STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 08-146

SegTEL, INC.

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

Order Denying Request for Arbitration

ORDER NO. 25,090

April 7, 2010

APPEARANCES: Jeremy L. Katz, on behalf of segTEL, Inc.; Christopher J. Allwarden, Esq. on behalf of Public Service Company of New Hampshire; Scott Wade, on behalf of Unitil Energy Systems, Inc.; and Robert Hunt, Esq., for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On November 14, 2008, segTEL, Inc. (segTEL) filed a Request for Arbitration Regarding Failure to Provide Access to Utility Poles by Public Service Company of New Hampshire (PSNH). segTEL stated that it sought access to 101 electric "transbution" poles in New London and Sunapee, owned by PSNH, for the attachment of telecommunications cables.[1] The poles in question are located on private property pursuant to private easement rights obtained by PSNH. PSNH said that it did not have authority to grant the request, leading to segTEL's request for arbitration.

On November 24, 2008, PSNH objected to segTEL's request for arbitration and moved to dismiss. On December 15, 2008, segTEL filed a response to PSNH's motion to dismiss.

[1] According to segTEL, "transbution" refers to utility poles carrying low voltage electric facilities that can accommodate both distribution and intrastate transmission needs.

Subsequently, on December 23, 2008, PSNH filed a motion to strike segTEL's response to the motion to dismiss as untimely.

On December 16, 2008, segTEL submitted a Pole Attachment Agreement, dated April 6, 2004. On February 10, 2009, segTEL filed Appendix 2, segTEL's application for pole attachments SUNP-New London-A001 and Appendix 3, segTEL's application for pole attachments SUNP-New London-A002. segTEL filed letters requesting confidential treatment for both filings. Because the information for which segTEL sought protection meets the statutory requirements of RSA 378:43, the materials are deemed protected without Commission action.

The Commission, on January 16, 2009, issued an Order of Notice scheduling a prehearing conference for February 3, 2009. On February 2, 2009, Unitil Energy Systems, Inc. (UES) filed a petition to intervene. On February 3, 2009, Edward N. Damon, Esquire, acting as hearings examiner, presided over the prehearing conference pursuant to RSA 363:17 and N.H. Code Admin. Rules Puc 203.14(c), and submitted his recommendations to the Commission on February 12, 2009. On February 27, 2009, the Commission issued Order No. 24,944 granting the motion of UES to intervene, denying PSNH's motion to dismiss, and approving a procedural schedule.

On March 6 and 31, 2009, Staff filed reports of technical sessions occurring on February 27 and March 18, 2009, respectively. Pursuant to an agreement made by the parties during a technical session, on April 16, 2009, segTEL filed a draft Notice to Landowners agreed upon by PSNH and segTEL.

On April 20, 2009, the Commission issued a secretarial letter requiring the parties to file briefs and reply briefs by May 15 and June 10, 2009, respectively, addressing the following issues:

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;

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?

Additionally, the Commission determined that landowners whose property might be involved have rights, duties, privileges, immunities or other substantial interests that may be affected by this proceeding, and that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing their intervention. The Commission determined that any landowner receiving direct notice of this docket will automatically be deemed a party upon receipt by the Commission of written notice from such landowner, or from his or her representative, that the landowner wished to participate. Participating landowners would be permitted to submit briefs and/or reply briefs regarding the legal issues identified within the secretarial letter.

On April 24, 2009, the Commission sent a notice to landowners whose property may be affected by issues in this docket. Responses were received from the following landowners: Roderic Reyelt, Leonard A. Pollari, Kendrick & Pamela Child, Michael H. Fowler, and Ausbon Sargent Land Preservation Trust. Briefs and reply briefs were filed by PSNH and segTEL. No other briefs were filed.

On May 14, 2009, PSNH and segTEL submitted the following stipulation of facts to the Commission:

1. segTEL, Inc. (segTEL) is a duly authorized Competitive Local Exchange Carrier (CLEC) in the State of New Hampshire, and, as such is a public utility.

2. Public Service Company of New Hampshire (PSNH) is an incumbent electric utility in the State of New Hampshire, and the sole or joint owner of each of the utility poles in New London and Sunapee, New Hampshire, that are the subject of this docket.

3. segTEL and PSNH are parties to a Pole Attachment Agreement dated April 6, 2004, which, along with the attachments, the parties agree shall be marked as Stipulated Exhibit 1 in this docket.

4. Pursuant to the Pole Attachment Agreement (Stipulated Exhibit 1), segTEL has requested and continues to request, and PSNH has previously granted and continues to grant, segTEL attachment licenses for poles in numerous locations throughout New Hampshire. To the best of both parties' knowledge and belief, all such other applications and attachment licenses are for poles that are located exclusively within the public highway right of way.

5. Most or all of the poles that are the subject of this docket are located within PSNH's right-of-way on private property.

6. PSNH has easements for its right-of-way on the private property where the poles that are the subject of this docket are located, all of which easements the parties agree shall be marked as Stipulated Exhibit 2 in this docket.

7. All of the easement rights owned by PSNH (Stipulated Exhibit 2) were obtained and recorded in the applicable Registry of Deeds prior to 1996.

8. Pursuant to the Pole Attachment Agreement (Stipulated Exhibit 1), segTEL submitted to PSNH two applications for pole attachment licenses for the poles that are the subject of this docket, dated January 18, 2008, which the parties agree shall be marked as Stipulated Exhibit 3 in this docket.

9. The poles which are the subject of this docket are part of a PSNH 34,500 volt (34.5 kV) power line designated as the PSNH 316 line, which is an electrical distribution line. The PSNH right-of-way easements (Stipulated Exhibit 2) and the poles which are the subject of this docket are used by PSNH for PSNH's electric utility business of distributing electric power and delivering electric service to its customers.

10. segTEL remitted advance payment for field survey work with its applications to PSNH. (Stipulated Exhibit 3) PSNH deposited segTEL's payments.

11. PSNH responded to segTEL's applications to PSNH (Stipulated Exhibit 3) by letter of George W. Kellermann, PSNH Manager-Operations Support, to Steven E. Goldsmith, segTEL President, dated August 6, 2008, which the parties agree shall be marked as Stipulated Exhibit 4 in this docket.

12. segTEL's pole attachment applications (Stipulated Exhibit 3) are for the attachment of fiber optic lines for telecommunications purposes, which will be owned, operated and maintained by segTEL, and will be used entirely by segTEL in its business of providing telecommunication and information services, independent of PSNH's electric utility business.

