

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket DT 08-146

segTEL, Inc.

Request for Arbitration Regarding Access to Utility Poles

BRIEF OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Public Service Company of New Hampshire (“PSNH”), by its undersigned attorney, files the following brief of the issues pursuant to the direction contained in the Secretarial Letter of Public Utilities Commission (“Commission”) Executive Director and Secretary Debra A. Howland, dated April 20, 2009:

I. Preliminary Statement

The parties have been directed by the Commission to brief the following issues in this matter:

1. Whether the underlying easements provide PSNH with the authority necessary to grant segTEL a license to attach to its poles in this matter;
2. Whether PSNH has a legal obligation to grant segTEL a license to attach to the poles regardless of whether or not PSNH has sufficient authority under the easements; and,
3. Is segTEL obligated pursuant to Section 6.2 of the Pole Attachment Agreement, to obtain authorization to construct, operate and/or maintain wires on the poles at issue from the owners of the land where the poles are located?

On May 14, 2009, PSNH and segTEL, Inc. (“segTEL”) filed a Stipulation of Facts as to certain uncontested facts in this matter (the “Stipulation”). Previously, on February 23, 2009, each of the parties also served and filed responses to data requests propounded to each other, and propounded by Commission Staff to each of the parties.

II. Factual Background

PSNH and segTEL are parties to a Pole Attachment Agreement dated April 6, 2004, which among other things provides for a process and procedure whereby segTEL may apply for and be granted a license to attach wires to PSNH's solely or jointly owned utility poles in the State of New Hampshire. (Stipulated Exhibit 1). Since executing the Pole Attachment Agreement in 2004, segTEL has never filed any complaint with the Federal Communications Commission ("FCC") challenging any term or provision of the Agreement as unfair, unreasonable or unenforceable on any grounds. (segTEL Response to PSNH Data Request 1-2). Likewise, other than the present proceeding, segTEL has never made any complaint to the Commission involving the Pole Attachment Agreement or any of its terms.

Pursuant to the Pole Attachment Agreement, segTEL submitted two pole attachment license applications to PSNH dated January 18, 2008, for licenses to attach to 90 PSNH poles in New London, and 11 PSNH poles in Sunapee, New Hampshire. (Stipulated Exhibit 3).

Unlike all other such applications and attachment licenses requested by segTEL and granted by PSNH for poles in numerous locations throughout New Hampshire, which to the best of both parties' knowledge and belief were for poles located exclusively within the public highway right of way, most or all of the 101 poles which are the subject of segTEL's pole attachment license applications in this matter are located within PSNH right of way on private property. (Stipulation, Nos. 4 and 5). PSNH has easements for its right of way on the private property where these poles are located, all of which easements the parties have agreed to mark as Stipulated Exhibit 2 (copies of the easements were included as attachments to PSNH's Response to Staff's Data Request 1-

004). The poles are part of a 34,500 volt (34.5 kV) electrical distribution power line designated as the PSNH 316 line. (Stipulation, No. 9). The PSNH easements and the poles which are the subject of this matter are used by PSNH in its electric utility business of distributing electric power and delivering electric service to its customers. (Stipulation, No. 9).

segTEL's pole attachment applications are for the attachment of fiber optic lines for telecommunications purposes; these fiber optic lines will be owned, operated and maintained by segTEL, and will be used entirely in its business of providing telecommunications and information services, independent of PSNH's electric utility business. (Stipulation, No. 12).

After PSNH's receipt of segTEL's pole attachment applications and the required prepayments for a pre-construction survey, the parties are not in agreement as to what steps were then taken by PSNH in processing the applications. PSNH maintains that it performed an initial field survey of the PSNH 316 line poles involved, but did not complete a pre-construction survey with segTEL representatives to determine the need for make-ready work. segTEL acknowledges it did not receive any make-ready cost estimate from PSNH. (segTEL Response to PSNH Data Request 1-14). Instead, PSNH responded to segTEL's pole attachment applications by a letter dated August 6, 2008. (Stipulated Exhibit 4).

In its letter, PSNH informed segTEL that it had completed a review of segTEL's pole attachment applications and the easement rights owned by PSNH in the private property locations of the poles, had determined that its easements "do not clearly allow PSNH to grant a third party telecommunications company . . . permission to use and occupy PSNH's easement corridor for the installation and operation of its private telecommunication line or cable", and concluded that it did not "own or control the

rights in these locations” that would allow PSNH to grant segTEL’s pole attachment applications. (Stipulated Exhibit 4). segTEL was further informed that if it wished to pursue attachment to PSNH’s poles in these locations, it would be necessary for segTEL to first secure the necessary private property rights sufficient to allow it to install and operate its facilities on PSNH’s poles in PSNH’s right of way, and then to resubmit its attachment applications for processing. (Stipulated Exhibit 4).

III. Legal Arguments

A. The PSNH easements do not provide PSNH with the authority necessary to grant segTEL a license to attach to PSNH’s poles in this matter.

