

**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.¹ 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.

¹ 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 Unifil Energy Systems, Inc. (Unifil) 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. Lightower

Lightower represents that it is a competitive local exchange carrier that offers fiber-based services to locations in southern New Hampshire. Lightower 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 Lightower, 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. Lightower asserts that, consequently, its rights, duties, privileges, immunities and special interests are substantially and specifically affected by the outcome of this proceeding. Lightower 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. Lightower 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 Until

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 203.17 The 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

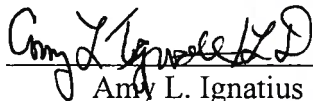
disputes before the Commission. Consequently, the Commission will not close this docket, but will stay these proceedings. The Commission will monitor the development of issues in Docket No. DT 12-107. Once the Commission determines that the specific issues raised by NHOS are sufficiently developed to 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.

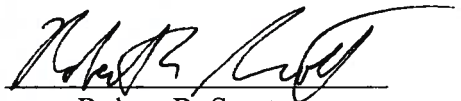
By order of the Public Utilities Commission of New Hampshire this third day of January, 2013.



Amy L. Ignatius
Chairman

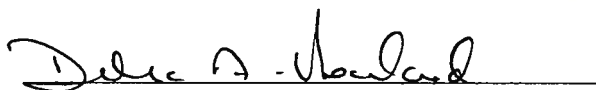


Michael D. Harrington
Commissioner



Robert R. Scott
Commissioner

Attested by:



Debra A. Howland
Executive Director