On August 6, 2009, the Commission issued a secretarial letter providing the parties with an opportunity to present oral argument on the issues on September 15, 2009, and instructing any party wishing to be heard to provide a written request to the Commission by August 31, 2009. Absent such a request, the Commission determined that it would decide this case on the papers filed as of June 10, 2009. On October 1, 2009, the Commission issued a secretarial letter stating that, because the Commission had not received any written requests for hearing, it would decide the case on the papers. On October 13, 2009, Roderic Reyelt filed a letter indicating that he did not wish to be heard in this matter.

II. POSITIONS OF THE PARTIES

A. Whether the underlying easements provide PSNH with the authority necessary to grant segTEL a license to attach to its poles in this matter.

1. segTEL, Inc.

segTEL stated that the underlying easements provide PSNH with the authority necessary to grant segTEL a license to attach to its poles. segTEL claimed that PSNH's denial of segTEL's license application seeking to make attachments to the poles in question is premised on the claim that PSNH's easements may not be assigned or licensed to segTEL. segTEL stated that a grant in fee simple is a possessory interest in real property that conveys title and ownership rights free of all encumbrances to the grantee.[2] segTEL described an easement as a non-possessory interest

[2] RSA 477:27.

in real property that can be created by written conveyance, prescription or implication.[3] segTEL pointed out that all of the easements at issue were created by written conveyance. Referring to the meaning and intent of certain types of easements, segTEL claimed that PSNH holds an appurtenant easement allowing it to grant the requested license. segTEL also argued that, to the extent that PSNH could attach its own wires and cable, or authorize any other utility to attach wires and cable, PSNH has the rights necessary to license segTEL to attach wires and cable.

segTEL further claimed that the 1972 Easements are quitclaim covenants, which convey title of the utility easement to PSNH sufficient to allow PSNH the right to license segTEL's attachments. Therefore, segTEL asserted, PSNH has full ownership rights free of all encumbrances, and PSNH has the authority necessary to grant segTEL a license to attach to its poles.

segTEL argued alternatively that, if the Commission determines that PSNH holds an easement in gross, it holds an alienable and thus transferable property right that is sufficient for PSNH to license segTEL's attachments. segTEL reported that several states have held that easements in gross, if of a commercial character, are alienable property interests and thus assignable, and cited several such rulings.[4] segTEL stated that taking into account that PSNH acquired express commercial easements in gross, and finding guidance from other states that have ruled on this issue, a commercial, exclusive utility easement in gross acquired by express grant can be apportioned unless contrary to the terms of the servitude, or unless the division unreasonably increases the burden on the servient estate.

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[3] *See Waterville Estates Assoc. v. Town of Campton*, 122 N.H. 506, 508 (1982).

[4] *See, e.g., Johnston v. Michigan Consolidated Gas Co.*, 337 Mich. 572, 582, 60 N.W.2d 464 (1953); *Zhang v. Omnipoint Communications Enterprises, Inc.*, 272 Conn. 627, 642, 866 A.2d 588 (2005); *Jackson v. City of Auburn*, 971So.2d 696 (2006) (Ala.Civ.App., 2006); *Hise v. BARC Electric Cooperative*, 254 Va. 341, 492 S.E.2d 154 (1997).

segTEL proffered that no undue burden will be created or increased by allowing segTEL to attach fiber optic cable to PSNH's poles. segTEL reported that other states have reached the conclusion that the addition of communications facilities to electric utility poles does not create an additional burden.[5] It asserted that, similar to the circumstances in other states, the rights held by PSNH are express, not prescribed. segTEL also argued that, in New Hampshire under an express grant, a grantee takes by implication whatever rights are reasonably necessary to enable it to enjoy the easement beneficially, which includes the right to make improvements that are reasonably necessary to enjoy the easement.[6] segTEL claimed that PSNH clearly acquired an express right to string and maintain lines on utility poles located on the easement property and that there is no evidence to conclude that placing additional wires on the poles is unreasonable.

segTEL claimed that even if, *arguendo*, PSNH's easement deeds did not contemplate the installation of fiber optic utility facilities, it is well established in New Hampshire that an easement may be maintained for a purpose not contemplated when it was created.[7] segTEL argued that the respective rights of easement holders are determined by reference to the rule of reason[8] and that the use to which an easement may be put depends upon what is reasonable, under all of the surrounding circumstances.[9] segTEL asserted that telecommunications are presumptively compatible with the distribution of electricity. segTEL stated that PSNH wants the Commission to distinguish electric utilities from telephone utilities, but that PSNH routinely

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[5] *Centel Cable Television Co. of Ohio, Inc. v. Cook,* 58 Ohio St.3d 8, 567 N.E.2d 1010 (1991); *Mumaugh v. Diamond Lake Area Cable TV Co.,* 183 Mich.App. 597, 456 N.W.2d 425 (1990).

[6] Bruce, *supra* §8:36, at 8-84; *see, e.g., White v. Hotel Co.*, 68 N.H. 38 (1894) (holding that a "grantee of a defined way has the right to do whatever is necessary to make it passable or usable for the purposes named in the grant").

[7] *Kalman v. Hutcheson,* 111 N.H. 36, 41 (1971).

[8] *Sakansky v. Wein,* 86 N.H. 337, 339 (1933).

[9] *Delaney v. Gurrieri,* 122 N.H. 819, 821 (1982); *Sakansky v. Wein, supra,* 86 N.H. at 339-40. *See also Heydon v. Mediaone,* 739 S.W.2d at 381 (finding that fiber optic cable does not unreasonably or materially increase the burden on the utility easement held by Detroit Edison electric company).

uses its facilities for telecommunications and signaling on many of its other similarly situated poles not relating to the instant easements. segTEL claims that Congress has determined that telecommunications attachments are presumptively compatible with all utility facilities. It contended that, under §621(a)(2), electric rights-of-way and easements are declared to be compatible and apportionable with fiber optic cable and telecommunications use. segTEL asserted that the Committee Report accompanying the Pole Attachments Act explains that this includes easements or rights-of-way used for utility transmission.[10]

In addition, segTEL argued that to the extent that the language of the deeds is controlling, telecommunications is a permissible use in all of the deeds, as telecommunications involves both the transmission of low voltage electric current and/or intelligence. segTEL noted that New Hampshire law indicates that the task is to determine the parties' intent in light of the surrounding circumstances at the time the easements were granted.[11]

segTEL maintained that contrary to PSNH's argument, nothing in the deeds indicates that the intended use of the easements was to be limited by the construction or the long and continued use of the original lines, wires and other equipment installed and maintained exclusively by PSNH and, in fact, the drafters expressly contemplated and provided for future construction and expanded use of the easements. segTEL argued that the intent of the original parties to the easements was to permit the erection of communications wires. segTEL professed that this interpretation of intent is consistent with 1) the fact that PSNH routinely installs circuits for communications on similarly situated poles for its own use; and 2) telecommunications has

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[10] *See* Cable Communications Policy Act of 1984, H. R. Rep. No. 934, 98th Cong., 2d Sess. 59, 1984 U.S.C.C.A.N. 4655, 4696, 47 USC §541(a) (2).

