 51 poles between these points.

segTEL

Survey 12/19/11

PSNH license not provided

FP license 8/8/12

MR: attach 24 inches above CATV

ATTACH DATE: 8/23/12 Daily worksheet indicates strand and hardware installed.

*Field observations: NHOS bolt is installed 24 inches over CATV. sT bolt and messenger attached 12 inches above CATV.*

*Conclusion: Since there was no CATV make ready, CATV would not have moved down. NHOS appears to have incorrectly attached in June, at 24 inches above CATV. sT had no make ready instructions relevant to NHOS, and apparently incorrectly attached in the open spot at 12 inches over CATV.*

*RECOMMENDED ACTION: Attachments need to be reversed. Since both parties are attached in the incorrect location, neither should pay the other make ready.*

**9. Pole T-15/58, E-63/81 Route 3 near Smitty's, Tilton**

NHOS

Survey 9/20/11

PSNH license issued 8/1/12

MR: attach 12 inches above CATV

FP license issued 2/8/12

MR: attach 12 inches above CATV

ATTACH DATE: 6/11/12 Waveguide Daily worksheet indicates 59 poles along route were framed starting with T-15/58 ending with T-15/6. License indicates 51 poles between these points.

segTEL

Survey 12/19/11

PSNH license not provided

FP license 8/8/12

MR: No FRP make ready work required. Attach 24 inches above CATV.

ATTACH DATE: 8/23/12 Daily worksheet indicates strand and hardware installed.

*Field observations: NHOS bolt is installed 24 inches over CATV. sT bolt and messenger attached 12 inches above CATV. Indent on back of pole indicates CATV may have moved down, but date not known and no CATV make ready was required for either attachment.*

*Conclusion: Since there was no CATV make ready, CATV would not have moved down at this time. NHOS appears to have incorrectly attached in June, at 24 inches above CATV. sT had no make ready instructions relevant to NHOS, and apparently incorrectly attached in the open spot at 12 inches over CATV.*

*RECOMMENDED ACTION: Attachments need to be reversed. Since both parties are attached in the incorrect location, neither should pay the other make ready.*

**10. Pole T-87/3-1.5, E-71A/4 on Route 3, McDonalds parking lot, Tilton (NHOS requested review of this pole while in field)**

NHOS

Survey 9/21/11

PSNH license issued 8/1/12

MR: CATV lower to 52, NHOS attach at 40.

FP license issued 2/8/12

MR: CATV lower to 52, NHOS attach at 40.

ATTACH DATE: After 8/27

segTEL

Survey 12/19/11

PSNH license not provided

FP license 8/8/12

MR: FRP lower to 76, 1 cable, 1PMT, CATV lower to 64, NHOS lower to 52, segTEL attach at 40.

ATTACH DATE: 8/23/12

MetroCast make ready complete 8/8/12; notified of completion 8/10/12.

*Field observations: No NHOS bolt was installed on this pole. segTEL asserts it paid make ready to MetroCast and FairPoint. FairPoint license confirms FairPoint make ready sufficiently completed. segTEL attached 50 inches below neutral. CATV 15 inches below segTEL and FairPoint 18 inches below CATV. Under these conditions, no room for NHOS attachment.*

*Conclusions: segTEL was not obligated to request make ready from NHOS since NHOS was not attached but should have notified NHOS of its new attachment height. However, segTEL should move its attachment to the correct location of 40 inches below neutral freeing a 12 inch space for NHOS.*

*RECOMMENDED ACTION: segTEL move attachment to 40 inches below neutral.*

**11. Pole T-87/1, E-71A/3 on Route 140, McDonalds parking lot, Tilton**

NHOS

Survey 9/21/11

PSNH license issued 8/1/12

MR: NHOS attach at 40.

FP license issued 2/8/12

MR: NHOS attach at 40.

ATTACH DATE: 8/20/12 Daily worksheet indicates 6 of 14 poles in run framed. 6 poles, including this one required no other make ready.

segTEL

Survey 12/19/11

PSNH license not provided

FP license 8/8/12

MR: CATV lower to 64, NHOS lower to 52, segTEL attach 40.

ATTACH DATE: 8/23/12

MetroCast make ready complete 8/8/12.

*Field Observation: NHOS bolt installed 40 inches below neutral on 8/20. segTEL attached at 52 inches below neutral on 8/23.*

*Conclusion: NHOS bolt prior to segTEL attachment. It appears segTEL did not follow make ready instructions with respect to NHOS or its own attachment location.*

*RECOMMENDED ACTION: Attachments need to be reversed. segTEL should pay NHOS make ready.*

**12. Pole T-87/3.5, E-71A/2 on Route 140, McDonalds parking lot, Tilton**  
(this pole is labeled T-2 on FairPoint license to segTEL, T-3.5 on FairPoint license to NHOS)

NHOS

Survey 9/21/11

PSNH license issued 8/1/12

MR: CATV and Tel lower. NHOS attach at 40.

FP license issued 2/8/12

MR: Tel lower one cable 12 inches, CATV lower 12 inches, NHOS attach above CATV.

ATTACH DATE: After 8/27; Daily worksheet not provided for this pole.

segTEL

Survey 12/19/11

PSNH license not provided

FP license 8/8/12 (Pole labeled T-87/2, E-71A/2)

MR: FairPoint lower to 76, CATV lower to 64, NHOS lower to 52, segTEL attach 40.

ATTACH DATE: 8/23/12

MetroCast make ready completed per segTEL instructions to 64 on 6/13/12 (in error); notified 8/10/12.

*Field Observation: segTEL attached at 40 inches below neutral, NHOS bolt installed in close proximity. Concern that holes are too close.*

*Conclusion: NHOS was not attached on this pole when segTEL attached. segTEL attached at 40, but did not inform NHOS its attachment location had changed. NHOS should not have installed a bolt that would compromise the integrity of the pole.*

*RECOMMENDED ACTION: NHOS should relocate to 52 inches below neutral. If pole is compromised due to close attachments, NHOS should remediate.*

# Exhibit F

STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

JUL 11 2012

DT 12-107

NEW HAMPSHIRE OPTICAL SYSTEMS, LLC

**Petition for an Investigation into Proposed Charges for Utility Pole Make-Ready**

**Order on Petition**

**ORDER NO. 25,386**

**July 3, 2012**

**I. PROCEDURAL BACKGROUND**

On March 24, 2012, New Hampshire Optical Systems, LLC (NHOS), filed a petition with the Commission requesting, pursuant to RSA 365:5, that the Commission undertake an investigation of third-party make-ready practices. According to the petition, NHOS is in the process of constructing a broadband network throughout New Hampshire and as part of that construction it seeks to attach its fiber optic cables to approximately 23,000 utility poles throughout the state. In order to accommodate the inclusion of NHOS' attachments, the status of the existing attachments must be surveyed and, in many instances, the existing attachments must be rearranged or otherwise amended to allow the new attachment. This rearrangement for a new attachment is referred to as "make-ready" work.

On May 11, 2012, the Commission issued an order of notice in the docket stating that the filing raised 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." May 11, 2012 Order of Notice at 2. Thereafter, the Commission received petitions to intervene from the New England Cable and Telecommunications Association (NECTA), the

CLEC Association of Northern New England (CANNE), and Unitil Energy Systems, Inc. (Unitil). In its petition to intervene, NECTA requested to intervene for the limited purpose of presenting and advancing arguments in its accompanying motion to dismiss or to limit the scope of the proceeding.

On June 6, NHOS filed a statement of position in the docket in which it reiterated many of the arguments from its petition and recommended that the Commission “[a]dopt a policy to ensure access is not denied or delayed due to disputes related to scope and/or costs of third party make-ready”, and “[e]stablish methods, standards and definitions to ensure that rates for third party make-ready are just and reasonable.” NHOS Statement of Position at 7. A pre-hearing conference was held as scheduled on June 7, 2012. On June 15, 2012, CANNE filed a response to NHOS’ petition and NECTA’s motion to dismiss, and NHOS filed an objection to NECTA’s motion to dismiss. On June 18, 2012, NECTA filed a response to NHOS’ statement of position.

## **II. POSITIONS OF THE PARTIES**

### **A. NHOS**

NHOS contends that it is in the midst of a broadband expansion project requiring it to attach cables to approximately 23,000 utility poles in New Hampshire and that it must complete its project by June, 2013. NHOS asserts that it has encountered problems with the costs charged by entities with cables and other equipment already attached to utility poles (third-party attachers). According to NHOS’ petition, some third-party attachers have been charging excessive rates to perform make-ready work or charging fees for surveys on poles where they have no facilities. NHOS states that it has attempted to negotiate with some third-party attachers, but has been unsuccessful at finding a resolution. NHOS, therefore, requests that “the

Commission investigate this matter, and establish the just and reasonable cost for third party make-ready work that is required to accommodate the NHOS pole attachments.” NHOS Petition at 4. NHOS contends that it has its own information about the costs of performing the work at issue and that what it is being charged by some third-party attachers is far above that cost. NHOS contends that these third-party attachers are public utilities under New Hampshire law and, therefore, have an obligation to charge make-ready rates that are just and reasonable.

According to NHOS’ statement of position, the Federal Communications Commission (FCC) has confirmed the need for rules to address issues relating to make-ready work. Further, NHOS argues that the Commission should both interpret its existing rules on pole attachments, New Hampshire Code of Administrative Rules Puc 1300, and implement new rules intended to lower the cost of third-party make-ready work. NHOS contends that without useful interpretations of existing rules and implementation of new rules, new attachers may be precluded from attaching to poles.

During the June 7, 2012 pre-hearing conference, NHOS contended that the impediments around make-ready threaten its “existing and real deadlines”. Transcript of June 7, 2012 Pre-Hearing Conference (Tr.) at 9. NHOS also stated that because the “most critical issue is access, the Commission should “establish rules which allow for immediate and reasonable time periods for access to be provided.” Tr. at 10. NHOS also contended that issues around timeframes could be addressed independently of rate issues. Tr. at 10-11. As stated by NHOS “The first issue that needs to be resolved is a time frame that companies that want to do business in New Hampshire can rely on, that will allow them to deploy their facilities, even if there is a lack of agreement on what the rates that they will be required to pay will ultimately be.” Tr. at 11-12.

With respect to the matters it was requesting the Commission to review, NHOS stated that it believed the Commission should: (1) evaluate ways of preventing disputes over rates from delaying deployment of facilities; (2) determine just and reasonable rates for attachments; and (3) determine the proper cost components upon which the rates would be based. Tr. at 14-16. NHOS also contended that pole owners may not be in a position to resolve disputes between a third-party attacher and a new entity seeking an attachment. Tr. at 17-18. NHOS contended that the result of permitting the offending behavior to continue is to discourage competition in New Hampshire. Tr. at 26.

#### **B. NECTA**

According to its request to intervene, NECTA is a non-profit corporation and trade association representing the interests of most cable television companies and their voice and Internet affiliates in New England. It contended that many of its member companies have or seek pole attachments and as such often must pay for and perform make-ready work. NECTA contended that to the extent the Commission sought to undertake a generic inquiry into pole attachment make-ready work, its members had rights that would be affected by this docket.

In its motion to dismiss or limit the scope of the docket, NECTA contended that although NHOS' petition contained specific allegations against particular, but unnamed, parties, it sought generic relief. NECTA argued that the petition should be dismissed because New Hampshire's pole attachment law, RSA 374:34-a, and the Commission's rules contemplate adjudications of particular disputes between companies and not generic issues relating to make-ready. NECTA further contended that this matter should, in the first instance, be governed by existing pole attachment agreements (PAAs) and good faith negotiations thereunder. According to NECTA,

only when negotiations have been unsuccessful, should a party resort to the Commission.

NECTA contended that NHOS should be required to name specific parties and specific acts that demonstrate how those other entities were not acting in good faith. Such specificity, contended NECTA, would allow the Commission to determine if the matter is truly ripe for adjudication.

NECTA further argued that given the factual allegations in the petition, there was an insufficient basis to undertake a general investigation into rates for make-ready work. According to NECTA, because the petition describes particular acts, but fails to identify any particular third-party attachers, as a matter of fairness to those with whom NHOS has no dispute, the allegedly offending entities must be named. NECTA contended that a generic proceeding on make-ready costs is inappropriate because each make-ready event is fact specific to the pole, the location and the facilities that must be moved. Therefore, according to NECTA, NHOS must limit its case by describing the entities and acts leading to its petition. According to NECTA, a generic investigation would serve only to force utilities and pole attachers into a proceeding that may impact their make-ready rates even if their practices are not at issue.

At the pre-hearing conference, NECTA reiterated its arguments for dismissing the petition or for limiting its scope. Tr. at 31. Further, NECTA stated that in the first instance these types of disputes should be resolved through the PAAs and that the PAAs provide a remedy. Tr. at 31-32. NECTA also reiterated its arguments that this docket should not be used for examination of broad or general issues. Tr. at 35.

In its response to NHOS' statement of position, NECTA again argued that the petition should be dismissed for the reasons set out in NECTA's motion to dismiss. Further, NECTA contended that to the extent that the statement of position sought a rulemaking such a request

was improper because the statement alleges specific acts committed by particular parties. According to NECTA, the generic relief of a rulemaking was not justified by the facts alleged and the matter should either be dismissed, or it should be limited by requiring NHOS to name particular entities.

### C. CANNE

According to its petition to intervene, CANNE is a non-profit association of facilities-based competitive local exchange carriers (CLECs) in Maine, New Hampshire and Vermont. As with NECTA, CANNE stated that its members operating in New Hampshire both attach to utility poles and perform make-ready to accommodate new attachments. CANNE contended that to the extent this is a complaint against particular third-party attachers, it should be so noticed. Alternatively, CANNE stated that to the extent this is a docket involving an investigation of general applicability to make-ready work, CANNE's members have an interest in the docket. According to CANNE, if it is a generic docket, then the scope should be defined to ensure that additional issues from CANNE members would be addressed.

At the pre-hearing conference, CANNE stated that at the time of the pre-hearing conference its interest was in the scope of the proceeding and that it was trying to determine whether the docket was a complaint against individual entities or a request for rulemaking. Tr. at 37. CANNE stated that because no other parties were named, the third-party attachers are in the unfair position of having to identify themselves in order to defend certain practices. Tr. at 38. CANNE further contended that if the request is for a rulemaking rather than a complaint against individual entities, then there may be other companies with interests in such a proceeding and that those companies may have other issues than those identified by NHOS. Tr. at 39-40.

In its response to NECTA's motion to dismiss and NHOS' statement of position, CANNE contended that the scope of the proceeding as framed by NHOS is unclear since NHOS both complains about specific acts and actors, and requests generic relief. According to CANNE, these goals are distinct and require different proceedings.

If it is to be a complaint investigation, CANNE states that because NHOS does not name any particular entity against which it is complaining, it "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." CANNE Response at 4. According to CANNE, "NHOS' request is unrealistic and places an unnecessary burden on the Commission to uncover alleged facts that clearly are in NHOS' possession." CANNE Response at 4. CANNE also states that because NHOS has not named particular parties, other utilities must guess whether they are targets of the complaint, and they risk being forced to identify themselves and their acts in order to defend themselves. CANNE contends that NHOS could easily narrow the matter to one the Commission could effectively adjudicate by naming the complained about entities.

If this is to be a rulemaking, then CANNE argues that a different set of procedures apply. In addition, CANNE contends that there may be other issues related to the pole attachment rules to address and that if the Commission is to undertake a rulemaking the scope should be appropriately set to avoid piecemeal rulemaking.

Following on the above arguments, CANNE states that the Commission should dismiss the filing and require NHOS to make a new filing that specifically states its claims and clarifies the relief it seeks. According to CANNE, under the circumstances presented, a rulemaking may

be more than is necessary and would consume substantial time, money and resources for all involved. Instead, CANNE contends that because NHOS' filings indicate complaints against one or a few third-party attachers, it should seek resolution of its complaints with those attachers.

**D. Unitil**

According to its petition to intervene, Unitil is a public utility primarily engaged in the distribution of electricity in New Hampshire and owns, in whole or in part, a substantial number of utility poles in New Hampshire. Unitil states that based upon the petition, it understands that NHOS may seek to attach to many of its poles and that it in so doing it may become involved in disputes with entities already attached to those poles. Unitil's petition states that to the extent the Commission addresses issues relating to make-ready charges and attachment procedures, Unitil has an interest in the case.

At the pre-hearing conference, Unitil stated that it understood that NHOS was seeking to attach to many of its poles, but that it was not aware of any disputes over attachments at present. Tr. at 41-42. Unitil also stated that it objected to treating this case generically since it was not clear from the petition whether the problems went beyond NHOS. Tr. at 42. Unitil also stated that it disagreed with the argument that these disputes would be covered by PAAs. Tr. at 42-43. Unitil stated that as a pole owner it sometimes has only limited influence over, or rights relative to third-party attachers. Tr. at 43. Further, Unitil stated that while there are provisions in the PAAs allowing the owner to perform make-ready if the attacher does not, the pole owner may be reluctant to do so to avoid some liability in moving those facilities. Tr. at 43. Unitil concurred in the arguments that if particular third-party attachers are causing problems, they should be named. Tr. at 44.

### III. COMMISSION ANALYSIS

In requesting that the Commission undertake an investigation of make-ready work, NHOS invokes RSA 365:5. That statute provides:

The commission, on its own motion or upon petition of a public utility, may investigate or make inquiry in a manner to be determined by it 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; and the commission shall make such inquiry in regard to any rate charged or proposed or to any act or thing having been done or having been omitted or proposed by any such utility in violation of any provision of law or order of the commission.

RSA 365:5. Further, NHOS has stated that due to the nature of its project, time is the "critical" issue in any investigation by the Commission. *See* Tr. at 9. Upon review of the information and arguments presented by NHOS, although there is authority to begin an investigation, we lack sufficient information to complete an adjudication that would provide the timely relief NHOS seeks.

In its initial petition, NHOS contends that "some" third-party attachers "have demanded that their make-ready work be performed at excessive rates, and that NHOS pay, in full, their stated cost of this work prior to performing their make-ready work". NHOS Petition at 2. NHOS also states that in "certain instances" third-party attachers "are charging make-ready survey fees for all poles on the applications submitted to the pole owners by NHOS" when, in "many instances," those parties "have no make-ready on the majority of the poles and often do not even have facilities on these poles." NHOS Petition at 4. In its statement of position, NHOS provides a bulleted list of alleged inappropriate charges. NHOS Statement of Position at 5-6. It thereafter recounts a negotiation with a single third-party attacher on issues relating to costs for make-ready. NHOS Statement of Position at 6-7. Based upon these allegations, it is not clear

how many entities have rates, charges or make-ready practices that are troubling to NHOS. Without identification of the offending parties, the rates in question and the poles that are at issue, any investigation into the allegations made by NHOS must, of necessity, cover every entity with facilities attached to poles in New Hampshire in order to include every entity that may perform make-ready. NHOS' objection to NECTA's motion to dismiss references matters affecting pole owners and their obligations under PAAs. NHOS Objection at 2. Any review of PAAs would require the involvement of pole owners. Therefore, given 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.

In addition, NHOS' filings do not make clear the scope of the issues that it proposes to have investigated. In its filings, NHOS contends that various unnamed entities are assessing inappropriate charges, that they are charging for inappropriate make-ready work, and that the Commission must take steps to rectify those practices pursuant to our authority over rates and terms in RSA 374:2. At the pre-hearing conference, NHOS contended that matters of timing for make-ready work must be resolved so that it may complete its project on time. Tr. at 9. In order to investigate each of NHOS' concerns and to develop a complete record, the Commission would need to inquire into: rates, charges, construction practices, actual costs, timing for make-ready, and possible remedies for overcharges or delays. To gather information on these issues from every pole owner and third-party attacher in New Hampshire will take substantial time.

Even if the Commission undertakes and completes an investigation of the type NHOS seems to seek, it is still not clear what relief NHOS is pursuing. In its petition, NHOS requested that the Commission establish rates and practices for make-ready work to accommodate NHOS'

pole attachments. In its statement of position, however, it sought the establishment of generally applicable rules for rates and practices, rather than just for its attachments. In its objection to NECTA's motion to dismiss, NHOS contended that the results of the investigation could form the basis for future rulemaking as opposed to providing NHOS any particular relief. Thus, NHOS appears to simultaneously seek relief specific to it, generic relief relating to state-wide practices for all entities, as well as for the establishment of a factual basis to begin a rulemaking proceeding.

The Commission recognizes that, based on the allegations presented, the existing regulatory structure may be in need of further standards. For example, NECTA contended that NHOS could seek relief from pole owners under the terms of the PAAs, while Unitil contended that as a pole owner it was limited in any relief it could provide. Further, it does not appear that the Commission's current rules provide definitive direction over disputes between prospective and existing attachers.. Such issues could pose barriers to effective competitive entry. Accordingly, the Commission will open a separate docket for the purpose of considering issues relating to pole attachment access. As part of that docket, we direct Staff to convene interested parties in a stakeholder process to develop a scope of issues to be considered and analyzed. The Commission will await the outcome of the stakeholder process, and any recommendations therefrom, and will proceed accordingly. We note, but do not limit, the possibilities to include adoption of new rules or amendment of current rules. We caution that such an inquiry will likely take significant time and will not be directed at providing particular relief to NHOS or its project.

In the meantime, rather 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. NHOS will have 30 days from the date of this order to do so. If no filing is made, we will close this docket without further action. 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. By doing so the entities complained against will be offered a fair opportunity to address the complaint and defend or explain their practices, and the Commission will have a complete record upon which to base its decision. The Commission will work as efficiently as practicable to reach a resolution.

