

**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.¹ 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,

¹ 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

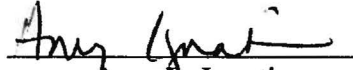
ORDERED, that NECTA’s and CANNE’s motions to dismiss are DENIED; and it is

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.

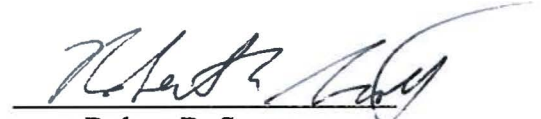
By order of the Public Utilities Commission of New Hampshire this fifth day of
September, 2012.



Amy D. Ignatius
Chairman

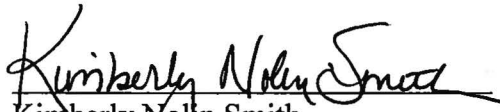


Michael D. Harrington
Commissioner



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 Unifil:

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?