[11] *See Lussier v. N. E. Power Co.*, 133 N.H. 753, 756 (1990), *citing Bisson v. Laconia Investment Properties, Inc.*, 131 N.H. 704, 707 (1989); *Sakansky v. Wein, supra* 86 N.H. at 339.

historically been transmitted by low voltage electric current, only recently being supplanted by technology that performs the same function with different technology.

segTEL contended that the parties to the earlier deeds contemplated the inclusion of wires carrying all levels of electric current, which would necessarily have included, in those times, copper telecommunications wires. According to segTEL, this view is consistent with the early easements being supplanted by the 1972 easements, which include the transmission of "intelligence." segTEL stated that it believes that the parties intended to allow the future addition of wires and cables for transmitting low voltage electric current and/or intelligence and that there is no language in the early easements specifically permitting "fiber optic" attachments, because fiber optic technology did not exist at the time these deeds were executed. segTEL stated that it would be a patently absurd result to read the easement as permitting the installation of, for instance, a massive 2000-pair copper cable (because it transmits electrical impulses) while at the same time prohibiting fiber optic cable, which by all standards is the evolutionary replacement of copper or coaxial cable.

segTEL concluded that, for the foregoing reasons, the underlying easements provide PSNH with the authority necessary to grant segTEL a license to attach to its poles in this matter.

2. Public Service Company of New Hampshire

PSNH stated that the easements do not provide PSNH with the authority necessary to grant segTEL a license to attach to PSNH's poles in this matter. PSNH argued that 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 property law. PSNH further argued that because the interpretation of the New Hampshire easement rights in this case depends upon the application of New Hampshire law, segTEL's citations to rulings and case law interpreting easement questions

in other states are not controlling. PSNH maintained that 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. PSNH further asserted that there is no reported case in New Hampshire that overrides the private property ownership rights of the underlying landowners whose land is encumbered by a power line right-of-way. According to PSNH, New Hampshire law recognizes the basic premise that an easement is distinct from ownership.[12] PSNH asserted that it cannot ignore the private property rights of the underlying landowners in assessing whether it owned or controlled easement rights sufficient to allow segTEL to attach to PSNH's poles situated in rights-of-way on private property.

PSNH stated that the leading case in New Hampshire on the interpretation of the scope and permissible use of electric utility easements 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. It urged that 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.[13]

PSNH also claimed that the words used in the applicable deeds reflect that the purpose and intent of the easement grant does not go beyond lines for the transmission of electric current. There is also no wording or language in any of these easement deeds, PSNH argued, 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. PSNH asserted that the clear and unambiguous wording

[12] 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 another for a particular purpose. *Arcidi v. Town of Rye*, 150 N.H. 694 (2004).

[13] *Lussier v. N. E Power Co.*, 133 N.H. 753 (1990).

specifying the allowable uses of PSNH's easement rights ends the inquiry under the New Hampshire Supreme Court's *Lussier* holding. PSNH contends that its determination that it does not own or control rights sufficient to allow segTEL access to PSNH's right-of-way was justified, reasonable and lawful under New Hampshire law. PSNH stated that because it owns the poles, but 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 and its related facilities consistent with its easement rights.

PSNH contended that the law of easements in New Hampshire is devoid of any reported case that 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. Contrary to segTEL's arguments, PSNH claimed that the New Hampshire Supreme Court ruled that "[s]imply 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."[14] PSNH concluded from this case that 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 such use, or as any basis for segTEL to use PSNH's easements for segTEL's purposes.

PSNH also stated that segTEL 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. PSNH maintained that this is not the law in New Hampshire, and the Federal Communications Commission (FCC) authority cited by segTEL to support this contention does not warrant such a sweeping notion. PSNH claimed that segTEL

[14] *Gill v. Gerrato*, 154 N.H. 36 (2006).

cited to a reported ruling 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.[15] That case, PSNH emphasized, did not involve an electric utility claiming it had insufficient ownership or control of the right-of-way to permit third party attacher access. According to PSNH, nothing in that ruling affects in any respect the FCC's prior determinations that a utility need only grant access to rights-of-way where its ownership or control is sufficient to permit such access under applicable state law.

PSNH reported that segTEL also relied on section 621(a) (2) of the Federal Cable Communications Policy Act of 1984, 47 USC §541(a) (2) for the proposition that electric utility rights-of-way are declared compatible with fiber optic telecommunications use. PSNH argued 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). PSNH stated, however, that 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.[16] PSNH concluded that there is no language in any of the PSNH easements in this matter that 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.

B. 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.

1. segTEL, Inc.

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[15] 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).

[16] *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).

segTEL argued that PSNH has a legal obligation to grant segTEL a license to attach to the poles regardless of whether PSNH has sufficient authority under the easements. segTEL stated that it is a duly authorized public utility with rights and privileges including access to utility poles owned by other utilities. According to segTEL, CLECs have been granted broad access to poles, conduits and rights-of-way by federal law under 47 USC § 224 and federal rules have established that CLEC access includes access to poles and rights-of-way owned solely by an electric utility. Under federal law, segTEL asserted that it has an existing and unfettered entitlement to attach to utility poles that includes access to rights-of-way, generally citing the Telecommunications Act. segTEL argued that the wording of the law conveys the notion that access to rights-of-way is equivalent to access to poles, and the laws and rules governing access to poles govern access to rights-of-way in the same manner.

segTEL claimed that access to electric utility poles and rights-of-way was established by Congress under the Pole Attachments Act, 47 U.S.C. § 224 (2000), which provided that the owners of poles and conduits have an obligation to lease space to telephone utilities and cable television companies that wish to attach cables or wires. It argued that Cable TV and CLEC attachers are entitled to the presumption that the rights-of-way owned, rented or utilized by incumbent utilities are compatible with communications attachment. segTEL contended that the FCC has found that attachers are entitled to unfettered access to utility rights-of-way. segTEL stated that when the FCC arbitrated a pole attachment agreement in which a power utility made a claim similar to what PSNH has raised here, the FCC rejected the argument outright.[17] segTEL maintained that the FCC has ruled repeatedly and consistently on denial of access cases with the result that the only reasons an incumbent utility can deny competitive attachments made by

[17] See *In the Matter of The Cable Television Association of Georgia, et al. v. Georgia Power Company*, Order, 18 FCC Rcd. 16333.

