

STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION



June 7, 2012 - 10:15 a.m.  
Concord, New Hampshire

RE: DT 12-107  
NEW HAMPSHIRE OPTICAL SYSTEMS, LLC:  
Petition for an Investigation into  
Proposed Charges for Utility Pole  
Make-Ready. (Prehearing conference)

PRESENT: Chairman Amy L. Ignatius, Presiding  
Commissioner Robert R. Scott  
Commissioner Michael D. Harrington  
  
Sandy Deno, Clerk

APPEARANCES: Reptg. N.H. Optical Systems, LLC:  
Christopher H. M. Carter, Esq. (Hinckley...)  
Michael E. Kushnir, Esq. (Hinckley, Allen...)  
Robert Carmichael (NHOS)  
Steven Janko (NHOS)  
Darren LaCroix (NHOS)

Reptg. New England Cable and  
Telecommunications Association:  
Susan S. Geiger, Esq. (Orr & Reno)  
Alicia Matthews (Comcast)

Reptg. CLEC Association of Northern  
New England (CANNE):  
Gregory M. Kennan, Esq. (Fagelbaum & Heller)

Court Reporter: Steven E. Patnaude, LCR No. 52

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**APPEARANCES: (c o n t i n u e d)**

**Reptg. Unitil Energy Systems, Inc.:**  
Gary M. Epler, Esq. (Unitil Services Corp.)

**Reptg. New Hampshire Electric Cooperative:**  
Mark W. Dean, Esq.

**Reptg. PUC Staff:**  
Matthew J. Fossum, Esq.  
Kate Bailey, Director/Telecom Division  
Michael Ladam, Telecom Division

**P R O C E E D I N G**

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2 CHAIRMAN IGNATIUS: I'd like to open the  
3 hearing in Docket DT 12-107. Which grows from a petition  
4 filed on April 24, 2012 by New Hampshire Optical Systems.  
5 It was a petition for investigation into proposed charges  
6 for utility pole make-ready work.

7 And, I think we should take appearances,  
8 and then address requests for intervention, and other  
9 procedural matters. I know there's been a Motion to  
10 Dismiss filed. And, I don't know if all parties are  
11 prepared to respond to that orally. If so, take argument  
12 on that. Although, there is a time period that you're  
13 entitled under the rules, if you want additional time to  
14 respond. But, since we're all here, if we can make any  
15 use of our time here to address that, I think that might  
16 be useful. So, I'll tell you know to be thinking about  
17 that. And, then, our standard in prehearing conferences  
18 is taking the positions of parties.

19 So, appearances please.

20 MR. CARTER: Good morning. I'm Chris  
21 Carter. I'm here on behalf of New Hampshire Optical  
22 Systems. With me today is my colleague, Mike Kushnir; the  
23 President of New Hampshire Optical Systems, Rob  
24 Carmichael; the Company's Chief Technology Officer, Steve

1 Janko, and also the Company's Controller, Darren LaCroix.

2 CHAIRMAN IGNATIUS: Good morning.

3 Welcome.

4 MS. GEIGER: Good morning. Susan  
5 Geiger, from the law firm of Orr & Reno. I represent New  
6 England Cable and Telecommunications Association. With me  
7 this morning is Alicia Matthews, from Comcast, a member of  
8 the organization.

9 CHAIRMAN IGNATIUS: Good morning.

10 MR. DEAN: Good morning. I'm Mark Dean,  
11 on behalf of the New Hampshire Electric Cooperative. I  
12 guess I should note for the record here the Co-op has not  
13 moved to intervene. We're in the "looking" phase of the  
14 look-before-you-leap process.

15 CHAIRMAN IGNATIUS: All right.

16 MR. KENNAN: Thank you. Good morning,  
17 madam Chairman. Gregory Kennan -- Commissioner  
18 Harrington, Commissioner Scott, didn't mean to neglect  
19 you. Sorry. My name is Gregory Kennan. I'm Of Counsel  
20 of the law firm Fagelbaum & Heller, LLP. And, I'm  
21 representing the CLEC Association of Northern New England,  
22 also known as "CANNE". And, I also have, if I may, have  
23 received a request via email that, because some people are  
24 listening on the bridge, if we could all please try to use

1 the microphones, because that apparently is what the  
2 bridge picks up.

3 CHAIRMAN IGNATIUS: All right. Thank  
4 you for the reminder. I had forgotten that that had been  
5 set up. And, maybe, when we're done with this, we'll  
6 double-check and make sure things are working. Further?

7 MR. EPLER: Good morning, madam  
8 Chairman, Commissioners. My name is Gary Epler. I'm  
9 counsel to Unitil Services Corporation, appearing on  
10 behalf of Unitil Energy Systems. Thank you.

11 MR. FOSSUM: And, good morning. Matthew  
12 Fossum, for the Staff of the Public Utilities Commission.  
13 And, with me today are Kate Bailey and Michael Ladam, from  
14 Commission Staff.

15 CHAIRMAN IGNATIUS: Good morning.  
16 Welcome, everyone. Are people able to hear over the  
17 telephone bridge?

18 MR. FOSSUM: Just because we didn't  
19 anticipate people being able to speak at the prehearing  
20 conference, we had muted those on the receiving end of the  
21 communications. So, I don't know that anybody will be  
22 able to answer that question.

23 CHAIRMAN IGNATIUS: They're all shouting  
24 "yes" and we can't hear them.

1 CMSR. HARRINGTON: But were we able to  
2 confirm, before this, that they -- it is working and they  
3 do hear it?

4 MR. FOSSUM: I believe that they can  
5 hear it when we use the microphones, at least based on  
6 what Mr. Kennan has said. But, no, I haven't -- I haven't  
7 heard anything directly coming through a speaker that  
8 would indicate that those on the other end are hearing us.

9 CHAIRMAN IGNATIUS: Just that you tested  
10 it out before we began, before you muted it, to make sure  
11 it was working? Mr. Kennan?

12 MR. KENNAN: I just sent a note to  
13 someone listening on the phone, and they said "yes, they  
14 could hear."

15 CHAIRMAN IGNATIUS: Okay. Thank you.  
16 All right. There are motions to intervene that have been  
17 submitted by New England Cable Telephone Association --  
18 excuse me, Television Association. Oh, that's not right  
19 either. New England Cable and Telecommunications  
20 Association, the Unitil Energy Systems, and the CLEC  
21 Association of Northern New England.

22 Are there any objections to the  
23 petitions to intervene?

24 (No verbal response)

1                   CHAIRMAN IGNATIUS: All right. Seeing  
2 none, we will take those under advisement. Because this  
3 is presented in a very generic way, the petition to  
4 investigate, we're inclined to be fairly broad in the  
5 analysis of a petition to intervene. And, so, -- one  
6 second.

7                   (Chairman and Commissioners conferring.)

8                   CHAIRMAN IGNATIUS: All right. So, we  
9 will grant the petitions to intervene. And, I note that  
10 the NECTA one was actually identified as a Petition for  
11 Limited Intervention, which we will take note of.

12                   The NECTA also filed a Motion to Dismiss  
13 on, is it -- on June 5th. And, should have been made  
14 available to all of the parties. I hope people have seen  
15 it. And, wonder if people are prepared to respond orally  
16 to the Motion to Dismiss, with the option of additional  
17 written response to supplement, if they wish. Are people  
18 expecting to do that this morning? Mr. Carter.

19                   MR. CARTER: Yes. We would like the  
20 opportunity to respond completely in writing, although we  
21 are preparing to address it in a more limited fashion  
22 today orally.

23                   CHAIRMAN IGNATIUS: All right. I think,  
24 if we can do that, just because I know this is a project

1 that has a lot of deadlines and a clock ticking. We're  
2 here, people have made the effort to be here. And, it  
3 would be useful to hear oral responses. But, because our  
4 rules do allow a ten-day period to respond, that clock has  
5 not run out yet, and we don't want to foreclose people's  
6 opportunity to respond. So, I think we should hear what  
7 we can, and then know that people can also submit written  
8 filings ten days from the day it was filed, which was on  
9 June 6 -- June 5th.

10 We also, at prehearing conferences, take  
11 a position, an initial position of parties on the docket.  
12 And, I think the order, I'm not sure we need to go around  
13 twice on both issues. It may be that we can do it  
14 together. Maybe first take positions, and then address  
15 the Motion to Dismiss, to the extent you want to, as part  
16 of that, rather than sort of artificially separating them,  
17 because they do somewhat cross over.