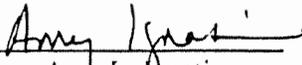
**Based upon the foregoing, it is hereby**

**ORDERED**, that NECTA's motion to dismiss is denied; and it is

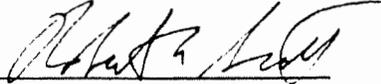
**FURTHER ORDERED**, that NHOS may revise its filings as described above within 30 days of the date of this order; and it is

**FURTHER ORDERED**, that Staff will convene interested parties in a stakeholder process to develop a scope and analyze pole attachment access issues.

By order of the Public Utilities Commission of New Hampshire this third day of July,  
2012.

  
\_\_\_\_\_  
Amy L. Ignatius  
Chairman

  
\_\_\_\_\_  
Michael D. Harrington  
Commissioner

  
\_\_\_\_\_  
Robert R. Scott  
Commissioner

Attested by:

  
\_\_\_\_\_  
Debra A. Howland  
Executive Director

# Exhibit G

STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

DT 12-246

ELECTRIC AND TELEPHONE UTILITIES

Review of Pole Attachment Access Issues

Order Granting Intervention and Staying Docket

ORDER NO. 25,449

January 3, 2013

**I. PROCEDURAL HISTORY**

In this Order, we grant interventions to University System of New Hampshire (USNH) and Light Tower Fiber LLC (Lighttower) and stay this proceeding pending further order.

On April 24, 2012, New Hampshire Optical Systems, LLC (NHOS) filed a petition with the Commission seeking, among other things, an investigation into matters relating to third-party make-ready practices on utility poles.<sup>1</sup> The petition was docketed as Docket No. DT 12-107. On July 3, 2012, the Commission issued Order No. 25,386 which concluded, in relevant part, that the Commission would open a docket "for the purpose of considering issues relating to pole attachment access." *New Hampshire Optical Systems, LLC*, Order No. 25,386 (July 3, 2012) at 11. The Commission opened this docket, DT 12-246, by order of notice dated August 6, 2012.

Parties in Docket No. DT 12-107 were added to the service list in this docket. On August 20, 2012, USNH filed a timely petition to intervene. On August 29, 2012, Lighttower filed a petition for late intervention. No objections to intervention have been filed.

On August 16, 2012, the New England Cable & Telecommunications Association, Inc.

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<sup>1</sup> In order to accommodate a new pole attachment, the status of the existing attachments must be surveyed and, in many instances, the existing attachments must be rearranged or otherwise amended to allow the new attachment. This rearrangement for a new attachment is referred to as "make-ready" work.

(NECTA) filed a motion to dismiss this docket, or in the alternative, to stay the proceedings until DT 12-107 is resolved. A stakeholders meeting was held on August 29, 2012, to develop the scope of issues to be analyzed and to discuss the conduct of proceedings. On October 10, 2012, Staff filed a report summarizing the stakeholders meeting and setting forth recommendations, which are summarized in part below. On October 24, 2012, in response to the Staff report on the stakeholder meeting, NECTA filed an additional motion to stay this docket until the evidentiary record is complete and a final non-appealable order is issued in DT 12-107.

Freedom Ring Communications, LLC d/b/a BayRing Communications, segTEL, Inc., and G4 Telecom NH, Inc. d/b/a Otel Telekom (collectively, the CLECs), Public Service Company of New Hampshire (PSNH), Liberty Utilities, NHOS, USNH, New Hampshire Telephone Association (NHTA), AT&T Corp., TCG New Jersey, Inc., Northern New England Telephone Operations LLC (FairPoint), and Unitil Energy Systems, Inc. (Unitil) filed comments addressing both Staff's recommendations and NECTA's motions to close or stay proceedings in this docket. This order is limited to our consideration of NECTA's requests to close or stay Docket No. DT 12-246.

## **II. POSITIONS OF THE PARTIES: INTERVENTION**

### **A. USNH**

USNH argues that its rights, duties, privileges, immunities and other substantial interests are likely to be affected by this proceeding. It also argues that its participation would be consistent with the interests of justice and will not impair the orderly and prompt conduct of this proceeding. USNH is the recipient of up to \$44.5 million in grant funding by the U. S. Department of Commerce under the Broadband Technology Opportunities Program. The grant is intended to help fund construction of broadband Internet infrastructure in the state. USNH

hired NHOS to construct this infrastructure. USNH represents that the circumstances that NHOS and USNH have encountered during construction are the same circumstances that gave rise to the Commission's decision to open this proceeding and are directly relevant to the issues that the Commission identified for consideration.

**B. Lighttower**

Lighttower represents that it is a competitive local exchange carrier that offers fiber-based services to locations in southern New Hampshire. Lighttower states that as a facilities-based telecommunications carrier, it is heavily dependent on the terms and conditions of access to utility poles in order to serve its customers in a time-sensitive and cost-effective manner. According to Lighttower, it is also affected by all changes in pole attachment terms and conditions applicable to third party attachers by virtue of being a third party on numerous poles. Lighttower asserts that, consequently, its rights, duties, privileges, immunities and special interests are substantially and specifically affected by the outcome of this proceeding. Lighttower further argues that its late filing will not prejudice any party to the proceeding and that the interests of justice would be supported by its intervention. Lighttower states that it accepts the schedule as it has been set.

**III. POSITIONS OF THE PARTIES AND STAFF: CLOSING OR STAYING THE DOCKET**

**A. NECTA**

In its motion filed August 16, 2012, NECTA argues that the process outlined by the Commission for this docket would be of questionable value. NECTA bases its position on the two assertions that; (1) third-party attachments have been occurring in New Hampshire without incident for more than fifty years, and (2) that NHOS made only vague and general accusations of wrong doing against third-party attachers and pole owners.

In its motion filed October 24, 2012, NECTA argues that detailed factual information concerning New Hampshire pole attachments is being compiled and developed in Docket No. DT 12-107, that there is a commonality of issues among the two dockets, and that the outcome of Docket No. DT 12-107 will have a direct bearing on the issues in this investigation. NECTA asserts that the factual record and determinations in DT 12-107 will narrow the issues and better inform and guide the parties' work in this docket. If this docket were to proceed, NECTA continues, then inefficiency and inconsistency may likely result. Stakeholders should not be required to devote substantial time and resources before the Commission determines, based on the outcome of Docket No. DT 12-107, what, if any, pole attachment rules are necessary. Accordingly, NECTA believes that this investigatory docket should be closed, or in the alternative, should be stayed until the issues in Docket No. DT 12-107 are resolved by a final, non-appealable order.

**B. FairPoint**

In a letter filed August 15, 2012, FairPoint asserts that the Commission should mediate whatever disputes NHOS might have with specific attachers and terminate this docket with no further action. FairPoint argues that NHOS's issues do not justify requiring the entire industry to engage in extensive litigation and rulemaking, especially where, as here, arrangements among attaching parties have been conducted with little Commission involvement for years and considerable resources have recently been expended to develop attachment rules.

In a subsequent filing made on October 26, 2012, FairPoint fully supports the Motion to Stay filed by NECTA on October 24, 2012. FairPoint reiterated its position that the pole access process generally has worked well. Because FairPoint views NHOS's issue as one between NHOS and one other competitive local exchange carrier, FairPoint does not believe that it is

sensible to involve both the telecommunications and electric industries in a lengthy and costly proceeding. FairPoint asserts that the most effective and efficient path to resolve NHOS's initial petition is to instead adjudicate Docket No. DT 12-107.

#### **C. NHTA**

NHTA concurs with NECTA and FairPoint. According to NHTA, further proceedings in this docket would be amorphous, data intensive, and costly and amount to an unwarranted waste of industry resources. NHTA believes that arrangements among attaching parties have been conducted in a business-like manner with little Commission involvement for many years.

#### **D. PSNH and Unitil**

PSNH argues that this docket would not have been opened but for complaints made by NHOS in Docket No. DT 12-107, and that it would be prudent and efficient to defer this investigation until the factual issues in DT 12-107 have been developed and addressed. PSNH posits that litigating Docket No. DT 12-107 first will better enable the Commission to determine what, if any, issues need to be addressed in a rulemaking. Accordingly, PSNH supports closing or staying this docket until DT 12-107 is resolved.

Unitil Energy Systems, Inc. (Unitil) joined the comments made by PSNH.

#### **E. CLECs**

The CLECs concur in the arguments made by NECTA. The CLECs further argue that carrying on two parallel and largely duplicative proceedings will tax the resources of the parties and Commission and will distract from ensuring the smooth operation of the State's telecommunication networks.

**F. USNH**

USNH objects to NECTA's motion. USNH states its understanding that NHOS is seeking Commission assistance with third-party attachers that do not move their existing facilities in a timely fashion and with pole owners that have not exercised rights under their pole attachment agreements. UNSH believes that the problems encountered by NHOS reflect broader problems that arise in other projects, and that an investigation such as the one in this docket is necessary and appropriate.

**G. Staff**

In its report of the stakeholder meeting, Staff notes that there are currently no explicit requirements for coordination of sequential work by multiple attachers and believes that the lack of a defined process can lead to confusion, delay, and dispute. Staff recommends that the Commission develop rules to establish timing and coordination for third party make-ready work and for the resolution of disputes. Staff also believes that the Commission should address in this docket the general practice of requiring new attachments to be located 40 inches below neutral and whether a more efficient method can be established.

**IV. COMMISSION ANALYSIS****A. Intervention**

The Commission considers petitions to intervene in accordance with the standards of RSA 541-A:32. *See* NH Code Admin. Rules Puc 203.17The Commission reviews the facts alleged in the petition and determines whether the petition has demonstrated "rights, duties, privileges, immunities or other substantial interests [that] may be affected by the proceeding . . . ." RSA 541-A:32, 1(b). If it finds that the petition meets this test, and that the intervention would not impair the orderly and prompt conduct of the proceeding, the intervention is granted.

Alternatively, the Commission may grant intervention in the interest of justice so long as the intervention “would not impair the orderly and prompt conduct of the proceedings.” RSA 541-A:32, II.

The Commission finds that the interests of justice would be served by allowing USNH to intervene because USNH has contracted with NHOS. *Cf.* RSA 541-A:32, II. Allowing USNH to intervene will not impair the orderly and prompt conduct of this proceeding. *Cf. id.*

The Commission finds that, because Lighttower is a facilities-based, third-party attacher, Lighttower’s “rights, duties, privileges, [and] immunities” may be affected by the outcome of this investigatory docket. *Cf.* RSA 541-A:32, I(b). The Commission also finds, based upon Lighttower’s representations, that allowing Lighttower to intervene will not impair the interest of justice or the orderly and prompt conduct of the proceedings. *Cf.* RSA 541-A:32, II. In part because no party has objected to Lighttower’s intervention, the Commission further finds that no party will be prejudiced by allowing Lighttower to intervene one day late.

Accordingly, the Commission will grant both USNH’s and Lighttower’s petitions to intervene.

#### **B. Closing the Docket or Staying Proceedings**

We are persuaded that the record developed and the determinations made in Docket No. DT 12-107 may aid the Commission and the parties in better understanding at least some of the issues that need to be addressed in a general investigation of pole access issues. We are also persuaded that developing a record in Docket DT 12-107 will lead to a more efficient and productive process in this docket. We remain concerned, however, that the recently enacted pole attachment rules, Puc Part 1300, may not adequately address make-ready requirements of third party attachers. Likewise, our rules may not provide guidance to parties sufficient to avoid

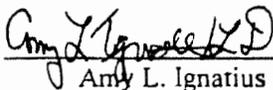
disputes before the Commission. Consequently, the Commission will not close this docket, but will stay these proceedings. The Commission will monitor the development of issues in Docket No. DT 12-107. Once the Commission determines that the specific issues raised by NHOS are sufficiently developed to inform our general investigation and to avoid duplication of effort, the Commission will lift the stay or close this docket on its own motion as appropriate.

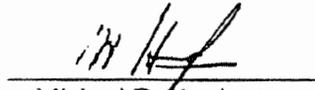
**Based upon the foregoing, it is hereby**

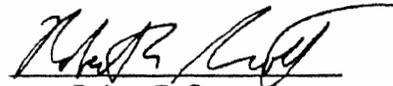
**ORDERED**, the petitions to intervene filed by University System of New Hampshire and Light Tower Fiber LLC are granted without restriction; and it is

**FURTHER ORDERED**, that the proceedings in this docket are stayed pending further order of the Commission.

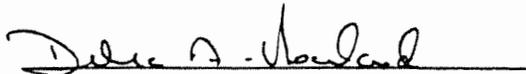
By order of the Public Utilities Commission of New Hampshire this third day of January, 2013.

  
\_\_\_\_\_  
Amy L. Ignatius  
Chairman

  
\_\_\_\_\_  
Michael D. Harrington  
Commissioner

  
\_\_\_\_\_  
Robert R. Scott  
Commissioner

Attested by:

  
\_\_\_\_\_  
Debra A. Howland  
Executive Director

**EXHIBIT D**

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

No. 217-2013-CV-00023

segTEL, Inc.

v.

University System of New Hampshire,  
New Hampshire Optical Systems, Inc., and  
Waveguide, Inc.

**SEGTEL, INC.'S CONSOLIDATED MOTION TO RECONSIDER  
THE COURT'S ORDER ON THE DEFENDANTS' MOTIONS TO DISMISS**

Counterclaim defendant segTEL, Inc. (“segTEL”) moves the Court to reconsider its Order of April 3, 2013 granting motions to dismiss filed by the University System of New Hampshire (“USNH”) and New Hampshire Optical Systems, Inc. and Waveguide, Inc. (together, “NHOS”) on the basis of misapprehended and overlooked facts and law.<sup>1</sup> *See* Super. Ct. R. 59-A; *Broom v. Continental Cas. Co.*, 152 N.H. 749, 752 (2005). Specifically, in dismissing segTEL’s claims as to NHOS by applying the doctrine of primary jurisdiction and yielding in the first instance to anticipated action by the Public Utilities Commission (the “PUC”), the Court (1) misapprehended the open docket at the PUC; (2) incorrectly concluded that actions by the PUC could resolve the fundamental segTEL claims; and (3) improperly dismissed the action—rather than stay it—despite recognition by the Court that the PUC cannot provide the monetary relief sought in this action and that the action will necessarily need to return to Superior Court.<sup>2</sup> Similarly, with regard to the dismissal of claims as to USNH, the Court (1) overlooked

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<sup>1</sup> The Court issued a consolidated order on the two motions. As a matter of economy, segTEL files a consolidated motion for reconsideration of both motions.

<sup>2</sup> Further, the Court neglected to state that the dismissals were *without prejudice* to comport with the recognition that damages claims would need to return to the Court for resolution.

significant evidence of USNH's control over NHOS and (2) did not provide an opportunity to replead.

**I. The Court Misapprehended segTEL's Claims Against NHOS.**

In ruling on NHOS' motion to dismiss, the Court did not "test the facts in the complaint against the applicable law," *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 44 (1987), because it did not address the facts alleged in segTEL's Writ. Rather, as evidenced by its summary of the claims at issue at p. 6 of its Order, the Court premised its decision upon a misapprehension of segTEL's claims and the two PUC proceedings initiated by NHOS.

The Court misapprehends PUC Docket DT 12-107, to which it has yielded under primary jurisdiction. The purpose of Docket DT 12-107 is "to *conduct 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." NHOS Petition in DT 12-107 at p. 1 (attached hereto as Exhibit 1). In a second docket which is currently stayed, the PUC stated that it would conduct a "*general investigation* of pole access issues," Docket No. DT 12-246, Order No. 25,449, Jan. 3, 2013. Both dockets are explicitly investigative, and both face the threshold issue of the extent of the Commission's authority under its current rules to adjudicate such matters.

The pending docket, Docket No. DT 12-107, differs from this case in four important respects which make any finding that the PUC has primary jurisdiction incorrect. First, DT 12-107 is an investigative rather than adjudicative proceeding, captioned as an "*Investigation* into Proposed Charges for Utility Pole Make Ready." NHOS Petition in DT 12-107 (emphasis added). In an August 2, 2012 filing entitled Amendment to Petition for Investigation (attached hereto as Exhibit 2), NHOS explicitly confirmed its understanding that the PUC was conducting

only an investigation, not an adjudicatory proceeding:

NHOS understands from the Order [Order on Petition, July 3, 2012, Order No. 25,386] that NHOS has been requested to supplement its pleadings so that the Commission may conduct the *investigation* requested by the NHOS pursuant to RSA 365:5, and so that the “actors” involved can receive notice and an opportunity to respond to this matter. *NHOS does not interpret the Order as directing NHOS to file a complaint* under RSA 365:1 and Puc 204.01.

*Id.* at 1 (emphases added). That DT 12-107 is limited to investigation is also reflected in the Staff’s recommendation that the PUC “open a separate proceeding to review the rates to be charged for make-ready.” Staff Recommendation at p. 7 (attached hereto as Exhibit 3). This Recommendation would, of course, be unnecessary if make-ready charges already were being adjudicated in Docket No. 12-107. *Compare with* Order at p. 6 (finding that the reasonableness of segTEL’s make-ready rates was being adjudicated before the PUC).

Second, to the extent that the PUC’s investigation addresses the claims of any party, it addresses claims by NHOS, and not segTEL. Staff Recommendation at p. 1 (“The Commission has defined the scope of investigation to include consideration of whether *NHOS* has faced unfair and unreasonable delays to access to utility poles . . .”) (emphasis added).

Third, Docket No. DT 12-107 is explicitly prospective, as reflected in the PUC Staff’s recommendation directing third party attachers to reach “an agreement outlining a process by which the *remaining* work can be accomplished”). *Id.* at p. 7 (emphasis added).

Fourth, and most importantly, DT 12-107 addresses different issues from those raised in segTEL’s Writ. In the Staff Recommendation issued on January 30, 2013, the Staff of the PUC identified the issues to be resolved between segTEL and NHOS as:

1. Whether segTEL should perform its own independent survey to verify what make-ready work segTEL needs to accomplish or whether it should only perform make-ready identified on the pole owner's Form 3;
2. If segTEL survey is performed, a schedule to get the surveys completed which takes into account both parties resources;

3. Dates by which segTEL can commit to completing make-ready work for each of the 82 areas identified on the Form 3s, once NHOS has confirmed a clear path;
4. Primary and secondary points of contact for coordination from each company;
5. Consequences if either party violates the agreement; and
6. Other issues identified by either segTEL or NHOS necessary to set forth an efficient process.

Staff Recommendation at p. 7. These are not segTEL's claims in this case, nor are they similar. Significantly, the PUC Staff did not recommend that the PUC adjudicate these issues. Rather, it recommended that segTEL and NHOS work with the PUC Staff or with a mediator to resolve the issues between themselves. *Id.* NHOS endorsed these recommendations, specifically requesting that the PUC direct segTEL and NHOS to appoint a mediator. NHOS Response to Staff Recommendation at pp. 5-6 (attached hereto as Exhibit 4).

Further, while the Staff Recommendation indicates the PUC Staff's opinion on the scope of the PUC's docket, the PUC has not accepted Staff's Recommendation and the current scope of the open docket is much narrower. *See* Order No. 25,407, Sept. 5, 2012 (clarifying scope of proceeding as limited to "an investigation of practices related to pole attachment work required for the construction of" the Middle Mile Project and "consideration of whether NHOS has faced unfair or unreasonable delays to access utility poles . . . and, if so, possible remedies") (attached hereto as Exhibit 5).

Contrary to the Court's conclusion, segTEL does not ask the Court to rule on segTEL's responsibilities and the timing of moving its infrastructure. Order at p. 6. segTEL is aware of its responsibilities. Writ at ¶ 17.<sup>3</sup> Nor does segTEL ask the Court to rule on the reasonableness of its rates for make-ready. Order at p. 6. Indeed, segTEL alleges that, under PUC rules, its rates

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<sup>3</sup> The PUC Staff acknowledged that NHOS' demand for work on "by multiple companies on thousands of poles in a short period of time is overwhelming" and that the work requested of segTEL alone would fall outside of limits imposed by existing agreements between attachers and pole owners, even if such agreements applied to attacher-attacher relationships, which they do not. Staff Recommendation at p. 6.

are “presumed to be just and reasonable.” Writ at ¶ 17.<sup>4</sup> Most importantly, neither the make-ready process nor the reasonableness of make-ready rates forms the basis of any of segTEL’s claims against NHOS. NHOS has not asked the PUC for—and the PUC has not provided—authority to NHOS to engage in the self-help, tortious conduct which has damaged segTEL. It is this *past* wrongful conduct in damaging and displacing segTEL’s infrastructure, including violating chapter 358-A, trespass to segTEL’s chattels, and intentional interference with contract, which forms the basis for segTEL’s claims for relief, claims which the Court acknowledges “may ultimately require adjudication in this court.” Order at p. 6. The six issues identified by the PUC Staff are all *prospective* and directed at creating a framework for pole attachers to coordinate work on a going-forward basis. In fact, the PUC Staff Recommendation specifically directs the parties to work with the PUC Staff or a mediator “to form an agreement outlining a process by which the *remaining* work can be accomplished.” Staff Recommendation at p. 7 (emphasis added). Neither the PUC nor its Staff proposes to consider how segTEL can obtain relief relating to NHOS’ past conduct, which constitutes the gravamen of segTEL’s claims before the Court.