CLECs are: 1) the attachments are unsafe or will create an unsafe situation, or 2) they will interfere with the facility owner's ability to meet its obligations of universal service.

segTEL also claimed that under applicable pole license application regulations, PSNH failed to provide a detailed reason for rejection of the proposed attachments for reasons of safety, reliability, or generally accepted engineering purposes within 45 days of segTEL's license application. It stated that PSNH did not deny access for these reasons and, in fact, they could not, as the proposed attachments can be made safely. segTEL argued that when looking to whether PSNH must allow segTEL to attach, the issue is not whether PSNH's easement rights permit apportionment, but whether PSNH's rights prohibit apportionment. According to segTEL, to read the obligation any other way would result in eliminating all easements created prior to 1996 simply because they did not anticipate competitive phone service, fiber optic cable or the internet. segTEL emphasized that PSNH has the burden to prove why it is prohibited from issuing segTEL licenses, and it must do so promptly after the application for license is made.

segTEL claimed that PSNH has the burden of proving with specificity why it is prohibited from granting third party licenses to each individual pole. segTEL also argued that federal law mandates that an incumbent utility give CLECs the rights and benefits that the incumbent itself enjoys. 47 U.S.C. § 224 *et seq*. According to segTEL, state and federal law prohibit utilities from discriminating against competitors and wholesalers in favor of themselves. Moreover, pursuant to 47 USC §621(a)(2) (the Cable Act), electric rights-of-way and easements are declared to be compatible with fiber optic cable and telecommunications use.

2. Public Service Company of New Hampshire

PSNH emphasized that it does not have the legal obligation to grant segTEL a license to attach to PSNH's poles in this matter regardless of whether PSNH has sufficient authority under

its easements. PSNH argued that 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. It asserted that the Commission's authority is constrained under RSA 374:34-a to consideration of pole attachment matters in accordance with the Pole Attachment Act, 47 USC §224, and the FCC's regulations thereunder.[18] PSNH stated that both federal law and regulations, and prior rulings by the FCC, mandate consideration of the ownership and control limitation upon requests for access and of private property rights under New Hampshire law.

PSNH claimed that it has not denied segTEL access to PSNH's poles and that segTEL fails to distinguish 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 stated that the 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. PSNH argued that the Federal Pole Attachment 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.[19] It contended that, 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. According to PSNH, the

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

[19] 47 USC §224(f); 47 CFR § 1.1403(a).

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."[20] PSNH stated that the FCC ruled that the scope of a utility's ownership and control of an easement 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.

PSNH urged that 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."[21] PSNH argued that 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 and therefore it was required to consider segTEL's access request in light of the private property location of the poles that were the subject of the attachment request.

PSNH asserted that it was required to assess the scope and extent of its right-of-way easements in these locations and to determine whether its easement rights were sufficient to allow it to grant segTEL's attachment request to its poles in the right-of-way. PSNH maintained

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[20] *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).

[21] *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).

that none of its actions violated segTEL's rights under any federal or state law or regulation and were entirely consistent with the Pole Attachment Act, FCC regulations, and RSA 374:34-a.

In response to segTEL's contention that PSNH had only 45 days from segTEL's application to deny access to its poles, PSNH reiterated that it has not denied segTEL access to PSNH poles. Instead, PSNH's letter to segTEL informed segTEL of PSNH's need to review and determine the extent of its ownership and control of the right-of-way where the poles were located and thus could not grant segTEL's request. PSNH purportedly 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 in PSNH's right of way.

C. 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?

1. segTEL, Inc.

segTEL maintained that it is not obligated, pursuant to section 6.2 of the segTEL/PSNH 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. segTEL recounted that more than six months after segTEL's applications, PSNH claimed that a provision regarding permission to carry on construction activities must be read as a requirement that segTEL obtain its own rights-of-way. According to segTEL, PSNH stated in its motion that "segTEL is contractually obligated to obtain the required authorization to install its own rights-of-way in order to make attachments on PSNH rights of way obtained from private landowners." segTEL stated that, if PSNH wanted to require segTEL to obtain its own rights-of-way, PSNH could have written such language into the contract in plain and ordinary words that conveyed that meaning.

segTEL pointed out that, for approximately ten years prior to the Pole Attachment Act, utilities sought unsuccessfully to require Cable TV (CATV) operators to obtain their own rights-of-way under the guise that CATV is not a utility. *See* 47 U.S.C. § 541. According to segTEL, for CATV, the approval from a Local Franchise Authority conveys the right to access incumbent poles, conduits, ducts, and rights of way. Likewise, segTEL maintained, the CLEC authority granted to segTEL by the PUC and the FCC conveys the necessary "approvals" segTEL requires to attach to incumbent utility facilities. segTEL asserted that the relevant question is whether PSNH holds rights to attach additional cable or wire to the poles, not whether segTEL is required to independently obtain such rights. segTEL reiterated that its applications asked PSNH to provide a license to segTEL, not that PSNH convey its easement to segTEL. segTEL maintained that it is applying for a license, not an easement, the difference being that an easement is a "nonpossessory interest in realty" while a license is a "transient or impermanent interest which does not constitute an interest in land."[22] segTEL claimed that it is requesting no more and no less than access to the authority under the easements that PSNH already has to string wires and cables.

2. Public Service Company of New Hampshire

PSNH maintained that, pursuant to express terms of Section 6.2 of the Pole Attachment Agreement between PSNH and segTEL dated April 6, 2004, 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 argued that it has no obligation under the agreement to issue segTEL any license to attach unless and until such time as that authorization has been obtained.