18 So, Mr. Carter, would you like to begin?

19 MR. CARTER: Yes. The central position,  
20 according to the Motion to Dismiss, is that this is not a  
21 ripe issue for dispute and doesn't otherwise fall within  
22 the jurisdiction of the PUC. We disagree on both fronts.  
23 And, as a matter of authority, we believe the PUC does  
24 have authority, under RSA 365:5, to take up this matter,

1 which we identified the issue in our initial request for  
2 an investigation. We're prepared to provide more  
3 substance on that argument today.

4 In essence, the very same reasons which  
5 compel the PUC to step into the regulatory void, if you  
6 will, merit the PUC denying the Motion to Dismiss. This  
7 is a existing, real and compelling problem which threatens  
8 to impede the extension of broadband services throughout  
9 New Hampshire, consistent with very clearly articulated  
10 state and federal policies. There is no dispute that the  
11 particular issue in front of the PUC, which is the ability  
12 of third party attachers to charge whatever rates or to  
13 impose whatever conditions they choose on make-ready work,  
14 that is not currently regulated. I note that the problems  
15 with the lack of regulation and oversight on this  
16 particular issue have been well articulated by the FCC,  
17 and even in comments submitted to the PUC prior to the  
18 adoption of the Rule 1300. Well, the problem has now  
19 fully ripened. As the Commission commented a short time  
20 ago, there are deadlines, existing and real deadlines, on  
21 behalf of my client, NHOS, this has been a problem that  
22 has impeded their work for at least six months, with no  
23 resolution in sight. And, in light of all this, we think  
24 it's appropriate for the Commission to exercise it's

1 statutory authority to investigate this issue. Rather  
2 than require individual new attachers and third party  
3 attachers to litigate individual disputes on a piecemeal  
4 basis, which inevitably would result in delays and hinder  
5 the state initiative and policy of extending broadband  
6 services in the state.

7 CHAIRMAN IGNATIUS: So, I understand  
8 you're concern of having to go one-by-one with an  
9 individual make-ready rates with different companies would  
10 be a concern, in terms of time. But how does one litigate  
11 something in a generic way?

12 MR. CARTER: Well, we don't -- we're not  
13 asking for a litigation in a -- if your question is, "how  
14 does the PUC step in?" Well, that relates to really the  
15 substance of why we're here. What can the PUC do? And,  
16 there are few immediate steps the PUC can do to address  
17 this problem. Most critically, is for the PUC to  
18 establish rules which allow for immediate or reasonable  
19 time periods for access to be provided. The most critical  
20 issue is access. Disputes between third party attachers  
21 and new attachers should not be permitted to bring these  
22 -- the deployment of these projects to a halt, and that is  
23 exactly what's going to happen.

24 Establishing those timeframes, which is,

1 we submit, within the authority of this Commission, would  
2 not require, as a first step, the Commission to deal with  
3 potentially the more complex issue of a rate structure.  
4 Secondly, as the FCC has recommended and the National  
5 Broadband Plan, the current situation -- does the problems  
6 posed by the current unregulated nature of this matter do  
7 merit this Commission stepping in to look at the potential  
8 rates that can be charged.

9           If you carry the matter to the logical  
10 extreme, as we pointed out in our written statement that  
11 we filed yesterday, a third party attacher may today  
12 decide that they want to charge my client \$250 per pole  
13 for a move. There is nothing in the current  
14 statutory/regulatory structure to say that another  
15 existing third party attacher could not charge \$1,500 for  
16 the same move. To require the new attachers, such as my  
17 client, to litigate that issue on a one-by-one basis,  
18 would be inimicable [sic] to the whole purpose of the New  
19 Hampshire Broadband Initiative. But that is a more --  
20 that is a, if you will, a book-end to the problem.

21           The first issue that needs to be  
22 resolved is a time frame that companies that want to do  
23 business in New Hampshire can rely on, that will allow  
24 them to deploy their facilities, even if there is a lack

1 of agreement on what the rates that they will be required  
2 to pay will ultimately be.

3 CMSR. HARRINGTON: Just so -- I'm trying  
4 to understand what you're proposing here. You would say  
5 that there would be access, meaning that the movements  
6 that were required would be performed, the new lines would  
7 be added to the pole, and at rates to be determined later?

8 MR. CARTER: Exactly. Right now, there  
9 is neither regulation as to timing or as to rates per  
10 lower, if you will. Nor is there guidance on a regulatory  
11 level about what rates may be included in a lower.

12 CHAIRMAN IGNATIUS: Excuse me. But  
13 there are regulations. Are you saying that you don't find  
14 those to be adequate in the 1300 rules?

15 MR. CARTER: We don't find that, on the  
16 particular -- the particular issue that we're bringing  
17 before the Commission today and asking the Commission to  
18 look at, the rates that a third party attacher, distinct  
19 from the pole owner, but the rates that the third party  
20 attacher may charge for make-ready work to a new attacher.  
21 And, the conditions that may be imposed on that. For  
22 example, can the existing attacher, an existing CLEC, in  
23 connection with needed -- with make-ready work required  
24 for my client to deploy the facility, can the existing

1     attacher require my client to pay for make-ready work that  
2     should have been done for a prior project, but wasn't?  
3     That is a real existing problem. Can the existing  
4     attacher require my client to pay for surveys of poles  
5     that do not require make-ready work?

6                     Those are issues that are separate and  
7     apart, for example, from what the unit cost for the work  
8     may be. It's a real problem. We have responded -- we  
9     have received responses to an RFP, where, for example, a  
10    rate, a conservative rate, per lower, came in at a low of  
11    \$20 per pole. Compare that to the rate that we've been  
12    quoted from existing attachers of \$214 per pole. That  
13    leads to the "logical extreme" argument that I pointed out  
14    a few minutes ago, which is, there is currently nothing to  
15    prevent an existing attacher from demanding a rate of  
16    \$1,000 per lower. We don't believe that the current PUC  
17    rules or the statutory framework within New Hampshire  
18    covers that issue. And, in fact, that -- that this very  
19    issue was debated and discussed prior to the adoption of  
20    1300. And, as I pointed out earlier, it's been evaluated  
21    very closely and reasonably on the federal level by the  
22    FCC.

23                     CMSR. HARRINGTON: Just one question,  
24    the fact that you mentioned rules now again. You also

1 talked about the need to get this "access" thing done  
2 rapidly, and maybe waiting for the actual rates to be set  
3 at a different time. If you're requesting a rulemaking,  
4 you understand that's going to take some months of time  
5 before the rules could be promulgated and go from JLCAR  
6 and everything else. That's not a very short-term  
7 process. Is that what you're requesting for everything  
8 you're talking about here or are you talking about rules  
9 for the longer term rate fix, and something out for the  
10 shorter term access problem?

11 MR. CARTER: Well, what we're asking for  
12 is the issue to be looked into and resolved as  
13 expeditiously as possible. For the same reasons that I've  
14 mentioned earlier. The real problem is currently  
15 threatening the fulfillment of the New Hampshire Broadband  
16 Initiative. The timing on that, you know, I'm not  
17 prepared here to tell the Commission ways in which this  
18 may be expedited. Although, I would certainly be willing  
19 to weigh in on that separate issue.

20 My point more specifically was, there  
21 are a few different categories, a few different parts of  
22 this problem. One is preventing disputes over rates and  
23 conditions for third party make-ready work from preventing  
24 the deployment of facilities. The National Broadband

1 Plan, for example, recommend a 30-day window.

2 The second issue is, how can -- how are  
3 those rates to be determined? Understanding that this is  
4 not a free market. This is existing in a monopoly. So,  
5 this is not something that can be -- that the normal  
6 competitive structure that governs commerce in New  
7 Hampshire can deal with. There is no pressure on existing  
8 attachers to charge just and reasonable rates, which is  
9 what the mandate of our statutory structure requires.

10 There are certainly a number of statutes  
11 and regulations which apply to the pole owner. But,  
12 again, we're talking about a particular issue of third  
13 party make-ready work, which we don't believe is regulated  
14 the way it should be. So, these are two separate issues.

15 A third issue, in addition to time for  
16 access, the amount of the charge, would be "what are the  
17 components of the charge?" As I mentioned, can an  
18 existing attacher require a new attacher, in the context  
19 of this monopoly, pay for repairs and general maintenance  
20 work, which is either not related to the new attacher's  
21 facility or should have been done by a prior entity.  
22 Again, the current monopolistic context here, if you will,  
23 doesn't provide the new attacher with any recourse. They  
24 either have to accept it or not. And, neither, under the

1 current conditions, neither of those alternatives is  
2 acceptable.