Nor could they. segTEL has not petitioned the PUC for any remedy or relief relating to NHOS’ past conduct. Nor has NHOS petitioned the PUC for permission to engage in the self-help which forms the basis of segTEL’s claims.<sup>5</sup> segTEL’s claims for relief are simply not before the PUC for disposition. Even if they were, according to the PUC, “it does not appear that the Commission’s current rules provide definitive direction over disputes between

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<sup>4</sup> NHOS would be estopped to argue otherwise, as it has signed agreements to pay, and actually has paid, this same rate to pole owners. Staff Recommendation at p. 2.

<sup>5</sup> Although NHOS amended its petition in Docket No. DT 12-107 to ask the PUC to “investigate third party make ready practices on the Middle Mile Project” and demand that the PUC take action against pole-owners, Amendment to NHOS Petition for Investigation at ¶ 20, NHOS has not asserted a claim against any party and has specifically stated that it was not filing a complaint. *Id.* at p. 1.

prospective and existing attachers.” DT 12-107, Order No. 25,386 (July 3, 2012) (attached hereto as Exhibit 6). Accordingly, the PUC has no rules upon which to take action. Although the PUC has opened, and subsequently stayed, a docket to consider rules relating to disputes between pole attachers, any such rules by their nature and consistent with due process of law can only be prospective in nature. The claims before this Court are for redress of retrospective conduct committed before any PUC rules on this issue could be established and therefore can only be heard in this court.

Moreover, the issues before the PUC relate to the make-ready process. segTEL’s claims seek remedies for NHOS’ tortious actions which occurred entirely outside of the make-ready process. *See, e.g.,* Writ at ¶ 59 (seeking damages arising from NHOS’ relocating segTEL’s infrastructure and crossing, wrapping, close connecting, and boxing in segTEL’s infrastructure). Tellingly, the Court’s order makes no reference to the substantive allegations concerning NHOS’ improper conduct. The Court cites to various points at paragraphs 15 through 24 of the Writ as the source for its summary of segTEL’s claim. Order at p. 6. However, segTEL does not begin to detail NHOS’ wrongful actions until paragraph 25 of its Writ, and does not assert its claims until paragraph 50 of its Writ. In short, the Court overlooked the wrongful conduct for which segTEL actually seeks relief and the claims segTEL actually asserted. Accordingly, the Court erred in concluding that segTEL’s claims are currently pending before the PUC. They are not.

The Court’s acknowledgement that segTEL’s claims “may ultimately require adjudication in this court” is absolutely correct. In fact, because the PUC has no rules dealing with attacher to attacher claims, because there is no pending inquiry by the PUC into NHOS’ unsanctioned and tortious self-help, and because the PUC cannot award the damages sought, this Court is segTEL’s only available venue for adjudication of these claims. segTEL’s claims are

ripe for adjudication in this Court now and the doctrine of primary jurisdiction does not apply here where segTEL's claims are not before the PUC for resolution. *Compare with Konefal v. Hollis/Brookline Coop. Sch. Dist.*, 143 N.H. 256, 258 (1998) ("Primary jurisdiction in an agency requires judicial abstention until the final administrative disposition of an issue, at which point the agency action may be subject to judicial review").

Further, because the Court has already recognized this fact, a stay of this proceeding is warranted in lieu of dismissal. *Ford Constr. Corp. v. TWG Constr. Co.*, 2004 N.H. Super. LEXIS 3 (N.H. Super. Ct. 2004) (staying rather than dismissing action pending binding arbitration). The Court can — and should — retain jurisdiction over segTEL's claims without running the risk of conflicting decisions or duplicative proceedings. To the extent that any of segTEL's claims do raise issues that are pending before the PUC, which they do not, the PUC has previously retained jurisdiction over prospective portions of disputes while allowing courts to retain jurisdiction over retrospective requests for relief.

In PUC Order No. 25,387, Docket No. DT 12-084, Jul. 3, 2012 (attached hereto as Exhibit 7), the PUC addressed a dispute between Time Warner Cable ("TWC") and the Public Service Company of New Hampshire ("PSNH") relating to PSNH's claim for a breach of contract and TWC's claims that PSNH's pole attachment rates were too high. PSNH had filed its breach of contract claims against TWC in this Court in early 2012. In March of 2012, TWC filed a petition with the PUC to seek resolution of its dispute with PSNH, including a determination as to the proper rates for TWC's pole attachments. TWC then removed the court case to the United States District Court for the District of New Hampshire and filed a petition to dismiss or stay the court proceedings pending resolution of the matter before the PUC.

In response to TWC's petition, the PUC stated that it "accepts and will assert jurisdiction

over the prospective rate setting issues in this case, but will not do so for the retrospective contract portions of the case.” Order No. 25,387 at p. 10. The PUC declined jurisdiction over retrospective claims despite the fact that, unlike here, the relationship between TWC and PSNH, as attacher and pole owner respectively, was governed by PUC Regulations (NH Code of Administrative Rules Chapter Puc 1300). In bifurcating the case, the PUC acknowledged that, “[t]hough the Commission has jurisdiction, it is not exclusive, nor is it necessarily coextensive with that of the courts.” *Id.* at p. 11. Acknowledging that PSNH had the option to choose the forum for its claims, the PUC determined that limiting its jurisdiction to the prospective setting of rates would grant appropriate deference to PSNH’s choice of forum and to the contract between PSNH and TWC.<sup>6</sup>

This Court should approach segTEL’s claims in the same way. segTEL chose to bring its claims in this Court because this Court, and not the PUC, has the authority to grant segTEL the relief it seeks. *See* Obj. to NHOS Mot. to Dismiss at pp. 10-12. This choice of forum is due some deference. *Vazifdar v. Vazifdar*, 130 N.H. 694, 697 (1988) (“plaintiff’s choice of forum enjoys a favorable presumption which will not be disturbed except for weighty reasons or in the event that defendant will suffer a gross injustice”).

segTEL’s claims seek mainly monetary relief of the kind that the PUC cannot grant as remedies for NHOS’ past actions. Therefore, the Court should retain jurisdiction over and proceed to adjudicate segTEL’s Counts II (violation of RS Ach. 358-A), III (trespass to chattels), and IV (intentional interference with contract), all of which are retrospective claims seeking damages the PUC cannot grant. The Court should also adjudicate segTEL’s prospective claims for declaratory judgment (Count I) and injunctive relief (Count VI). If the Court opts to defer

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<sup>6</sup> In light of the PUC’s own doubt that its rules cover the relationship between attachers, there is even greater reason for the Court to adjudicate segTEL’s retrospective damages claims here.

ruling on these claims pending resolution of matters currently pending in Docket Nos. DT 12-107 and DT 12-246 before the PUC, Counts I and IV should be stayed rather than dismissed.

**II. The Court Overlooked Significant Evidence of Control in Granting USNH's Motion to Dismiss.**

The court granted USNH's motion to dismiss because it identified "no factual allegations specifying how USNH controlled or directed NHOS in the construction of the network" in segTEL's Writ. Order at p. 4. The Court overlooked a great deal of such evidence, as indicated by the Court's analysis of vicarious liability. Further, the Court misapprehended the law regarding the degree of control required to establish an agency relationship.

As the New Hampshire Supreme Court has confirmed, "[c]ontrol by the principal does not mean actual or physical control at every moment; rather, it turns upon the principal manifesting some continuous prescription of what the agent shall or shall not do." *Dent v. Exeter Hosp., Inc.*, 155 N.H. 787, 792 (2007) (citing *Herman v. Monadnock PR-24 Training Council*, 147 N.H. 754, 758-59 (2002)). Control by the principal "may be exercised by prescribing what the agent shall or shall not do before the agent acts, or at the time when he acts, or at both times." Restat 2d of Agency, § 14 (comment a).

segTEL alleged that USNH continually prescribed what NHOS could or could not do, both before NHOS acted, and during the time when NHOS acted. First, USNH, as a federal grant recipient, "shall comply, and *must require each contractor and subcontractor to comply*, with all applicable federal, state and local laws and regulations" relating to construction. Writ at ¶ 19 (quoting Section 8C of the Special Award Condition) (emphasis added). In short, USNH must prescribe what NHOS can and cannot do to ensure that NHOS complies with applicable laws and regulations. These are allegations of continuous control that must be given deference in

at the motion to dismiss stage. The Court overlooked these allegations.

Further allegations of continuous control are rooted in the federal regulations which govern the grant to USNH which funds NHOS' tortious acts. Under 15 CFR § 14.41, "[t]he *recipient is the responsible authority*, without recourse to the DoC [Department of Commerce], regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature" (emphasis added). USNH is also required to maintain a "system for contract administration . . . *to ensure contractor conformance* with the terms, conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients *shall evaluate contractor performance* and document, as appropriate, whether contractors have met the terms, conditions and specifications of the contract." 15 CFR § 14.47 (emphases added). USNH is obliged by applicable statutes to continuously control NHOS' actions. The Court overlooked these allegations of control.

The Court acknowledged USNH's obligations to "ensure grants are administered properly, track programmatic and fiscal performance, and to be accountable for the protection of taxpayer investments," Order at p. 4, but overlooked the obvious inference to be drawn from these obligations: that they evidence USNH's control over NHOS. *See General Insulation Co. v. Eckman Constr.*, 159 N.H. 601, 611 (2010) (when reviewing a motion to dismiss, the Court "assume[s] the plaintiff's pleadings to be true and construe[s] all reasonable inferences in the light most favorable to it"). The fact that USNH owes statutory obligations to the National Telecommunications and Information Administration ("NTIA"), Order at p. 4, does not make these obligations any less indicia of control. segTEL does not assert claims against USNH for

breach of these obligations. Indeed, the Court's assertion that segTEL has argued that "USNH owes it a nondelegable duty," *id.*, demonstrates that the Court has misapprehended both the claims segTEL has brought and the theory of liability asserted against USNH. Under applicable law and the terms of its federal grant, USNH is "the responsible authority," 15 CFR § 14.41, for the build out of the Middle Mile Project and is responsible for ensuring that actions of its agents, such as NHOS, comply with applicable law.

The Court both overlooked these extensive allegations of USNH's control over NHOS and drew incorrect inferences from the allegations it did cite. The Court must reconsider its Order granting USNH's motion to dismiss. At the very least, the Court must allow segTEL the "opportunity to amend the writ before dismissing for failure to state a claim." *Cambridge Mut. Fire Ins. Co. v. Crete*, 150 N.H. 673, 678 (2004).

### **III. In the Alternative, the Court Must Stay, Rather Than Dismiss segTEL's Claims.**

The Court's acknowledgement that that segTEL's claims "may ultimately require adjudication in this court" requires the Court to stay these proceedings rather than to dismiss them. A dismissal could have a preclusive effect which would impair segTEL's ability to obtain the relief it seeks, *see, e.g., Daigle v. City of Portsmouth*, 129 N.H. 561, 570 (1987) (setting forth elements of collateral estoppel), relief which it cannot obtain before the PUC. *See* Obj. to NHOS Mot. to Dismiss at pp. 10-12. Accordingly, rather than dismiss claims which it will likely adjudicate in the future, the Court should stay these proceedings pending resolution of issues raised by NHOS before the PUC which the Court has determined are relevant to segTEL's claims.

If the Court does not stay segTEL's claims for relief, it should clarify that, consistent with the Court's recognition that segTEL's claims will ultimately require adjudication in this

court, the Court should clarify that its dismissal is without prejudice. *Pine Gravel v. Cianchette*, 128 N.H. 460, 464 (1986) (noting that “dismissal is without prejudice, and that the dismissal has the same effect as a stay”).

WHEREFORE, segTEL respectfully requests that this Honorable Court:

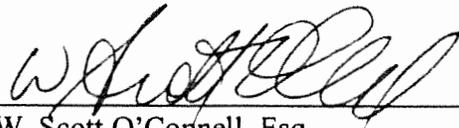
- a. Reconsider its Order on the Defendants’ Motions to Dismiss and deny these motions; or
- b. Stay this action; or
- c. Allow segTEL to amend its claims against USNH; or
- d. Clarify that segTEL’s claims are dismissed without prejudice;
- e. Schedule an oral argument on this Motion; and
- f. Grant such other and further relief as is just and equitable.

Respectfully submitted,

segTEL, Inc.,

By its Attorneys,

NIXON PEABODY LLP



W. Scott O’Connell, Esq.

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900 Elm Street

Manchester, NH 03101

Tel: (603) 628-4000

Dated: April 15, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Motion* was served on all counsel of record on this 15th day of April, 2013 by first class mail, postage prepaid.

  
\_\_\_\_\_  
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# EXHIBIT 1

**BEFORE THE STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION  
Case No. \_\_\_\_\_**

**PETITION FOR INVESTIGATION INTO PROPOSED CHARGES  
FOR UTILITY POLE MAKE READY**

New Hampshire Optical Systems, LLC (“NHOS”), by its counsel, Hinckley, Allen & Snyder LLP, hereby petitions the State of New Hampshire Public Utilities Commission (the “Commission”) to conduct 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.

NHOS has been awarded a contract to construct a federally-funded project to establish affordable broadband access throughout New Hampshire. To complete this work, NHOS will attach fiber-optic cable to approximately 23,000 utility poles which include cable attachments owned by utilities other than the pole owners (“Third Party Attachees”). Despite good faith efforts, NHOS has been unable to reach agreement with certain Third Party Attachees over the cost of make-ready work required for the NHOS pole attachments. In order to prevent this disagreement from further derailing NHOS’ work on the project, NHOS requests pursuant to RSA 365:5 that the Commission investigate the matter, and establish the just and reasonable cost for third party make-ready work that is required to accommodate pole attachments, such as proposed to be made by NHOS.

**FACTS**

1. NHOS is a registered CLEC based in Nashua, New Hampshire.
2. NHOS is installing approximately 750 miles of fiber-optic cable through a region extending generally from the New Hampshire seacoast to the southwest part of the state, and then north to the Lakes Region and the North Country (the “Middle Mile Project”).

3. Construction will require NHOS to attach fiber-optic cable to approximately 23,000 utility poles that are primarily joint-owned / joint use and in the public right-of-way. Transmission facilities owned by various Third Party Attachees, such as other CLECs and Cable TV providers have previously been installed on certain of these poles.

4. The pole owners have not objected to NHOS undertaking the pole attachments necessary for the construction of the Middle-Mile Project. To make room for the NHOS attachment, the pole owners have directed the Third Party Attachees to rearrange existing facilities.

5. Some of the Third Party Attachees have demanded that their make-ready work be performed at excessive rates, and that NHOS pay, in full, their stated cost of this work prior to performing their make-ready work.

6. By way of example, NHOS has received a quoted rate of \$214.50 (exclusive of pre- and post- construction survey fees and travel costs) from Third Party Attachees for lowering a single facility, however, in connection with a recent request for proposal conducted by an NHOS' affiliate, the documented industry average quoted for the same services was \$54.28, with a low cost of \$22.00. In addition, NHOS is aware that similar Third Party Attachees have negotiated contract rates of less than \$23.00 plus traffic management for the same work.

#### **APPLICABLE STATUTES AND REGULATIONS**

7. Under RSA 374:2, all charges demanded by any public utility for any service "shall be just and reasonable." Any charge that is unjust or unreasonable, or in excess of that allowed by law, is prohibited. Id.

8. Under RSA 374:34-a, the Commission has the authority to regulate the rates, charges, terms, and conditions of pole attachments. Further, under RSA 365:5, 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.”

9. Here, although the pole owners may require that Third Party facilities be relocated under no circumstances may the Third Party Attachees require NHOS, or any potential attachee, to pay a premium for the facility relocation costs. Only the actual costs may be charged for this work, and the charges must be just and reasonable.

10. During the past four months, NHOS has attempted to reach agreement with the Third Party Attachees over the completion of the make-ready work required for the NHOS pole attachments, the costs of that work, and the allocation of those cost.

11. Despite good faith efforts, NHOS has not been able to reach agreement with the Third Party Attachees over the cost of the make-ready work. To date, the Third Party Attachees have demanded reimbursement at rates that far exceed the just and reasonable cost of the work, in some cases defending their cost position on the argument that their pricing is consistent with the costs charged by the pole owners. Nevertheless, this position is misguided, as costs associated to the pole owner are significantly higher than to the Third Party Attachees, and as such, the added cost should not be passed on to NHOS. Further, the actions of these Third Party Attachees threatens to bar the NHOS pole attachments unless or until NHOS agrees to pay the costs demanded, and Third Party Attachees have rejected NHOS’s offer to perform the make-ready work itself at no cost and with their oversight.

12. The ongoing disagreement over the cost of make-ready work threatens to interfere with NHOS’s ability to complete the Middle-Mile Project, an outcome which could prevent Network New Hampshire Now (“NNHN”) from meeting the June, 2013 deadline established as a condition of receiving federal funds for the state-wide broadband project, and further, provide a

means for Third Party Attachees to financially benefit from or delay any competitive attachments such as NHOS.

13. The Vermont Public Service Board has stated in Rule 3.700 of its regulations, that “In completing make-ready work, a utility should pursue reasonable least-cost alternatives ... currently relied upon by that utility”. While obviously the Vermont statute is not applicable in New Hampshire, ensuring reasonable low cost alternatives for third party make-ready services should be shared commitment by New Hampshire. In this instance, certain of the Third Party Attachees have claimed they will use in-house crews to complete make-ready in an attempt to justify their rates. The same Third Party Attachees are known to outsource much of their construction and should be expected to do so to complete make-ready and not attempt to hide true cost by claiming in-house cost well above industry norm. In addition, make-ready work should be conducted consistent with the Third Party Attachees’ typical construction practices and adopting higher cost practices because the cost burden can be passed on to potential attachees should not be considered just and reasonable.

14. In certain instances, Third Party Attachees are charging make-ready survey fees for all poles on the applications submitted to the pole owners by NHOS. In many instances, these Third Party Attachees have no make-ready on the majority of the poles and often do not even have facilities on these poles. This practice should not be considered just and reasonable.

#### **REQUEST FOR INVESTIGATION AND RELIEF**

15. Pursuant to RSA 365:5, NHOS requests that the Commission investigate this matter, and establish the just and reasonable cost for third party make-ready work that is required to accommodate the NHOS pole attachments.

16. In addition, NHOS request that the Commission establish the just and reasonable charges Third Party Attachees can charge for make-ready work required to accommodate the NHOS pole attachments.

Respectfully submitted,

NEW HAMPSHIRE OPTICAL SYSTEMS,  
LLC

By its attorneys

Dated: April 24, 2012

  
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#50681711

# EXHIBIT 2

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

**Case No. DT 12-107**

**AMENDMENT TO NHOS PETITION FOR INVESTIGATION**

**I. PRELIMINARY**

On July 3, 2012, the Commission issued Order No. 25,386, which denied NECTA's motion to dismiss the April 24, 2012 Petition For Investigation (the "Petition") filed by New Hampshire Optical Systems, Inc. ("NHOS"). The Order directed NHOS, within 30 days, to "revise its filings in order to provide greater clarity and specificity about the particular acts or actors that NHOS alleges are impeding its work." Pursuant to the Order, NHOS submits the following Amendment to its Petition and subsequent pleadings in this case.

NHOS understands from the Order that NHOS has been requested to supplement its pleadings so that the Commission may conduct the investigation requested by the NHOS pursuant to RSA 365:5, and so that the "actors" involved can receive notice and an opportunity to respond to this matter. NHOS does not interpret the Order as directing NHOS to file a complaint under RSA 365:1 and Puc 204.01.

**II. SUPPLEMENTAL FACTUAL ALLEGATIONS**

1. NHOS hereby incorporates by reference the facts set forth in the Petition, as well as in its June 6, 2012 Statement of Position Regarding Charges For Utility Pole Make Ready, and its June 15, 2012 Objection to NECTA's Motion to Dismiss.

**A. The Middle-Mile Project**

2. On April 14, 2011, NHOS was awarded a contract for a project that entails the installation of approximately 750 miles of fiber optic cable in New Hampshire, through a region

extending generally from the seacoast, to the southwest part of the state, and then north to the Lakes Region and the North Country (the "Middle-Mile Project").

3. The Middle-Mile Project is funded by a grant awarded under the federal Broadband Technology Opportunities Program ("BTOP") to NHOS and its partners, the University of New Hampshire ("UNH") and the National Telecommunications and Information Administration ("NTIA").

4. The deadline for NHOS to complete the installation of cable along the 750 mile route of the Middle-Mile Project is June 2013. If this deadline is not met, there is a risk that federal funding received for the Project will lapse.

5. To complete its work under the Middle-Mile Project, NHOS must attach fiber optic cable to approximately 23,000 utility poles. Those poles are owned by providers of telecommunications and electrical services, examples of which include FairPoint Communications, Unitil and PSNH.

6. Certain third parties previously have attached their utilities to many of the 23,000 utility poles within the scope of the Middle-Mile Project. These third parties ("third-party attachers") include Tech Valley/segTEL.

**B. Pole Attachment Agreements**

7. The rights and obligations between the pole owners and third-party attachers are governed by pole attachment agreements ("PAAs") entered into between each pole owner and each attacher. A standard PAA is employed by pole owners for all attachments in the State of New Hampshire. A sample PAA is attached as Exhibit A.

8. The PAA serves as a means of implementing the standards set forth in Puc 1300 for ensuring that the rates, charges, terms and conditions for pole attachments “are just and reasonable.”