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[22] *See Waterville Estates Assoc. v. Town of Campton,* 122 N.H. 506, 509 (1982) (quotation omitted); *see also N. .E Tel. & Tel. Co. v. City of Franklin*, 141 N.H. 449, 455-56 (1996).

PSNH contended that 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. PSNH suggested that to give credence to segTEL's interpretation of the agreement fails to give any meaning or context to the other words in the same sentence of Section 6.2, which defines the "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." PSNH stated that the authorizations in Section 6.2 refer to 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. According to PSNH, 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).

PSNH asserted that, when read as a whole, Sections 6.1, 6.2 and 6.3 of Article VI of the agreement 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. PSNH held that segTEL's belief as to the meaning of Section 6.2 lacks support and should be rejected by the Commission. PSNH indicated that segTEL does not want to be bound to comply with Section 6.2 of the agreement, yet it has not put forth any specific reasons or authority for why the Commission should find that provision unreasonable, unjust or unenforceable.

3. Intervenors and Staff

The intervening landowners filed no briefs and did not present any oral argument, but instead submitted letters generally opposing segTEL's petition. The Ausbon Sargent Land Preservation Trust, which holds conservation easements on some of the affected properties, contends that the easements "were clearly granted exclusively for the transmission of electric current in order to provide electricity, the addition of the fiber optic telecommunication cable would constitute an expansion of the original easement, and a new agreement with each individual landowner would have to be reached..." and further, that the terms of the conservation easements would prohibit segTEL's installation of fiber optic lines. UES and Staff took no position.

III. COMMISSION ANALYSIS

The events leading to this dispute arise from a Pole Attachment Agreement between PSNH and segTEL, dated April 6, 2004. Pursuant to that agreement, segTEL has the right to apply for and obtain a license from PSNH to attach wires to PSNH's utility poles located in New Hampshire. On January 18, 2008, segTEL applied for a license to attach to 90 PSNH poles in New London and 11 PSNH poles in Sunapee. segTEL's pole attachment applications are for the attachment of fiber optic lines for telecommunications purposes, to be used by segTEL to provide telecommunications and information services. The poles that are the subject of this docket are located within PSNH rights-of-way on private property.

Five owners of land upon which the poles are located have intervened in this docket with concerns about segTEL's requests. PSNH did not grant segTEL a license to attach fiber optic telecommunications cables to these utility poles claiming, among other things, that it does not possess sufficient ownership and control of the associated rights-of-way to do so. In taking this

position, PSNH asserts that the plain language of the applicable easements is controlling. After consideration of the arguments and relevant law, and for the following reasons, we agree.

A. Whether the underlying easements provide PSNH with the authority necessary to grant segTEL a license to attach to its poles in this matter.

RSA 374:34-a, I defines "pole," in relevant part, as follows:

> . . . any pole, duct, conduit, or right-of-way that is used for wire communications or electricity distribution and is owned in whole or in part by a public utility . . .

RSA 374:34-a, VI states as follows:

> Any pole owner shall provide nondiscriminatory access to its poles for the types of attachments regulated under this subdivision. A pole owner may deny access to its poles on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

We agree with segTEL that the denial of access to utility poles must be non-discriminatory and is allowed when there is insufficient capacity, there are safety and reliability issues or there are generally applicable engineering issues. What segTEL disregards is that PSNH must own, in whole or in part, a right-of-way in order to be subject to RSA 374:34-a, VI. Because we find that PSNH does not have sufficient ownership rights under the applicable easements, PSNH has not denied segTEL access for the purposes of RSA 374:34-a, VI. Our recently enacted pole attachment rules, N.H. Admin. Rules, Puc Chapter 1300, make this explicit, recognizing at Puc1303.01(c) that denial is allowed where the pole owner lacks the authority to grant access.

Applying the statutory definition of "pole" to PSNH, we must determine, in this case, whether the "right-of-way" held by PSNH on each applicable tract of private land constitutes ownership sufficient for PSNH to grant segTEL's applications. New Hampshire common law determines PSNH's rights to each tract, and it has long been settled that a deed granting an easement conveys only an easement and nothing more. *Graves v. Amoskeag Mfg. Co.*, 44 N.H.

462, 464 (1863). PSNH cannot be said to have denied segTEL a license to attach to its poles unless PSNH had sufficient rights to convey such a license. PSNH's rights, as established by the easement deeds, are the crux of the controversy in this matter.

In New Hampshire, the "rule of reason" is a rule "of interpretation, designed to give reasonable meaning to unclear or general terms in an easement deed." *Sakansky v. Wein*, 86 N.H. 337, 339 (1933). The New Hampshire Supreme Court has held, in relevant part, as follows:

> The beginning and end of our inquiry is found in the words of the easement deeds. Our task is to determine the parties' intent in light of the surrounding circumstances at the time the easements were granted. When, however, the words of the deed are clear and the meanings unambiguous, there is neither a need to resort to extrinsic facts and circumstances to aid in our determination, nor a need to rely on *Sakansky v. Wein's* "rule of reason." *Lussier v. New England Power Company*, 133 N.H. 753, 756 (1990) (citations omitted).

In this case, PSNH submitted copies of the easement deeds and the parties incorporated those documents by reference into the stipulation of facts. (Stipulated Exhibit 2). The parties agreed that these documents fall into two categories; those from the first half of the twentieth century (the earlier deeds) and those from the second half (the later deeds). The easements transfer to PSNH a one-hundred foot wide corridor extending through the towns of New London and Sunapee. The parties also recognize that the earlier deeds and later deeds contain distinguishable conveyance language, and that the two categories of deeds may be analyzed by reference to representative language contained in each category. We agree, and we review the language below for the purpose of determining whether PSNH received sufficient rights to grant the license segTEL has requested.

The following conveyance language contained in the 1915 deeds, is representative of the language contained in the earlier deeds:

> . . . do hereby give, grant bargain, sell and convey unto the second party, 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... (emphasis added)

In reviewing this language, we find that the words of the earlier deeds are clear and their meanings unambiguous. Therefore, to decide this matter we need not go beyond the words of the earlier easement deeds. *Id.* The earlier deeds unambiguously convey rights-of-way "for the transmission of high or low voltage electric current." We do not construe the phrase "transmission of high or low voltage electric current" to encompass "telecommunications and information services" which is what segTEL seeks to convey with its fiber optic lines. segTEL has not presented any persuasive basis for concluding that these two phrases are synonymous, or even that one includes the other. According to the New Hampshire Supreme Court's holding in *Lussier*, that must be the "beginning and end of our inquiry" and we may not reach out to extrinsic facts or provide further interpretation to the terms of the easement, as *Sakansky* would allow in less clear circumstances. Because segTEL's pole attachment applications are for the attachment of fiber optic lines for telecommunications purposes, to be used by segTEL to provide telecommunications and information services, we find that PSNH does not have sufficient authority to grant segTEL a license to attach fiber optic lines to those poles governed by the earlier deeds.