3 So, those are at least three areas that  
4 we believe warrant the Commission's evaluation. And, we  
5 are seeking help, and not NHOS alone, we have the support  
6 of a number of other CLECs who have identified their  
7 support, Oxford -- excuse me, Oxford Networks, Windstream,  
8 the Southern New Hampshire Planning Commission, and I  
9 expect that there are other entities today who are willing  
10 to weigh -- who are prepared to weigh in with their own  
11 perspective on this problem.

12 But, getting back to the issue that I  
13 first stood up on, "should this matter be dismissed?"  
14 Unequivocally, no. The Commission has the authority to  
15 look into this problem, it needs to look into this  
16 problem, and we are not -- in no way are we asking the  
17 Commission to interfere in the rights of individuals to  
18 contract over the normal flow of commerce in this state.  
19 It's because this is a monopoly, and it's because this  
20 issue is not regulated, and because the third party  
21 attachers are not subject to the ordinary, competitive  
22 pressures that would maintain a just and reasonable rate  
23 structure, that we need the Commission to step in to fill  
24 that void.

1                   CHAIRMAN IGNATIUS: Can I ask you, you  
2 keep referring to this as a "monopoly" and "monopolistic  
3 conditions". And, it jars my brain when you say that,  
4 because the pole owner is almost always a utility that is  
5 regulated, and I think would be a fair description of a  
6 "monopoly". And, yet, you said you're "not concerned  
7 about the pole owner, and the regulations we have about  
8 pole owners don't help you here, because it's a different  
9 situation." So, the other -- the other people who are  
10 already on the pole, I take it, are the ones you're  
11 concerned with, who I think of as "competitors", rather  
12 than a monopolistic holder.

13                   So, what am I missing in your use of the  
14 word "monopoly"?

15                   MR. CARTER: The standard pole  
16 attachment agreement does, well, as you've noted, Ms.  
17 Ignatius, the pole owners are subject to regulation under  
18 1300. The relationship between the pole owner is covered  
19 on a contractual basis. That contract does contain some  
20 of the timelines that I'm suggesting that the Commission  
21 consider. That contract does not apply to make-ready work  
22 between the existing attacher and the new attacher.

23                   So, let me make sure that I'm being  
24 clear. NHOS wants to deploy its facility. It needs to

1 and has done what it needs to do on a contractual and  
2 licensing basis with the pole owner. But that's only part  
3 of the problem. There are then -- there is then  
4 additional make-ready work, which we're using the term  
5 "third party make-ready", which needs to be negotiated  
6 between the existing attacher and the new attacher. Which  
7 the pole owner is not necessarily -- is not required by  
8 statute or regulation to weigh in on, and may have no  
9 incentive to weigh in on.

10 My use of the term "monopoly" derives  
11 from the fact that there is one pole -- there very well  
12 may be one pole line that a new attacher needs to use to  
13 fulfill, for example, a contract with a state or federal  
14 government, which is exactly what we have here. The terms  
15 and conditions of its work with the pole owner are  
16 regulated, that's not the problem right now. But the  
17 terms and conditions by which the existing attachers are  
18 going to allow us to deploy our facilities are subject to  
19 the whim of the existing third party attacher. They have  
20 a spot on that pole. They do not have to -- they are  
21 responsible for moving their own facility, and they can  
22 say whether or not they're willing to do that. We cannot  
23 go, for example, and lower the facility that's owned by  
24 another entity. That's their responsibility and their

1 right. So, that's where the lack of competitive pressure  
2 comes in. There is simply no competitive pressure to be  
3 brought to bear on the existing attachers, in terms of the  
4 circumstances under which they are going to go in and  
5 lower, for example, their facility. There's no ceiling,  
6 for example, on the rate they can charge. There's no  
7 standard on what they can include in that charge, whether  
8 they can include repairs on the pole.

9 CMSR. HARRINGTON: Let me just ask you a  
10 question before we get off that subject. So, what you're  
11 saying then is that, in the agreement between the third  
12 party attacher and the pole owner, there's no -- nothing  
13 in those agreements that requires them to accommodate  
14 future attachments to the pole?

15 MR. CARTER: First, I don't believe so.  
16 And, second, even, hypothetically, if there was such an  
17 agreement, that does not give rise to a contractual right  
18 that can be enforced by the new attacher. We are -- we  
19 deal with the pole owner. We are doing that, and have  
20 done that. It's not why we're here. We also need to  
21 negotiate with the existing third party attacher on the  
22 make-ready work.

23 CMSR. HARRINGTON: And, they have no  
24 obligation under their contractual agreement with the pole

1 owner to accommodate subsequent attachments.

2 MR. CARMICHAEL: They have no -- they  
3 have no obligation for rates --

4 CMSR. HARRINGTON: Could you use the  
5 microphone.

6 MR. CARMICHAEL: I'm sorry.

7 CHAIRMAN IGNATIUS: And, your name  
8 please. I'm sorry, I've forgotten.

9 MR. CARMICHAEL: This is Rob Carmichael.

10 CHAIRMAN IGNATIUS: Thank you.

11 MR. CARMICHAEL: They have no rate  
12 structure. So, I guess, when we talk about "monopoly",  
13 we're talking about the point of leverage from which the  
14 third party would sit. So, they already have access to  
15 the space. And, in that point of leverage, it's tough to  
16 negotiate. There is no -- they have no incentive to move  
17 and allow us in that space.

18 CMSR. HARRINGTON: So, they may have a  
19 requirement contractually to accommodate you, but, since  
20 there's no cap on the price, you're saying they could  
21 charge -- they could come up with any price they want,  
22 which, in effect, would mean they could block it?

23 MR. CARMICHAEL: Right. And, if we're  
24 not willing to pay whatever that rate is, basically, they

1 have a monopoly position, in the fact that we're forced to  
2 accept whatever rates or charges they would dream up, in  
3 hopes to get them to move.

4 MR. JANKO: If I may? Steve Janko.  
5 There is, in the pole attachment agreement, there is  
6 typically an agreement that the third party attachees will  
7 move in a certain amount of time, if the pole owners  
8 exercise that right. But it's my understanding that it  
9 does not give someone like our ourselves the opportunity  
10 to -- we do not share in the ability to exercise that  
11 right. And, the pole owners to date have been somewhat  
12 reluctant to use that, that part of the contract.

13 CHAIRMAN IGNATIUS: Thank you.  
14 Commissioner Scott.

15 CMSR. SCOTT: If I could just clarify  
16 with Attorney Carter. You said a couple times now that  
17 you don't feel the existing statutory framework covers  
18 this issue. And, I just wanted to clarify, clearly, the  
19 fact that you're here, your sense is that we have the  
20 legal authority to address this issue. So, I just wanted  
21 to make sure I understand your position.

22 MR. CARTER: The PUC has the authority  
23 to conduct an investigation into this current real  
24 problem. The current statutory and regulatory framework

1 does not provide something that NHOS and other new  
2 attachers can take with them to resolve the problem -- the  
3 problems that I've been addressing, in terms of timing of  
4 access and terms of access. Other than the overarching  
5 requirement that charges must be fair and reasonable,  
6 there is not, at this time, a comparable set of standards  
7 that apply to new attachers in the area of third party  
8 make-ready work that already exist with respect to the  
9 pole owners and their relationship and interactions with  
10 the new attachers. That relationship is regulated.

11           Again, the statutes say and the 1300  
12 states very clearly that charges should be "fair and  
13 reasonable". But I expect that the existing attachers  
14 will take the position that that's -- what's "fair and  
15 reasonable" is in -- within the eye of the beholder.

16           You know, I think that the National  
17 Broadband Plan that we've quoted from in our statement  
18 really hits this on the head. It says "absent  
19 regulation,...existing attachers have few incentives to  
20 change their behavior." And, perhaps "monopoly" is too  
21 strong a -- one might think that "monopoly" is too strong  
22 a word. I disagree. That's a term that applies when  
23 there is -- when normal competitive forces cannot bring a  
24 rule of reasonableness to the commercial relationship.

1 And, that is exactly what we have here. There is a lack  
2 of incentive, either from a competitive sense or from a  
3 regulatory position, for the existing attachers to ensure  
4 that the rates and terms that they demand are just and  
5 reasonable.

6 CHAIRMAN IGNATIUS: Well, I think we use  
7 the word in a particular context. And, I understand, from  
8 your perspective, about "leverage" is the word you used,  
9 and "ability to negotiate" is something, I understand your  
10 argument. Of course, if you're successful in attaching,  
11 you then become one of the monopolists that you're  
12 concerned about. But --

13 MR. CARTER: And, I would say that we  
14 would invite the same level of oversight that we're asking  
15 the Commission to apply here. Again, if it doesn't occur,  
16 as the New Hampshire delegation pointed out in the letter  
17 that we've quoted, entities are not going to want to do  
18 new business in New Hampshire. And, New Hampshire ranks  
19 at the very bottom, in terms of the reasonableness of the  
20 third party make-ready work. The evidence of the negative  
21 impact of this particular issue is very compelling. Thank  
22 you.

