

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 07-027

Kearsarge Telephone Company, Wilton Telephone Company, Inc.,
Hollis Telephone Company, Inc. and Merrimack County Telephone Company
Petition for Alternative Form of Regulation

Petitioners' Objection to
segTEL, Inc.'s Motion To Withdraw its Motion to Compel
and to Set Aside Order No. 24,802

NOW COME Kearsarge Telephone Company, Wilton Telephone Company, Inc., Hollis Telephone Company, Inc. and Merrimack County Telephone Company (collectively, the "Petitioners"), by and through their attorneys, Devine, Millimet & Branch, P.A., and object to segTEL, Inc. ("segTEL")'s Motion to Withdraw Motion to Compel and to Set Aside Order No. 24,802 for the reasons set forth below.

Factual Background

1. The underlying discovery dispute arose out of the competitive relationship between the Petitioners and segTEL, and the concerns raised in light of that relationship when segTEL requested a volume of highly competitively sensitive information from Petitioners.

2. segTEL is a competitive local exchange carrier and is an information services provider in areas actually served by the Petitioners. segTEL is a telecommunications service provider in areas adjacent to the Petitioners' service area, and, in these proceedings, segTEL has expressed its intent to enter the telecommunications service market in the Petitioners' exchange areas. segTEL, in other words, is Petitioners' direct competitor.

3. By way of background to segTEL's current motion, in this docket the Petitioners seek the Commission's approval of an alternative form of regulation pursuant to RSA 374:3-b. Through two rounds of discovery, Petitioners responded to data requests propounded by Staff, OCA and the intervenors, including segTEL. In the first round of discovery, the Petitioners responded to Staff data requests concerning competition in the territories served by the Petitioners. The Petitioners produced highly confidential and competitively sensitive detailed maps of each of the exchanges in the four companies at issue (confidential attachments TDS-CONF 0057-0072), as well as a summary of competition for each exchange included in the actual data responses themselves.

4. In the second round of discovery, segTEL propounded data requests in which it requested the production of all documents, maps, and other material referred to as confidential in the Staff data responses. Petitioners objected. Though Petitioners did not produce the information to segTEL, Petitioners made this information available to segTEL's counsel attorneys eyes only. segTEL filed a motion to compel to which the Petitioners also objected.

5. In Order No. 24,802, dated November 2, 2007, the Commission agreed with the Petitioners that "in the particular circumstances of the case, they are entitled to withhold the requested, competitively sensitive information from segTEL." Order No. 24,802, p. 4. The Commission recognized that "in the context of telephone proceedings, the Legislature has decided as a matter of public policy to grant enhanced protection of information that '[p]ertains to the provision of competitive services,' or sets 'forth trade secrets that required significant effort and cost to produce, or other confidential, research, development, financial, or commercial information, including customer, geographic, market, vendor or product-specific data, such as

pricing, usage, costing, forecasting, revenue, earnings, or technology information not reflected in tariffs of general application.’ RSA 378:43, II (a) and (b).” Order No. 24,802 at p. 5.

6. The Commission reviewed segTEL’s request in the context of that enhanced protection, and observed that the commercial competitor status of Petitioners and segTEL, segTEL’s unwillingness to limit access to its counsel or an outside technical expert, and segTEL’s desire to gain access for key segTEL decision makers, all augured in favor of refusing to compel production. See Order No. 24, 802 at 5-6.

7. Recently, and well after Order No. 24,802 issued, the Petitioners and segTEL reached a settlement. Given that settlement, segTEL now seeks to withdraw its motion to compel and set aside Order No. 24,802 on the grounds that the settlement has rendered the motion to compel moot which requires that the Commission’s Order be set aside. In the alternative, segTEL seeks clarification and/or rehearing.

8. The Petitioners do not object to that portion of segTEL’s motion which seeks to withdraw segTEL’s Motion to Compel, though, having been decided, no apparent purpose would be served by withdrawal. segTEL’s request that the Commission set aside, clarify, or reconsider Order No. 24,802, however, lacks merit.

Argument

I. segTEL’s Motion to Compel Was Fully Adjudicated Before the Parties Entered Into a Settlement Agreement, and Therefore, segTEL’s Motion, Not the Order, Is Moot.

9. “Generally, . . . a matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead.” E.g., In re Juvenile No. 2005-212, ___ N.H. ___, 917 A.2d 703, 705 (2007); Appeal of Hinsdale Federation of Teachers, NEA-New Hampshire, NEA, 133 N.H. 272, 276 (1990). Unless a pressing public interest is involved, or the question is capable of repetition yet evading review, an issue that has already

been resolved is not entitled to judicial intervention. See Appeal of Hinsdale Federation of Teachers, 133 N.H. at 276.

10. The Commission ruled on segTEL's motion to compel on November 2, 2007, over one month ago. The Petitioners and segTEL entered into a settlement agreement after the Order issued and before segTEL's recently filed motion seeking rehearing or clarification. This Commission is without a justiciable controversy, but that does not render the Order moot; instead, it renders segTEL's Motion moot. Further action on segTEL's motion and the corollary Order will unnecessarily consume Commission resources, but provide segTEL no specific relief, because as segTEL recognizes, it has reached a settlement with the Petitioners. In the absence of any dispute between segTEL and Petitioners, segTEL can state no basis for this Commission to revisit segTEL's motion to compel.

