STATE OF NEW HAMPSHIRE

BEFORE

THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

DT 08-146

segTEL, Inc.

Request for Arbitration Regarding Access to Utility Poles

BRIEF OF segTEL, INC.

I. INTRODUCTION

This matter arises from a dispute over Public Service Company of New Hampshire's (PSNH's) denial of applications made by segTEL, Inc. (segTEL) to attach its facilities to approximately 100 existing PSNH-owned utility poles in Sunapee and New London, New Hampshire. Since the beginning of the 20th century, PSNH has acquired perpetual rights and easements and/or quitclaim covenants over private property 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 high and low voltage electric current and/or intelligence.[1]

On August 6, 2008, more than six (6) months after segTEL's application, PSNH denied segTEL's application, claiming that PSNH does not own or control the rights in these locations which would allow it to grant segTEL's pole attachment license applications. PSNH further claimed that its rights and easements do not allow PSNH to grant a third party

[1] A discussion of the language of PSNH's easement deeds can be found *infra*.

telecommunications company, such as segTEL, the same right to use and occupy PSNH's easement corridor for the installation and operation of its private telecommunications line or cable. In this regard, PSNH is in error.

After technical sessions and discovery, the Commission sent letters to landowners of the underlying properties involved in this docket. By secretarial letter issued April 20, 2009, the New Hampshire Public Utilities Commission (Commission) directed segTEL, Inc. (segTEL) and Public Service Company of New Hampshire (PSNH) to file briefs 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?

The threshold here is a simple one. If PSNH holds rights sufficient to allow PSNH to attach to these poles, must it license segTEL to attach. Any other reading of the Telecommunications Act strains the ordinary language of Congress's grant of access by CLECs to incumbent utility rights of way.

PSNH does hold sufficient rights. The perpetual rights and easements held by PSNH provide PSNH itself with the authority necessary to attach additional lines to its utility poles. As such, to the extent that PSNH itself has the necessary rights to attach to the poles at issues in this docket, it must grant segTEL access to those rights of way. segTEL's position is supported by both federal and New Hampshire law, as discussed *infra*.

A. Stipulation of facts

On May 14, 2009, PSNH and segTEL submitted a stipulation of facts to the Commission. segTEL and PSNH agreed that the following documents are stipulated exhibits in this matter: Stipulated Exhibit 1, the Pole Agreement between segTEL, Verizon and PSNH, with all attachments ("segTEL/PSNH Pole Agreement"); Stipulated Exhibit 2, the easements filed with the applicable Registry of Deeds ("Exhibit 2 Easements"); Stipulated Exhibit 3, segTEL's applications for licenses to attach, with all attachments ("segTEL Applications"); and Stipulated Exhibit 4, PSNH's response to segTEL by George W. Kellerman, dated August 6, 2008 ("August 6 Letter").

B. The easements fall into two categories with but two distinct sets of conveyance language.

Central to this matter are approximately 33 documents, provided to the Commission by PSNH, and collectively known herein as the Exhibit 2 Easements. The Exhibit 2 Easements were granted between 1915 and 1972 by private property owners to PSNH or the predecessors-in-title to PSNH (collectively referred to as "PSNH"). The easements convey to PSNH an unbroken one-hundred-foot-wide strip of land which extends approximately 5 miles through the towns of New London and Sunapee.

One of the documents in the Exhibit 2 Easements is a deed executed in 1955, describing land that PSNH purchased in New London for the purpose of constructing a power sub-station that is located in the second mile of the right-of-way described above. PSNH owns this property in fee simple.[2]

Of the remaining 32 documents, nine were executed in 1972 ("1972 Easements"). The 23 remaining documents were executed between 1915 and 1917 ("Early Easements"). Of these, five have apparently been superseded by the 1972 easements.

[2] *See Book 735, page 13, Merrimack County Registry of Deeds,* being the fourth deed in the Mile 2 section of Exhibit 2 Easements (*"Substation Deed"*)

The 1972 Easements, all of which "are intended to include all or part" of the strips of land conveyed by earlier easements, are Quitclaim Covenants that identically state that the Grantors convey:

> ...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** . . .
> *See, for example,* Book 1142 page 7, Merrimack Country Registry of Deeds *[emphasis added] being the fifth deed in the Mile 2 section of Exhibit 2 Easements.*

There is more variation in the Early Easements, although the variations are limited to concerns regarding (a) the level of precision describing the location of the right of way, which does not concern us here; and (b) the amount and types of payments made for rights and damages. All of the Early Easements agree that a specific sum of money will be paid and accepted as "full payment for all rights granted hereunder and as full compensation for any damage done to their property by the exercising of the rights herein granted." *See,* for example, *Vol. 421, Page 448, Merrimack Country Registry of Deeds,* being the fourth deed in the Mile 3 section of Exhibit 2 Easements. The deeds granted in 1916 and 1917 (as well as two of the deeds dating from 1915) each offer a sum of money ($-- in one instance) "per pole or tower" while the remaining deeds simply specify a lump sum. Several of the deeds provide for an additional sum of money to be paid as "special damages" or as compensation for wood, timber, pine and/or grass land. Finally, three of the deeds have specific language covering future liability in the event of fires or other damage to the landowner's property from "breaking wires."