23 CMSR. HARRINGTON: Just one more  
24 question. What do you believe is causing this

1 intransigence, or at least your perceived intransigence on  
2 the part of the third party? I mean, do they feel as  
3 though they looked at this as a opportunity to make a  
4 large amount of profit, and you're not willing to pay that  
5 much? They simply -- it's too much of an inconvenience?  
6 Do they look at this as such a minor part of their overall  
7 business they just don't want to deal with it? What's  
8 driving them to be, in your words, charging unjust and  
9 unreasonable rates?

10 MR. CARTER: Well, first, they can. I  
11 mean, to be somewhat cryptic.

12 CMSR. HARRINGTON: But everybody that  
13 can doesn't mean they do.

14 MR. CARTER: They have no incentive.  
15 This is a -- we operate -- we should operate in a free  
16 market. With respect to the leverage between the existing  
17 attacher and the new attacher, this is not a free market.  
18 What competitive leverage can a new attacher bring to bear  
19 from an existing attacher in the negotiation of a rate or  
20 the terms of a lower or the terms and conditions of a  
21 lower? There is none. The only threat is litigation.  
22 And, we all know the timing that it would take to resolve  
23 that on a case-by-case basis.

24 Secondly, so, they -- why is it being

1 done? Because it can be done, and nothing says that it's  
2 illegal to do it. Secondly, there is an enormous  
3 opportunity for a financial windfall here. So, there is  
4 certainly an element of opportunism being brought to bear.  
5 For example, my client needs to deploy his facilities on  
6 22,000 poles to fulfill its contractual obligation under  
7 the pending state and federal project. The estimate is  
8 that that consists of approximately 760 miles of cable,  
9 each mile has approximately 30 poles. To give you a  
10 flavor of the magnitude of financial differential here,  
11 between what we believe would be just and reasonable and  
12 subject to market condition, and what currently is being  
13 demanded, our -- as I mentioned, the RFP that we sent out,  
14 in an open market, came back with competitive rates, with  
15 a low of \$22 per lower, an average of about \$54 per lower,  
16 per pole. Again, 22,000 poles. The rate that we are  
17 being asked to pay, and "asked" is probably too soft of a  
18 word, told that we have to pay, is approximately \$250.  
19 And, that's conservative. That's just for the lower.  
20 There are other line items here that apply, and we're just  
21 using the lower as an example that many people can  
22 visualize. That alone results in a differential per mile  
23 of I believe it's a \$6,000 increase per mile, multiply  
24 that by 760 miles; \$7.6 million.

1 CMSR. HARRINGTON: And, you mentioned an  
2 "RFP". Those were sent out to --

3 MR. CARTER: My math is poor. I'll let  
4 people who went further in math in school than I did do  
5 the math. But 6,000 times 760. So, there's an  
6 opportunity for a huge financial windfall here. So, to  
7 answer your question, Commissioner, that this -- that's  
8 the second answer to this is, there's a financial upside.

9 The third is, there is, in many, because  
10 of the current regulatory framework in New Hampshire, it's  
11 been referred to, on the industry basis, as the "wild  
12 west", all right? And, what that means is, there is work  
13 that should have been done, that needs to be done, on the  
14 current pole lines. The lack of oversight at this point  
15 gives the existing attachers, third party attachers, the  
16 opportunity to insist that entities like my client do work  
17 that is unrelated to the make-ready required for their  
18 facility, and should have been done previously. So, the  
19 current void, if you will, also is an opportunity to clean  
20 up someone else's problem.

21 Again, the impact of all this is to  
22 drive out competition from New Hampshire. Because new  
23 businesses that are aware of the notoriously, at present,  
24 high rates being charged for third party make-ready, and

1 the lack of a remedy, and the uncertainty of what will  
2 occur, means that it's a huge disincentive for other  
3 entities, like NHOS, to come into the state and try to  
4 fulfill the initiative of extending broadband service to  
5 rural areas of the state.

6 CMSR. HARRINGTON: And, you had  
7 mentioned an RFP that you got those figures for, the "22"  
8 versus and the "55". The RFP was sent out to actual third  
9 party --

10 MR. CARTER: To contractors, "tell us  
11 what you charge us for a lower."

12 CMSR. HARRINGTON: So, not the actual  
13 third party person that owned the line, but to the people  
14 that they would hire to do the work?

15 MR. JANKO: That is correct. We sent  
16 out an RFP to the industry; we received 9 replies. The  
17 average for that, we use that particular item as an  
18 illustration, but, I assure you, and I'd be happy to share  
19 all the different line items, the types of make-ready that  
20 is done typically. We chose that item because it's most  
21 prevalent, and it's an illustration that people can  
22 understand.

23 We, like Chris had said, we received  
24 rates from third parties just to do that move, to take

1 that facility from one location on the pole, move it down  
2 12 inches, of \$214.50, plus survey fees, plus traffic  
3 management, plus travel, plus any other surveys that they  
4 feel are required. So, what we've done is we went out to  
5 the industry, and, in a lot of cases, some of these --  
6 some of the make-ready you can negotiate with the pole  
7 owners and say "I have these" -- "I have these rates from  
8 these contractors, would you be willing to let me do them  
9 or would you be willing to use these contractors? Here  
10 are the rates." So, we went out to the industry, and, for  
11 that same move, we received, from all regional contractors  
12 that replied, all five of them, an average of \$33.90,  
13 including the traffic management. So, it's not even  
14 apples-to-apples. It goes beyond what the service that  
15 was being provided for ten times the rate. So, the  
16 average is \$33, and we received a low of 22. And, these  
17 are reputable, large contractors, working here in the  
18 Northeast.

19 MR. CARMICHAEL: I would add to that  
20 that most of these contractors, and I believe all of the  
21 third parties that we've been in discussion with, do or  
22 have used these contractors in the past. So, there have  
23 been recent, you know, claims of using in-house and trying  
24 to mask over costs, because it becomes difficult to

1 outline the cost, when those charges go in-house. But  
2 they all have previously used these contractors.

3 And, I just -- if I could just answer  
4 your question a bit, just to conclude the "why are we  
5 getting these?" I think we do get all three, you know,  
6 several flavors, so it is a competitive block. They're in  
7 that space. And, they don't necessarily want to see  
8 another competitive provider in that area, possibly  
9 reducing their margin and bringing in more competition.

10 As well as, you know, some people are  
11 looking at this opportunistically, maybe to cover some  
12 maintenance items and some costs that they have that are  
13 real, they may have maintenance items that are plant  
14 that's in disrepair, moves that they need to do, strand  
15 that they need to correct. And, they're looking at this,  
16 you know, it's a budget, and say, "okay, well, I got to  
17 get this area cleaned up." So, I guess, when we look at  
18 charges in that circumstances, the rate may be correct for  
19 the work, but the work isn't related to us.

20 MR. JANKO: As an illustration, if I  
21 may --

22 MS. GEIGER: Excuse me.

23 MR. KENNAN: Excuse me, madam Chairman.

24 MS. GEIGER: I'm going to object any

1 more to this testimony. I don't think this was noticed as  
2 an evidentiary hearing. I believe these witnesses, if  
3 they want to make this information available to the  
4 Commission, should be sworn in and subject to  
5 cross-examination. I think this is highly irregular for a  
6 prehearing conference, and I object to it.

7 MR. KENNAN: And, I would second that.  
8 And, if it's to be noted that this is a -- in the nature  
9 of an opening statement or a statement of position, that  
10 could be one thing. But this cannot have any evidentiary  
11 weight.

12 CHAIRMAN IGNATIUS: I would agree with  
13 you. I think it's helpful. We've been asking these  
14 questions to understand the context. But the evidence is  
15 under oath, on the stand. And, this is really just  
16 getting us oriented to the scope of what it is that people  
17 are concerned about.

18 MR. CARTER: And, that's exactly what  
19 we're trying to do. We're trying to explain to the  
20 Commission and answer your questions what the problem is.  
21 And, I'm sure that the other parties here will do the  
22 same.

