

**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.

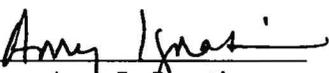
Based upon the foregoing, it is hereby

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

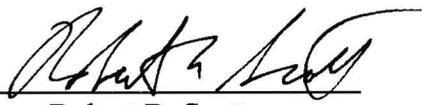
FURTHER ORDERED, that NHOS may revise its filings as described above within 30 days of the date of this order; and it is

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