The question of when an incumbent utility owns or controls a right of way to the extent necessary to permit attachment access is a matter of state law¹. Therefore, the easement law of the State of Hampshire must control the question of whether the PSNH easements do or do not provide PSNH the authority necessary to grant segTEL authorization by license to attach to PSNH’s poles in this matter.²

There is no presumption under New Hampshire law that a right of way owned and used by an electric utility for power line purposes may be made available to third parties for telecommunications uses unrelated to the electric utility’s business. There is not a single reported case in New Hampshire which supports such a presumptive trampling of the private property ownership rights of the underlying landowners whose land is encumbered by a power line right of way.

New Hampshire law recognizes the basic premise that an easement is distinct from ownership. An easement is a nonpossessory right to the use of another’s land; it merely grants the easement holder the right to enter and make use of the property of

¹ Please see the arguments set forth by PSNH in Section III.B. of this Brief.

² Because the interpretation of the New Hampshire easement rights in this case depends upon the application of New Hampshire law, segTEL’s citation to rulings and case law interpreting easement questions in other states such as Georgia or Alabama are not controlling.

another for a particular purpose. *Arcidi v. Town of Rye*, 150 N.H. 694 (2004). Whether the easement is “appurtenant” (i.e., of benefit to an identifiable parcel of land) or “in gross” (i.e., of benefit to the holder personally as opposed to an identifiable land parcel), the axiom is the same -- an easement creates only a right to use the land of another. *Id.* at 698-99; see also, *Tanguay v. Biathrow*, 156 N.H. 313 (2007). It does not equate to ownership of the land burdened by the easement, nor does it allow the holder of the easement to act under its easement as if it were the owner of that land. PSNH was therefore not free to ignore the private property rights of the underlying landowners in assessing whether or not it owned or controlled easement rights sufficient to allow segTEL to attach to PSNH’s poles situated in right of way on private property

The leading case in New Hampshire on the interpretation of the scope and permissible use of electric utility easements is *Lussier v. N. E. Power Co.*, 133 N.H. 753 (1990). In *Lussier*, the underlying landowners, whose property was encumbered by sixty year old power line right of way easements granted to the predecessor of New England Power Company, brought an action seeking a determination of whether an expanded use of the easements was permissible. The New Hampshire Supreme Court affirmed the lower court’s ruling that the wording contained in the utility easements in question permitted the construction of a third transmission line and an electrical switching station in the right of way, which had been continuously used for two power lines for the previous sixty years. *Lussier* holds that the question of permissible use of an easement is one of determining the intent of the parties at the time of the original easement grant; the words used in the easement deed control, and where the words used are clear and unambiguous, there is no need to resort to outside facts or circumstances, or to rely upon the interpretive test of the “rule of reason” to ascertain whether the use is a reasonable one.

The PSNH right of way corridor to which segTEL is seeking access to run its fiber optic telecommunications cable is a 100 foot wide corridor established by easement grants in the early 1900's. The easements were granted in the 1915-to-1916 time frame by the then current landowners to the Sunapee Electric Light and Power Company.³ Two representative examples of these easement deeds, which are included in Stipulated Exhibit 2, are attached to this Brief as Appendix I. The language in these deeds grants to Sunapee Electric, and its successors and assigns, the perpetual right and easement "to erect, repair, maintain, operate and patrol a line of poles or towers and wires strung upon the same, and from pole to pole and tower to tower for the transmission of high or low voltage electric current with all necessary anchors, guys and braces to properly support and protect the same, over and across the lands owned by the first party. . . ." Obviously, the words used reflect that the purpose and intent of the easement grant does not go beyond lines for the transmission of electric current.

In the early 1970's, PSNH purchased additional easement rights from the then current landowners in certain portions of the same 100 foot wide corridor; a representative sample of these easement deeds, which are included in Stipulated Exhibit 2, is attached to this Brief as Appendix II. The language in these deeds grants to PSNH the right and easement "to construct, repair, rebuild, operate, patrol and remove overhead and underground lines consisting of wires, cables, ducts, manholes, poles and towers together with foundations, crossarms, braces, anchors, guys, grounds and other equipment, for transmitting electric current and/or intelligence over, under and across"

³ Sunapee Electric Light and Power was later acquired by New Hampshire Power Company in 1924. PSNH became the holder of the original Sunapee Electric easement rights when, ten years after PSNH's own formation in 1926, PSNH acquired New Hampshire Power Company in 1936.

the 100 foot wide strip described in the grant. Again, the words used clearly reflect an intended use of the easement for lines transmitting electric current and/or intelligence.⁴

There is no wording or language in any of these easement deeds which expressly or impliedly allows for the additional installation of telecommunications wires, cables, equipment or hardware of any cable company, telecommunications carrier or services provider, or any other third party. There is also no wording or language in any of these easement deeds which would even suggest that PSNH, as the holder of those easements, is authorized or permitted to allow access to the lands encumbered by these easements for a CLEC such as segTEL to install and operate its fiber optic cable. Certainly, there is nothing expressed in these easement grants which would allow PSNH, or the Commission in this case, to conclude, consistent with the FCC's standard as expressed in the *Local Competition Fifth Report and Order*, that PSNH owns and controls the right of way in question to the extent that PSNH "could voluntarily provide access to a third party and would be entitled to compensation for doing so".⁵

The clear and unambiguous wording specifying the allowable uses of PSNH's easement rights and right of way ends the inquiry under the New Hampshire Supreme Court's holding in *Lussier v. N.E. Power Co.*, supra p. 5. PSNH's determination that it did not own or control rights sufficient to allow segTEL access to PSNH's right of way was entirely justified, reasonable and lawful under New Hampshire law. As the FCC has plainly recognized, an electric utility may not grant access to what it does not own or control. PSNH owns its poles, but it does not own the land upon which those poles have

⁴ Transmission of intelligence data with respect to SCADA systems, electronic controls, and other similar internal communications functions is a fundamental aspect of the operation and control of a modern electric utility transmission and distribution system.