11. The fact that a party disliked a Commission Order and disagrees with the Commission's reasoning, in the absence of any actual dispute to adjudicate, does not create a justiciable controversy. The resolution of the discovery dispute between the Petitioners and segTEL to which Order No. 24,802 pertained followed by segTEL's and the Petitioners' settlement obviates the need for any further action by this Commission.

II. segTEL Cannot Show That Order No. 24,802 Was Unlawful or Unreasonable, Nor Can it Demonstrate Good Cause to Reconsider Order No. 24,802; Therefore, the Motion to Set Aside and the Motion for Reconsideration Must Be Denied.

12. segTEL's motion states no basis on the merits for reconsideration or clarification of the Order, because in refusing to compel unfettered production of the information segTEL sought, this Commission overlooked neither fact nor applicable law. To succeed on a motion for rehearing, segTEL "must demonstrate that the order [was] unlawful and unreasonable." Re City of Nashua, 90 PUC 130, *2 (Order No. 24,448) (2005) (*citing* RSA 541:3 and RSA 541:4).

“[G]ood cause for rehearing may be shown by new evidence that was unavailable at the time or that evidence was overlooked or misconstrued.” *Id.* (citing Dumais v. State, 118 N.H. 309, 312 (1978)). segTEL presents no evidence that was not available at the time of its initial motion tending to show that the Commission’s Order should be set aside. Instead, segTEL makes a series of unpersuasive arguments that the Order is unreasonable.

13. First, segTEL asserts that to the extent Order No. 24,802 is based upon RSA 378:43, it must be reconsidered, as the statute does not apply to parties to an adjudicative proceeding. RSA 378:43, however, does not carve out an exception for parties to an adjudicative proceeding. The Commission properly relied upon the provisions in RSA 378:43 discussing treatment of competitively sensitive information in proceedings before it, and there is no need to reconsider Order No. 24,802.

14. In addition, segTEL argues that the Order’s reference to the expertise of segTEL’s attorney means that segTEL may have to forego the assistance of outside counsel. The Commission has routinely allowed parties to proceedings before it, either by agreement or by Order, to share highly confidential information on an attorney’s eyes only basis. This is done so that information may be shared, facilitating the preparation of a party’s case in the adjudicative proceeding, while recognizing that often parties to a docket are in direct competition with one another and employees of the parties to a docket should not be allowed to access certain types of sensitive information due to the risk of unfairly gaining a competitive advantage. This principle applies equally to all parties appearing in proceedings before the Commission, and segTEL is no different. Notably, as the Commission points out, segTEL did not request to compel Petitioners to produce the information to an outside, technical expert in addition to outside counsel. Order at

6. Nothing about the Order limits segTEL's ability to procure the assistance of the outside counsel of its choosing and still participate fully in Commission proceedings.

15. segTEL expresses concern that Order No. 24,802 "suggests that the size of a telecommunications carrier is determinative of its ability to access to [sic] competitively sensitive information during the course of discovery in an adjudicative proceeding." segTEL bases this position on language in Order No. 24,802, which noted that segTEL "is a small company, seeking to gain access to competitively sensitive materials for key decision makers as opposed to technical experts who can be isolated from such decision makers..." Order No. 24,802 at p. 5-6.

16. segTEL takes the quoted language out of context, overlooks the reference to outside technical experts, and overly narrowly construes the Commission's Order. The Commission used that language in its discussion of due process and the many factors it took into consideration when ruling on segTEL's motion to compel. Those factors include the presence of other intervenors in the docket with similar objectives, segTEL's limited access to the information in light of the fact that Petitioners freely shared it with segTEL's outside counsel upon execution of a confidentiality agreement, segTEL's efforts to have the information produced to key decision makers rather than outside technical experts and Petitioners' ability to persuade the Commission that unfettered disclosure to segTEL would likely cause competitive harm.

17. Neither the words nor implication of the Order can fairly be characterized as suggesting that a small telecommunications carrier should never be able to access competitively sensitive information. segTEL's size particularly in light of its insistence on disclosure to key

decision makers and refusal to settle for disclosure to an outside technical expert, was one of a number of factors which lead to the ruling in this particular situation.

18. As the Commission clearly expressed in Order No. 24,802, when faced with discovery disputes such as this one and entertaining a due process analysis, the Commission will consider a number of factors in the context of the individual proceeding. That is what the Commission did here, and it is what the Commission will do in the future. segTEL states no basis for clarification of Order No. 24,802.

Conclusion

19. For the above stated reasons, the Petitioners respectfully request that segTEL's motion be denied, but for its request to withdraw segTEL's motion to compel.

Respectfully submitted,

KEARSARGE TELEPHONE CO., WILTON
TELEPHONE CO., INC., HOLLIS TELEPHONE
CO., INC. and MERRIMACK COUNTY
TELEPHONE CO.

By their Attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: December 10, 2007

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this day to the parties by electronic mail.

Dated: December 10, 2007

By: _____
Frederick J. Coolbroth, Esq.