23 CHAIRMAN IGNATIUS: Why don't we move to  
24 the next party. Ms. Geiger.

1 MS. GEIGER: Thank you very much.  
2 Basically, NECTA's position is laid out in the Motion to  
3 Dismiss or, in the alternative, the Motion to Limit the  
4 Scope of this proceeding. NECTA's position is that, it's  
5 clear from the Petition that was filed that the Petitioner  
6 sweeps with a rather broad brush. Basically, the Petition  
7 alleges specific complaints against unnamed parties, but  
8 the relief they request is generic. And, we believe that,  
9 as we've laid out in the motion, that NHOS should be  
10 required to identify those parties with whom it has  
11 specific disputes.

12 We believe that the statutory scheme  
13 that applies here, the pole attachment statute, RSA 374-A,  
14 as well as the Commission rules, the Commission's rules  
15 clearly contemplate an adjudication of disputes between  
16 particular parties. And, here, we believe it's  
17 inappropriate for the Commission to become involved in a  
18 dispute between pole attachers and other would-be  
19 attachers, who, such as NHOS, who necessitate the  
20 performance of make-ready work by existing pole occupants.

21 This dispute is, in the first instance,  
22 governed by the contractual terms regarding make-ready  
23 work that are set forth in the applicable pole attachment  
24 agreements, between a pole owner and the pole attachers.

1 And, here, I believe, in response to comments that were  
2 made earlier by NHOS's counsel, if, for example, if a pole  
3 attacher is, a third party attacher, such as a cable  
4 company, is asked by a pole owner to move its facilities,  
5 the contract between those two parties says that the cable  
6 company must move those facilities within 30 days, or 45  
7 days, depending on the agreement. And, if those  
8 facilities are not moved, the utility can move them, and  
9 then charge the pole attacher.

10 So, there is a remedy here. There is a  
11 way. There is a way to allow, there is a responsibility,  
12 under pole attachment agreements, to do make-ready work  
13 and to give access to new attachers, by requiring existing  
14 attachers to move their facilities within 30 days.

15 CHAIRMAN IGNATIUS: So, just so I  
16 understand that. If a new attacher wants to come forward  
17 and has to move other -- other people's lines have to be  
18 moved to make it work, do they go straight to the pole  
19 owner?

20 MS. GEIGER: That's my understanding.

21 CHAIRMAN IGNATIUS: The pole owner says  
22 "yes", and then everybody falls in? Or, does the new  
23 attacher have to go to each of the individuals who are  
24 already on the pole and make separate arrangements?

1 MS. GEIGER: My understanding is that,  
2 in the first instance, the new attacher has to ask the  
3 pole owner whether or not they can attach to the pole.

4 CHAIRMAN IGNATIUS: And, if there are  
5 two other entities already on the pole, is there a charge,  
6 a separate charge for each of them, or is the charge one  
7 charge for all of the work that gets done on the pole?

8 MS. GEIGER: My understanding is that  
9 each attacher -- if each attacher has to do make-ready  
10 work, then they may charge for it.

11 CHAIRMAN IGNATIUS: So, how does someone  
12 know, just in a sort of generic sense, how does someone  
13 know, who wants to attach on a pole, what each of those  
14 individuals will charge, once they get the go-ahead from  
15 the pole owner to make them move?

16 MS. GEIGER: I'm sorry, I'm not -- I'm  
17 not able to answer that question today. I'm not prepared  
18 to engage in a Q&A about specific instances. And, I think  
19 that that raises the very point that I -- or underscores  
20 the very point that our motion indicates. This is a --  
21 these issues should be considered on a case-by-case basis,  
22 because each pole out there is comprised of different  
23 facilities. And, I think a one-size-fits-all solution, as  
24 is what's being suggested here, is inappropriate.

1                   CHAIRMAN IGNATIUS: Well, let me just --  
2 I realize it's not time to go through all the facts, but  
3 you said this is resolved -- the remedy here is through  
4 the contracts, between the pole owner -- as between the  
5 pole owner and the new -- the would-be new attacher is the  
6 contract you're talking about? Or, is it -- are you  
7 talking about a contract between --

8                   MS. GEIGER: No. There's an existing  
9 contract between the pole owner and cable companies, for  
10 example.

11                   CHAIRMAN IGNATIUS: So, each of the  
12 already-attached entities?

13                   MS. GEIGER: Right. And, in that  
14 contract, there are provisions that require the cable  
15 company, for example, to move their facilities within 30  
16 days, if a pole owner asks them to do that. And,  
17 typically, those requests are made, because new attachers  
18 want space on the pole. So, there is -- there is a  
19 mechanism that requires existing attachers to move their  
20 facilities within 30 or 45 days, what's ever in the  
21 contract. So, to say that "there is absolutely no remedy"  
22 or "no guidelines" or, you know, "things are just sort of  
23 left at will", I think is a mischaracterization, as my  
24 motion indicates. Third party attachments and payment of

1 make-ready costs are within the purview of pole attachment  
2 agreements. And, a determination of "what is a reasonable  
3 make-ready cost?", should be made on a case-by-case basis,  
4 depending on the poles that are implicated.

5 We shouldn't use this docket as a  
6 generic one to examine broad or general issues, such as  
7 what kinds of formulas should apply here. I think here  
8 we've been given -- you've been given this morning some  
9 very, very specific information and specific complaints,  
10 and we don't know who those complaints are about. And,  
11 that's basically what we're asking, at least in the first  
12 instance, is, at the very least, the Petition should  
13 either be dismissed for failure to state with specificity  
14 the parties against whom it is complaining, and, in the  
15 alternative, if the Petition is not dismissed, the  
16 Petitioner should be required to provide with specificity  
17 the particular pole attachers that are causing the  
18 problems that they're complaining of, and to give the  
19 Commission specific facts that relate to those problems.

20 We don't think that those disputes  
21 should be turned into a generic docket. We think they  
22 should be handled on an individual basis, as is currently  
23 contemplated by the pole attachment rules, the 1300 rules,  
24 which say that, if a pole attacher and pole owner, after

1 negotiating in good faith, can't reach agreement, then  
2 they come to the Commission. And, here, we don't know,  
3 because we don't know which parties the NHOS is  
4 complaining against, we don't know the extent to which  
5 they have undergone or engaged in good faith negotiations.  
6 And, so, we don't know if the issues are ripe for  
7 adjudication.

8 So, I would -- NECTA stands on its  
9 written motions, and would be happy to answer any further  
10 questions. Thank you.

11 CHAIRMAN IGNATIUS: All right. Thank  
12 you. Commissioner Harrington.

13 CMSR. HARRINGTON: Well, I'm assuming  
14 that, where you talk about "this should not be a generic  
15 order on this", that it would also apply to the newest  
16 request on a rulemaking as well?

17 MS. GEIGER: Thank you, Commissioner  
18 Harrington. That's a good point. I don't think we've  
19 really spoken to that yet. And, I'm really not prepared  
20 to do that. We got this after business hours yesterday, I  
21 believe after 5:00. I haven't had a chance to -- NECTA's  
22 executive director hasn't had a chance to poll the  
23 individual members of NECTA. So, I'm not in a position to  
24 formally provide a position on that.

1                   But I believe that it's fair to say  
2                   that, although this is called a "position statement", what  
3                   it looks to me like is a petition for a rulemaking under  
4                   541-A. And, I'm just not in a position to take a -- not  
5                   in a position to take a -- not in a position to take a  
6                   position on a rulemaking petition.

7                   CHAIRMAN IGNATIUS: Thank you. All  
8                   right. Mr. Kennan, are you next?

9                   MR. KENNAN: I guess so. Thank you,  
10                  madam Chairman. I'm not even sure where to begin,  
11                  because, even in the short time that this docket has  
12                  opened, it seems to be taking a lot of twists and turns.  
13                  So, let me see if I can at least state with some degree of  
14                  clarity where I think we are on this. CANNE's interest in  
15                  this proceeding at this stage is in the scope of the  
16                  proceeding. And, we've alluded to and we've heard, I  
17                  think, the gist of the issues already today. Is this a  
18                  complaint against particular third party attachers or is  
19                  it something like a generic rulemaking proceeding? NHOS's  
20                  original petition looked like a complaint versus one or  
21                  more individual third party attachers. It claimed that  
22                  rates are too high. But it doesn't name names. And, it  
23                  did seem that NHOS does have problems with individual  
24                  existing third party attachers.

1                   The gentleman, Mr. Janko I believe his  
2 name is, said that "one existing third party attacher was  
3 trying to charge \$214." Well, if they have a problem with  
4 one existing third party attacher, why haven't they named  
5 that person? Without naming names, filing a petition as  
6 they did, without naming names, puts the third party  
7 attachers in an impossible and unfair position. How can  
8 they defend themselves? They either have to come forward,  
9 identify themselves, and, in essence, incriminate  
10 themselves, saying "I'm one of those people that they're  
11 complaining about", in order for them to defend  
12 themselves. I think that's fundamentally unfair.