9. The PAA provides for the issuance of non-exclusive licenses to the third-party attachers (the “Licensees”) which authorize the connection of the Licensees’ facilities to the utility poles of the pole owners (the “Licensors”). See Article 2.1. Before attaching to any pole, a Licensee must submit applications for pole attachment licenses, and must designate the priority for the completion of make-ready work – such as the rearrangement of existing facilities or other pole changes – that must be performed by the Licensor prior to the attachment of the Licensee’s facilities. See Article 3.3. The PAA provides that Licensors “shall make commercially reasonable efforts” to complete make-ready work within six months of receiving payment for the work from the Licensee. See Article 5.4.

10. With respect to make-ready work required to be performed by existing third-party attachers (not the pole owners), the PAA does not grant new attachers the power to control the time, scope or rate of third-party make-ready work. However, pole owners have the contractual right under the PAA to demand that Licensees perform this work within designated time frames, and, if those time frames are not met, to perform the make-ready work themselves at the Licensees’ expense.

11. Specifically, Article 7.1.5 of the PAA states that when a pole owner or other attachers (such as NHOS) “need to attach additional facilities to any of Licensor’s Utility Poles,” the Licensee “will upon written notice from the Licensor rearrange its Attachments on the Utility Pole or transfer them to a replacement Utility Pole ... so that the additional facilities of the Licensor ... or other Licensee [such as NHOS] may be attached ...”

12. Further, Article 7.1.6 provides that if the Licensee “does not rearrange or transfer its Attachments within fifteen (15) days after receipt of written notice from the Licensor requesting such rearrangement or transfer ... Licensor ... may perform or have performed such rearrangement or transfer.”

13. The PAA does not give new attachers, such as NHOS, the right to enforce these provisions, or to demand that the pole owners insist that existing third-party attachers act expeditiously, and in a just and reasonable manner, in performing make-ready work required to attach new facilities.

**C. Third-Party Make Ready Work Has Prevented NHOS From Beginning Work on the Middle-Mile Project**

14. In October 2010, NHOS entered into PAAs with the owners of the utility poles within the scope of the Middle-Mile Project. Then, in June and July 2011, NHOS filed applications with pole owners for licenses to begin the installation of its fiber optic cable, and it paid for make-ready work required of the pole owners for the work to proceed.

15. More than a year has passed, yet NHOS has been unable to proceed with the Project. This is because existing third-party attachers, in particular segTEL, have refused to perform the make-ready work that must occur before NHOS can attach its fiber optic cable.

16. The third-party attachers 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. Further, these attachers have deliberately delayed the start of that work, even after NHOS assented to their unreasonable payment demands.

17. Third-party attachers, like segTEL, clearly have no incentive to cooperate in allowing competitors like NHOS to gain access to utility poles, and they are free to exploit to their advantage the absence of rules and standards over third-party make-ready work.

18. Moreover, to date, pole owners have declined to enforce the provisions of Articles 7.1.5 and 7.1.6 of the PAA to require that third-party attachers perform the make-ready work necessary for NHOS to install its fiber optic cable.

19. NHOS shares the Commission's position, set forth in the Order, that current Commission rules do not appear to provide definitive direction over disputes between prospective and existing attachers and that the existing regulatory structure may be in need of further standards. NHOS also agrees with Unitil's position that while there are provisions in the PAA allowing the sole owners to perform make-ready if the attacher does not, the owners may be reluctant to do so to avoid some liability in moving those facilities. Additionally when the pole owners are reluctant, the new attacher has no authority to leverage the provisions in the PAA. The result of these issues is that a new attacher has little to no leverage to negotiate reasonable terms with existing attachers and is left to rely on the cooperation of existing attachers for establishing reasonable rates and timeframes for performance of make-ready work.

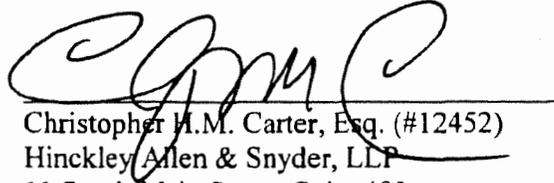
20. For the reasons set forth above, and in NHOS' prior pleadings, NHOS requests that the Commission investigate third-party make-ready practices on the Middle-Mile Project, and demand that pole owners employ their contractual right under the PAA to require third-party attachers to perform make-ready work in a timely fashion, and under terms that are fair and reasonable.

Respectfully submitted,

NEW HAMPSHIRE OPTICAL SYSTEMS, INC.

By its attorneys

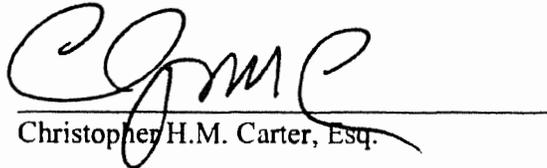
Dated: August 2, 2012



Christopher H.M. Carter, Esq. (#12452)  
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 date of August 2, 2012, 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.

#50834474

# EXHIBIT 3

# STATE OF NEW HAMPSHIRE

## Inter-Department Communication

**DATE:** January 30, 2012  
**AT (OFFICE):** NHPUC

**FROM:** Kate Bailey *KMB*  
**SUBJECT:** Staff Report and Recommendation regarding NHOS Complaint in DT 12-107  
**TO:** Commission  
Executive Director

### Introduction

On September 5, 2012, the Commission issued Order No. 25,407 providing an opportunity for New Hampshire Optical Systems (NHOS) who was contracted by the University System of NH to construct the so called Middle Mile project, funded in part by the American Recovery and Reconstruction Act, to identify specific issues preventing it from attaching to utility poles. The order directed NHOS to answer 12 questions in an attempt to narrow the issues about access to utility poles. In addition, the order directed pole owners to answer a different set of questions. The Commission defined the scope of the investigation to include consideration of whether NHOS has faced unfair and unreasonable delays to access to utility poles during the construction of its Middle Mile project, and if so, a possible remedy. The order went on to state that once factual evidence is received it would determine how best to proceed.

Staff has reviewed answers received from NHOS, FairPoint, PSNH, and Unitil to the Commission's questions. On September 24, 2012, Staff conducted a field visit in Franklin and Tilton with NHOS and segTEL and gathered additional information from segTEL, NHOS and MetroCast. This report summarizes the information gathered, provides Staff's analysis of certain disputes, whether NHOS has faced unfair and unreasonable delays, and a recommendation on how to proceed.

### Summary of Issues and Analysis

NHOS filed its response to the Commission's questions on October 2, 2012. It identified segTEL, BayRing, TelJet and FairPoint as entities with which it has outstanding disputes related to pole attachments.

In response to the Commission's first question, NHOS stated its understanding that incumbent telephone companies, primarily FairPoint, manage the communications space

on the poles and *assume responsibility for communications with other attaching entities*. (emphasis added). According to pole owners' responses, this is not the case. Once FairPoint issues a pole attachment license, on a Form 3, which includes make-ready necessary by existing attachers, it is the new attacher's responsibility to coordinate rearrangement with existing attachers. FairPoint, as pole owner, notifies attachers when it replaces a pole, to transfer facilities to the new pole, but does not take responsibility for notifying existing attachers when rearrangement of facilities for a new attacher is necessary. (FP response 7 and 8). PSNH and Unitil provided responses similar to FairPoint. These companies issue notice to existing attachers when the pole owner sets a new pole and attachments need to be transferred to the new pole. However, both PSNH and Unitil state that coordination for rearranging existing attachments for a new attacher has traditionally been performed by the new attacher. (PSNH and Unitil responses 7 and 8)

NHOS' response to the Commission's second question reports that it has pole attachment disputes with segTEL, BayRing and TelJet. The dispute with BayRing and TelJet is limited to the rate both are charging NHOS to move their facilities. NHOS has the same dispute over rates with segTEL, but also alleges segTEL is intentionally manipulating the process to delay completion of the work. Lastly, NHOS includes the pole owners in its complaint as having a responsibility, but not meeting it, for ensuring reasonable access and management of third-party make-ready.

NHOS argues segTEL's, BayRing's and TelJet's rates are heavily inflated and do not reflect the cost of performing make-ready. NHOS cites a construction rate for lowering a segTEL attachment of \$214.50. It claims BayRing's rates are nearly identical to segTEL's. This rate is identical to the rate in Attachment 1 of the Pole Attachment Agreement between FairPoint, PSNH and NHOS, (Attachment 1 to PSNH responses) which would be charged by the pole owner if the pole owner transferred, moved, raised or lowered a cable. Staff has not investigated the reasonableness of this rate, but points out that NHOS agreed to pay the pole owner this rate when it signed the pole attachment agreement. NHOS argues the pole owner should rearrange existing attachments if the existing attacher does not timely rearrange its attachments. In the event the pole owner performs this work, it would charge NHOS the same rate NHOS is disputing with segTEL and BayRing. It seems illogical to argue on one hand the rates charged by segTEL and BayRing are preventing attachments, and on the other hand, that the pole owners should remedy the timeliness issue, by performing the work for the same rate. Staff, without any information about the cost of this work agrees, on its face, the rate seems high and recommends the rate be investigated in a separate proceeding. The Commission could require NHOS to put money in escrow while the rate dispute is litigated and require BayRing, segTEL and TelJet to account for the costs of performing the work and to provide detailed copies of invoices for this work.

NHOS argues the pole owners have responsibility to ensure reasonable access to their poles and should manage third-party make-ready. The pole owners disagree. PSNH stated it only moves others facilities in the case of emergency or storm restoration where public safety and service restoration are overriding factors. PSNH does not move and has not moved third-party attachments to accommodate new attachers for several reasons.

According to PSNH among other things, it does not own the facilities, the pole attachment agreement does not obligate pole owners, but provides the right, to perform this work; it does not have the time or resources to perform this work; its work force is not trained to handle telecommunications facilities; it is concerned about liability claims for damage or loss and cost recovery for the work; and it is not beneficial to the core electric service business. Unitil agrees with PSNH that it has the right to make such transfers but that deciding whether to invoke the option to move another licensee's facilities would include evaluation of the potential liability for damage to the facilities; the risk of being unable to recover the cost of the work and the risk of protracted litigation over rate disputes; and the difficulty in determining facts in dispute between two attachers. FairPoint responded that it has never relocated an existing attacher's facilities to accommodate a new attacher and objected to the remainder of the question because, according to FairPoint, it presupposes a legal conclusion.

It is clear pole owners have not previously interpreted the pole attachment agreements to obligate them to ensure timely relocation of existing attachments to accommodate new attachers. Many third-party attachments have been made to incumbent utility poles since 1996 and this issue has not previously been raised. Staff believes the pole owners' reasons for choosing not to perform this work are reasonable and agrees with the pole owners' interpretation of the pole attachment agreement that the language in the agreements upon which NHOS relies, does not obligate pole owners to rearrange existing third-party attachments.

NHOS made various allegations against segTEL about poles in Laconia and Franklin. Staff met with NHOS and segTEL in Franklin and reviewed 12 poles along a route between Franklin and Tilton. Both companies had crews in the area and NHOS provided a police detail. After the field visit, Staff analyzed licenses from the pole owners (Form 3s) to determine what make-ready was required for each attachment; daily worksheets from both segTEL and NHOS construction contractors, to determine the date on which attachments were made; and information from MetroCast about when it performed its required make-ready for these attachments. In some cases, Staff was able to determine when various activities occurred on these poles and who caused the discrepancy. In other cases, Staff could not definitively reconstruct what happened. Attached is a report of the facts, observations, conclusions and recommended action for each of the 12 poles, numbered sequentially for reference. As a result of the analysis, Staff notes the following.

In Franklin and Tilton, NHOS did not follow industry standard construction practices. Standard construction practice for pole attachments is to place strand and hardware together along a pole line followed by installation of fiber on the strand. According to the daily worksheets, NHOS' construction contractor initially "framed" the poles. As explained by NHOS, "framing" the pole means installation of a bolt which holds the strand. In Franklin and Tilton, NHOS bolts had been placed in some of the poles in June, but strand was not attached. After investigation, Staff concluded this may have been due to a dispute with MetroCast over charges for the make-ready work needed by NHOS. The dispute was resolved on August 27, but subsequently, when NHOS went to

place the bolts in the poles which had required work by MetroCast, segTEL had begun its attachment process.

Approximately 3 months after NHOS was licensed, segTEL was licensed in the same location with make-ready instructions to relocate NHOS attachments. If NHOS were attached, it would have been clear to segTEL that it was required to make arrangements with NHOS to relocate the NHOS attachments. In some cases, segTEL make-ready instructions included a requirement to have NHOS rearrange its attachment to a lower position on the pole. In other cases, there was no indication NHOS was required to move. When segTEL began to make its attachments, in some cases it found unmarked bolts with no strand or fiber in its assigned location and in other cases, the attachment space was vacant, without even a bolt in place. Although some make-ready instructions indicated an NHOS attachment needed to be relocated, it appears segTEL failed to contact NHOS about make-ready in this location. segTEL claims its construction contractor did not move any NHOS bolts. Of the 12 poles analyzed by Staff, there is no evidence to contradict this. There is however, evidence that NHOS installed a bolt on 2 poles, after segTEL made its attachment, in close proximity to the segTEL attachment with less spacing than that required by the National Electrical Safety Code. (See staff analysis numbers 3 and 12).

NHOS argued it should be allowed to make all of its attachments in its originally licensed location and then segTEL should be required to pay NHOS to relocate to its new attachment height. If NHOS had paid MetroCast for the required make-ready and attached to all the poles in this location in June with strand, consistent with standard industry practice, it would have been clear to segTEL when it began its attachment process in August, that NHOS would need to relocate. segTEL argued in its experience, some licensed carriers subsequently choose not to attach. In such cases, segTEL occupies the licensed space without relocation expenses. In this area, NHOS had placed bolts in some of the poles. Because segTEL's make-ready instructions included relocation of NHOS attachments, segTEL should have contacted NHOS to investigate the significance of bolts in the segTEL assigned location on some poles but not others.

NHOS was not willing to concede its position that it had the right to install all of its attachments before segTEL could begin its attachments. On the day of the field visit, Staff observed several instances (See staff analysis numbers 2, 7, 8, 9) where both parties were attached in the wrong location or where segTEL was incorrectly attached (See Staff analysis number 6, 11) and suggested the parties work together since both had crews in the area to rearrange and correct them that day. Staff believes this would have cleared up the discrepancies in the area preventing both parties from proceeding without interference, but NHOS was unwilling. This would not, however, have cleared up other violations such as attachments that were too close.

On the twelve poles staff analyzed, it appears segTEL and NHOS are almost equally at fault. On five of the poles reviewed, Staff concluded that both segTEL and NHOS failed to accurately follow make-ready instructions, or there was not enough evidence to determine what happened. On 4 of the poles, it appears segTEL is responsible for the

problems and should remediate. NHOS is responsible for the problems on the remaining 3 and should remediate.

NHOS Exhibit Y contains 132 pages of e-mail correspondence between NHOS and or Waveguide (NHOS's construction contractor) and segTEL. Although it does not appear to be a complete record of correspondence and some e-mails are out of order, the frustration about the amount of work and timeliness is evident. The e-mails are generally about coordination of segTEL make-ready work for NHOS. After reviewing all the e-mails, it does not seem that segTEL is intentionally delaying make-ready, but rather, segTEL is not staffed to do the amount of work required by NHOS and that the lack of rules about requirements for third-party make-ready impeded the ability to complete the work within NHOS's expectations.

NHOS provided segTEL's proposed Reciprocal Make-Ready Agreement in Exhibit K. Although the agreement was not signed by NHOS, NHOS refers to it as segTEL's "documented process." The agreement requires the party requesting make-ready, to put specific details about required work in writing with a statement that all other make-ready has been completed to allow for the requested work to be done. The agreement also states that a completed TELCO make-ready Form 3 shall be presumed reasonable for the purposes of making the request.

In November 2011, NHOS began sending copies of FairPoint Form 3s to segTEL as a request to perform required make-ready. Form 3s are the form FairPoint uses to license attachments. As part of the FairPoint licensing process, a survey of the poles is performed by the pole owners and requesting attacher. During the survey, make-ready work required by the pole owners and third parties is determined and documented on the Form 3s. Existing third-party attachers do not participate in the pole owner survey.

Much of the e-mail correspondence has to do with NHOS submitting Form 3s as a request for make-ready. There were disputes about whether all other parties' make-ready had been completed. This information is necessary because other attachments have to be moved to make space available for segTEL to move its attachment. Since, according to the pole owners, NHOS is responsible for coordination of all third-party make-ready necessary before it can attach, it is not unreasonable for a third party like segTEL to require a clear path so that it can complete all of the rearrangements required by NHOS in an area, at one time. Some of the later e-mails contain correspondence requesting that segTEL complete the portion of work that can be done, with a recognition that segTEL would be required to subsequently dispatch workers to complete the remainder of work in the area at a later time.

Additional correspondence has to do with coordination between a segTEL employee and Waveguide scheduling times to meet in the field to survey a requested route and agree on work that needs to be done. segTEL independently surveys each pole and sometimes identifies more work than that identified on the Form 3 which in segTEL's assessment needs to be done in order to maintain compliance with codes and standards. This practice introduces extra work and a great deal of additional time into the attachment process for

NHOS. It also raises a question about whose responsibility it is to maintain code compliance on the pole.

If an existing attacher believes the pole owner has failed to identify work required to maintain code compliance in instructing the existing attacher to rearrange its facilities, should the existing attacher follow the pole owner's instructions without question or ensure that once it moves its attachment, the attachment is code compliant? Or, if a pole owner has concluded that no make-ready work is needed should the existing attacher have the right to force costs on the new attacher by requiring an existing code violation be corrected before the new attacher can attach<sup>1</sup>? There are no rules governing rearrangement of third-party attachments, but there are rules requiring utilities, both pole owners and attachers, to maintain their facilities according to the National Electrical Safety Code. It is not unreasonable for segTEL to ensure its attachments are and remain code compliant. However, it would be unreasonable for segTEL to expect NHOS to wait for and pay to correct existing segTEL violations, in the event such violations are discovered. This process significantly adds to the time to complete third-party make-ready, which was unexpected by NHOS.

NHOS also provided several pictures in Exhibits H and I which depict multiple segTEL attachments which do not appear to comply with the NESC<sup>2</sup>. If the point of this is to demonstrate that segTEL should not be allowed to ensure its attachment rearrangements will comply with code because segTEL has other existing non-compliant attachments, Staff would not recommend additional non-compliant attachments be made.

### **Conclusion and Recommendation**

Based on its review, Staff does not believe there is evidence to find NHOS has been subject to unfair or unreasonable delays or that segTEL has intentionally manipulated the process to delay NHOS. The attachment process has clearly taken longer than NHOS expected, based on its interpretation of existing rules and the pole attachment agreement. However, the 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. During the review, Staff observed actions from both segTEL and NHOS that delayed accomplishment of the work.

According to NHOS Exhibit A, approximately 3600 poles require segTEL make-ready identified on 82 Form 3s. Staff notes that pole attachment agreements made by pole owners generally set a maximum of 2,000 poles in process at one time, among all attachers: if segTEL had the clearer and stronger obligations of a pole owner, this project would still be outside the scope of such agreements. In order to accomplish this work efficiently, expectations should be outlined and agreed upon containing precise

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<sup>1</sup> An example of where this may have occurred is in the Staff analysis of Pole 2 where fire alarm is 3 inches too close to neutral and neither the NHOS nor segTEL Form 3 includes any make-ready instructions for fire alarm.

<sup>2</sup> Staff has not investigated whether these attachments comply or do not comply with the NESC.

requirements for both parties in order to complete the work. Issues to be settled should include, but not necessarily be limited to:

1. whether segTEL should perform its own independent survey to verify what make-ready work segTEL needs to accomplish or whether it should only perform make-ready identified on the pole owner's Form 3;
2. If segTEL survey is performed, a schedule to get the surveys completed which takes into account both parties resources;
3. Dates by which segTEL can commit to completing make-ready work for each of the 82 areas identified on the Form 3s, once NHOS has confirmed a clear path;
4. Primary and secondary points of contact for coordination from each company;
5. Consequences if either party violates the agreement; and
6. Other issues identified by either segTEL or NHOS necessary to set forth an efficient process.

Staff recommends segTEL and NHOS be required to work with Staff or an independent mediator to form an agreement outlining a process by which the remaining work can be accomplished. Additionally, Staff recommends the Commission open a separate proceeding to review the rates to be charged for make-ready, and require NHOS to escrow a reasonable amount to ensure third parties will be reimbursed once a determination on rates has been made.

Finally, Staff is aware of a pilot underway in the state of Connecticut to hasten pole attachments on poles requiring substantial make-ready. In such instances, the new attacher is allowed to make a temporary attachment beneath the lowest attachment if there is enough space to maintain vertical clearance to the roadway, required by the NESC. The temporary attachment is permitted for a limited period of time, and the attachment must be relocated once make-ready above is completed. This practice allows a new attacher to attach more timely, but requires the extra expense of moving the attachment once make-ready is complete. Staff recommends this idea be considered with interested CLECs and the pole owners and reported back to the Commission.

**Poles Reviewed at NHOS' request on School Street in Franklin**

**1. Pole T-2/4, E-11/4**

NHOS

Survey 9/30/11

PSNH License issued April 5, 2012

MR –none, attach 12 above CATV

FP license 12/16/2011

MR: Fire Alarm raise to 40, NHOS attach at 52

ATTACH DATE: 6/13/12 Waveguide Daily work sheet shows 32 poles were “framed” (bolt inserted) starting with pole 2/4 and ending with pole 116/19 and 10 cables were raised or lowered which corresponds with the same number of raise or lowers required by fire alarm on these poles. License indicates 47 poles between these two points. No details to identify which specific poles were framed, however, e-mail from Steve Janko indicates poles which required MetroCast make ready were not framed on this date.

segTEL

Survey 12/28/11

PSNH license not provided

FP license 3/8/12

MR: CATV lower to 76, NHOS lower to 64, ST attach at 52

ATTACH DATE: 8/23/12 Daily worksheet indicates strand and hardware installed.

