

STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION

Docket No. DT 08-146

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

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S**  
**OBJECTION TO REQUEST FOR ARBITRATION**  
**AND**  
**MOTION TO DISMISS**

NOW COMES Public Service Company of New Hampshire ("PSNH"), by its undersigned attorney, and objects to and moves to dismiss the segTEL Request for Arbitration Regarding Failure to Provide Access to Utility Poles by Public Service Company of New Hampshire, dated November 14, 2008, and in support thereof says as follows:

1. There is no legal basis supporting segTEL's request for arbitration by the Public Utilities Commission ("Commission") in this matter. The Commission has not by order or otherwise established a process for the arbitration of pole attachment disputes between electric utilities and CLECs. The Commission's prior orders cited by segTEL as support for its arbitration request in this instance (Dockets DE 96-265 and DE 97-229) were orders implementing provisions of the Federal Telecommunications Act of 1996, specifically 47 USC §251 and 47 USC §252, which relate to the duties of incumbent local exchange carriers (ILECs) to negotiate and provide for interconnection with competing telecommunications carriers (such as CLECs), and the establishment by State utility commissions of mandatory arbitration procedures to hear and resolve open interconnection issues between ILECs and CLECs. segTEL's belief that such arbitration "is appropriate" in disputes between CLECs and incumbent electric utilities is incorrect.

is incorrect. As segTEL has demonstrated no valid legal basis for the Commission to act as an arbitrator in this matter, the request should be dismissed by the Commission outright.

2. There is also no factual or supportable legal basis for segTEL's complaint against PSNH of a failure to provide access to PSNH's utility poles.

3. First and foremost, PSNH has not denied segTEL access to its poles. What segTEL 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 a private right of way is pursuant to, and subject to, individual private property easements previously granted by each underlying property owner. Unlike utility poles and wire or cable attachments to those poles situated in a public highway right of way<sup>1</sup>, permissible 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).

4. In its interpretation of the Pole Attachment Act, the FCC has given clear meaning to the use of the phrase "owned or controlled". The FCC has determined 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*

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<sup>1</sup> All such installations in New Hampshire, inclusive of those made by attaching parties such as CLECs, are subject to State or municipal licensing of rights to use and occupy the public right of way pursuant to RSA 231:159, et seq..

*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.)

5. segTEL has chosen to ignore the application of this key provision of the Pole Attachment Act in its Request for Arbitration in this matter. It has also failed to mention anywhere in its filing the fact that, under the terms of its existing pole attachment agreement with PSNH, it is contractually obligated to obtain such private

property rights as may be required before it is entitled to receive any consideration of its application for a license to attach to PSNH poles located on private property.

6. Utility pole owners PSNH and FairPoint (as successor to Verizon New England, Inc.), and segTEL, are parties to a voluntary Pole Attachment Agreement dated April 6, 2004, which is currently in effect (hereinafter the "PAA"). The PAA establishes the rights, responsibilities and obligations of the parties with respect to the licensing of segTEL attachments to the solely or jointly owned poles of PSNH and FairPoint. 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. Under the relevant provisions of the PAA (attached hereto as Appendix I), 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 (Article II – Scope of Agreement, Section 2.1). Article VI – Specifications and Legal Requirements, Section 6.2 of the PAA 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 the PAA it has signed with PSNH, segTEL is contractually obligated to obtain the required authorization to install 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.

7. The Commission's present interim rules with regard to pole attachments fully protect the provisions of pole attachment agreements voluntarily entered into. Rule 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.” The provision in the PAA obligating segTEL to obtain required authorizations to place its attachments on the private property where PSNH’s poles are situated, is presumptively valid and binding on segTEL, and shall not be altered by the Commission.

8. 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 and FCC regulations, and with the provisions of the PAA in place between PSNH and segTEL.<sup>2</sup>

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<sup>2</sup> segTEL asserts that, under FCC regulations, PSNH had 45 days to deny segTEL access to its poles, after which, if not denied, access is “deemed to be granted”. The applicable FCC regulation, 47 CFR §1.1403 (b), specifies a 45 day time period for denial of access, but nowhere states that failure to meet that time period results in granting of the access request. This assertion is irrelevant, in any event, as PSNH’s letter to segTEL was not a denial of access to PSNH’s poles, and in fact clearly invited segTEL to resubmit its license applications once the needed private property rights were obtained. Moreover, this assertion is not dispositive of the underlying issue

9. segTEL contends 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, the authority cited by segTEL in its filing 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) as if this ends the inquiry, 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. Next, segTEL 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 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*

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regarding the need for obtaining property rights from the underlying landowners before any attachment request could be approved.