⁵ Please see the arguments set forth by PSNH in Section III.B. of this Brief.

been placed – it has only the rights to use that land for the purposes of its power lines and its related facilities consistent with its easement rights.

segTEL has raised several contentions in its previous filings in this matter disputing PSNH's interpretation of the scope of its easement rights and its authority under those easements. All of those contentions are without merit.

segTEL has asserted that there is no wording in the PSNH easements which prohibits, or purports to prohibit, the attachment of the telecommunications wires of a third party, and no clause in the easements that would result in a forfeiture of PSNH's right of way if such attachments were allowed. Therefore, segTEL maintains, it has the right to make its attachments under PSNH's easements and should not be required to obtain its own right of way. (segTEL's Objection to PSNH's Motion to Dismiss, p. 9). However, the law of easements in New Hampshire is devoid of any reported case which holds that a particular use of an easement is permissible simply because that use or purpose has not been expressly prohibited, or because the wording in an easement is silent on the subject.

In an analogous easement case, the New Hampshire Supreme Court has already addressed and determined this issue adverse to segTEL's contention. In *Gill v. Gerrato*, 154 N.H. 36 (2006), the Court addressed a question about the permissible use of an access easement for ingress and egress over one parcel of land (the servient tenement), for the benefit of another parcel (the dominant tenement). The owners of another parcel (the non-dominant, third party tenement) sought to use the access easement for their benefit, over the objection of the servient and dominant tenement owners. The trial court ruled that, since there was no wording in the easement deed indicating an intention to prevent use of the access easement by a non-dominant third party tenement, the non-dominant third party tenement owners had a right to use the easement for their

benefit over the servient tenement. The Supreme Court in *Gill* reversed, stating: “Simply because there is no language in a deed that indicates an intention by the parties to prevent non-dominant, third party tenements from benefiting from the easement does not mean that the deed creates an independent right to the easement in a non-dominant, third party tenement.” *Id.* at 41. The Court went on to state: “Because we find no language in the deed establishing an independent easement for the benefit of the [non-dominant, third party tenement] property, we reverse the trial court’s ruling . . . “. *Id.* at 40. Thus, under the holding in the *Gill* case, the absence of any language in the PSNH easements preventing or prohibiting a third party’s telecommunication use may not be taken as any authority for PSNH to allow to such use, or as any basis for segTEL to use PSNH’s easements for segTEL’s purposes.

segTEL has further contended that it is entitled to the benefit of a presumption that “the rights of way owned, rented or utilized by incumbent utilities are compatible with communications attachments” (segTEL November 14, 2008 Letter, p. 4). However, that is not the law in New Hampshire, and the authority cited by segTEL to support this contention does not warrant such a sweeping notion.

segTEL cites first to the nondiscriminatory access provisions of 47 USC §224(f)(1) of the Federal Pole Attachment Act as if no further analysis is needed, when in fact such a simplistic analysis entirely fails to acknowledge the meaning given by the FCC to the phrase “owned or controlled” found in the same statute.⁶ Nondiscriminatory access is only required with respect to a pole, duct, conduit or right of way owned or controlled by the utility.

segTEL also cites to a reported ruling by the FCC in which the FCC is claimed to have found that attachers are entitled to “unfettered access to utility rights of way”, and

⁶ Please see the arguments set forth by PSNH in Section III.B. of this Brief.

to have “rejected . . . outright” utility claims similar to the ones made by PSNH in this matter (segTEL November 14, 2008 Letter, p. 4, citing to *In the Matter of The Cable Television Association of Georgia, et al. v. Georgia Power Company, Order*, 18 FCC Rcd 16333 (August 8, 2003)). However, the *Georgia Power* ruling did not involve a situation where the electric utility claimed it did not own or control right of way easement rights sufficient to permit third party attacher access. At issue in *Georgia Power* was a proposed provision in a pole attachment agreement in which the utility sought to impose a requirement that the attacher separately negotiate with and separately pay the utility for accessing and using the utility’s private property easements. Such a requirement was declared by the FCC to be unreasonable because the FCC’s rate formula assured the utility just compensation, and therefore the utility was not entitled to additional or different payment from the attacher for access to private easements. Of course, in this case PSNH has made no such demand of segTEL, or sought to impose any such requirement for access. Nothing in the FCC’s *Georgia Power* ruling affects in any respect the FCC’s prior determinations that a utility need only grant access to rights of way which it owns or controls sufficient to permit access under applicable state law.