13                   So, if this proceeding is indeed a  
14 complaint about the rates of particular attaching  
15 entities, then CANNE believes that NHOS should file a  
16 proper complaint that identifies those specific parties.  
17 The Commission should notice it appropriately based on  
18 that complaint. And, let those parties come in and defend  
19 themselves.

20                   But this morning, and in the filing,  
21 which I received indirectly from another party five  
22 minutes before the hearing, it now looks like NHOS is  
23 looking for something very different. They're looking for  
24 an investigation, whose objective is to formulate general

1 rules and policies for make-ready work. That opens up a  
2 whole other can of procedural, substantive, and policy  
3 worms.

4 First of all, as Ms. Geiger alluded, it  
5 begins to look like a request for a rulemaking. And, I  
6 think, Commissioner Harrington, you hit it right on the  
7 head. It's a generic proceeding to adopt policies, this  
8 is in NHOS's position statement, adopt policies, establish  
9 methods, standards, and definitions. And, I think Mr.  
10 Carter even said, in so many words, "establish rules", is  
11 a rulemaking proceeding. Well, that's governed, as we  
12 know by a whole different set of procedures under RSA  
13 541-A:3.

14 Furthermore, if indeed there are other  
15 issues associated with make-ready that should be covered  
16 by a rulemaking, let's get them all on the table. I think  
17 Mr. Carter alluded to other parties potentially having an  
18 interest here. If they have problems, if they have an  
19 interest, let's find out what those are. If this is going  
20 to be a rulemaking, and, parenthetically, if the  
21 Commission has the authority to do that under its rules,  
22 and I'm not really speaking to that this morning, but, if  
23 it's going to be something like that, then let's notice it  
24 properly, we believe. Let's get all input from anybody

1 who might be affected. Let's prioritize the issues based  
2 on the Commission's best judgment, as to what's the most  
3 important issues for the state as a whole in this area,  
4 and proceed on that basis.

5 But, right now, we're neither fish nor  
6 fowl. And, our primary interest at this point is to have  
7 clarity as to the specific direction of this proceeding,  
8 what's it really about, and that proper procedural rules  
9 should be followed. Thank you.

10 CHAIRMAN IGNATIUS: Thank you.

11 CMSR. HARRINGTON: Just one question.  
12 So, at this point, you're not debating the substance of  
13 the issue about "access to poles" and "rates" and all  
14 this, but just the process of how we go about that to  
15 address the issue?

16 MR. KENNAN: I don't think -- I don't  
17 think that issue has really been teed up yet,  
18 Commissioner, and that's the point I'm trying to make.

19 CMSR. HARRINGTON: All right. Thank  
20 you.

21 CMSR. SCOTT: One quick clarification  
22 also. Similar to Commissioner Harrington's question to  
23 Attorney Geiger. Do your clients plan on responding to  
24 the late submission you discussed?

1 MR. KENNAN: I can't answer that,  
2 Commissioner Scott, because, as I said, I received it  
3 indirectly five minutes before the hearing started. And,  
4 I haven't had a chance to confer with them.

5 (Chairman Ignatius and Commissioner  
6 Scott conferring.)

7 CMSR. SCOTT: Thank you.

8 MR. KENNAN: You mean this morning's --

9 CMSR. SCOTT: For you this morning, for  
10 us last night.

11 MR. KENNAN: Yes. Well, I hadn't seen  
12 it. So, I can't say.

13 CMSR. SCOTT: Fair enough.

14 CHAIRMAN IGNATIUS: Let's -- we'll give  
15 you an opportunity at the end, as the moving party, but,  
16 Mr. Epler.

17 MR. EPLER: Yes. Thank you. First of  
18 all, I would just like to reserve the right to respond in  
19 writing, to the extent necessary. But let me see if I can  
20 quickly try to summarize our position. As the Commission  
21 is aware, Unitil is a pole owner. We own poles both  
22 jointly and solely. And, it's our understanding that New  
23 Hampshire Optical is seeking to attach to a number of our  
24 poles. It's not clear, based on the pleadings, whether or

1 not there's -- the dispute that is alleged in their  
2 petition involves any of the poles in Unitil's services  
3 territory or any of the third party attachers who are  
4 attached to Unitil's poles.

5 At the risk of testifying, I did contact  
6 our Manager of Operations in both the Seacoast and the  
7 Capital area, and they were at least unaware of any  
8 disputes at this time. My understanding is that, New  
9 Hampshire Optical has applied to attach to our poles. We  
10 have done some make-ready work estimations and  
11 pre-construction surveys. They have paid monies. And, I  
12 don't know if they're in the process of being attached.  
13 So, I'm just not aware of that, and can't tell by the  
14 Petition what the status is with regard to our poles.

15 In terms of some of the things that's  
16 been stated already this morning, we would agree in part  
17 and disagree in part with NECTA's motion. We would agree  
18 that we would object to treating this matter generically.  
19 It's not clear whether or not there is a generic problem.  
20 At least that I have been unaware or my company has been  
21 unaware of disputes among third party attachees. So, it's  
22 not clear if it goes beyond this particular petitioner or  
23 not. At least there's no facts yet establishing that.

24 We would disagree that this particular

1 dispute may be governed by the pole attachment agreements.  
2 As the Petitioner has said, the pole attachment agreement  
3 is a contract between the pole owners and the third party  
4 attachees. As a pole owner, we have oftentimes limited  
5 influence or limited rights with respect to relationships  
6 between the third party attachees on our poles. And, as a  
7 result, that's one of the reasons why you have double  
8 poles. The issue where a pole is replaced by the electric  
9 company, or at least the maintaining party, which would be  
10 the electric company or the telephone company, and then  
11 you'll see a pole right next to it that still has some  
12 lines attached to it. Even though there is, as indicated,  
13 provisions in the pole attachment agreements to require  
14 the attachees to move their lines, oftentimes that does  
15 not occur. There's liability issues associated with the  
16 pole owner going on his own to move those lines, in terms  
17 of equipment and so on. So, there's often limited ability  
18 from the pole owner to be able to make things happen.  
19 Particularly in terms of the types of disputes that  
20 they're talking about, it's not only just access and  
21 timing, but, apparently, it's also the cost. There is  
22 nothing in the pole attachment agreement that governs the  
23 relationship between attachees.

24 I may regret stepping into this part of

1 it, but, if I can suggest a remedy, I don't think that the  
2 generic approach is appropriate here. But it would seem  
3 that, as has been mentioned by previous counsel, if there  
4 are particular attachees that are a problem, they should  
5 be named and given an opportunity to present their side.  
6 And, certainly, under the Commission auspices, under the  
7 statute, and the rules, to try to resolve this dispute,  
8 the location, the specific routes should be delineated,  
9 the poles that they're seeking to attach should be  
10 identified. And, certainly, the state has an interest, or  
11 at least that's my understanding, the state has an  
12 interest in having this matter resolved. That, by clearly  
13 identifying what's at issue here, that would seem to be  
14 the way to resolve it most quickly.

15 I could state that we -- Unitil had been  
16 involved with a number of disputes with some attachees.  
17 And, without putting them on the spot, the Staff was able  
18 to get involved in some of those disputes, and was very  
19 helpful in resolving them, without having to seek orders  
20 from the Commission and so on. So, I just suggest that as  
21 a remedy here. Thank you.

22 CHAIRMAN IGNATIUS: Thank you. Mr.  
23 Epler, does the Company have a tariff on file for  
24 attachments to your poles, when it's an attachment --

1 well, I guess my question doesn't even make any sense.

2 I'll withdraw it.

3 MR. EPLER: Well, I mean, I can answer.

4 We do not have tariffed rates for attachments. We, I  
5 believe, and I would have to verify this, I believe that  
6 we do have a schedule of fees. But it also varies on a  
7 case-by-case basis, depending upon the height of the pole,  
8 the number of attachees, the particular town it's located  
9 in, because traffic charges are different from town to  
10 town, traffic control charges. The loading on the pole,  
11 whether or not the pole needs to be replaced. There are a  
12 number of specific factors that go into the make-ready  
13 work and pre-construction survey.

14 CHAIRMAN IGNATIUS: And, is the schedule  
15 of fees publicly available anywhere or does one have to  
16 already be in negotiations on a particular contract to  
17 attach before they would know?

18 MR. EPLER: Again, I would have to check  
19 whether or not we have a specific schedule of fees. I do  
20 not believe it's publicly available, if one exists.