*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.

10. 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 (11<sup>th</sup> Cir. 1992), cert den, 506 U.S. 862 (1992), reh, en banc, den, 988 F. 2d 1071 (11<sup>th</sup> Cir. 1993). The PSNH private property power line easements in this case are not so broad or inclusive as to fall into a category of easements dedicated to general public utility uses, as might be the case involving a residential subdivision or the development of an industrial or business park.

11. Since the question of when a utility owns or controls the right of way to the extent necessary to permit access is a matter of state law, the easement law of the State of Hampshire must control the outcome in this case.<sup>3</sup> There is certainly 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 use unrelated to the electric utility's business. Indeed, there is not a single reported case in

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<sup>3</sup> 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.

New Hampshire which supports such a presumptive trampling of private property interests.

12. 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 grants the holder the right to enter and make use of the property of another for a particular purpose. *Arcidi v. Town of Rye*, 150 N.H. 694 (2004). 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 New Hampshire Supreme Court affirmed a lower court ruling that the utility easements in question permitted the construction of a third transmission line and an electrical switching station in a right of way continuously occupied with only two 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 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.

13. The PSNH right of way corridor to which segTEL is seeking access to run its fiber optic telecommunications cables and related hardware and facilities 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.<sup>4</sup> Two representative examples of these easement deeds are attached as Appendix II. The language in these deeds grants to Sunapee

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<sup>4</sup> Sunapee Electric Light and Power was later acquired by New Hampshire Power Company in 1924, and 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.



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 is also attached as part of 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 . . .” 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 related data transmission.<sup>5</sup>

14. 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

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<sup>5</sup> 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.

conclude, consistent with the FCC's standard as expressed in the *Local Competition Fifth Report and Order*, that it owns and controls the right of way in question to the extent that it "could voluntarily provide access to a third party and would be entitled to compensation for doing so".

15. Given the clear and unambiguous limitations of PSNH's easement rights in the right of way to which segTEL sought access, PSNH's determination that it did not own or control rights sufficient to allow segTEL's access was entirely justified, reasonable and lawful. 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 been placed – it has only the rights to use that land for the purposes of its power lines.

16. To the extent segTEL would disagree with or dispute PSNH's determination of the permissible scope of its easement rights in the right of way in question, that is a matter involving the adjudication of private property rights and interests which belongs in another forum, not before the Commission. It is axiomatic that the Commission must act within the scope of its delegated powers. *Re Exeter and Hampton Electric Company*, 69 N.H.P.U.C. 259, 261 (1984). While the legislature has delegated the authority to the Commission to adjudicate private real property rights in certain limited circumstances (e.g., RSA 371:1, involving the exercise eminent domain by public utilities), the Commission does not generally have the jurisdictional authority to determine real property issues or disputes. The resolution of private property disputes in New Hampshire is within the general jurisdictional purview of the Superior Court. *See, Gray v. Seidel*, 143 N.H. 327 (1999) (holding that dispute over whether a particular use was a reasonable use of property rights granted in an easement properly belonged before the Superior Court). The Commission's newly delegated jurisdictional authority over pole

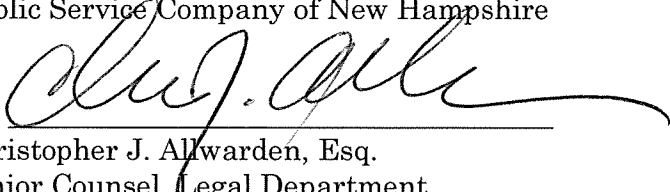
reasonable use of property rights granted in an easement properly belonged before the Superior Court). The Commission's newly delegated jurisdictional authority over pole attachments contained in RSA 374:34-a is not so broad as to extend to the Commission the jurisdiction to require access to private 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. Both the Federal law and regulations, and the 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 all CLECs presumptively entitled to access to incumbent utility rights of way for their fiber attachments.

WHEREFORE, PSNH respectfully objects to segTEL's request for arbitration and moves that segTEL's complaint against PSNH be dismissed in its entirety.

Dated: 11/24/08.

Respectfully submitted,

Public Service Company of New Hampshire

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