Additionally, segTEL cites to section 621(a) (2) of the Federal Cable Communications Policy Act of 1984 (47 USC §541(a) (2) of the so-called “Cable Act”) for the proposition that electric utility rights of way are declared compatible with fiber optic telecommunications use. That Federal law grants franchised cable companies rights over “public rights-of-way” and “through easements . . . which have been dedicated for compatible uses.” 47 USC §541(a) (2). However, in the case of private property easements, this statute has been interpreted to apply only when the landowner has so relinquished his rights in the property as to amount to a public dedication of the easement to general utility use by any utilities. *Cable Holdings of Georgia, Inc. v.*

McNeil Real Estate Fund VI, Ltd., 953 F. 2d 600 (11th Cir. 1992), cert den, 506 U.S. 862 (1992), reh, en banc, den, 988 F. 2d 1071 (11th Cir. 1993). There is no language in any of the PSNH easements in this matter which would allow PSNH or the Commission to conclude that the original grantors of those easements intended to dedicate their property to general utility use for any and all utility purposes. Nothing in the wording of those easements can support a finding or determination that the grantors of those easements intended to relinquish their ownership rights to such an extent as to permit use of their lands for anything other than PSNH's (or its predecessor's) electric utility lines and related facilities.

B. PSNH does not have the legal obligation to grant segTEL a license to attach to PSNH's poles in this matter regardless of whether or not PSNH has sufficient authority under its easements.

The Commission's jurisdictional authority over pole attachments contained in RSA 374:34-a is not so broad as to extend to the Commission the jurisdiction to require access to private property. The Commission's authority is constrained under RSA 374:34-a to consideration of pole attachment matters in accordance with the Federal Pole Attachment Act, 47 USC §224, and the FCC's regulations thereunder.⁷ Both the Federal law and regulations, and prior rulings by the FCC, mandate consideration of the ownership and control limitation upon requests for access. Where, as here, the issue of ownership and control must turn upon a private property rights determination under New Hampshire law, the Commission should resist segTEL's invitation to run roughshod over the relationship between landowner and easement holder by declaring

⁷ Chapter 340:2 of the 2007 Laws, effective July 16, 2007, requires that for a period of at least 2 years after the effective date of the act, the Commission's rules to carry out the provisions of RSA 374:34-a shall be consistent with the regulations adopted by the Federal Communications Commission under 47 U.S.C section 224.

all CLECs presumptively entitled to access to incumbent utility rights of way for their fiber optic cable attachments.

PSNH has not denied segTEL access to PSNH's poles. What segTEL continually fails to distinguish is that the poles to which it desires access in this case are part of a 34.5kV electric power line situated in a private right of way, not on a public highway. PSNH's placement of its poles in the private right of way is pursuant to, and subject to, individual private property easements previously granted by each underlying property owner or their predecessors in title. Unlike utility poles, and wire or cable attachments to those poles, situated in a public highway right of way, PSNH maintains that attachments to poles in a private property right of way can only be allowed if permitted by the private property rights granted to the pole owner.

The Federal Pole Attachment Act (47 USC §224) (the "Pole Attachment Act" or the "Act")), and the FCC's regulations promulgated thereunder, only mandate that a utility provide non-discriminatory access to any pole, duct, conduit or right of way "owned or controlled" by the utility. 47 USC §224(f); 47 CFR §1.1403(a). In its interpretation of the Pole Attachment Act, the FCC has given clear meaning to the use of the phrase "owned or controlled" found in the law and in its regulations. The FCC has declared that, in order for a right of access to be triggered under the Act, "the property to which access is sought not only must be a utility pole, duct, conduit or right-of-way, but it must be owned or controlled by the utility". *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98*, 15 FCC Rcd 22983, 23022, P 85 (October 25, 2000) (hereinafter *Local Competition Fifth Report and Order*). In the right of way context, the FCC has ruled that "the scope of a utility's ownership and control of an easement or right-of-way is a matter of state law", meaning that the access

obligations of 47 USC §224(f) apply “when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access.” *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order in CC Docket No. 96-98, First Report and Order [Part 4 of 5]*, 11 FCC Rcd 15499, 16082, P 1179 (August 8, 1996). If this were not clear enough, the FCC has elaborated on its interpretation by concluding that, consistent with the purposes of the Act, “utility ownership or control of rights-of-way and other covered facilities exists only if the utility could voluntarily provide access to a third party and would be entitled to compensation for doing so”, and again, “state law determines whether, and the extent to which, utility ownership or control of a right-of-way exists in any factual situation within the meaning of Section 224.” *Local Competition Fifth Report and Order*, at 23023, P 87; see also, *UCA, LLC, d/b/a Adelphia Cable Communications v. Lansdowne Community Development, LLC, et al.*, 215 F. Supp. 2d 742 (E. D. Va. 2002) (upholding reasonableness of FCC’s interpretation as giving effect to reality that a utility can only grant access to easement rights that it has and which derive solely from state law.)

segTEL has simply chosen to ignore the existence, the meaning and the application of this fundamental provision of the Pole Attachment Act in its complaint in this matter.