21 CHAIRMAN IGNATIUS: Thank you. All  
22 right. Mr. Fossum.

23 MR. FOSSUM: Thank you. Staff, I guess,  
24 at this point, doesn't have a whole lot to add to what has

1       been said already.  As to the initial, and presuming we're  
2       taking positions of parties, as well as statements about  
3       the Motion to Dismiss, as to the initial petition that was  
4       filed, Staff's position is, essentially, we have no  
5       position.  To the extent that it is a complaint about  
6       specific parties and specific actions, I think we would  
7       agree that, in order to facilitate resolution of those  
8       issues, those parties and the specific actions complained  
9       about should be named and made more apparent.

10                    To the extent, based on the language  
11       either in the initial position -- or, in the initial  
12       petition or in the position statement that has been  
13       subsequently filed, that this is a request for a  
14       rulemaking, then Staff will certainly engage with  
15       interested parties in a rulemaking, if that is ultimately  
16       where the issue is to go.

17                    And, at the moment, I believe that's all  
18       that Staff has.

19                    CHAIRMAN IGNATIUS:  All right.  Mr.  
20       Fossum, I don't know if you've already thought about this  
21       before, if it's not already clear to everyone, this is a  
22       matter of first impression, and we have not yet worked  
23       through much to do with the statute or these rules.  And,  
24       so, we're all exploring it together.

1                   Have you considered whether the terms in  
2                   our 1300 rules that talk about provisions for make-ready  
3                   work, time, and standards for rates, apply solely to rates  
4                   charged by the pole owner or somehow, by extension, also  
5                   apply to any third party make-ready work and timing, both  
6                   rates and timing that would be involved?

7                   MR. FOSSUM: Personally, no, I have not  
8                   given that issue any particular consideration. And, at  
9                   least so far as I know, I mean, Staff has not discussed  
10                  that issue with any specificity.

11                  CHAIRMAN IGNATIUS: Commissioner  
12                  Harrington?

13                  CMSR. HARRINGTON: No.

14                  CHAIRMAN IGNATIUS: Oh, I'm sorry. Mr.  
15                  Carter, you had something you were rising on before to  
16                  respond to. Is there anything further you would like to  
17                  add?

18                  MR. CARTER: Thank you very much. To  
19                  reply, on the procedural question, the threshold question  
20                  raised by the Motion to Dismiss, I think the various  
21                  comments that we've heard today tend to prove the point  
22                  that the Commissioners should exercise its statutory  
23                  authority to investigate.

24                  Counsel for New England Cable argues

1 that "the pole attachment contracts govern this". We  
2 disagree. Unutil disagrees. There's a question there  
3 that needs to be looked into. What I have not heard, and  
4 I think this is critical, is apart from that contract,  
5 which, again, is between the owner and the existing  
6 attachers, not the new attachers, where do these standards  
7 -- where would the standards come from? We submit that we  
8 have not been able to identify them.

9           Having complaints between -- over third  
10 party make-ready work resolved piecemeal on an individual  
11 basis, first, wouldn't address what we believe is the  
12 overarching problem for the PUC to look into, consistent  
13 with the FCC recommendations. Second, again, what would  
14 the basis of the decision be? Rule 1304.06 is the  
15 applicable provision of 1300 and it regards to rates  
16 charged by pole owners, it seems unequivocal to us that  
17 the standards that are laid out in this provision don't  
18 apply to the rates and conditions being demanded by the  
19 third party attachers now.

20           In terms of whether names need to be  
21 named, I submit, for what purpose? No one today has  
22 articulated that they have disagreed with the fact that  
23 there's a problem. Apart from a reference to the pole  
24 attachment contract, no one has identified a standard that

1 could be used to resolve this issue. And, so, I submit  
2 that what we have heard this morning militate in favor of  
3 the PUC exercising its authority to look into this. Thank  
4 you.

5 CHAIRMAN IGNATIUS: Well, in fairness,  
6 to say "no one has", I forget how you phrased it, sort of  
7 "has said there isn't a dispute" or "isn't a problem", I  
8 think what I heard was people saying "I don't know if he's  
9 talking about me or not. And, I'm not going to guess that  
10 I'm the one that's been the difficult party in their  
11 minds. And, how do you defend against an unknown?" I  
12 mean, I have some sympathy for that argument. Is that not  
13 a fair concern on their part? They don't know what --  
14 who's the one that's being complained about.

15 MR. CARTER: My point, Commissioner, is  
16 somewhat different. It's no one has said "there is a  
17 solution for this issue." I submit that our position to  
18 the Commission this morning and in our papers is that this  
19 is a real and existing problem. In our written statement,  
20 we provide some support for that. First, the Commission  
21 can confirm for itself "is there a problem?" Second,  
22 having done that, "is this a problem that should or can be  
23 resolved on a individual basis between third party  
24 attachers?" Given that no contract applies, and that the

1 current statutes and rules don't address this problem.

2 So, I think those are the two critical issues that should  
3 be taken into account in evaluating the Motion to Dismiss.

4 It's not so much -- the question is  
5 somewhat different than whether the other third party  
6 attachers who -- existing owners who express an opinion  
7 today whether they are involved in a dispute, they may be  
8 doing nothing wrong. Or, they may have had no problem.  
9 But I think the Commission certainly has the authority to  
10 determine whether we are accurate in identifying a  
11 problem, which is raising competitive concerns, safety  
12 concerns, in terms of work not being done. And, if there  
13 is a problem, whether it's a problem that should be  
14 addressed. Thank you.

15 CHAIRMAN IGNATIUS: And, so that, if --  
16 assuming the Motion to Dismiss were denied, is it your  
17 expectation that you would then come forward with specific  
18 allegations of companies, charges, requirements for work  
19 you think are inappropriate? What would be the next step  
20 in getting to a decision?

21 I mean, we either deal in factual  
22 adjudication, with evidence, and need to make a  
23 determination against the statutes' standards, or we deal  
24 in generic, policy-driven rulemaking. And, I am a little

1 confused. Because it seems like this is something of a  
2 blend of the two. And, I'm just a very practical person.  
3 I think, "all right, what do I do tomorrow, and what are  
4 we going to hear?" Or, is there going to be testimony on  
5 particular facts, and we follow that track? Or, are we  
6 going to have a public policy comment period and follow  
7 that more legislative path?

8 MR. CARTER: Well, on the first  
9 question, on whether "specific facts are required", we  
10 will certainly be prepared to, if the Commission  
11 undertakes an investigation that we've requested under RSA  
12 365:5, that certainly will deal with specifics and not  
13 with generalities. Second, we believe that the Commission  
14 will then have the authority to help, having identified,  
15 which we expect it will, or validated the problem that's  
16 been raised, I expect the Commission will then be in a  
17 position to determine what the appropriate solution will  
18 be. As it would, I submit, under any case where a  
19 petition is brought under this statutory provision. And,  
20 that's one of the reasons why we're here today. We think  
21 that the Commission can be useful in helping to fulfill  
22 the problem and solve this problem in an expeditious way,  
23 providing guidance to third party attachers. If,  
24 ultimately, this results in a new rulemaking, or something

1 of that -- akin to that, I'm not in a position right now  
2 to anticipate if that's what the ultimate outcome will be.  
3 But I would suggest that we are exactly in the zone that  
4 RSA 365:5 contemplates, which is, we're asking the  
5 Commission to look at an area that's clearly within its  
6 jurisdiction. And, we believe needs to be addressed, not  
7 simply on an individual basis, but more statewide. Thank  
8 you.

9 CMSR. SCOTT: Maybe I can clarify at  
10 least what would be helpful for me is. You're using some  
11 examples, for instance, up to "\$250", the implication is,  
12 is "that's excessive or unreasonable". It's hard for me  
13 to, you know, for me personally, to make that  
14 determination without hearing from the person who's  
15 claiming you need -- "I need to charge those rates" and  
16 why they need to do that.

17 MR. CARTER: Absolutely. And,  
18 Commissioner, I am by no means mean to suggest that  
19 defining those facts is not going to be a part of this  
20 process. We did not put those facts in our initial  
21 filing, because we don't see this as a dispute that's  
22 limited between NHOS and a particular existing attacher.  
23 That's why we chose this route. This is a problem that  
24 exists, and it's going to repeat itself, and we're here

1 today, in a technical session, I would suggest, to help  
2 answer some of the questions, in terms of where we go from  
3 here.