We must next consider the language of the later easements. The following language, circa 1972, is representative of the later deeds:

> . . . with QUITCLAIM covenants, the RIGHT and EASEMENT to construct, repair, rebuild, operate, patrol and remove overhead and underground lines consisting of cables, ducts, manholes, poles and towers with foundations, crossarms, braces, anchors, guys, grounds and other equipment, *for transmitting electric current and/or intelligence* .... (emphasis added)

The later deeds convey rights-of-way "for transmitting electric current and/or intelligence." Again, segTEL seeks to attach fiber optic lines to provide telecommunications and information services. segTEL is not seeking attachment for transmitting electric current, and segTEL has not presented any persuasive basis for concluding that the use of the term "intelligence" in the easement deeds generally encompasses all telecommunications or information services. We find more persuasive PSNH's argument that the term "intelligence," as used in these easements, relates to the transmission of intelligence data with respect to the operation and control of an electric utility transmission and distribution system such as what is provided through Supervisory Control and Data Acquisition or SCADA systems, electronic controls, and other similar internal communications functions. This is especially convincing because there is simply no independent reference to telecommunications in any of the easements. Because we find the terms clear on their face, we cease our inquiry into their meaning, pursuant to *Lussier*, and do not undertake a further *Sakansky* analysis.

Finally, under current New Hampshire law, appurtenant easements exist only when there is both a servient and a dominant estate. *Arcidi v. Town of Rye*, 150 N.H. 694, 698 (2004). In the instant docket, we address utility rights-of-way. None of the applicable easements involve servient and dominant estates such as those that exist when two tracts are appurtenant to one another and one owner's land serves the abutting (dominant) landowner. Accordingly, segTEL's arguments on this point are not relevant.

B. Whether PSNH has a legal obligation to grant segTEL a license to attach to the poles regardless of whether PSNH has sufficient authority under the easements.

segTEL asserts that PSNH has a legal obligation to grant segTEL a license to attach to the utility poles regardless of whether PSNH has sufficient authority under the easements. segTEL's position is that federal law provides it with unfettered access and entitlement to attach

to utility poles, which includes access to rights of way, citing 47 U.S.C. § 224(f) and *In the Matter of the Cable Television Association of Georgia, et al v. Georgia Power Company*, Order , 18 FCC Rcd. 16333 (sic). segTEL also cites 47 U.S.C. § 621(a)(2) for its assertion that electric rights-of-way and easements are declared to be compatible with fiber optic cable and telecommunications use.

We do not agree with segTEL's interpretation of the *Georgia Power* order. In *Georgia Power*, the FCC held that Georgia Power, an electric utility, was not entitled to additional payment for the use of private easements by cable companies. *Id. at 16345*. The FCC did not hold that the rights of private landowners are somehow superseded or preempted by 47 U.S.C. §224. The portion of that case addressing rights-of-way does include a cite to 47 U.S.C. §224 for the mandate that "[a] utility shall provide a cable television system . . . with nondiscriminatory access to any . . . right-of-way owned or controlled by it." Pursuant to that section, if a utility owns or controls a right-of-way, it must provide nondiscriminatory access. There is no dispute that the extent of such ownership and control, however, is governed by New Hampshire state law where the property at issue is located in this state.

Furthermore, while we agree that FCC decisions related to pole attachments should be used as guidance for pole attachment matters, the State of New Hampshire now regulates rates, terms and conditions for access to poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. § 224(f). 47 U.S.C. § 224(c)(1) reads as follows:

> Nothing in this section shall be construed to apply to, or to give the [FCC] jurisdiction with respect to rates, terms, and conditions, for access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by the state.

Pursuant to 47 U.S.C. § 224(c)(3)(A), we took jurisdiction over pole attachments on the effective date of N.H. Code Admin. Rules Puc 1300 (January 17, 2008). Our jurisdiction to hear

and resolve segTEL's complaint concerning terms and conditions relative to pole attachments, therefore, comes from 47 USC 224(c), RSA 374:34-a and Puc 1300. We have certified to the FCC that the Commission regulates the rates, terms and conditions for pole attachments in a manner sufficient to replace FCC jurisdiction and, in fact, RSA 374:34-a, VII reads, in relevant part, as follows:

> The [Public Utilities Commission] shall have the authority to hear and resolve complaints concerning [. . .] terms, conditions, voluntary agreements, or any denial of access relative to pole attachments.

The critical issue in this proceeding, however, concerns whether PSNH has the right in the first instance to grant access, which we have concluded it does not. It follows logically then that PSNH cannot be held to deny access to segTEL, or any other telecommunications provider, simply because it was not granted such a right by the underlying landowners

In conclusion, we disagree with segTEL's position that federal law provides it with unfettered entitlement to attach to utility poles. In these circumstances, such an approach would nullify the property rights of the landowners. As we determined above, PSNH does not have the prerequisite property rights to accommodate segTEL's request; those rights continue to reside with the underlying landowners. Finally, we find the Cable Act, 47 U.S.C. § 621(a)(2) to be inapplicable and, therefore, do not address segTEL's associated arguments.

C. Is segTEL obligated, pursuant to Section 6.2 of the Pole Attachment Agreement, to obtain authorization to construct, operate and maintain wires on the poles from the owners of the land where the poles are located.

Section 6.2 of the Pole Attachment Agreement, reads as follows:

> 6.2 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.

PSNH asserted that this language obligated segTEL to obtain authorization from landowners to attach wires to its poles. We agree with segTEL that, if PSNH holds sufficient rights under applicable easements, it is obligated to grant a license to attach pursuant to RSA 374:34-a, IV. We construe Section 6.2, however, to obligate segTEL to obtain authority from landowners when, and to the extent that, PSNH does not hold such authority. In this particular docket, we have determined that PSNH has no authority to grant the requested licenses to segTEL, therefore, if segTEL wishes to attach to the utility poles at issue in this matter, it must seek authority to do so directly from the underlying landowners.