MetroCast lowered to 76 on 8/2/12, notified segTEL MR was complete on 8/10/12

*Field observations: no measurements taken, NHOS bolt appears to be very close to an existing hole, evidence by marks on pole that bolt may have been moved. segTEL denies it moved NHOS bolt and NHOS denies installing bolt in current location.*

*Conclusions: No MetroCast make ready was needed for NHOS attachment. NHOS bolt was likely attached on 6/13 and should have been at 52 inches (if MetroCast instructed to lower to 76 for segTEL, it must have originally been at 64 and NHOS would have framed at 52). MetroCast lowered to 76 inches on 8/2/12, leaving 24 inches between NHOS and MetroCast. segTEL should have requested NHOS lower to 64 before attaching at 52.*

*RECOMMENDED ACTION: No proof or finding of who moved bolt; both parties deny. segTEL did not contact NHOS to perform make ready. segTEL should pay for remediation.*

## 2. Pole T-2/5, E-11/5

### NHOS

Survey 9/30/11

PSNH License issued April 5, 2012

MR: CATV move down to 12 above telephone, attach at 12 above CATV

FP license 12/16/2011

MR: CATV lower to 12 above telephone, attach above CATV

ATTACH DATE: After 8/27/12. 6/13/12 Waveguide Daily work sheet shows 32 poles were framed (bolt inserted) starting with pole 2/4 and ending with pole 116/19. License indicates 47 poles between these two points. No details to identify which specific poles were framed, however, e-mail from Steve Janko indicates poles which required MetroCast make ready were not framed on this date.

MetroCast MR completed per segTEL instructions to lower to 76 on 8/2/12; notified of completion on 8/27.

### segTEL

Survey 12/28/11

PSNH license not provided

FP license 3/8/12

MR: tel lower to 88, CATV lower to 76, NHOS lower to 64, segTEL attach at 52.

ATTACH DATE: 8/23/12 Daily worksheet indicates strand and hardware installed.

MetroCast lowered to 76 on 8/2/12; notified of completion on 8/10.

*Field Observations: NHOS attached 20 ft 10 in, sT attached 21 ft 3.5 in, muni attached 22 ft 10 in, neutral 25 ft 11 in. Spacing between NHOS and sT is 5.5 inches, spacing between sT and muni is 18.5 inches, spacing between muni and neutral is 37 inches.*

*Conclusion: Based on information from NHOS, it would not have placed a bolt on this pole until after MetroCast notified NHOS make ready was complete on August 27. segTEL attached on 8/23.*

*Both parties attached at incorrect height. CATV would have been lowered when segTEL and NHOS attached. Muni (fire alarm) is attached 3 inches too close to neutral and there were no make-ready instructions for muni. segTEL instructions were to attach at 52 below neutral. segTEL attached at 55. NHOS instructions were to attach at 12 above CATV. It apparently attached 2 feet below muni. Assuming neutral is located at 311 inches as measured, NHOS should be at 20 ft 7 inches and sT should be located at 21 ft 7 inches and CATV should be attached at 19 ft 7 inches. NHOS is 3 inches too high, segTEL is 3.5 inches too low, muni is 3 inches too high. If these corrections are made, spacing would be correct.*

*RECOMMENDED ACTION: Each party should move their attachment to comply.*

### 3. Pole T-2/6, E11/6

#### NHOS

Survey 9/30/11

PSNH License issued April 5, 2012

MR: CATV move down to 12 above telephone, attach at 12 above CATV

FP license 12/16/2011

MR: CATV lower to 12 above telephone, attach above CATV

ATTACH DATE: After 8/27/12. 6/13/12 Waveguide Daily work sheet shows 32 poles were framed (bolt inserted) starting with pole 2/4 and ending with pole 116/19. License indicates 47 poles between these two points. No details to identify which specific poles were framed, however, e-mail from Steve Janko indicates poles which required MetroCast make ready were not framed on this date.

MetroCast make ready completed on 8/26, notified of completion 8/27.

#### segTEL

Survey 12/28/11

PSNH license not provided

FP license 3/8/12

MR: electric move street light 12 inches, fire alarm attach at 40, segTEL attach at 52.

ATTACH DATE: 8/23/12 Daily worksheet indicates strand and hardware installed.

*Field observation: segTEL is attached at 52 inches below neutral. NHOS bolt is also located approximately 52 inches below neutral. According to segTEL no NHOS bolt was on this pole when it attached. segTEL make ready instructions do not include instructions about NHOS from this pole through the next 6 poles. NHOS claims this pole was framed (bolt inserted) when segTEL attached.*

*Conclusion: NHOS did not frame this pole until after MetroCast make ready was complete on or after August 27, corroborating segTEL's assertion that no NHOS bolt was in place when segTEL attached. NHOS attached after August 27 and therefore after segTEL. segTEL attached where it was licensed and there was no indication from make ready that work needed to be performed by NHOS at this location.*

*RECOMMENDED ACTION: If there is adequate room, NHOS should move its attachment to 12 inches above CATV. NHOS should pay for remediation.*

#### 4. Pole T-2/7, E-11/7

##### NHOS

Survey 9/30/11

PSNH License issued April 5, 2012

MR: attach at 12 above CATV

FP license 12/16/2011

MR: double pole; telephone transfer 2 cables, 1 PMT, 6dw, NHOS attach 12 over CATV

ATTACH DATE: 6/13/12 Waveguide Daily work sheet shows 32 poles were framed (bolt inserted) starting with pole 2/4 and ending with pole 116/19. License indicates 47 poles between these two points. No details to identify which specific poles were framed.

MetroCast was not required to perform make ready on this pole for NHOS.

##### segTEL

Survey 12/28/11

PSNH license not provided

FP license 3/8/12

MR: fire alarm raise to 40, segTEL attach 24 inches above CATV

ATTACH DATE: 8/23/12 Daily worksheet indicates strand and hardware installed.

*Field observation: NHOS is attached 20 inches above CATV. No field notes about segTEL. NHOS map in DT 12-107 indicates no segTEL violations on this pole.*

*RECOMMENDED ACTION: NHOS should relocate to 12 inches above CATV.*

## 5. Pole T-9/30, E-1/72 on Route 3 by Carwash in Franklin

### NHOS

Survey 9/30/11

PSNH License issued April 5, 2012

MR: Fire alarm raise to 40, NHOS attach 52.

FP license 12/16/2011

MR: Fire alarm raise to 40, NHOS attach 52.

ATTACH DATE: 6/14 Waveguide Daily worksheet indicates 12 of 31 poles between T-116/20 and T-92/1 were framed. 31 poles included T-9/30, but no indication which 12 poles were framed. Also indicates 4 fire alarm cables moved. Make ready indicates 13 fire alarm moves needed in this run. 5 poles needed only fire alarm move before NHOS attachment. Cannot determine which poles were framed.

### segTEL

Survey 12/28/11

PSNH license not provided

FP license 3/8/12

MR: NHOS attach at 64, segTEL attach at 52.

ATTACH DATE: 8/21/12

*Field observations: sT attached at 46 inches. NHOS asserted segTEL had moved NHOS bolt on this pole, as evidenced by markings on back of pole. segTEL denies.*

*Conclusion: Cannot determine from NHOS daily worksheet if pole was framed when segTEL attached. segTEL make ready instructions were to have NHOS attach at 64 below neutral. segTEL should have informed NHOS attachment height had been relocated whether NHOS was attached or not. Only work required on this pole was either by NHOS (who performed work for fire alarm) or segTEL. No factual evidence on who placed NHOS bolt in current location. segTEL is attached at incorrect height.*

*RECOMMENDED ACTION: segTEL is incorrectly attached at 46 and should move its attachment to correct height of 52" below neutral. Because NHOS will need to attach strand and fiber here, NHOS should move its bolt to 64, if necessary, when running strand. Not enough evidence to determine who should pay, so each party should perform its own necessary work.*

**Poles reviewed at segTEL's request in Franklin and Tilton**

**6. Pole E-1/39 (PSNH solely owned) at the corner of Prospect and Central Street, Franklin**

**NHOS**

Survey 9/30/11

PSNH License issued April 5, 2012

MR: attach at 40

FP license 12/16/2011

MR: no instructions, PSNH pole

ATTACH DATE: 6/13/12 Waveguide Daily work sheet shows 32 poles were framed (bolt inserted) starting with pole 2/4 and ending with pole 116/19 which includes this pole. License indicates 47 poles between these two points. No details to identify which specific poles were framed.

**segTEL**

Survey 12/28/11

PSNH license not provided

FP license 3/8/12

MR: identified as pole 1/30 with no instructions because it is a PSNH pole.

ATTACH DATE: 8/20/12 Daily worksheet indicates strand and hardware installed

MetroCast: Not attached

*Field observation: segTEL is attached below NHOS. Wires will cross, so fiber cannot be installed. segTEL did not have instructions on where to attach or what make ready was required. It appears segTEL incorrectly attached under NHOS.*

*Conclusion: As no make ready was required of MetroCast, NHOS probably installed its bolt before segTEL attached. segTEL did not have make ready instructions on this pole and installer should have noticed it was not attaching directly under neutral as on previous poles. In this case, where bolt was installed in location where segTEL would have logically attached, and segTEL had no attachment instructions, segTEL should have investigated further.*

*RECOMMENDED ACTION: Attachments need to be reversed. segTEL should pay NHOS make ready to move bolt.*

**7. Pole T-15/56, E-63/79 Route 3 near Smitty's, Tilton**

NHOS

Survey FP: 9/20/11, PSNH: 9/30/11

PSNH license issued 8/1/12

MR: attach 12 inches above CATV

FP license issued 2/8/12

MR: attach 12 inches above CATV

ATTACH DATE: 6/11/12 Waveguide Daily worksheet indicates 59 poles along route were framed starting with T-15/58 ending with T-15/6. License indicates 51 poles between these points.

segTEL

Survey 12/19/11

PSNH license not provided

FP license 8/8/12

MR: No FRP make ready work required. LTS raise neutral 12 inches. Attach 24 inches above CATV

ATTACH DATE: 8/23/12 Daily worksheet indicates strand and hardware installed.

*Field observations: NHOS bolt is installed 24 inches over CATV. sT bolt and messenger attached 12 inches above CATV. This location had recent sawdust in mulch indicating unexplained activity on this pole.*

*Conclusion: Since there was no CATV make ready, CATV would not have moved down. NHOS appears to have incorrectly attached in June, at 24 inches above CATV. sT had no make ready instructions relevant to NHOS, and apparently incorrectly attached in the open spot at 12 inches over CATV.*

*RECOMMENDED ACTION: Attachments need to be reversed. Since both parties are attached in the incorrect location, neither should pay the other make ready.*

**8. Pole T-15/57, E-63/80 Route 3 near Smitty's, Tilton**

NHOS

Survey 9/20/11

PSNH license issued 8/1/12

MR: attach 12 inches above CATV

FP license issued 2/8/12

MR: attach 12 inches above CATV

ATTACH DATE: 6/11/12 Waveguide Daily worksheet indicates 59 poles along route were framed starting with T-15/58 ending with T-15/6. License indicates 51 poles between these points.

segTEL

Survey 12/19/11

PSNH license not provided

FP license 8/8/12

MR: attach 24 inches above CATV

ATTACH DATE: 8/23/12 Daily worksheet indicates strand and hardware installed.

*Field observations: NHOS bolt is installed 24 inches over CATV. sT bolt and messenger attached 12 inches above CATV.*

*Conclusion: Since there was no CATV make ready, CATV would not have moved down. NHOS appears to have incorrectly attached in June, at 24 inches above CATV. sT had no make ready instructions relevant to NHOS, and apparently incorrectly attached in the open spot at 12 inches over CATV.*

*RECOMMENDED ACTION: Attachments need to be reversed. Since both parties are attached in the incorrect location, neither should pay the other make ready.*

**9. Pole T-15/58, E-63/81 Route 3 near Smitty's, Tilton**

NHOS

Survey 9/20/11

PSNH license issued 8/1/12

MR: attach 12 inches above CATV

FP license issued 2/8/12

MR: attach 12 inches above CATV

ATTACH DATE: 6/11/12 Waveguide Daily worksheet indicates 59 poles along route were framed starting with T-15/58 ending with T-15/6. License indicates 51 poles between these points.

segTEL

Survey 12/19/11

PSNH license not provided

FP license 8/8/12

MR: No FRP make ready work required. Attach 24 inches above CATV.

ATTACH DATE: 8/23/12 Daily worksheet indicates strand and hardware installed.

*Field observations: NHOS bolt is installed 24 inches over CATV. sT bolt and messenger attached 12 inches above CATV. Indent on back of pole indicates CATV may have moved down, but date not known and no CATV make ready was required for either attachment.*

*Conclusion: Since there was no CATV make ready, CATV would not have moved down at this time. NHOS appears to have incorrectly attached in June, at 24 inches above CATV. sT had no make ready instructions relevant to NHOS, and apparently incorrectly attached in the open spot at 12 inches over CATV.*

*RECOMMENDED ACTION: Attachments need to be reversed. Since both parties are attached in the incorrect location, neither should pay the other make ready.*

**10. Pole T-87/3-1.5, E-71A/4 on Route 3, McDonalds parking lot, Tilton (NHOS requested review of this pole while in field)**

NHOS

Survey 9/21/11

PSNH license issued 8/1/12

MR: CATV lower to 52, NHOS attach at 40.

FP license issued 2/8/12

MR: CATV lower to 52, NHOS attach at 40.

ATTACH DATE: After 8/27

segTEL

Survey 12/19/11

PSNH license not provided

FP license 8/8/12

MR: FRP lower to 76, 1 cable, 1PMT, CATV lower to 64, NHOS lower to 52, segTEL attach at 40.

ATTACH DATE: 8/23/12

MetroCast make ready complete 8/8/12; notified of completion 8/10/12.

*Field observations: No NHOS bolt was installed on this pole. segTEL asserts it paid make ready to MetroCast and FairPoint. FairPoint license confirms FairPoint make ready sufficiently completed. segTEL attached 50 inches below neutral. CATV 15 inches below segTEL and FairPoint 18 inches below CATV. Under these conditions, no room for NHOS attachment.*

*Conclusions: segTEL was not obligated to request make ready from NHOS since NHOS was not attached but should have notified NHOS of its new attachment height. However, segTEL should move its attachment to the correct location of 40 inches below neutral freeing a 12 inch space for NHOS.*

*RECOMMENDED ACTION: segTEL move attachment to 40 inches below neutral.*

**11. Pole T-87/1, E-71A/3 on Route 140, McDonalds parking lot, Tilton**

NHOS

Survey 9/21/11

PSNH license issued 8/1/12

MR: NHOS attach at 40.

FP license issued 2/8/12

MR: NHOS attach at 40.

ATTACH DATE: 8/20/12 Daily worksheet indicates 6 of 14 poles in run framed. 6 poles, including this one required no other make ready.

segTEL

Survey 12/19/11

PSNH license not provided

FP license 8/8/12

MR: CATV lower to 64, NHOS lower to 52, segTEL attach 40.

ATTACH DATE: 8/23/12

MetroCast make ready complete 8/8/12.

*Field Observation: NHOS bolt installed 40 inches below neutral on 8/20. segTEL attached at 52 inches below neutral on 8/23.*

*Conclusion: NHOS bolt prior to segTEL attachment. It appears segTEL did not follow make ready instructions with respect to NHOS or its own attachment location.*

*RECOMMENDED ACTION: Attachments need to be reversed. segTEL should pay NHOS make ready.*

**12. Pole T-87/3.5, E-71A/2 on Route 140, McDonalds parking lot, Tilton**  
(this pole is labeled T-2 on FairPoint license to segTEL, T-3.5 on FairPoint license to NHOS)

NHOS

Survey 9/21/11

PSNH license issued 8/1/12

MR: CATV and Tel lower. NHOS attach at 40.

FP license issued 2/8/12

MR: Tel lower one cable 12 inches, CATV lower 12 inches, NHOS attach above CATV.

ATTACH DATE: After 8/27; Daily worksheet not provided for this pole.

segTEL

Survey 12/19/11

PSNH license not provided

FP license 8/8/12 (Pole labeled T-87/2, E-71A/2)

MR: FairPoint lower to 76, CATV lower to 64, NHOS lower to 52, segTEL attach 40.

ATTACH DATE: 8/23/12

MetroCast make ready completed per segTEL instructions to 64 on 6/13/12 (in error); notified 8/10/12.

*Field Observation: segTEL attached at 40 inches below neutral, NHOS bolt installed in close proximity. Concern that holes are too close.*

*Conclusion: NHOS was not attached on this pole when segTEL attached. segTEL attached at 40, but did not inform NHOS its attachment location had changed. NHOS should not have installed a bolt that would compromise the integrity of the pole.*

*RECOMMENDED ACTION: NHOS should relocate to 52 inches below neutral. If pole is compromised due to close attachments, NHOS should remediate.*

# EXHIBIT 4

**Christopher H.M. Carter**  
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March 7, 2013

Debra A. Howland  
Executive Director and Secretary  
NH Public Utilities Commission  
21 S. Fruit Street, Suite 10  
Concord, NH 03301

**Re: DT 12-107 – New Hampshire Optical Systems, Inc.**

Dear Ms. Howland:

I am writing on behalf of New Hampshire Optical Systems, Inc. (“NHOS”) and Waveguide, Inc. (collectively “NHOS”) in response to the January 30, 2013 Staff Report and Recommendation issued in Docket DT 12-107. The Staff Report concludes with four specific recommendations: (1) that NHOS and segTEL work with Staff or an independent mediator to reach agreement on a process for completing make-ready work on the Middle-Mile Project; (2) that the Commission open a new docket to investigate rates for make-ready work; (3) that NHOS escrow a reasonable amount to cover the cost of make-ready work, once a determination on rates has been made; and (4) that the Commission consider implementing the pilot program underway in Connecticut for hastening attachments on poles requiring substantial make-ready, by permitting temporary attachments at lower pole positions. Staff Report, p. 7. Please be advised that NHOS fully supports each of these recommendations but suggests that recommendation (4) will provide limited assistance in resolving the issues with segTEL.

Separate from these recommendations, the Staff Report contains a number of statements that are either factually incorrect or incomplete. In addition, portions of the Staff Report could be interpreted to recommend that the Commission adopt the Report as its findings of fact and rulings of law, or make such findings and rulings itself. As discussed below, because of significant limitations in the investigative process giving rise to the Staff Report, it would be improper for the Commission to adopt any of the findings and rulings set forth in it. The purpose of this letter is to briefly address some of the errors and other problems in the Staff Report as a means of illustrating why the Commission should not rely on the Report to make factual findings or legal rulings at this point in this proceeding. These infirmities, however, do not undermine the value of Staff’s overall recommendations set forth on page 7 of the Report.

The Process Followed by Staff Provides an Insufficient Basis to Make Factual Findings and Rulings of Law

As the report notes, Staff obtained the responses that NHOS and three utility pole owners filed, under oath, pursuant to Order No. 25,407. (Order No. 25,407 joined segTEL as a party to this proceeding, but it did not require segTEL to provide responses – under oath or otherwise – to questions relevant to this matter.) In addition, on September 24, 2012, Staff met in the field with individuals representing some of the parties in this case. Furthermore, according to the Report, Staff “gathered additional information” at other times from segTEL, and from NHOS and MetroCast. The Report does not identify the “additional information” or the individuals who provided the same. Of the information gathered by Staff and relied on for the Report, other than the initial information provided by NHOS and the pole owners, none appears to have been provided under oath.

NHOS understands that the Commission regularly relies on informal information gathering processes in deciding when and whether to open an adjudicative action or other proceeding. However, using such an informal process as the basis for making findings of fact or rulings of law here would be improper, as it would deprive NHOS and other interested parties of the ability to know what information is being presented to the Commission, and to respond to the same. Before any findings are made, all information presented for the Commission’s consideration should be identified and placed on the record, the information should be provided under oath and subject to cross-examination and/or further discovery, and the parties should be afforded an opportunity to respond to that information.

NHOS recognizes that the Commission may have had no intention of issuing findings of fact or rulings of law based on the Staff Report. However, because the wording of the Report leaves room for ambiguity on this point, the remainder of this letter addresses some, but not all of the issues raised by the Staff Report that NHOS believes need correction or further explanation.

Examples of Incorrect or Incomplete Statements in the Staff Report

1. The Report states “it is the new attacher’s responsibility to coordinate rearrangement with existing attachers.” Staff Report, p. 2. The Report cites no support for this statement, referring only to the pole owners’ self-serving contentions as to how make-ready work “traditionally” has been coordinated. In fact, the standard Pole Attachment Agreement (“PAA”) used by pole owners refutes this statement. See NHOS Responses pursuant to Order No. 25,407, Exhibit G (sample PAA). Sections 7.1.5 and 7.1.6 of the PAA demonstrate that it is the pole owner’s obligation to coordinate rearrangement with existing attachers. NHOS does not dispute that, as a matter of general practice, attaching parties typically attempt to coordinate rearrangement plans among themselves. However, when informal efforts to manage this process through mutual cooperation fail – leading to the situation that is at issue in this case – a new attacher’s only recourse is through the pole owner under the PAA, which sets forth the process by which the owner coordinates interactions with other attaching parties. This important legal issue is at the heart of the dispute now before the Commission.