4 CHAIRMAN IGNATIUS: Thank you.

5 Commissioner Scott -- Commissioner Harrington.

6 CMSR. HARRINGTON: Just a couple of more  
7 questions on that. It seems as if we've, obviously, had  
8 pole attachments added, a number of poles, thousands of  
9 poles probably across the state, thousands of attachments  
10 have been put on there, and yet this is the first time  
11 this issue has been brought up. So, it may be generic in  
12 your issue, but it doesn't seem to be generic at least  
13 across the state, that people have been able to work this  
14 thing out. So, are you dealing with, I know you don't  
15 want to name names at this point, but -- all I can think  
16 of is that bad -- the Seinfeld episode on that, I'm sorry.  
17 The Chinese restaurant? But do you have a problem with  
18 multiple third parties or is it basically most of your  
19 problems are limited to a single entity?

20 MR. CARTER: Several.

21 CMSR. HARRINGTON: Several. Okay. And,  
22 you've also mentioned now, in your original petition, that  
23 the PUC should exercise "its authority to investigate  
24 under 365:5", which you just reiterated that. But, in

1 your most recent one, of I guess yesterday, the 6th, it  
2 says you "submit this Statement of Position regarding the  
3 need for rulemaking to ensure that charges for third party  
4 make-ready work are just and reasonable." So, it seems as  
5 if you kind of requested two different paths here  
6 simultaneously. So, are you suggesting the Commission  
7 should exercise its authority to investigate first, and  
8 determine if there is a need for a rulemaking, and then  
9 possibly pursue that? Or, are you requesting that we jump  
10 right into a rulemaking now, and maybe do the  
11 investigation on the same, in parallel paths? I'm not  
12 quite sure what you're requesting at this point. They  
13 seem to be two different paths.

14 MR. CARTER: Yes. I understand your  
15 question. Ideally, we would come to some -- get some  
16 guidance from the PUC that will help address the immediacy  
17 of the problem. We believe there is a need for reform and  
18 there is a need for standards. That very well may only be  
19 accomplishable by rulemaking. From the perspective of my  
20 client, its problem is more immediate than I expect can be  
21 mitigated by going through the entire rulemaking process.  
22 I think that's the best answer I can give you.

23 CMSR. HARRINGTON: But, at this time,  
24 you're not specifically requesting a formal rulemaking

1 process?

2 MR. CARTER: No.

3 CMSR. HARRINGTON: Just so we get that  
4 straight?

5 MR. CARTER: No.

6 CMSR. HARRINGTON: Okay. Thank you.

7 CHAIRMAN IGNATIUS: Is this an  
8 opportunity for mediation through Commission oversight,  
9 either with an internal mediator or someone under  
10 contract? Has anyone thought about that? Whether that's  
11 a useful mechanism? Ms. Geiger.

12 MS. GEIGER: Yes. Thank you, Chairman  
13 Ignatius. I hadn't given it a great deal of thought, but  
14 I think it's an excellent suggestion. There aren't too  
15 many matters coming before the Commission that tee  
16 themselves up as readily for mediation as something like  
17 this. It seems to me that, to the extent that we have a  
18 particular complaint here, who has some specific disputes  
19 that it now says against multiple parties, it seems to me  
20 that mediation might be a good way to address this  
21 specific issue.

22 The other thing I would note is that,  
23 while the Petitioner is asking the Commission to exercise  
24 its authority under RSA 365:5, it's my understanding that

1 that statute applies to the Commission's authority to  
2 investigate rates, terms and charges by public utilities.  
3 And, certainly, there are some members of the NECTA,  
4 namely, cable associations -- or, cable companies, excuse  
5 me, over whom this Commission does not have any authority.

6 So, it's NECTA's position that the --  
7 again, we're not going to beat a dead horse here, but I  
8 think that the Commission understands that, and most  
9 parties here believe that an adjudication of particular  
10 facts should not lead to a generic result. In other  
11 words, if there are specific problems, obviously, the  
12 Commission should look into them, and resolve them through  
13 mediation or otherwise. But we do not think that a few  
14 problems should give rise to a generic solution that may  
15 not be warranted. Thank you.

16 CHAIRMAN IGNATIUS: Thank you. Anyone  
17 else with a thought on whether mediation would be  
18 appropriate here? Mr. Carter.

19 MR. CARTER: Yes. On behalf of NHOS, it  
20 would be helpful in the short term. I don't believe it  
21 addresses what we believe is an existing problem and will  
22 be a long-standing problem that needs to be addressed,  
23 which, again, is why we've asked for this investigation.  
24 But, as to -- we certainly would be in favor of mediation

1 to address the short-term, the immediate issues.

2 CHAIRMAN IGNATIUS: Thank you. Mr.  
3 Kennan.

4 MR. KENNAN: Madam Chairman, if I may.  
5 I think, for my client, it's very hard to say that, at  
6 this point, mediation often sounds like a good idea, but  
7 we still don't know who's in, who's out, exactly what are  
8 the issues, and what there is to be mediated. So, it's  
9 very hard for us to take a position on that one way or the  
10 other, again, without knowing exactly what we're dealing  
11 with here. So, I would reiterate CANNE's request that the  
12 scope of the proceeding be clarified, that we know exactly  
13 what we're driving toward, what the objective is, and  
14 perhaps, at that point, mediation might be appropriate,  
15 but I can't take a position on that right now, without  
16 knowing the specifics of the proceeding.

17 CHAIRMAN IGNATIUS: All right. Are  
18 there any other matters people wanted to raise with us  
19 this morning?

20 (No verbal response)

21 CHAIRMAN IGNATIUS: I think the  
22 challenge is what can usefully be done in the following  
23 technical session. In the normal course, it's a little  
24 more straightforward where we're going and people develop

1 a procedural schedule, work through some of the scoping  
2 issues that follow a more normal path. In this case, if  
3 there's the ability to continue to explore that, once we  
4 leave, I'd encourage you to do that. If you're not able  
5 to, then, obviously, we will -- and, if you're able to  
6 make any kind of recommendation, we'll take that into  
7 consideration.

8 If you're not able to make any progress  
9 on that, and you're still kind of where we are at this  
10 point, then we'll speak to it without any further input,  
11 over than, obviously, the further Motion to Dismiss  
12 responses that you have a time frame that you're allowed  
13 under our rules to respond.

14 So, if there's any opportunity to try to  
15 develop a schedule, based on -- sometimes we see  
16 situations where people will develop two schedules, say  
17 "If (a), if it's goes in a certain path, this is the  
18 schedule; if it goes another path, it goes that way." If  
19 there's any ability to work that up, that might be helpful  
20 as well. But this one is a bit amorphous. So, I under  
21 stand if it proves more of a challenge than people are  
22 able to come to a resolution on. Anyway, it's worth a  
23 try.

24 And, if there's any other technical

1 details that people can share with one another and help  
2 advance everyone's thinking on this, I'd encourage you to  
3 do that as well. And, if there's any further  
4 recommendations, any agreed upon stipulation of facts,  
5 anything that the parties do come to agreement on,  
6 obviously, they can be filed with us, either through Staff  
7 or individual parties, and we'll take them into  
8 consideration.

9           So, I appreciate everyone's thoughtful  
10 responses this morning. We did go into more than what is  
11 traditionally done in a prehearing conference. But you  
12 get everybody here, it's an opportunity to really explore  
13 positions in a way that you can't do when you're just  
14 looking at papers. And, so, we appreciate your  
15 willingness to go there. Mr. Kennan, yes.

16           MR. KENNAN: Madam Chairman, I'm really  
17 not trying to be difficult about this, and I really don't  
18 want to beat a dead horse. But, again, it seems very  
19 difficult to try to "work something out" in a technical  
20 session without knowing if particular parties are involved  
21 or not. It's very hard for someone to commit to something  
22 through me, their attorney, without knowing if they're in  
23 and out and what exactly they're committing to.

24           So, I'm certainly willing to stay. But

1 I just want to state at the outset that I think that, even  
2 that request, puts parties in a somewhat difficult  
3 position, because they don't know what's involved and they  
4 don't know what their particular involvement might be.

5 CHAIRMAN IGNATIUS: And, perhaps, when  
6 we're off the record and in a slightly different format  
7 here, there might be more -- you know, might make more  
8 progress on that, but I'll leave that to the Petitioners.

9 Unless there's anything else?

10 (No verbal response)

11 CHAIRMAN IGNATIUS: We'll stand  
12 adjourned until further proceedings. And, we will take  
13 whatever we see under -- in response to the Motion to  
14 Dismiss or if anything does come of the technical session  
15 efforts under advisement.

16 (Chairman and Commissioners conferring.)

17 CHAIRMAN IGNATIUS: Thank you.

18 **(Whereupon the prehearing conference**  
19 **ended at 11:41 a.m., and a technical**  
20 **session was held thereafter.)**