D. Conclusion

This case is primarily, and fundamentally, a case about the property rights of landowners, and only secondarily, and contingently, a case about telecommunications policy. The threshold issue concerns the nature of the property rights that the landowners conveyed to PSNH in the first instance. PSNH, as successor in interest to Sunapee Electric Light and Power Company, believes the rights it was granted through its easement are limited to use for electric power line purposes. segTEL, a telecommunications provider, contends that the landowners conveyed to PSNH an easement that would permit additional uses, namely, telecommunications.

In support of its position, segTEL makes a variety of arguments, including that the easement is apportionable, that its line would not constitute a burden, and that it is good telecommunications policy to permit it to string its cables. While the additional lines may arguably not constitute a burden, and though the broad deployment of competitive facilities is consistent with our policy favoring competition, these considerations cannot create a property right in PSNH that does not exist. 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. Accordingly, we find against segTEL.

Based upon the foregoing, it is hereby

ORDERED, the relief requested by segTEL, Inc. in its Request for Arbitration Regarding Failure to Provide Access to Utility Poles by Public Service Company of New Hampshire is DENIED.

By order of the Public Utilities Commission of New Hampshire this seventh day of April, 2010.

Thomas B. Getz (KNS)
Thomas B. Getz
Chairman

Amy L. Ignatius
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary

Concurrence and Dissent of Commissioner Clifton C. Below

I concur with the analysis and decision of the majority with regard to the issue of whether PSNH has a legal obligation to grant segTEL a license to attach to the poles regardless of whether PSNH has sufficient authority under the easements: they do not. I also concur with the majority regarding segTEL's obligations, pursuant to Section 6.2 of the Pole Attachment Agreement, to obtain authorization to construct, operate and maintain wires on the poles from the owners of the land where the poles are located; that is, if PSNH does not posses the property

rights or authorization for segTEL's proposed attachment, the burden is on segTEL to obtain such authorization from the underlying property owners. However, I respectfully dissent with regard to the issue of the authority granted to PSNH by the easements at issue in this docket because I reach a different conclusion based on the record in this case and how I understand the law to apply.

While I agree with the majority that we must look to the words of the applicable deeds to decide this matter, certain words and phrases in those deeds are subject to different interpretations. My reading of the deed language interpreted by the majority leads me to different conclusions as to their meaning, and as to the procedural approach to coming to a decision on their meaning.

In reviewing the early easements, all conveyed by written deeds from 1915 to 1917, the majority held that the deeds for these easements unambiguously convey rights-of-way "for the transmission of high or low voltage electric current," and, therefore, the majority did not construe this phrase to encompass "telecommunications and information services" conveyed over fiber optic lines. It is not clear to me, however, that telecommunications and information services conveyed over fiber optic lines are completely distinct from the transmission of high or low voltage electric current. This is especially true in light of the fact that the language regarding high and low voltage electric current was written in the early part of the twentieth century, long before fiber optic cables were established as an alternative to wires transmitting low voltage electric current as a means to convey telecommunications and information. The mere fact that the precise technology segTEL seeks to deploy and the services it seeks to provide were not explicitly anticipated by the landowners and utility in the early twentieth century does not, in itself, end the inquiry. Rather, it raises the question whether the deployment of fiber optic

lines for transmission of telecommunications and information services would, legally and practically, place any greater burden on the landowner than wires transmitting electricity and whether such use is consistent with the original scope and intent of the easements. In other words, is such a use reasonable and within the meaning of the original grant, given the evolution in technology that was unforeseeable when these deeds were written? I conclude that an evidentiary hearing would be the appropriate procedure to allow adequate resolution of this issue and the ambiguity of the original deed language.

For these early easements there are facts that should be further explored. At the time (1915-1917) telephone and electric telegraph services were provided by wires transmitting "high or low voltage electric current," as the deeds described the principal permitted use of the easements. Did the deeds intend to restrict such electric current to the provision of electric power service only, or could the transmission of low voltage electric current also be used to transmit data or voice communications? With current technology, known as broadband over power lines or BPL, power lines transmitting either high or low voltage electric current can be used with commercially available technology to convey large amounts of data and telecommunication services while simultaneously providing electric service. From my understanding of the technology, this could be done without any physical change to the power lines within the right-of-way in question here, simply by installing power line modems at either end of the distribution/transmission line, before they connect to a transformer. If PSNH could do this, or even install a fiber optic cable to do likewise for its own internal use, such as for a SCADA system, within its easement property rights, as their brief suggests at footnote 4, page 7, then could PSNH assign such right to another utility? Since all of the early deeds include

express language making the rights assignable, could PSNH license telecommunications service providers to use its power lines to transmit telecommunications if it so desired?

The evolution of early orders by the Public Service Commission, the predecessor of the current Public Utilities Commission, may shed some light on the intent and scope of the early easements in question. In its first year in operation, 1911, the Commission issued several orders in which it granted to electric utilities, by condemnation, what are effectively easement rights across private land to run transmission lines. The relevant part in Order No. 25 (December 20, 1911), the first such order, granted the right to:

> ". . .construct a transmission line of poles, towers and wires across the land of the persons named in said petition, as hereinafter more specifically set forth, and that said Ashuelot Gas and Electric Company and its successors and assigns, by virtue of its said petition and this decree, are and shall be entitled to construct a transmission line of steel towers and other steel structures known as A frames in the locations hereinafter specifically set forth, and to string its wires upon said towers and structures, namely, electric transmission wires carrying a voltage of approximately 66,000 volts, one or more ground wires located on top of said towers and structures and designed as protection against lightening, and telephone wires used in said Company's own business, . . ." *Keene Gas & Electric Co. v. Bolleset al.*, 1 N.H. P.S.C.R. 48.