2. The Report states that “segTEL is not staffed to do the amount of work required by NHOS and that the lack of rules about requirements for third-party make-ready impeded the ability to complete the work within NHOS’s requirements.” Staff Report at 5. The Report continues that “Staff does not believe there is evidence to find NHOS has been subject to unfair or unreasonable delays or that segTEL has intentionally manipulated the process to delay NHOS,” noting that “the amount of work required to be performed by multiple companies on thousands of poles in a short period of time, is overwhelming.” *Id.* at 6. The Report cites no evidence to support the conclusion that segTEL has been overwhelmed by the number of poles requiring make-ready and therefore cannot fulfill all of the requests from NHOS in a timely fashion. Moreover, the Report fails to note that of NHOS’s requests to approximately 80 other attaching entities for make-ready work relating to nearly 22,000 poles for the Middle-Mile Project, more than 20,000 relocations have been completed by parties other than segTEL. As of the time Staff conducted its investigation, segTEL had not completed the work for a single pole. Nor had it provided a quote for the cost of performing any make-ready work. To date, in the 10 months since segTEL received NHOS’s formal make-ready requests on May 4, 2012, segTEL has completed relocations on fewer than 100 of the approximately 3,000 utility poles requiring segTEL make-ready. At this rate, segTEL would not complete the required work for 25 years. There is no evidence to support the Staff Report’s statement that segTEL lacks the resources to perform the required make-ready work, or that this process is “overwhelming.” Instead, the evidence indicates that segTEL’s true intent is to derail or delay the Middle-Mile Project.

NHOS is prepared to provide additional evidence, under oath, that segTEL has failed to meet commitments it made to NHOS and FairPoint to conduct even a limited number of relocations. Notably, in the past segTEL has been an outspoken advocate of the need for timely pole access, and it has aggressively advocated for a process that would provide quotes in five days, followed by a good faith effort to complete work within 20 days. Here, segTEL has refused to adopt such a process for NHOS’s attachments. It has declined to document the process and timelines it purportedly is following in responding to NHOS’s requests for make-ready. segTEL stands alone in failing to relocate its facilities to accommodate construction of the Middle-Mile Project. The only credible explanation for segTEL not completing make-ready work required by NHOS is that the Middle-Mile Project will increase competition in markets that segTEL currently serves, something that segTEL opposes.

segTEL’s conduct on the Middle-Mile Project stands in stark contrast to comments segTEL submitted to Staff during the development of Puc 1300. During that rulemaking process, segTEL stated: “[T]he time lost when a utility fails to schedule and perform make-ready work results in serious delay to market that rises to the level of a competitive barrier. . . . Utilities must not be permitted to install their own facilities on a different timeline than that for the completion of make ready work. To allow otherwise gives utilities an unfair advantage over competitive attachers.” See 3/5/08 Comments of segTEL, Inc. in DRM 08-004, *Rulemaking, PUC 1300 Pole Attachments, Regular Rules*, pp. 10-11 (copy attached). segTEL then argued that the “[a]doption of enforcement mechanisms are also necessary to ensure that make-ready timeframes are followed,” and that “the rules should allow competitive attachers to seek direct damages against a utility that violates make-ready timeframes.” *Id.* at 11. These comments demonstrate that segTEL is well aware of the impact its delays have on NHOS.

3. The Staff Report suggests that lack of payment by NHOS is the reason segTEL has not performed the required make-ready work. See Staff Report at 2. This is inaccurate. NHOS can document that it has requested quotes and invoices from segTEL for more than eight months, but segTEL has refused to provide any. In fact, Staff was present when NHOS requested quotes from segTEL during the field visit in Franklin and Tilton that is referred to in the report. At the time, Staff agreed that NHOS's request for quotes and/or invoices "seems reasonable." The Report discusses none of this, and instead implies, inaccurately, that NHOS has simply refused to pay. Moreover, the Report fails to address the fact that NHOS has paid other parties for make-ready work at rates similar to those demanded by segTEL, relying on appropriate dispute resolution processes to resolve disputes over the reasonableness of the charges. NHOS stands ready to do the same with segTEL, but segTEL refuses to provide quotes or invoices for the required work.

The Staff Report does conclude that segTEL's construction rate "on its face...seems high," and, therefore, recommends that the Commission investigate the rate. Staff Report at 2.<sup>1</sup> segTEL's demand for excessive rates contradicts its position during the development of the Puc 1300 rules:

segTEL additionally proposes that rates charged for other services performed by utilities such as pole surveys and make ready be limited to the actual and *reasonable* expenses associated with providing such services. Utilities should not be allowed to create a profit center for the performance of mandated services simply because a prospective attacher has no other choice but to pay the rates demanded if they wish to attach.

See 3/5/08 Comments of segTEL, Inc. in DRM 08-004, *Rulemaking, PUC 1300 Pole Attachments, Regular Rules*, p. 16 (emphasis in original).

4. The Staff Report correctly notes that "segTEL independently surveys each pole and sometimes identifies more work than that identified on the Form 3 which in segTEL's assessment needs to be done in order to maintain compliance with codes and standards. This practice introduces extra work and a great deal of additional time into the attachment process for NHOS." Staff Report at 5. The Report then poses the question: "should the existing attacher follow the pole owner's instructions without question or ensure that once it moves its attachments, the attachment is code compliant?" Staff Report at 6. NHOS agrees with the Staff's conclusion that "it would be unreasonable for segTEL to expect NHOS to wait for and pay to correct existing segTEL violations." Id.

There would be serious and potentially catastrophic consequences to a process that permitted each existing attacher to conduct its own survey that potentially conflicted with the pole owners' engineering study, and to then demand that additional make-ready be conducted to meet the attacher's own interpretation of standards. The entire pole attachment process would grind to a

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<sup>1</sup> The statement in the Report that Staff did not receive any information about the cost of the work overlooks that NHOS's responses to Order No. 25,407 included, at Exhibit D, price quotes received by Waveguide in response to an industry-wide RFP for relocations, surveys, and other make-ready work.

halt, as it has for NHOS in segTEL's regions. segTEL's construction practices in Laconia, documented in Exhibit H to NHOS's responses to Order No. 25,407, demonstrate segTEL's lack of concern for code compliance when building its own plant, and show that segTEL's arguments regarding the need to redo the pole owners' engineering studies is a pretext for delay.

The FCC has recognized that a procedure which allowed existing attachers to veto previous engineering decisions could be manipulated to deny access to a competitor. In FCC 11-50, issued April 7, 2011, the FCC observed "that no matter how rigorous a survey is carried out, disputes over interpretation or changed circumstances can arise in the field." FCC 11-50 at ¶ 59. However, because existing attachers "may view other attachers as rivals," the FCC declined to give even incumbent local exchange carriers ("LECs") "veto power" over engineering judgments, and warned that "objections from incumbent LECs based on alleged engineering concerns will be scrutinized very carefully, particularly when the parties are in a competitive relationship." *Id.* at ¶ 60. segTEL is using the survey process for the anticompetitive purposes that the FCC sought to avoid.

5. With regard to the specific dispute in Tilton and Franklin that arose while the Staff was conducting its investigation, the Staff Report focuses on the end state of 12 poles involved, rather than the history of how the dispute came about. Had the Commission had an opportunity to conduct a full evidentiary process, it would have seen that segTEL ignored NHOS's rights under its existing license to attach to the poles and instead placed segTEL facilities in the space NHOS had invested considerable time and money to develop. As Staff concluded, although segTEL's "make-ready instructions indicated an NHOS attachment needed to be relocated, it appears *segTEL failed to contact NHOS about make-ready in this location.*" Staff Report at 4 (emphasis added). This is not a minor matter. By not informing NHOS that the pole owners' updated engineering documents require NHOS to relocate to accommodate segTEL's new attachment, and then selectively conducting make-ready work along the route, segTEL created a situation where NHOS could not install its cable in accordance with the license issued to it by the pole owners, and the engineering documents supplied to the NHOS field crews no longer matched the field conditions. These actions directly violate the notification requirements of Puc 1303.06 and Article 7.1.5 of the PAA.

### Conclusion

NHOS recognizes that this proceeding presents a number of fact intensive and potentially complex issues for the Commission to resolve. The recommendations for next steps set forth in the Staff Report are constructive proposals if they are pursued expeditiously. However, the information set forth in the Staff Report is incomplete in numerous regards, and is flawed because the investigative process undertaken by Staff was limited in many respects, and lacks evidentiary safeguards of an adjudicative proceeding.

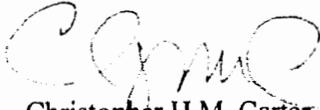
NHOS believes that the Commission, rather than issuing an order with factual findings and legal rulings at this stage, should direct the parties to select a mediator and report to the Commission within 60 days regarding the outcome of their efforts to resolve their disputes. NHOS further supports the proposal that it pay into escrow a reasonable amount necessary for segTEL to

Debra A. Howland  
March 7, 2013  
Page 6

**HinckleyAllenSnyder**LLP  
ATTORNEYS AT LAW

complete all outstanding make-ready work for the Middle Mile Project and that the Commission open a proceeding as soon as possible to determine what rates and charges are reasonable for such make-ready work.

Sincerely,



Christopher H.M. Carter  
CHMC/smc

Cc: Client  
Service List

#51457538

# EXHIBIT 5

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DT 12-107**

**NEW HAMPSHIRE OPTICAL SYSTEMS, LLC**

**Petition for Investigation into Proposed Charges for Utility Pole Make Ready**

**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**

**September 5, 2012**

**I. PROCEDURAL BACKGROUND**

On April 24, 2012, New Hampshire Optical Systems, LLC (NHOS), filed a petition with the Commission requesting, pursuant to RSA 365:5, that the Commission undertake an investigation of practices related to pole-attachment work required for the construction of NHOS' statewide "Middle Mile" fiber-optic communications network project. In order to accommodate the inclusion of NHOS' attachments, the status of the existing attachments must be surveyed and, in many instances, the existing attachments must be rearranged or otherwise amended to allow the new attachment. (This rearrangement for a new attachment is referred to as "make-ready work.") On June 6, 2012, the Commission granted petitions to intervene of the New England Cable and Telecommunications Association (NECTA), the CLEC Association of Northern New England (CANNE), and Unitil Energy Systems, Inc. (Unitil) at a pre-hearing conference held for this proceeding. On July 3, 2012, the Commission issued Order No. 25,386, allowing NHOS an opportunity to revise its filings in order to provide specificity regarding its pole attachment work-related disputes within 30 days of the Order's issuance. (A summary of

the procedural history of this docket through July 3, 2012 may be found within Order No. 25,386).

On August 2, 2012, NHOS submitted an amended petition for an investigation pursuant to RSA 365:5. In response, on August 13, 2012, NECTA and CANNE each filed motions to dismiss NHOS' petition, as revised. On August 15, 2012, Northern New England Telephone Operations LLC (commonly known as "FairPoint") filed a letter stating that, though FairPoint was not a party to this proceeding, as a pole owner and incumbent carrier, it shared NECTA's and CANNE's concerns, and supported their motions to dismiss NHOS' petition. On August 16, 2012, the New Hampshire Telephone Association (NHTA), a trade association representing small local exchange carriers in this State, also filed a letter indicating NHTA's support for NECTA's and CANNE's motions to dismiss, and concurrence with FairPoint's letter. (NHTA, like FairPoint, is not a party to this proceeding).

On August 20, 2012, the University System of New Hampshire (USNH), which contracted with NHOS to construct the Middle Mile network system, filed a petition to intervene in this proceeding and on August 22, 2012, the Northern Community Investment Corporation (NCIC) also filed a petition to intervene. On August 23, 2012, NHOS filed an objection to NECTA's and CANNE's motions to dismiss, and provided additional details in connection with its petition. USNH filed a letter in support of NHOS' objection to the motions to dismiss on August 23, 2012.

## II. POSITIONS OF THE PARTIES

### A. New Hampshire Optical Systems, LLC

NHOS, in its amended petition of August 2, 2012, restates much of its initial petition and names TechValley/segTEL as an example of a third-party attacher with which NHOS has had difficulties. Amended Petition of NHOS at 2. NHOS reiterates its continuing allegations that certain third-party attachers have “refused to perform the make-ready work that must occur before NHOS can attach its fiber optic cable” *Id.* at 4. NHOS further alleges that “the third-party attachers 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. Further, these attachers have deliberately delayed the start of that work, even after NHOS assented to their unreasonable payment demands.” *Id.* NHOS also alleges that pole owners “have declined to enforce the provisions [of Pole Attachment Agreements] to require that third-party attachers perform the make-ready work necessary for NHOS to install its fiber optic cable.” *Id.* at 5. NHOS alleges that these failures have led to serious delays that may jeopardize the Middle Mile network project’s viability, given the Federally-imposed completion deadline of June 2013. *Id.* at 2. To avoid such an outcome, NHOS requests “that the Commission investigate third-party make-ready practices on the Middle-Mile Project, and demand that pole owners employ their contractual right under the [Pole Attachment Agreement] to require third-party attachers to perform make-ready work in a timely fashion, and under terms that are fair and reasonable.” *Id.*

In its objection to NECTA’s and CANNE’s motions to dismiss, NHOS defends the veracity of its allegations, repeats the need for prompt Commission action to provide make-ready/pole attachment-related relief, and points to its desire to avoid direct confrontation with

pole owners, and third-party attachers, with which NHOS seeks cooperation. Specifically, NHOS states: “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. .... 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.” NHOS Objection to Motions to Dismiss, 8/23/2012, at 4. NHOS summarizes its request for relief in its objection to the Motions to Dismiss by asking “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....” *Id.* at 3.

In addition to the utilities cited above, NHOS mentions MetroCast as one of the CLECs to which FairPoint provided a 15 day notice to move an existing attachment and states that as a result, MetroCast “removed the majority of the roadblocks to moving forward with its make ready work.” *Id.* at 7.

**B. New England Cable and Telecommunications Association**

NECTA, in its motion to dismiss, argues that NHOS, despite the Commission’s directive in Order No. 25,386, failed to properly state the specific facts giving rise to NHOS’ prayer for

relief in its amended petition, thereby making NHOS' petition vague, deficient, and subject to dismissal.

**C. CLEC Association of Northern New England, Inc.**

CANNE, in its motion to dismiss, argues that NHOS' amended petition was so vague as to prevent the Commission from investigating and adjudicating the allegations brought forth by NHOS. CANNE also argues that NHOS' amended petition does not comply with the terms of Order No. 25,386, due to its vagueness and failure to specify the relief NHOS seeks from the Commission, thereby warranting dismissal.

**D. University System of New Hampshire**

USNH, the recipient of the Federal grant of up to \$44.5 million for the construction of the Middle Mile network, hired NHOS to engage in the construction of the project, and to coordinate all make-ready work. USNH seeks intervention in this proceeding, stating that USNH's rights, duties, privileges, immunities, and other substantial interests are likely to be affected by this proceeding, given NHOS' status as USNH's contractor and agent.

**E. Northern Community Investment Corporation**

NCIC, an organization involved in supporting businesses located in the North Country region of New Hampshire, seeks to intervene in this proceeding. NCIC states that completion of the Middle Mile fiber network is of the utmost importance to the success of its own local wireless data infrastructure project, and for the future economic development of the North Country. In light of this, NCIC expresses its concern with the allegations of pole-attachment related delays in the construction of the Middle Mile project.

### **III. COMMISSION ANALYSIS**

#### **A. Motions to Dismiss; Commission Request for Additional Information**

The progression of this docket has not followed a normal pathway, despite efforts to expedite a resolution. The initial NHOS petition sought investigation of rates and charges imposed by unnamed third party attachers. In its statement of position filed before the prehearing conference, NHOS also suggested that the adoption of rules regarding access to poles and rates for third party make-ready work would be an appropriate vehicle to resolve the issues. At the close of the pre-hearing conference NHOS changed its position and no longer requested resolution through rulemaking. Despite allegations of impropriety, the petition provided no specific conduct to investigate and no pole locations, pole owners or third party attachers on which to focus our investigation. The Middle Mile project involves approximately 23,000 poles, and numerous pole owners and third party attachers. Without specifics, we could not conduct a meaningful investigation. Rather than dismissing the petition, however, in Order No. 25,386 we permitted NHOS to revise its filing and identify particular acts or actors impeding its progress. In its amended petition NHOS again asserted that the conduct of others was improper, focusing not on rates and scope of make-ready work as originally petitioned, but on timely access to poles. NHOS did provide a reference to difficulties with “CLECs like segTEL”, without specifically identifying which poles are at issue and which third-parties are causing specific delays. NHOS also argued for the first time that the Commission should compel pole owners to exercise contractual terms in their various Pole Attachment Agreements with pole attachers to require

third-party attachers to perform make-ready work in a timely fashion.<sup>1</sup> NHOS Amended Petition at 4.

The amended petition still left the Commission with an impractical task – investigate all CLECs, of whom there are 106 registered to do business in the state, regarding all 23,000 pole attachments on the Middle Mile project, with all pole owners. Clearly this was an untenable request and it is not surprising that NECTA and CANNE moved to dismiss for failure to establish specific acts or actors to be investigated. In its objection to the motions to dismiss, NHOS narrowed its request to review of third-party make ready practices on its project, on the poles owned by FairPoint, PSNH or Unitil and involving CLECs segTEL and BayRing. NHOS included BayRing here for the first time, as a CLEC to be included in the investigation, but without any specific allegations of improper conduct on the part of either named CLEC. NHOS provided information about one additional CLEC, MetroCast, but conceded that the majority of roadblocks attributable to MetroCast have been resolved. It is still not clear whether NHOS has unresolved issues with any CLEC other than segTEL.

Although we now understand NHOS' reluctance to be more precise about its disputes, we cannot investigate NHOS' particular problems without more detailed information. It is unfortunate that four months have passed and we have not received the most basic information to evaluate at the start of a Commission investigation. This docket must be a fact specific inquiry, rather than a more generic rulemaking proceeding such as the one currently underway in docket No. DT 12-246. Rather than dismiss the amended petition, however, we will require NHOS to provide direct answers, under oath, to a series of questions set forth in the Appendix to this order,

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<sup>1</sup> FairPoint objected to this argument stating that NHOS was intimating "that pole owners should be conscripted as agents for resolution and enforcement of third party rights."

to establish a factual framework for further investigation of this matter pursuant to RSA 365:5. We urge NHOS to answer these questions forthrightly, with the understanding that only complete disclosure of the facts involved in its pole-attachment disputes can offer the means for effective resolution of this matter. Further we urge NHOS to respond to the questions as quickly as possible so that our investigation and resolution of the issues identified may proceed expeditiously.

**B. Motions to Intervene**

RSA 541-A:32, I, provides for mandatory intervention when a party has demonstrated that “rights, duties, privileges, or other substantial interests may be affected by the proceeding.” RSA 541-A:32, I. We hereby grant USNH intervention under RSA 541-A:32, I, because its role in retaining NHOS as its contractor for the construction of the Middle Mile network gives it substantial interests in this proceeding.

RSA 541-A:32, II provides for discretionary intervention when “such intervention would be in the interests of justice and would not impair the prompt and orderly conduct of the proceeding.” RSA 541-A:32, II. We hereby grant NCIC intervention under RSA 541-A:32, II.

**C. Designation of Additional Parties and Incorporation of Additional Parties into Commission Request for Additional Information**

This investigation arises from a dispute among NHOS, one or more pole owners, and one or more third-party attachers. Current parties include two trade organizations that have CLEC members, NECTA and CANNE, but no CLECs themselves, and only one of the many pole owners in the state, Unitil. Because the scope of the investigation appears to involve specific

CLECs and pole owners, the record would be unreasonably limited if we were to proceed only with the parties who have sought intervention.

Pursuant to RSA 541-A:1, XII, and RSA 541-A:31, therefore, and in the interest of orderly resolution of issues brought forward in this docket, we find that the pole owners and CLECs named by NHOS in its pleadings and related materials, all of which are public utilities, should be included as parties in this investigation, so as to ensure full disclosure of required information and to protect these entities' procedural rights. We designate the following additional entities as parties to this proceeding: FairPoint, PSNH, segTEL, BayRing Communications, and MetroCast. FairPoint, PSNH and Unitil must reply to a series of questions labeled "Questions for Pole Owners" in the Appendix, and the answers to these questions shall be made under oath. Upon review of answers provided by NHOS and the pole owners, we direct our Staff to prepare questions for any identified CLECs and in turn, expect prompt responses from the CLECs, similarly made under oath.

**D. Examination of Scope of Proceeding; Pre-Hearing Conference; Ongoing NHOS Construction Efforts**

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.

Once factual evidence is received in response to the questions appended hereto, as well as any follow-up thereto, we will determine how best to proceed. We remind all parties that the requirements of RSA 374:34-a and Chapter Puc 1300 governing pole attachments remain in force during the pendency of this investigative docket, and stress that the possible existence of a dispute among the parties does not give any party license to block or otherwise delay any pole-attachment installation work by NHOS or others.

**Based upon the foregoing, it is hereby**

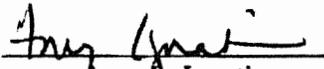
**ORDERED**, that NECTA's and CANNE's motions to dismiss are DENIED; and it is

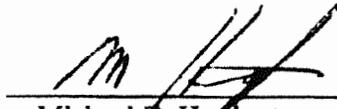
**FURTHER ORDERED**, that USNH's and NCIC's petitions to intervene are hereby GRANTED; and it is

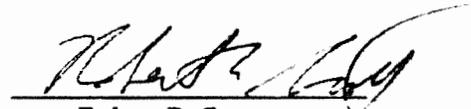
**FURTHER ORDERED**, that FairPoint, PSNH, segTEL, BayRing Communications, and MetroCast are hereby joined to this proceeding as parties; and it is

**FURTHER ORDERED**, that NHOS, FairPoint, PSNH and Unutil provide responses, under oath, to the questions listed in the Appendix of this Order as soon as possible.