Since the question of ownership and control is a legally relevant and applicable consideration in requests for access both under the Pole Attachment Act, and under RSA 374:34-a, PSNH was entitled to consider segTEL’s access request in light of the private property location of the poles which were the subject of the attachment request. PSNH was entitled to assess the scope and extent of its right of way easements in these locations. PSNH was entitled to make the determination that it did not own or control right of way easement rights sufficient to allow it to grant segTEL’s attachment request

to its poles in the right of way. PSNH was entitled to inform segTEL of this determination, and to further inform segTEL that it (segTEL) needed to obtain the required private property rights to allow segTEL's attachments to PSNH poles in these locations before PSNH could proceed further with the consideration and processing of segTEL's attachment request. None of those actions by PSNH violated segTEL's rights under any Federal or state law or regulation, and in fact all were entirely consistent with the Pole Attachment Act, FCC regulations, and RSA 374:34-a.

segTEL has argued that it is entitled to attach to the PSNH poles in this matter because the Pole Attachment Act and RSA 374:34-a, and the regulations promulgated thereunder, only permit a utility pole owner to deny access where there is insufficient capacity, or for reasons of safety, reliability and generally applicable engineering purposes. As PSNH has raised none of these reasons here, segTEL concludes it must be allowed to attach to PSNH's poles as requested. segTEL also has contended that PSNH had only 45 days from segTEL's application to deny access to its poles, and when it failed to do so, segTEL became entitled to attach to PSNH's poles.⁸

First, these arguments fail to accept the fact that PSNH has not denied segTEL access to PSNH poles. PSNH's letter to segTEL informs segTEL of PSNH's review and determination of the ownership and control of its easement rights covering the right of way where the poles to which segTEL desired accessed were located, but it does not deny or refuse access to those poles. (Stipulated Exhibit 4). It further informed segTEL that segTEL may re-submit its pole attachment applications for processing by PSNH once segTEL secured the necessary rights to allow its facilities to be attached to PSNH's poles

⁸ The applicable FCC regulation, 47 CFR §1.1403(b), specifies a 45 day time period for a utility denial of access, but does not state either the consequences of a failure to meet that that time period, or that the access request will be deemed granted if not denied within the 45 day period.

in PSNH's right of way. (Stipulated Exhibit 4). Nowhere in PSNH's letter is there a statement that PSNH is refusing or denying access to PSNH's poles.

Secondly, these arguments raised by segTEL conveniently ignore that, under any reasonable reading of the applicable law and regulations, there can be no denial of access to a pole, duct, conduit or right of way which is not "owned or controlled" by the utility to the extent sufficient for the utility to even allow or deny access. This is precisely the issue which PSNH has raised with respect to segTEL's attachment request, and which segTEL does not want to acknowledge in this matter.

C. segTEL is contractually obligated under Section 6.2 of the Pole Attachment Agreement to obtain authorization to construct, operate and maintain its wires on the PSNH poles in this matter from the owners of the land where those poles are located.

PSNH and segTEL are parties to a Pole Attachment Agreement dated April 6, 2004, which is currently in effect (Stipulated Exhibit 1, hereafter referred to as the "PAA").⁹ The PAA establishes the rights, responsibilities and obligations of the parties with respect to the licensing of segTEL attachments to PSNH's poles. In accordance with the PAA, segTEL has applied for and been granted licenses for attachment to PSNH poles in numerous locations throughout the State of New Hampshire. (Stipulation, No. 4).¹⁰ segTEL's applications for licenses to attach to PSNH utility poles in Sunapee and New London which are at issue in this matter were submitted pursuant the procedures established and agreed to under the PAA, and are subject to all of the terms and provisions of the PAA.

⁹ FairPoint Communications, as successor to Verizon New England, is also a party to the PAA as a licensor, with respect to poles jointly owned with PSNH, or solely owned by FairPoint. None of the PSNH poles involved in this matter are jointly owned with FairPoint.

¹⁰ To the best of both parties' knowledge and belief, these pole attachment applications and licenses have been for poles located exclusively within the public highway right of way, and not for poles located within PSNH right of way on private property. (Stipulation, Nos. 4 and 5).

Under the provisions of the PAA, the agreement of the pole owning utilities to issue licenses to attach to their poles is expressly made subject to the provisions of the PAA (PAA, Article II – Scope of Agreement, Section 2.1). Article VI of the PAA, entitled “Specifications and Legal Requirements”, Section 6.2, states as follows:

“Licensee shall be responsible for obtaining from the appropriate public and/or private authority any required authorization to construct, operate and/or maintain Licensee’s Facilities on public and private property at the location of Licensor’s poles.”

Thus, by the express terms of Section 6.2 of the PAA it has signed with PSNH, segTEL is contractually obligated to obtain any required authorization to construct, operate and maintain its attachments on private property where PSNH’s poles are located. PSNH has no obligation whatsoever under the PAA to issue segTEL any license to attach unless and until such time as that authorization has been obtained.

