

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DT 08-146

segTEL, Inc.

Request for Arbitration Regarding Failure to Provide Access to
Utility Poles by Public Service of New Hampshire

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S OBJECTION TO
REQUEST FOR RECONSIDERATION WITH HEARING OF ORDER NO. 25,090**

Pursuant to Rule Puc 203.07(f), Public Service Company of New Hampshire ("PSNH"), by its undersigned attorney, makes the following Objection to the Request For Reconsideration With Hearing Of Order Number 25,090 filed by segTEL, Inc. ("segTEL"), dated May 5, 2010, in this matter. The grounds for this Objection are that segTEL's Request for Reconsideration (i) fails to state good reason for such rehearing as required by RSA 541:3 and (ii) fails to demonstrate that the decision or order complained of is unlawful or unreasonable as required by RSA 541:4.

I. Introduction

This proceeding arises out of a pole attachment request made by a New Hampshire CLEC (segTEL) to attach its own fiber optic telecommunications cable to a total of 101 PSNH-owned utility poles (90 poles in New London and 11 in Sunapee). The poles in question are situated on private property within right of way owned by PSNH pursuant to private property easements. The poles are components of a 34.5 kV overhead electric power line which PSNH has constructed and currently operates and maintains within the right of way as part of its electric utility distribution system.

PSNH responded to the pole attachment request by informing segTEL that its existing right of way easements did not grant PSNH rights of ownership and control sufficient to allow a third party telecommunications company such as segTEL to use

and occupy the right of way for its own private telecommunications cable. segTEL subsequently commenced this proceeding at the Commission claiming PSNH had denied it access to PSNH's poles and right of way, and seeking an arbitration of the alleged denial.

Following a series of procedural developments in this proceeding, including the filing by the parties of an agreed Stipulation of Facts and briefs addressing the issues¹, the Commission issued its Order Denying Request for Arbitration, Order No. 25,090, dated April 7, 2010 (hereinafter referred to as the "Order"). In its Order, the Commission agreed with PSNH's position regarding its easements, concluding that "by the plain language of the easements, the landowners conveyed to PSNH and its predecessors only those rights related to the transmission of electric current; the easements do not refer to or encompass the transmission of telegraph, telephone or other forms of telecommunications and thus PSNH cannot convey rights to a third party for telecommunications purposes." Order at 27-28.

On or about May 6, 2010, segTEL filed a motion for rehearing, styled as a "Request For Reconsideration With Hearing Of Order Number 25,090" (hereinafter referred to as the "Request").² PSNH objects to segTEL's Request and, for the reasons which follow, asks the Commission to deny it.

II. Standards for Motion for Rehearing

By Commission rule, motions for rehearing of a Commission order or decision are to be made in accordance with the provisions of RSA Chapter 541. *See*, Rule Puc 203.33. RSA 541:4 requires that a motion for rehearing "shall set forth fully every

¹ The procedural history in this docket is fully detailed in Section I of the Commission's Order No. 25,590, and need not be repeated here.

² Although dated May 5, 2010, electronic service of a copy of the Request upon PSNH was not made until May 6, 2010. Furthermore, the Commission's Secretary's office indicates that the Request was not actually filed with the Commission until May 7, 2010.

ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” A motion for rehearing may properly be denied by the Commission where, based on the grounds stated in the motion, no good cause for rehearing is shown. RSA 541:3; *Appeal of Gas Service, Inc.*, 121 N. H. 797, 801 (1981). A successful motion does not merely reassert prior arguments and request a different outcome. *See, Connecticut Valley Electric Co.* 88 NH PUC 355, 356 (2003); *Public Service Co. of New Hampshire*, Order No. 25,050, Docket No. DE 09-033 (December 8, 2009).

III. **Argument**

Judged against the standards for a rehearing motion, segTEL’s Request fails to demonstrate that the Order was either unlawful or unreasonable, and does not offer any good cause for granting rehearing. In essence, segTEL seeks rehearing because it dislikes the Commission’s decision and therefore requests a different outcome.

The principal basis of segTEL’s Request is the argument that the Commission made findings of fact in reaching its decision which segTEL claims were “misconceived”, and for which a hearing should now be conducted to adjudicate those facts. Remarkably, segTEL asserts as one of the grounds for this notion that it believed the Stipulation of Facts submitted by the parties to be sufficient for the Commission to make its determination solely on the legal briefs filed, and suggests now that it mistakenly agreed to this procedure without an adjudicatory hearing.