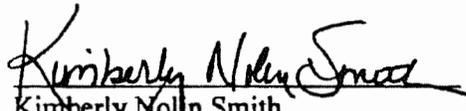
By order of the Public Utilities Commission of New Hampshire this fifth day of  
September, 2012.

  
Amy D. Ignatius  
Chairman

  
Michael D. Harrington  
Commissioner

  
Robert R. Scott  
Commissioner

Attested by:

  
Kimberly Nollin Smith  
Assistant Secretary

# EXHIBIT 6

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DT 12-107**

**NEW HAMPSHIRE OPTICAL SYSTEMS, LLC**

**Petition for an Investigation into Proposed Charges for Utility Pole Make-Ready**

**Order on Petition**

**ORDER NO. 25,386**

**July 3, 2012**

**I. PROCEDURAL BACKGROUND**

On March 24, 2012, New Hampshire Optical Systems, LLC (NHOS), filed a petition with the Commission requesting, pursuant to RSA 365:5, that the Commission undertake an investigation of third-party make-ready practices. According to the petition, NHOS is in the process of constructing a broadband network throughout New Hampshire and as part of that construction it seeks to attach its fiber optic cables to approximately 23,000 utility poles throughout the state. In order to accommodate the inclusion of NHOS' attachments, the status of the existing attachments must be surveyed and, in many instances, the existing attachments must be rearranged or otherwise amended to allow the new attachment. This rearrangement for a new attachment is referred to as "make-ready" work.

On May 11, 2012, the Commission issued an order of notice in the docket stating that the filing raised 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." May 11, 2012 Order of Notice at 2. Thereafter, the Commission received petitions to intervene from the New England Cable and Telecommunications Association (NECTA), the

CLEC Association of Northern New England (CANNE), and Unitil Energy Systems, Inc. (Unitil). In its petition to intervene, NECTA requested to intervene for the limited purpose of presenting and advancing arguments in its accompanying motion to dismiss or to limit the scope of the proceeding.

On June 6, NHOS filed a statement of position in the docket in which it reiterated many of the arguments from its petition and recommended that the Commission “[a]dopt a policy to ensure access is not denied or delayed due to disputes related to scope and/or costs of third party make-ready”, and “[e]stablish methods, standards and definitions to ensure that rates for third party make-ready are just and reasonable.” NHOS Statement of Position at 7. A pre-hearing conference was held as scheduled on June 7, 2012. On June 15, 2012, CANNE filed a response to NHOS’ petition and NECTA’s motion to dismiss, and NHOS filed an objection to NECTA’s motion to dismiss. On June 18, 2012, NECTA filed a response to NHOS’ statement of position.

## **II. POSITIONS OF THE PARTIES**

### **A. NHOS**

NHOS contends that it is in the midst of a broadband expansion project requiring it to attach cables to approximately 23,000 utility poles in New Hampshire and that it must complete its project by June, 2013. NHOS asserts that it has encountered problems with the costs charged by entities with cables and other equipment already attached to utility poles (third-party attachers). According to NHOS’ petition, some third-party attachers have been charging excessive rates to perform make-ready work or charging fees for surveys on poles where they have no facilities. NHOS states that it has attempted to negotiate with some third-party attachers, but has been unsuccessful at finding a resolution. NHOS, therefore, requests that “the

Commission investigate this matter, and establish the just and reasonable cost for third party make-ready work that is required to accommodate the NHOS pole attachments.” NHOS Petition at 4. NHOS contends that it has its own information about the costs of performing the work at issue and that what it is being charged by some third-party attachers is far above that cost. NHOS contends that these third-party attachers are public utilities under New Hampshire law and, therefore, have an obligation to charge make-ready rates that are just and reasonable.

According to NHOS’ statement of position, the Federal Communications Commission (FCC) has confirmed the need for rules to address issues relating to make-ready work. Further, NHOS argues that the Commission should both interpret its existing rules on pole attachments, New Hampshire Code of Administrative Rules Puc 1300, and implement new rules intended to lower the cost of third-party make-ready work. NHOS contends that without useful interpretations of existing rules and implementation of new rules, new attachers may be precluded from attaching to poles.

During the June 7, 2012 pre-hearing conference, NHOS contended that the impediments around make-ready threaten its “existing and real deadlines”. Transcript of June 7, 2012 Pre-Hearing Conference (Tr.) at 9. NHOS also stated that because the “most critical issue is access, the Commission should “establish rules which allow for immediate and reasonable time periods for access to be provided.” Tr. at 10. NHOS also contended that issues around timeframes could be addressed independently of rate issues. Tr. at 10-11. As stated by NHOS “The first issue that needs to be resolved is a time frame that companies that want to do business in New Hampshire can rely on, that will allow them to deploy their facilities, even if there is a lack of agreement on what the rates that they will be required to pay will ultimately be.” Tr. at 11-12.

With respect to the matters it was requesting the Commission to review, NHOS stated that it believed the Commission should: (1) evaluate ways of preventing disputes over rates from delaying deployment of facilities; (2) determine just and reasonable rates for attachments; and (3) determine the proper cost components upon which the rates would be based. Tr. at 14-16. NHOS also contended that pole owners may not be in a position to resolve disputes between a third-party attacher and a new entity seeking an attachment. Tr. at 17-18. NHOS contended that the result of permitting the offending behavior to continue is to discourage competition in New Hampshire. Tr. at 26.

#### **B. NECTA**

According to its request to intervene, NECTA is a non-profit corporation and trade association representing the interests of most cable television companies and their voice and Internet affiliates in New England. It contended that many of its member companies have or seek pole attachments and as such often must pay for and perform make-ready work. NECTA contended that to the extent the Commission sought to undertake a generic inquiry into pole attachment make-ready work, its members had rights that would be affected by this docket.

In its motion to dismiss or limit the scope of the docket, NECTA contended that although NHOS' petition contained specific allegations against particular, but unnamed, parties, it sought generic relief. NECTA argued that the petition should be dismissed because New Hampshire's pole attachment law, RSA 374:34-a, and the Commission's rules contemplate adjudications of particular disputes between companies and not generic issues relating to make-ready. NECTA further contended that this matter should, in the first instance, be governed by existing pole attachment agreements (PAAs) and good faith negotiations thereunder. According to NECTA,

only when negotiations have been unsuccessful, should a party resort to the Commission.

NECTA contended that NHOS should be required to name specific parties and specific acts that demonstrate how those other entities were not acting in good faith. Such specificity, contended NECTA, would allow the Commission to determine if the matter is truly ripe for adjudication.

NECTA further argued that given the factual allegations in the petition, there was an insufficient basis to undertake a general investigation into rates for make-ready work. According to NECTA, because the petition describes particular acts, but fails to identify any particular third-party attachers, as a matter of fairness to those with whom NHOS has no dispute, the allegedly offending entities must be named. NECTA contended that a generic proceeding on make-ready costs is inappropriate because each make-ready event is fact specific to the pole, the location and the facilities that must be moved. Therefore, according to NECTA, NHOS must limit its case by describing the entities and acts leading to its petition. According to NECTA, a generic investigation would serve only to force utilities and pole attachers into a proceeding that may impact their make-ready rates even if their practices are not at issue.

At the pre-hearing conference, NECTA reiterated its arguments for dismissing the petition or for limiting its scope. Tr. at 31. Further, NECTA stated that in the first instance these types of disputes should be resolved through the PAAs and that the PAAs provide a remedy. Tr. at 31-32. NECTA also reiterated its arguments that this docket should not be used for examination of broad or general issues. Tr. at 35.

In its response to NHOS' statement of position, NECTA again argued that the petition should be dismissed for the reasons set out in NECTA's motion to dismiss. Further, NECTA contended that to the extent that the statement of position sought a rulemaking such a request

was improper because the statement alleges specific acts committed by particular parties. According to NECTA, the generic relief of a rulemaking was not justified by the facts alleged and the matter should either be dismissed, or it should be limited by requiring NHOS to name particular entities.

### **C. CANNE**

According to its petition to intervene, CANNE is a non-profit association of facilities-based competitive local exchange carriers (CLECs) in Maine, New Hampshire and Vermont. As with NECTA, CANNE stated that its members operating in New Hampshire both attach to utility poles and perform make-ready to accommodate new attachments. CANNE contended that to the extent this is a complaint against particular third-party attachers, it should be so noticed. Alternatively, CANNE stated that to the extent this is a docket involving an investigation of general applicability to make-ready work, CANNE's members have an interest in the docket. According to CANNE, if it is a generic docket, then the scope should be defined to ensure that additional issues from CANNE members would be addressed.

At the pre-hearing conference, CANNE stated that at the time of the pre-hearing conference its interest was in the scope of the proceeding and that it was trying to determine whether the docket was a complaint against individual entities or a request for rulemaking. Tr. at 37. CANNE stated that because no other parties were named, the third-party attachers are in the unfair position of having to identify themselves in order to defend certain practices. Tr. at 38. CANNE further contended that if the request is for a rulemaking rather than a complaint against individual entities, then there may be other companies with interests in such a proceeding and that those companies may have other issues than those identified by NHOS. Tr. at 39-40.

In its response to NECTA's motion to dismiss and NHOS' statement of position, CANNE contended that the scope of the proceeding as framed by NHOS is unclear since NHOS both complains about specific acts and actors, and requests generic relief. According to CANNE, these goals are distinct and require different proceedings.

If it is to be a complaint investigation, CANNE states that because NHOS does not name any particular entity against which it is complaining, it "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." CANNE Response at 4. According to CANNE, "NHOS' request is unrealistic and places an unnecessary burden on the Commission to uncover alleged facts that clearly are in NHOS' possession." CANNE Response at 4. CANNE also states that because NHOS has not named particular parties, other utilities must guess whether they are targets of the complaint, and they risk being forced to identify themselves and their acts in order to defend themselves. CANNE contends that NHOS could easily narrow the matter to one the Commission could effectively adjudicate by naming the complained about entities.

If this is to be a rulemaking, then CANNE argues that a different set of procedures apply. In addition, CANNE contends that there may be other issues related to the pole attachment rules to address and that if the Commission is to undertake a rulemaking the scope should be appropriately set to avoid piecemeal rulemaking.

Following on the above arguments, CANNE states that the Commission should dismiss the filing and require NHOS to make a new filing that specifically states its claims and clarifies the relief it seeks. According to CANNE, under the circumstances presented, a rulemaking may

be more than is necessary and would consume substantial time, money and resources for all involved. Instead, CANNE contends that because NHOS' filings indicate complaints against one or a few third-party attachers, it should seek resolution of its complaints with those attachers.

#### **D. Unitil**

According to its petition to intervene, Unitil is a public utility primarily engaged in the distribution of electricity in New Hampshire and owns, in whole or in part, a substantial number of utility poles in New Hampshire. Unitil states that based upon the petition, it understands that NHOS may seek to attach to many of its poles and that it in so doing it may become involved in disputes with entities already attached to those poles. Unitil's petition states that to the extent the Commission addresses issues relating to make-ready charges and attachment procedures, Unitil has an interest in the case.

At the pre-hearing conference, Unitil stated that it understood that NHOS was seeking to attach to many of its poles, but that it was not aware of any disputes over attachments at present. Tr. at 41-42. Unitil also stated that it objected to treating this case generically since it was not clear from the petition whether the problems went beyond NHOS. Tr. at 42. Unitil also stated that it disagreed with the argument that these disputes would be covered by PAAs. Tr. at 42-43. Unitil stated that as a pole owner it sometimes has only limited influence over, or rights relative to third-party attachers. Tr. at 43. Further, Unitil stated that while there are provisions in the PAAs allowing the owner to perform make-ready if the attacher does not, the pole owner may be reluctant to do so to avoid some liability in moving those facilities. Tr. at 43. Unitil concurred in the arguments that if particular third-party attachers are causing problems, they should be named. Tr. at 44.

### III. COMMISSION ANALYSIS

In requesting that the Commission undertake an investigation of make-ready work, NHOS invokes RSA 365:5. That statute provides:

The commission, on its own motion or upon petition of a public utility, may investigate or make inquiry in a manner to be determined by it 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; and the commission shall make such inquiry in regard to any rate charged or proposed or to any act or thing having been done or having been omitted or proposed by any such utility in violation of any provision of law or order of the commission.

RSA 365:5. Further, NHOS has stated that due to the nature of its project, time is the “critical” issue in any investigation by the Commission. *See* Tr. at 9. Upon review of the information and arguments presented by NHOS, although there is authority to begin an investigation, we lack sufficient information to complete an adjudication that would provide the timely relief NHOS seeks.

In its initial petition, NHOS contends that “some” third-party attachers “have demanded that their make-ready work be performed at excessive rates, and that NHOS pay, in full, their stated cost of this work prior to performing their make-ready work”. NHOS Petition at 2. NHOS also states that in “certain instances” third-party attachers “are charging make-ready survey fees for all poles on the applications submitted to the pole owners by NHOS” when, in “many instances,” those parties “have no make-ready on the majority of the poles and often do not even have facilities on these poles.” NHOS Petition at 4. In its statement of position, NHOS provides a bulleted list of alleged inappropriate charges. NHOS Statement of Position at 5-6. It thereafter recounts a negotiation with a single third-party attacher on issues relating to costs for make-ready. NHOS Statement of Position at 6-7. Based upon these allegations, it is not clear

how many entities have rates, charges or make-ready practices that are troubling to NHOS. Without identification of the offending parties, the rates in question and the poles that are at issue, any investigation into the allegations made by NHOS must, of necessity, cover every entity with facilities attached to poles in New Hampshire in order to include every entity that may perform make-ready. NHOS' objection to NECTA's motion to dismiss references matters affecting pole owners and their obligations under PAAs. NHOS Objection at 2. Any review of PAAs would require the involvement of pole owners. Therefore, given 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.

In addition, NHOS' filings do not make clear the scope of the issues that it proposes to have investigated. In its filings, NHOS contends that various unnamed entities are assessing inappropriate charges, that they are charging for inappropriate make-ready work, and that the Commission must take steps to rectify those practices pursuant to our authority over rates and terms in RSA 374:2. At the pre-hearing conference, NHOS contended that matters of timing for make-ready work must be resolved so that it may complete its project on time. Tr. at 9. In order to investigate each of NHOS' concerns and to develop a complete record, the Commission would need to inquire into: rates, charges, construction practices, actual costs, timing for make-ready, and possible remedies for overcharges or delays. To gather information on these issues from every pole owner and third-party attacher in New Hampshire will take substantial time.

Even if the Commission undertakes and completes an investigation of the type NHOS seems to seek, it is still not clear what relief NHOS is pursuing. In its petition, NHOS requested that the Commission establish rates and practices for make-ready work to accommodate NHOS'

pole attachments. In its statement of position, however, it sought the establishment of generally applicable rules for rates and practices, rather than just for its attachments. In its objection to NECTA's motion to dismiss, NHOS contended that the results of the investigation could form the basis for future rulemaking as opposed to providing NHOS any particular relief. Thus, NHOS appears to simultaneously seek relief specific to it, generic relief relating to state-wide practices for all entities, as well as for the establishment of a factual basis to begin a rulemaking proceeding.

The Commission recognizes that, based on the allegations presented, the existing regulatory structure may be in need of further standards. For example, NECTA contended that NHOS could seek relief from pole owners under the terms of the PAAs, while Unitil contended that as a pole owner it was limited in any relief it could provide. Further, it does not appear that the Commission's current rules provide definitive direction over disputes between prospective and existing attachers.. Such issues could pose barriers to effective competitive entry. Accordingly, the Commission will open a separate docket for the purpose of considering issues relating to pole attachment access. As part of that docket, we direct Staff to convene interested parties in a stakeholder process to develop a scope of issues to be considered and analyzed. The Commission will await the outcome of the stakeholder process, and any recommendations therefrom, and will proceed accordingly. We note, but do not limit, the possibilities to include adoption of new rules or amendment of current rules. We caution that such an inquiry will likely take significant time and will not be directed at providing particular relief to NHOS or its project.

In the meantime, rather 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. NHOS will have 30 days from the date of this order to do so. If no filing is made, we will close this docket without further action. 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. By doing so the entities complained against will be offered a fair opportunity to address the complaint and defend or explain their practices, and the Commission will have a complete record upon which to base its decision. The Commission will work as efficiently as practicable to reach a resolution.

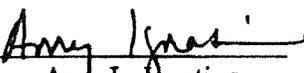
**Based upon the foregoing, it is hereby**

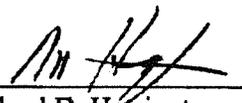
**ORDERED**, that NECTA's motion to dismiss is denied; and it is

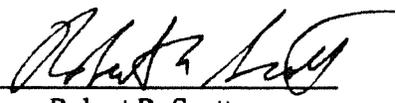
**FURTHER ORDERED**, that NHOS may revise its filings as described above within 30 days of the date of this order; and it is

**FURTHER ORDERED**, that Staff will convene interested parties in a stakeholder process to develop a scope and analyze pole attachment access issues.

By order of the Public Utilities Commission of New Hampshire this third day of July, 2012.

  
 Amy L. Ignatius  
 Chairman

  
 Michael D. Harrington  
 Commissioner

  
 Robert R. Scott  
 Commissioner

Attested by:

  
 Debra A. Howland  
 Executive Director

**SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED**

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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# EXHIBIT 7

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DT 12-084**

**TIME WARNER ENTERTAINMENT COMPANY L.P. d/b/a TIME WARNER CABLE**

**Petition for Resolution of Dispute with Public Service of New Hampshire**

**Order on Jurisdiction, Scope, Interventions and Schedule**

**ORDER NO. 25,387**

**July 3, 2012**

**I. FACTUAL AND PROCEDURAL BACKGROUND**

On March 30, 2012, Time Warner Entertainment Company L.P. d/b/a Time Warner Cable (TWC) filed a petition with the Commission for resolution of a dispute with Public Service Company of New Hampshire (PSNH) regarding the fees charged for the attachment of TWC's cables to utility poles owned, in whole or in part, by PSNH. According to the petition, TWC attaches its cables to utility poles owned by numerous entities including PSNH to provide its end user customers with television programming and Internet access and, since 2005, voice communications services through a Voice over Internet Protocol (VoIP) product. The terms of the attachments are governed by three pole attachment agreements between TWC and PSNH, the most recent of which was signed in 2004.<sup>1</sup>

According to TWC's petition, pursuant to its agreement with PSNH, PSNH is required to abide by certain procedures prior to and following any change in the rates charged for attachments. TWC contends that PSNH has not abided by the rate change requirements and

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<sup>1</sup> All matters in dispute in this case follow the execution of the 2004 agreement and the relevant arguments reference the language of the 2004 agreement and do not specifically mention the prior agreements. Accordingly, as used in this order "the agreement", or similar phrases, denotes the 2004 agreement unless the context demonstrates otherwise.

therefore any changes are not binding on TWC. In addition, TWC's petition alleges that the rates charged by PSNH are unlawfully high and are based on an outdated formula previously employed by the Federal Communications Commission (FCC). According to TWC, PSNH is improperly charging different rates depending upon its assessment of whether certain attachments, or portions of attachments, are for the provision of video and Internet services or are for the provision of communications service with the communications services being charged at a higher rate. According to TWC, PSNH may not do this. TWC's petition contends that TWC has disputed the charges as demanded by PSNH since at least 2006 and that PSNH is the only pole owner attempting to charge these impermissible rates.

According to TWC's petition, the Commission should apply the factors set out in its pole attachment rules, New Hampshire Code of Administrative Rules Puc 1300, to determine the proper rate to be charged for TWC's attachments. Based upon various legal precedent and policy arguments, TWC contends that the lower rate applicable to video and Internet services is the only rate that should apply, and not the bifurcated rate structure PSNH has created. TWC notes in its petition that any payments it has made to PSNH in the period in dispute have been at the lower rate and that it has never paid the communication service rate billed by PSNH.

In early 2012, prior to TWC's petition to the Commission, PSNH sued TWC in Merrimack County Superior Court for failure to pay the amounts PSNH contended were due for TWC's attachments. PSNH contended that by failing to pay the amounts billed, TWC had breached the pole attachment agreement between them. In March 2012, TWC removed that case to the Federal District Court for the District of New Hampshire based upon diversity of citizenship. Around the same time, TWC filed this petition with the Commission. In its petition

TWC contended that the Commission is the proper venue for this matter. In April 2012, TWC filed a motion in the federal court to dismiss or stay the federal court action pending the outcome of the matter before the Commission. In June 2012, PSNH objected to TWC's motions in federal court and TWC responded to PSNH's objection.

On April 16, 2012, PSNH responded to TWC's March petition to the Commission with a letter to the Commission stating, in part, that it did not object to Time Warner's petition to the extent it seeks to have the Commission determine the just and reasonable rates for pole attachments prospectively. In other words, PSNH accepted that the Commission is the proper venue for determining pole attachment rates on a "going forward" basis. PSNH, however, contended that the courts are the proper venue for a determination on the parties' dispute over the "retrospective" portion of the dispute concerning prior unpaid attachment fees. According to PSNH, the Commission did not have jurisdiction over the entirety of the dispute.