PSNH has taken the position in this matter, and argues in this Brief, that it does own or control easement rights sufficient to allow segTEL’s attachments to PSNH poles in PSNH’s right of way, and that such authority must be obtained by segTEL from the private property owners affected by segTEL’s request before its pole attachment request need be further considered. Under these circumstances, Section 6.2 of the PAA is applicable and may be invoked by PSNH to require compliance by segTEL before PSNH can be compelled to address segTEL’s request for a license to attach.

segTEL has attempted to avoid the plain meaning and applicability of Section 6.2 of the PAA by asserting two strained, and ultimately unconvincing, arguments. The first of these is the assertion by segTEL in its response to a Commission Staff data request that it was “under the belief” that the “required authorization” specified in the wording of Section 6.2 referred to segTEL’s authorization to engage in business as an FCC registered telecommunications utility and as a CLEC in New Hampshire. (segTEL

Response to Staff's Data Request 1-6). This assertion unreasonably fails to give any meaning or context to the other words in the same sentence of Section 6.2, which defines the needed "required authorization" in relation to the construction, operation and maintenance of a licensee's facilities "on public and private property at the location of Licensor's poles." Clearly, what this sentence of Section 6.2 is referring to is needed authorizations for the construction, operation and maintenance of a licensee's facilities on the physical public or private property where the poles of the licensor are located, and not a general regulatory authorization to do business as a utility or carrier. Moreover, such an interpretation of Section 6.2 is inconsistent with the other provisions of Article IV, which address construction and maintenance specifications (Section 6.1), permissions from other joint owners or joint users of the poles (Section 6.2), and forfeitures of the rights of a licensor, joint owners or joint users to occupy the property on which the subject poles are located (Section 6.3). When read as a whole, Sections 6.1, 6.2 and 6.3 of Article VI of the PAA refer to construction specifications and legal requirements pertaining to the construction, operation and maintenance of a licensee's facilities in relation to the property locations of the poles to which those facilities will be attached. segTEL's belief as to the meaning of Section 6.2 lacks any credence or support and should be soundly rejected by the Commission.

segTEL also seeks to avoid the obligations of Section 6.2 by challenging, on a broader basis, its voluntary assent to the terms and provisions of the PAA. Suggesting there is disparate bargaining power and citing to FCC rulings supposedly condoning a "sign and sue" policy, segTEL claims it is entitled to a presumption that the PAA and its terms are neither voluntary nor reasonable.

Notwithstanding this claim, the fact is that segTEL did sign the PAA over five years ago, and has stipulated that it has, under the PAA, applied for and obtained

licenses to attach to PSNH poles in numerous locations throughout New Hampshire pursuant to its terms. It is also a fact that, since entering into the PAA, segTEL has never filed a complaint with the FCC challenging any term or provision of the PAA as unfair, unreasonable or unenforceable on any grounds. (segTEL Response to PSNH Data Request 1-2). Similarly, other than the complaint made by segTEL in this docket, there has been no prior complaint made by segTEL to the Commission regarding its Pole Attachment Agreement with PSNH, or any of its terms. The reality is that segTEL, despite its protestations about not voluntarily entering into the PAA, has utilized its contractual rights under the PAA to grow its telecommunications business, and has benefitted by its terms.

segTEL does not want to be bound to comply with Section 6.2 of the PAA, yet it has not put forth any specific reasons or authority for why the Commission should find that provision to be unreasonable, unjust or unenforceable. On its face, Section 6.2 does no more than allocate to the party seeking to attach to the utility's poles the responsibility to obtain any required authorizations to install, operate and maintain its facilities on the public or private property where the poles are situated. This is simply a reasonable recognition of the fact that every pole to which attachment is requested will be situated in the ground, in a physical location, on public or private property, where authorization or permission for the installation and maintenance of the attaching party's facilities may be necessary or required. Furthermore, the FCC has ruled that the Pole Attachment Act does not create any requirement on the part of a utility to exercise its eminent domain authority to expand its rights in an existing right of way over private property in order to accommodate a request for access by third party attachers. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Order on Reconsideration of Local Competition Order,*

14 FCC Rcd 18049, 18059-18063 (October 26, 1999). Therefore, Section 6.2's allocation of responsibility to the party seeking to attach is prima facie reasonable and consistent with the FCC's interpretation of the Pole Attachment Act, particularly in circumstances where expanded or additional right of way easement rights may be needed as a matter of state law.

While the PAA does predate the effective date of the Commission's authority to regulate pole attachment matters under RSA 374:34-a and the Commission's Puc 1300 interim rules, segTEL's position that the PAA is presumptively involuntary and unreasonable is totally at odds with the spirit and intent of the Commission's regulatory authority and rules. RSA 374:34-a, V, clearly expresses the New Hampshire Legislature's desire to protect pole attachment agreements which have been voluntarily entered into, by declaring that nothing in the statute shall prevent parties from entering into such agreements without Commission approval. The Commission's interim rules fully protect the provisions of pole attachment agreements voluntarily entered into, and do not validate a presumption of unreasonableness. To the contrary, Puc 1303.04 specifies that "Any pole attachment agreement entered into voluntarily under this part shall be presumed to be just, reasonable and nondiscriminatory." The rule further directs that the Commission "shall not alter the terms of any such agreement." These provisions reflect a regulatory scheme which presumes that the terms of a pole attachment agreement voluntarily entered into are fair and reasonable, not one which favors the opposite presumption urged upon the Commission by segTEL in this matter.