The reality is that segTEL had every opportunity in this proceeding to seek a hearing if it deemed one to be necessary. segTEL chose instead to agree to and to adopt the procedure followed in this matter to decide the case on the written record

developed and on the briefs of the parties.³ In Commission Staff's March 2, 2009, "Report of Technical Session" in this docket, Staff noted, "Participants agreed that it's possible that resolution of this docket may be accomplished based upon written briefs, without an adjudicatory hearing, however, they wish to attempt to come to a stipulation of facts before committing to that." Such a Stipulation of Facts was indeed reached between PSNH and segTEL, and was filed with the Commission on May 14, 2009. As the Order points out, the parties were even given an opportunity to present oral argument on the issues prior to any determination by the Commission, but segTEL did not avail itself of that option either. When the Commission issued a secretarial letter to the parties on October 1, 2009, stating that it would decide the case on the papers submitted, segTEL did not object or assert the need for additional proceedings. It is not grounds for rehearing that segTEL believed a hearing was not needed, and now believes a hearing is needed because the Commission's determination was adverse to segTEL's views.

As further support for its Request, segTEL asserts that the Commission's Order made findings of fact which were "misconceived" because they resulted in narrow interpretations of the wording used in the PSNH easement deeds. segTEL refers to the words "transmission" and "intelligence" used in the easements, where dictionary definitions exist which, according to segTEL, suggest other interpretations more supportive of allowing the installation of fiber optic cable for telecommunications use.⁴ This is merely a rehash of the arguments made in segTEL's briefs previously filed in

³ The written record consisted not only of the agreed Stipulation of Facts, but also numerous documents produced in response to various data requests, including copies of all of the recorded PSNH easements in question.

⁴ Reliance is placed by segTEL upon Commissioner Below's dissent, in which there is discussion of the possible meanings and intent of the clear and unambiguous terms used in the PSNH easements.

this matter, and presents no new evidence which was not or could not have been presented to the Commission by segTEL in the course of these proceedings.

segTEL has not met its burden to demonstrate that the Commission's Order was either unlawful or unreasonable. The Commission did not, as segTEL contends, make findings of fact which warrant reconsideration. Instead, the Commission followed the applicable law and decided this proceeding on a reasonable basis in light of the facts on the record before it.

The New Hampshire Supreme Court's ruling in *Lussier v. New England Power Company*, 133 N. H. 753 (1990), which was followed by the Commission here, makes clear that the determination of a deed's intended meaning and its legal effect is ultimately a question of law for the court; in this instance, the Commission acted as the arbiter of this dispute and properly made that legal determination. The *Lussier* case further instructs that, where the words used in a deed are clear and their meaning unambiguous, there is no need to resort to extrinsic facts or circumstances, or considerations of what is or is not a reasonable meaning or intent of the words used. In its Order the Commission correctly applied the law of the interpretation of easements as required by *Lussier*. It reasonably interpreted the words used in the PSNH easements, in light of the record before it, to be clear and controlling in not granting PSNH sufficient authority to allow segTEL rights to attach a fiber optic telecommunications cable to PSNH's poles. It was reasonable for the Commission to determine that the phrase "for the transmission of high or low voltage electric current" as used in the earlier PSNH easement deeds clearly and unambiguously did not include authority for attachments for telecommunications or information services. Similarly, it was reasonable for the Commission to determine that the phrase "for transmitting electric current and/or intelligence" as used in the later PSNH easement

deeds clearly and unambiguously did not provide authority for attachments for all telecommunications or information services. Under the holding in *Lussier*, that ends the inquiry. segTEL's argument that other, less narrow, or reasonable interpretations of the wording used in the easement deeds may exist is simply not relevant, and does not support a request for rehearing.

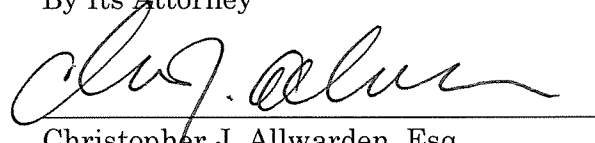
IV. Conclusion

segTEL has certainly failed to meet its burden to demonstrate that the Order issued by the Commission was either unlawful or unreasonable, as required by law. *See*, RSA 541:4. The Commission's determinations with regard to PSNH's easement rights were not "mistakenly conceived" or "misconceived", as segTEL contends, but were reasonable and consistent with applicable law. Accordingly, the Commission should find that good cause or reason for rehearing has not been shown, and should deny segTEL's Request.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW
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By Its Attorney

Date: May 11, 2010



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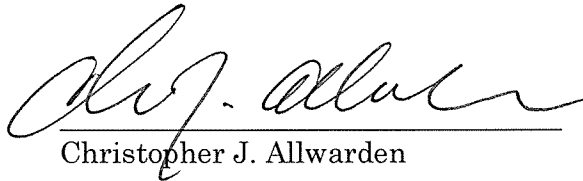
CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2010, I caused Public Service Company of New Hampshire's Objection To Request For Reconsideration With Hearing Of Order No. 25,090 to be served pursuant to Rule Puc 203.11 on the following service list:

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