On April 24, 2012, TWC submitted a letter disagreeing with many of the points raised in PSNH's letter. According to TWC's letter, a retrospective ruling by the Commission is permitted because the parties' contract specifically contemplated such an event. Further, according to TWC, the long history of regulation of pole attachments meant that PSNH could not have had a reasonable expectation that its decisions on attachment rates would not be subject to regulatory oversight.

On May 2, 2012 the Commission issued an order of notice in this docket setting a pre-hearing conference for May 24, 2012. Prior to the pre-hearing conference petitions to intervene were received from Comcast Cable Communications Management, LLC, Comcast of New Hampshire, Inc., Comcast of Massachusetts/New Hampshire, LLC and Comcast of Maine/New

Hampshire, Inc. (collectively Comcast), segTEL, Inc. (segTEL), and Unitil Energy Systems, Inc. (Unitil). On May 23, 2012, TWC objected to the petitions to intervene of segTEL and Unitil, but withdrew its objections on May 29. The pre-hearing conference was held as scheduled. During that pre-hearing conference the Commissioners requested that the filings made by the parties in the federal court action relating to jurisdiction and scope be provided to the Commission. Those filings were later submitted to the Commission.

On June 1, 2012, Staff submitted a report of technical session containing a proposed schedule as well as recommendations on certain issues in this docket. Specifically, Staff's report addressed the Commission's concerns about restrictions on the schedule for this docket as a result of the requirements of 47 U.S.C. § 224. According to Staff's report, the parties to this matter have agreed that a Commission order adopting the 360 days permitted by federal law would be sufficient for setting the timeframe for this case. In addition, Staff's report stated that TWC, as the petitioning party, has agreed to waive any right it might have under the statute to insist upon a shorter timeframe. Staff's report addressed scheduling matters while noting that the schedule may be amended depending upon the Commission's decision regarding its jurisdiction and the scope of this proceeding.

## **II. INTERVENTIONS**

As noted, requests for intervention were received from Comcast, segTEL and Unitil. Comcast contended that it is similarly situated to TWC and that it holds contracts for pole attachments with PSNH that are materially the same as those between TWC and PSNH. Transcript of May 24, 2012 Pre-hearing Conference (Tr.) at 7-8. Comcast acknowledged that this matter could be cast as a contract dispute between TWC and PSNH, but contended that to

the extent the Commission adjudicated the terms and conditions of that agreement, that adjudication could be *res judicata* with respect to its contracts. Tr. at 8. Therefore, it contended, for reasons of administrative economy, it should be permitted to intervene in this case. Tr. at 8. Similarly, segTEL, a competitive local exchange carrier, contended that it held pole attachment agreements with PSNH and that segTEL understood its contracts to be substantially identical to TWC's. Tr. at 9. segTEL also argued that to the extent this docket may involve rate setting, its attachments would be affected by that decision and therefore its intervention was justified. Tr. at 9-10. segTEL also contended that because a substantial portion of TWC's filing related to the FCC's findings in its recent pole attachment cases and the way that those findings might relate to New Hampshire, as an attachor in New Hampshire, segTEL's interests may be affected. Tr. at 11.

For its part, Unitil contended that as a pole owner it has attachment agreements in place with numerous entities including Comcast. Tr. at 17. It also contended that its pole attachment agreements were substantially similar to those of PSNH in that all such agreements had their genesis with a template provided years ago by Verizon. Tr. at 17. Therefore, Unitil contended, to the extent judgments are made about the agreements, such judgments could affect its agreements as well. Tr. at 17. Unitil also noted that it currently has an active dispute with Comcast over the same issue raised by TWC. Tr. at 17. Lastly, Unitil noted that the relief requested by TWC was generic in nature rather than specific to its dispute. Tr. at 17-18. As noted, TWC initially objected to the interventions of segTEL and Unitil, but subsequently withdrew those objections.

By this order we grant the interventions of Comcast, segTEL and Unitil. Because pole owners are to provide non-discriminatory access to their poles, *see* RSA 374:34-a, VI, a requirement placed upon one entity will likely extend to all entities attached to one owner's poles. Because Comcast and segTEL are attachers with agreements with PSNH substantially similar to the one in dispute, it is possible that an adjudication of the disputed agreement will, provide guidance for interpretation of those other contracts. Likewise, with respect to Unitil, any decisions rendered in this case may provide guidance as to future disputes on similar contract provisions. Furthermore, Unitil has noted that it has essentially the same dispute pending with Comcast. We conclude that, although none of these parties' contractual arrangements will be directly implicated by this docket, it will advance administrative efficiency to allow Comcast, segTEL and Unitil to intervene pursuant to, RSA 541-A:32, II.

### **III. JURISDICTION AND SCOPE**

#### **A. Positions of the Parties**

##### **1. PSNH**

At the pre-hearing conference, PSNH reasserted its contention that the dispute between it and TWC is a "simple debt collection matter." Tr. at 25. According to PSNH, it filed its court case to collect unpaid fees pursuant to the 2004 contract between it and TWC under which, it contends, it was justified in charging a different rate for telecommunications services. Tr. at 25. PSNH contended that pursuant to section 15.5 of the 2004 agreement, a party bringing an action under the agreement could do so either in court or with a regulatory agency and PSNH elected to file its case in court. Tr. at 26. PSNH argues that TWC is asking the Commission to ignore that choice of law provision, but the Commission should not do so. Tr. at 26.

Further, PSNH contended that in making its request to remove the matter from the courts, TWC does not act with clean hands. Tr. at 27. More specifically, PSNH argued that under the terms of section 3 of the agreement, TWC was to abide by certain requirements if it disputed the amount it was being billed. Tr. at 27. According to PSNH, under the agreement any rate change that was not properly challenged within the allowed timeframe was deemed accepted by TWC. Tr. at 27. To properly challenge the rates, PSNH contended that TWC was required to dispute the rate in writing, and submit the issue to an appropriate regulatory body. Tr. at 27-28. PSNH contended that TWC did not do either of these acts. Tr. at 28. PSNH further argued that if an amount was disputed, TWC was required to place the disputed amount in an interest bearing escrow account until the dispute is resolved, but that TWC did not do so. Tr. at 28. Thus, PSNH contended that TWC ignored the terms of the agreement that provided a dispute resolution mechanism and because it did so, it could not now ask the Commission to ignore the choice of law provision in the agreement. Tr. at 28. PSNH also confirmed its earlier position that it did not dispute the Commission's ability to review prospective rate revisions, although it believed that the dispute over the unpaid amounts under the agreement belonged in court. Tr. at 29.

In responding to arguments raised by TWC, PSNH stated that the pole attachment law in New Hampshire gives effect to voluntary agreements between parties. Tr. at 35. According to PSNH, the dispute here involves such a voluntary agreement. Tr. at 35. PSNH also contended that the pole attachment statute does not grant exclusive jurisdiction to the Commission to resolve disputes such as this. Tr. at 35.

In response to questions about possible bifurcation of the issues, PSNH contended that bifurcation of the prospective and retrospective portions of this matter is "straightforward." Tr.

at 37. According to PSNH, the claim for money due under the agreement belongs in the court and the issue of rates on a going forward basis belongs with the Commission. Tr. at 37-38. PSNH also contended that the two issues could be dealt with in parallel. Tr. at 38.

## 2. TWC

At the pre-hearing conference, TWC responded to PSNH's arguments by noting that federal law governed the agreement at the time it was created in 2004 and that at no time during the period in dispute have pole attachments been unregulated. Tr. at 29. Therefore, according to TWC, at the time the agreement was made it was known that there were limitations on the charges that could be levied under the agreement and that federal law allowed attaching entities to file complaints with the FCC to resolve issues even after signing an agreement. Tr. at 29. Accordingly, TWC argued, PSNH did not have a reasonable expectation that it would be able to charge any rates it chose under the agreement. Tr. at 30.

TWC also argued that the 2004 agreement did not specify the bifurcated rate structure that PSNH later imposed and that PSNH did not properly notify TWC of changes in the rates. Tr. at 30. TWC also pointed out that it never paid the disputed higher rate and that PSNH never responded to its objections to the bills. Tr. at 30. TWC contended, therefore, that any issues relating to the agreement were not as clear as PSNH had contended. Tr. at 30-31.

TWC also contended that New Hampshire's pole attachment statute, RSA 374:34-a, permitted the Commission to hear and resolve disputes such as this one. Tr. at 31. In addition, TWC argued that the Commission pole attachment rules, New Hampshire Code of Administrative Rules Puc 1300, permitted the Commission to hear and resolve this dispute. Tr. at 31. TWC contended, based upon the above authority and its contention that it is in the public

interest for the Commission to hear and decide this matter, that the Commission should resolve this dispute and provide clarity on the application of its rules. Tr. at 32. TWC argued that in resolving this dispute, the Commission would not be involved in retroactive ratemaking. Tr. at 32.

TWC also pointed out that there are ongoing proceedings at the FCC with respect to pole attachment rates, and that the FCC has adopted new pole attachment formulas both to avoid disputes about rates and to avoid creating unreasonable signals in the marketplace. Tr. at 33. TWC also argued that 20 of the 21 states that have certified that they regulate pole attachments have adopted a single formula for pole attachment rates. Tr. at 34. Thus, according to TWC, the Commission should take this opportunity to determine what the rates should be, just as other states and the FCC have done. Tr. at 34.

In response to questions about bifurcation, TWC contended that because the Commission had certified to the FCC that it would regulate pole attachments, it is the Commission's responsibility to hear and decide this matter. Tr. at 38. According to TWC, the agreement at issue is not a contract of the type that courts are accustomed to dealing with and that these contracts are subject to a highly regulated framework. Tr. at 38. Thus, TWC contended that guidance from the Commission was necessary to understand and interpret the agreement. Tr. at 38-39.

TWC agreed that the prospective and retrospective issues could be reviewed separately by the Commission, but there was some question whether both could be done within the statutory timeframe. Tr. at 39. TWC also argued that leaving a portion of the dispute to the court to resolve would be improper because there is some question about whether PSNH was charging

rates permitted by the FCC, and, therefore, there may be a need to apply the applicable formulas and to make other policy decisions in the context of reviewing this matter. Tr. at 40. Such decisions, according to TWC, should be made by the Commission and not a court. Tr. at 40. No other party or intervenor offered argument directly on the issues of scope and jurisdiction at the pre-hearing conference.

### **B. Commission Analysis**

We note at the outset that TWC agreed to provide the filings in the federal court for the Commission to review, at least in part, to inform the Commission about the arguments that had been made to the court about jurisdiction for this dispute. Tr. at 48. Since that time we have received for inclusion in the record in this docket the motion to dismiss or stay filed by TWC in the federal court, PSNH's objection to that motion, and TWC's response to the objection. While recognizing that the intended audience for those documents is the federal court and not the Commission, we note that we have reviewed those submissions and the arguments in them in reaching a determination here. Based on all of the arguments in this docket, we conclude that the matter should be bifurcated in the manner proposed by PSNH. For the reasons that follow, we decline to accept jurisdiction over the entirety of the parties' dispute and limit our inquiry to the prospective rate setting aspects of this docket.

RSA 374:34-a, the New Hampshire pole attachment statute, provides that "The commission shall have the authority to hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments." RSA 374:34-a, VII. Accordingly, the statute grants to the Commission the authority, but does not impose the obligation, to hear disputes of the type at issue here. Similarly, our pole

attachment rules provide that a party to a pole attachment agreement may petition for resolution of a dispute arising under an agreement and the Commission will conduct an adjudication of that dispute. N.H. Code Admin. R. 1304.03, 1304.05. The rules do not define or limit the scope of the petition or of the inquiry that the Commission undertakes in response to a petition. As a result, the Commission disagrees with the assertion that it is required to adjudicate the entirety of this dispute. Though the Commission has jurisdiction, it is not exclusive nor is it necessarily co-extensive with that of the courts. In this case, we conclude that for reasons of administrative efficiency, as the issue is already before the court, and out of deference to the provisions of the parties' agreement, the Commission should limit its adjudication to the setting of prospective rates. Further, we note that no party disputes the Commission's authority in that regard. The parties' contract specifically provides that any action brought under it may be commenced in the court of the county of the capital of this state or in a regulatory agency with jurisdiction. *See* Section 15.5 of the 2004 Pole Attachment Agreement. Accordingly, an action could be commenced in either the Merrimack County Superior Court, or the Commission. As the party filing suit, PSNH exercised its option to elect the superior court as the forum for resolving its action. TWC does not contend that PSNH could not make such an election, nor that the election violated any term of the parties' agreement. Rather than challenge PSNH's ability to choose, TWC argues that PSNH's election should be undone for various reasons. We do not find the justifications offered by TWC compelling.

Before proceeding to TWC's specific arguments, we address briefly the FCC's "sign and sue" rule. The FCC recently determined that it would continue the sign and sue rule, the purpose of which is to protect the rights of an attacher to challenge allegedly unreasonable portions of an

agreement it has signed. *See In the Matter of Implementation of Section 224 of the Act*, 26 F.C.C.R. 5240, 5292 (2011) (stating that the sign and sue rule “allows an attacher to challenge the lawfulness of terms in an executed pole attachment agreement that the attacher claims it was coerced to accept in order to gain access to utility poles.”). We do not find any arguments under that rule about the need for Commission action particularly relevant in this case. Because no party has disputed the Commission’s authority to hear and decide issues about prospective ratemaking, which may involve determining whether portions of the existing agreement are just and reasonable, the protections intended by the FCC’s rule are provided by the Commission’s process here.

As for TWC’s other arguments, many of its assertions are variations on the argument that pole attachments are highly regulated by the FCC and the Commission, and because they are so regulated, PSNH could not have had a reasonable expectation that it could charge whatever it chose. Thus, TWC argues, the Commission must act to rectify PSNH’s attempts to charge more than is or was permissible. We do not decide whether PSNH did, or could have had, such an expectation. We do, however, agree that pole attachments are and have been subject to regulatory oversight and that to the extent a party to an agreement attempts to impose or enforce an unreasonable or unjust condition, a regulatory body may correct that action. Doing so, however, does not create exclusive jurisdiction for the regulator for any and all issues relating to pole attachment agreements.

In this regard we find instructive the facts and decision in *Public Service Company of Colorado v. Federal Communications Commission*, 328 F.3d 675 (2003). In that case, Public Service Company of Colorado (PSCo), a pole owning utility, charged Mile Hi Cable Partners,

L.P. and other attaching companies (collectively Mile Hi), for unauthorized attachments pursuant to a fee schedule in an attachment agreement between the companies. *Id.* at 676. When Mile Hi did not pay, PSCo brought suit in Colorado state court seeking damages for unpaid fees. *Id.* In response, Mile Hi filed a complaint with the FCC<sup>2</sup> alleging that the rates, terms and conditions of the underlying agreement were unjust and unreasonable. *Id.* Shortly thereafter the state court dismissed PSCo's state court action on the ground that the FCC had primary jurisdiction over the rates, terms and conditions of the agreement. *Id.* at 677. On appeal to the state's court of appeals, however, the matter was remanded to reinstate PSCo's claims, but further activity was stayed in the court pending final action by the FCC. *Id.*; *see also Public Service Company of Colorado v. Mile Hi Cable Partners, L.P.*, 995 P. 2d 310, 312-13 (Colo. App. 1999).

Thereafter, the FCC determined that certain of the rates, terms and conditions of the agreement relating to unauthorized attachments were unjust and unreasonable and reformed those terms and required PSCo to recalculate its bills to conform to the reformed terms. *Mile Hi*, 328 F. 3d at 677. PSCo petitioned the federal courts for review of the FCC's action. *Id.* at 678. In affirming the FCC's action the federal court noted that "[a]fter the utility performs its recalculation, the state trial court, as it anticipated, will be able to decide the utility's claim according to the FCC's modifications of the agreement." *Id.* at 679. Accordingly, the claim for breach of contract for failure to pay certain fees under the agreement remained in the courts, while the regulator reviewed the terms of the agreement itself to determine if they were just and reasonable. *See also Union Elec. Co. v. Cable One, Inc.*, 2011 WL 4478923 \*5 (E.D. Mo. 2011) (staying contract action in federal court pending resolution of complaint about pole attachment

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<sup>2</sup> Mile Hi brought its complaint to the FCC because the state of Colorado had not asserted jurisdiction over pole attachments. *See* 47 U.S.C. § 224.

rates and service classifications at the FCC because the plaintiff “may need to seek further relief from this Court on its underlying breach of contract claim” after the FCC acts.). We see little difference between those cases and the one at hand.

In this case, as in the above cases, the pole owner brought a breach of contract action in court to enforce payment under the terms of the agreement and, in response, the attacher contended to the overseeing regulatory body that the terms of the agreement regarding the setting of rates are unreasonable. In the above cases, the courts and the FCC accepted as appropriate the separation of the relevant matters as between those entities and we see no reason to do otherwise here. In agreeing with the above treatment, we do not suggest that the federal court in this case should stay the matter pending our ruling on rate setting under the agreement, but we do note that the situations are sufficiently analogous to demonstrate that the Commission is well within the bounds of its discretion to decline to wrest jurisdiction over the entire matter from the courts.

By separating the matters as requested by PSNH we frame the remaining issues before us similarly to the way the FCC chose in its decision in the *Mile Hi* case:

Although certain remedies for breach of contract may be pursued in forums other than the Commission, the Commission has primary jurisdiction over issues about the reasonableness of rates, terms and conditions concerning pole attachments. The issue in this matter is not whether the Complainant failed to pay an invoice based on a just and reasonable term or condition, but whether the term or condition itself was reasonable.

*In the Matter of Mile Hi Cable Partners, LP*, 17 F.C.C.R. 6268, 6271 (2002). Accordingly, under the authority in RSA 374:34-a, the Commission accepts and will assert jurisdiction over the prospective rate setting issues in this case, but will not do so for the retrospective contract portions of the case. To provide further clarity as to the scope of the Commission’s adjudication

of this matter, we clarify that by “prospective rate making issues” we mean to review the terms of the parties’ agreement, with particular emphasis on the rate setting provisions, to determine whether they are just and reasonable in light of the relevant and applicable state and federal law. To the extent any terms may be found to be unjust or unreasonable, the Commission will, as the FCC did in *Mile Hi*, order revisions to the agreement. Whether and to what degree any ordered revisions should be applied to prior acts or omissions is not a matter we will decide here.

#### **IV. SCHEDULE**

Federal law on pole attachments permits states to assert their jurisdiction over pole attachments and their related agreements. *See* 47 U.S.C. § 224. Once a state asserts its jurisdiction the federal scheme no longer applies. The federal law, however, places certain conditions upon a state’s exercise of jurisdiction over pole attachments. Relevant to this matter is 47 U.S.C. § 224(c)(3), which provides:

For purposes of this subsection, a State shall not be considered to regulate the rates, terms and conditions for pole attachments –

- (A) unless the State has issued and made effective rules and regulations implementing the State’s regulatory authority over pole attachments; and
- (B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter –
  - (i) within 180 days after the complaint is filed with the State, or
  - (ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

In other words, federal law conditions a state’s exercise of authority over a specific pole attachment dispute on the state’s ability to resolve the complaint within 180 days of filing if there are no regulations regarding the time for resolution, or within another period if there are regulations on the time, provided that period is no longer than 360 days from filing.

The Commission's rules on pole attachments do not specifically designate a time period for resolution of complaints about the rates, terms and conditions of pole attachments. Therefore, the default time of 180 days would apply and this matter would need to be resolved by the end of September 2012 to meet the default timeframe. As noted in Staff's report of technical session, however, the parties to this case have agreed that they would consider a Commission order setting the time period at 360 days for resolution as sufficient to constitute "rules and regulations" under section 224 for purposes of setting a schedule in this docket. Staff's report also notes that TWC, as the petitioning party, has agreed to waive any right it might have to insist upon the matter being completed within 180 days. No party has objected to Staff's report or contended that the agreements Staff recounts are invalid or misstated.

In consideration of the parties' agreements on the timeframe, and with the intent of giving the parties to this docket adequate time to prepare and present their positions, we adopt a timeframe of 360 days for completion of the complaint underlying this docket according to the scope set out above. Further, because the Commission has adopted and will apply the 360 day timeframe, the procedural schedule set out in Staff's report relying upon that timeframe is hereby approved and adopted.

**Based upon the foregoing, it is hereby**

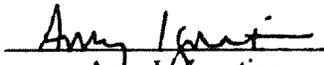
**ORDERED**, that the motions to intervene of Comcast, segTEL and Unitil are granted; and it is

**FURTHER ORDERED**, that the Commission will accept and assert jurisdiction over the "prospective rate making issues" as described above; and it is

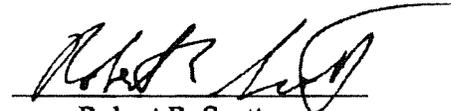
**FURTHER ORDERED**, that the Commission will not assert jurisdiction over the retrospective issues relating to PSNH's claim for breach of contract; and it is

**FURTHER ORDERED**, that this docket shall be governed by the 360 day timeframe described in 47 U.S.C. § 224 and that the proposed schedule relying upon that timeframe is adopted.

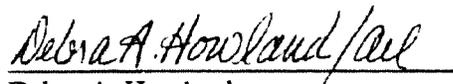
By order of the Public Utilities Commission of New Hampshire this third day of July, 2012.

  
Amy L. Ignatius  
Chairman

  
Michael D. Harrington  
Commissioner

  
Robert R. Scott  
Commissioner

Attested by:

  
Debra A. Howland  
Executive Director

**SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED**

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Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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