IV. Conclusion

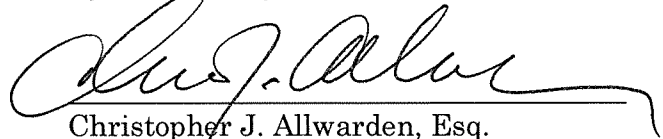
PSNH's private property easements covering the right of way and poles involved in segTEL's attachment request do not, as a matter of law, provide PSNH with the authority to allow segTEL's access to and use and occupancy of the right of way for

attaching its facilities to PSNH's poles. PSNH is not legally obligated to grant segTEL a license to attach to PSNH poles unless it owns or controls easement rights for the private property right of way where such poles are located to the extent necessary or sufficient to allow such access, and PSNH does not own or control such rights in this case. In accordance with the terms (Section 6.2) of the Pole Attachment Agreement contractually in effect between PSNH and segTEL, PSNH may require and segTEL is obligated to obtain the necessary authorizations from the owners of the private property where the PSNH poles are located, before PSNH has any legal or contractual obligation to grant segTEL's attachment request.

Respectfully submitted,

Public Service Company of New
Hampshire
By Its Attorney

Date: 5/15/09.



Christopher J. Allwarden, Esq.
Senior Counsel, Legal Department
780 North Commercial Street
Manchester, NH 03101
603-634-2459

APPENDIX I

MCRD
COPY: ✓
BOOK 421
PAGE 449

leading from New London to Sunapee.

To have and to hold to the said second party, its successors and assigns forever.

The exact location of the transmission lines and its poles and towers is to be selected by the second party, after its final surveys have been completed, within the above limitations.

Permission is given to trim or remove such trees and underbrush as in the judgment of the second party interfere with or endanger said lines when erected. The second party covenants and agrees for itself, its successors and assigns to pay all taxes that may be assessed on the poles, towers or wires erected hereunder on the premises of the first party.

The second party agrees that before transmitting electricity over the transmission lines, rights for which are granted in this instrument, it will pay or tender to said first party the sum of \$50.00; and the first party hereby agrees to accept said sum as full payment for all rights granted hereunder and as full compensation for any damages done to her property by the exercising of the rights herein granted.

The first party covenants and agrees that they have full right, title and authority to convey the foregoing rights and privileges and will defend and account said grants against the claims or demands of all persons.

Witness the hand and seal of the first party this 18th day of November 1915.

In the presence of
Fred Barry
J. H. Sanborn Jr.
State of New Hampshire County of Merrimack

Fred Barry (Ed)
Agnes D. Kay (Ed)

On this 18th day of November A.D. 1915 before me, a Justice of the Peace, personally appeared Fred B. and Agnes D. Kay to me known to be the same persons described in and who executed the foregoing instrument, who acknowledged the same to be their free act and deed.

Isaac H. Sanborn Jr Justice of the Peace

Received Nov. 23, 9-45 A.M. 1915

Recorded and examined: Attest

Frederick C. Brown

Register

New London

Know All Men By These Presents
That I, Susan A. Larrick of New London County of Merrimack and State of New Hampshire, (hereinafter called the "first party"), in consideration of One Dollar to me in hand paid by the Sunapee Electric Light and Power Company, a corporation duly established by law and having its principal place of business in Sunapee, in the county of Sullivan and State of New Hampshire, (hereinafter

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Rec'd
 State of New Hampshire
 County of Merrimack }
 On this 15th day of May A.D. 1915
 before me, a Justice of the Peace, personally appeared George H. Hayes, and Alice H. Hayes, and who acknowledged the foregoing instrument, who acknowledged themselves to be the same persons described in and who executed the same.

Witness the hand and seal of the first party the 15th day of May 1915.

In the presence of
 N. J. Collins
 George Hayes (I.B.)
 Alice H. Hayes (I.B.)

1915

That we, George Hayes, and Alice H. Hayes his wife, both of New Hampshire, County of Merrimack, and State of New Hampshire, (hereinafter called the "first party"), in consideration of One Dollar to us to have paid by the BUNTING MICHROFILM RIGHT AND a corporation duly established by law and having its principal place of business in Sunapee, New Hampshire, (hereinafter called the "second party"), the receipt of which is hereby acknowledged; do hereby give, grant, bargain, sell and convey unto the second party, its successors and assigns, all necessary easements, rights and powers to permit the transmission of light or low voltage electric current by the first party in the town of New London of New Hampshire, County of Merrimack and State of New Hampshire, bounded and described as follows:

extending from line of lands of J. Barrett, southerly, to line of lands of Mrs. J. Dean, said line was surveyed in March, 1915 and is shown on a plan entitled "Transmission Line, Sunapee Electric Co. & Tr. Co., New London to Roby, N. H., 20x12-100 ft. to the inch, sheet N". Said plan is recorded in the Merrimack County Registry of Deeds.

It is a part of the understanding of this agreement that the transmission or removal of trees and undergrowth as hereafter mentioned shall not extend beyond a distance of fifty feet on each side of said surveyed line.