Likewise Orders No. 26, 46, and 70, all include language allowing "telephone wires used in said Company's own business." *Keene Gas & Electric Co. and Ashuelot Gas & Electric Co. v. Brown et al.*, 1 N.H. P.S.C.R. 54 (1911); *Keene Gas & Electric Co. and Ashuelot Gas & Electric Co. v. Saben et als.* 1 N.H. P.S.C.R. 108 (1912); *and Keene Gas & Electric Co. and Ashuelot Gas & Electric Company v. Tierney et al.*, 1 N.H. P.S.C.R. 200 (1912). Within just a few years this language apparently evolved to drop the limitation on telephone wires use "in said Company's own business" as well as some of the other details. For example, Order No. 491 (December 27, 1915) grants the Ashuelot Gas & Electric Company a right to "string thereon [on poles] one or more circuits of wire carrying a voltage of approximately 66,000 volts or less,

[and] one or more ground wires and telephone circuits . . . " without any further limitation on the telephone use. *Keene Gas & Electric Co. and Ashuelot Gas & Electric Co. v. Hodgman et al.*, 5 N.H. P.S.C.R. 303. On the one hand, this suggests that telephone circuits at the time might be distinguished from wires carrying electric current, and on the other hand, it suggests that telephone circuits were an expected appurtenant use to electric power transmission lines and the notion of limiting them to electric utilities' own use was known before 1914, but not apparently used thereafter in condemnation proceedings for utility lines across private lands. In subsequent condemnation orders through at least 1920, for both electric and telephone utilities, virtually identical language was used in the granting of rights-of-way or easements to "construct and maintain a line of poles, with the necessary cross-arms, wires, insulators, brackets and other accessories"[23] without any reference to voltage or use for electric power transmission versus telephone services.

An evidentiary hearing would allow a better determination of the early deed parties' intent in light of the surrounding circumstances at the time the easements were entered into and an understanding of whether a fiber optic cable, in lieu of a copper wire cable transmitting electric current, is an evolution of technology that is or isn't within the reasonable use allowed and burden imposed on the current landowners by the original easement deeds.

With regard to the later deeds (circa 1972), the majority reviewed, among other things, the language that conveys rights-of-way "for transmitting electric current and/or intelligence." In rejecting segTEL's assertion that the term "intelligence" includes telecommunications and information services, the majority relied on PSNH's argument that "intelligence" instead "relates

[23] *See* Order No. 410 (November 25, 1914), *Rockingham County Light & Power Company v. French et al.*, 5 N.H. P.S.C.R. 104; Order No. 670 (August 2, 1917), *Rockingham County Light & Power Company v. Nora E. Flynn et al.*, 6 N.H. P.S.C.R 208; Order No. 762 (June 15, 1918), *New England Telephone & Telegraph Company v. Joseph Dalphond et al.*, 6 N.H. P.S.C.R 369; and Order No. 1080 (July 9, 1920), *New England Telephone & Telegraph Company v. Thomas Cogger et al.*, 7 N.H. P.S.C.R 446.

to the transmission of intelligence data with respect to the operation and control of an electric utility transmission and distribution system such as what is now provided through Supervisory Control and Data Acquisition or SCADA systems, electronic controls, and other similar internal communications functions." I respectfully disagree.

First, there is nothing in the language of these deeds that indicates an intent to limit the term "intelligence" to such a narrow construction. As the majority previously stated, we need not go beyond the words of the deeds to construe them, unless we find those words to be ambiguous. Although the deeds do not provide a definition of the term "intelligence," this does not necessarily lead to the conclusion that the word is ambiguous. In fact, the 1971 edition of the Oxford English Dictionary provides, among others, the following definition for the term "intelligence:"

> Interchange of knowledge, information or sentiment; mutual conveyance of information; communication, intercourse.

This definition itself is sufficient to lead to the determination that the later deeds conveying rights for transmitting electric current and/or intelligence encompass telecommunications and information services, especially as the construction is "and/or" and not something like "and intelligence for the Company's own use." Additionally, a more recent definition of the term provides further support for the conclusion that "intelligence" includes telecommunications and information services:

> "intelligence [. . .] the information impressed or modulated on a transmission carrier – either voice or data." *Newton's Telecom Dictionary*, 16th ed. (July 2000).

While these readily available definitions support the conclusion that the later deeds include a conveyance to PSNH to transmit intelligence, PSNH's assertions related to SCADA are simply not supported by any legal or technical authority. Again, at a minimum, a hearing on this

issue may have provided further development and understanding of the conflicting interpretations of the parties. Absent that, I conclude that the term "intelligence" does encompass the telecommunications and information services segTEL seeks to provide in this matter. This conclusion leads to another issue to be resolved by the Commission; whether PSNH has the authority to grant segTEL a license to attach to the utility poles subject to those later easements.

In order to address that issue, it is necessary to look beyond the representative sample language to other language contained in the deeds at issue in this docket. That language conveys to PSNH "the RIGHT and EASEMENT to construct, repair operate, patrol and remove overhead and underground lines." Unlike the language in the earlier deeds, the "successors and assigns" of PSNH are not referenced in this granting clause. However, further along in these later deeds, the following representative phrase is found:

> The Grantor(s) for themselves and their heirs, executors, administrators, successors and assigns, covenant [. . .] and agree [. . .] to and with the Grantee, its successors and assigns, that they will not erect or maintain 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.

The use of the phrase "to and with the Grantee, its successors and assigns" indicates an intent on the part of the Grantor to allow conveyance of the easement rights to successors and assigns of the Grantee. The conveyance of such a right arguably implies that the Grantor anticipated that successors and assigns of the Grantor would be utilizing the land in the same way that the Grantee is permitted to use the land, namely, the use of lines "for transmitting electric current and/or intelligence." If so, then PSNH, through these later easements, received not only the right to use the property itself, but also to convey that right to its successors and assigns. Although segTEL cannot be said to be a successor to PSNH, I conclude that the

granting of a license to attach by PSNH to segTEL would constitute an assignment[24] of PSNH's easement rights. On that basis, I further conclude that a hearing on these issues would be the next logical next step to resolving them, giving each party an opportunity to present its legal arguments in the context of factual evidence.

Clifton C. Below
Commissioner

[24] Black's Law Dictionary defines the word "assigns" as follows: "Assigns. Assignees; those to whom property is, will or may be assigned. Used e.g., in the phrase, in deeds, 'heirs, administrators, and assigns to denote the assignable nature of the interest or right created.'" *Black's Law Dictionary*, 5th ed., p. 109 (1979). An "assignor" is a person who assigns or transfers property to another. *Id.*

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04/07/10 Order No. 25,090 issued and forwarded to all parties. Copies given to PUC Staff.

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FILING INSTRUCTIONS: PURSUANT TO N.H. ADMIN RULE PUC 203.02(a),

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INTERESTED PARTIES

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