The exact location of the transmission line and its easements to be selected by the second party, after final surveys have been completed, within the above described limits.

Provision is given to trim or remove such trees, shrubs, vines, etc., as may be found in the judgment of the second party injurious with or adjacent thereto when so needed.

The second party agrees that before transmitting light or power thereon it will pay or tender to the first party, its successors and assigns, for all damages done to the property of the first party, its successors and assigns, in this instrument, it will pay or tender to the first party, its successors and assigns, for all damages done to the property of the first party, its successors and assigns, except that the second party at the same time agrees to pay and the first party hereby agrees to accept and release as full payment for the damages done to his property by the second party, its successors and assigns, for the sum of \$250.00.

The second party agrees to accept the further sum of forty two (42) dollars as special damages to wood and timber.

The first party covenants and agrees that they have full right, title and authority to convey the foregoing right and privileges and will defend same to and against against the claims or demands of all persons.

Witness the hand and seal of the first party the 15th day of May 1915.

In the presence of
 George Hayes (I.B.)
 Alice H. Hayes (I.B.)

1915

Witness the hand and seal of the Justice of the Peace.

1915

RECORDED

See Plan No. 308.

Known All Men by These Presents

VOL. 434

APPENDIX II

ARTHUR S. LITTLE, JR.

of New London, County of Merrimack

in The State of New Hampshire (hereinafter called the Grantor) for consideration paid, grant(s) to Public Service Company of New Hampshire, a corporation having its principal place of business at 1087 Elm Street, in Manchester, in the County of Hillsborough, and The State of New Hampshire (hereinafter called the Grantee), with Quitclaim covenants, the RIGHT and EASEMENT to construct, repair, rebuild, operate, patrol and remove overhead and underground lines consisting of wires, cables, ducts, manholes, poles and towers together with foundations, crossarms, braces, anchors, guys, grounds and other equipment, for transmitting electric current and/or intelligence over, under and across a Strip of land 100 feet in width in the town of New London county of Merrimack in The State of New Hampshire.

Said 100 foot Strip shall extend 50 feet westerly and 50 feet easterly of a line or extension of a line, described as follows:

Beginning at a point in Grantor's southerly boundary line at lands of Edith Perkins and Town of New London, said point being located 5 feet, more or less, northeasterly measuring along Grantor's southerly boundary line from Grantor's most southerly corner; thence, North 16° West, 593 feet to the northerly boundary line of Grantor's land at land of Mary C. Barrett.

The 100 foot wide strip of land herein described is intended to include all or part of the same strip of land described in deed of George Hayes to the Sunapee Electric Light and Power Company dated May 15, 1916 and recorded in the Merrimack County Registry of Deeds, Book 434, Page 541.

Said Strip of land being a part of the premises of the Grantor(x) described in deed of Marion S. Little & Winifred L. Williams to Arthur S. Little, Jr. dated August 26, 1968 and recorded in the Merrimack County Registry of Deeds, Book 1036, Page 10

This conveyance shall, subject to the right to cut or trim trees and to remove structures or obstructions which are now found within the limits of the Strip, and the right to cut or trim such trees on the above-mentioned premises of the Grantor(x) as in the judgment of the Grantee may interfere with or endanger said lines or their maintenance or operation.

The Grantor(s) for him, self, and his heirs, executors, administrators, successors and assigns, covenant(s) and agree(s) to and with the Grantee, its successors and assigns, that they will not erect or maintain any building or other structure, or permit the erection or maintenance of any building or other structure of any kind or nature upon the Strip, or change the existing grade or ground level of the Strip by excavation or filling.

There is reserved to the Grantor(s) the right to cut or trim trees and to remove structures or obstructions which are now found within the limits of the Strip, and the right to cut or trim such trees on the above-mentioned premises of the Grantor(x) as in the judgment of the Grantee may interfere with or endanger said lines or their maintenance or operation.

72083

And I, Beverly R. Little, wife of Arthur S. Little, Jr.,
release to said Grantee all rights of dower, ~~rights~~ and homestead and other interest therein.

WITNESS our hands and seals this 15th day of June, 19 72.

In the presence of

Leighton A. White
Barbara Burns

Arthur S. Little, Jr.
Beverly R. Little

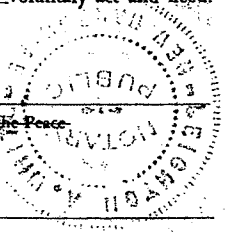


The State of New Hampshire
Merrimack SS.
June 15, 19 72

Arthur S. Little, Jr. and
Beverly R. Little
Personally appeared and acknowledged the foregoing instrument to be
their voluntary act and deed.
Before me.

Consideration is less
than \$100.
My commission expires: 1/21/77

Leighton A. White
Notary Public Justice of the Peace



~~SS.~~
~~19~~

~~Personally appeared and acknowledged the foregoing instrument to be~~
~~voluntary act and deed.~~
~~Before me.~~

~~Notary Public Justice of the Peace~~

New London

Little

MERRIMACK COUNTY RECORDS
Received Sept. 8, 9-00A.M. 1972
Recorded Vol. 1144 Page 149
Examined: Kathleen M. Ray
Register.