Despite these variations, the deeds are consistent in the rights granted. In no instance is there language limiting the right and easement granted in the primary paragraph. Each of the Early Easements, "in consideration of One Dollar" paid, identically state that the Grantors:

> 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.
>
> *See, for example, Vol. 434, Page 43, Merrimack County Registry of Deeds, [emphasis added] being the first deed in the Mile 2 section of Exhibit 2 Easements.*

The easements continue:

> The first party covenants and agrees that they have the full right, title and authority to convey the foregoing rights and privileges and will defend the same to said grantee against the claims and defenses of all persons."
>
> *Id.*

II. ARGUMENT

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

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. This claim is without merit. The terms of the easements clearly expressed the original grantors' and grantee's intent to allow the addition of wires and other equipment, such as those challenged here, to the right-of-way.

In deciding the issue of whether underlying easements provide PSNH with the authority necessary to grant segTEL a license to attach to its poles in this matter, it is necessary first to consider the types and nature of the property rights conveyed to PSNH by these various deeds. A grant in fee simple is a possessory interest in real property which conveys title and ownership rights free of all incumbrances to the grantee. RSA 477:27. An easement, however, is a nonpossessory interest in real property that can be created by written conveyance, prescription or implication. *See Waterville Estates Assoc. v. Town of Campton,* 122 N.H. 506, 508 (1982). All of the easements at issue were created by written conveyance.

An appurtenant easement is a nonpossessory right to the use of another's land. It creates two distinct estates -- the dominant estate, which is the land that benefits by the use of the easement, and the servient estate, which is the land burdened by the easement. *Quality Discount Market Corp. v. Laconia Planning Bd.*, 132 N.H. 734, 739 (1990). *Id.* An appurtenant easement is incapable of existence separate and apart from the dominant estate. *Id.* The benefit of an appurtenant easement "can be used only in conjunction with ownership or occupancy of a particular parcel of land." *Restatement (Third) of Property: Servitudes* comment *a* at 31 (2000).

An easement in gross is also a nonpossessory right to the use of another's land, but it is a mere personal interest. *Burcky v. Knowles*, 120 N.H. 244, 247(1980). "There is a servient estate, but no dominant estate" because the easement "benefits its holder whether or not the holder owns or possesses other land." J. Bruce & J. Ely, Jr., *The Law of Easements and Licenses in Land* § 2:2, at 2-3 (2001); *see Burcky*, 120 N.H. at 247. An easement in gross "grants to the holder the right to enter and make use of the property of another for a particular purpose." *Warburton v. Va. Beach Fed. Sav. & Loan*, 899 P.2d 779, 781 (Utah Ct.App.1995). *See also, e.g., Town of Kearny v. Municipal San. Landfill Auth.*, 143 N.J. Super. 449, 363 A.2d 390, 396 (1976) (finding that an agreement to deposit refuse on land was an easement in gross because it permitted a limited use or enjoyment of the burdened estate).

1. The underlying easements are appurtenant easements which grant PSNH the right to license or authorize third persons to use its right of way.

To the extent that the Exhibit 2 Easements are appurtenant easements, New Hampshire Law holds that PSNH, as the holder of an appurtenant easement, has the right to license or authorize others to use its rights of way. Appurtenant easements rely on the existence of a

dominant and a servient estate. Unlike an easement in gross where "[t]here is a servient estate, but no dominant estate" because the easement "benefits its holder whether or not the holder owns or possesses other land" (*See Burcky, supra*), a right of way corridor such as this one has no benefit to the holder if it is not continuous.

Further, there exists a dominant estate to which the right of way deeds are servient. In 1953 PSNH acquired a deed in fee simple on a parcel in New London which it purchased for the purpose of constructing a power sub-station. *See Substation Deed*. Although subsequent easement deeds do not refer to the sub-station in particularity, the equipment located on these private rights-of-way would ultimately terminate at substations or at other power facilities. As such, the burdened property on which the rights-of-way exist is necessarily connected with the use or enjoyment of the benefitted parcel on which PSNH facilities, such as the substation, are located.

The existence of these dominant estates creates an appurtenant easement because "the language creates two distinct tenements in which a dominant estate [*i.e.*, PSNH's power facilities] is benefited by use of an easement on a servient estate [*i.e.*, PSNH transport and distribution facilities]. *Burcky*, 120 N.H. at 247. On a higher level, these private properties burdened by the easement are all servient estates because the poles and cables thereon have to go somewhere and require an originating and terminating destination, as well as a source of PSNH services to be of use. They specifically exist to provide ingress and egress for services (as opposed to a simple personal use easement entitling the easement holder to, for instance, construct a building or store compost on the burdened parcel.)

In New Hampshire, the Supreme Court has determined that the dominant estate holder of

an appurtenant easement "may license or authorize third persons to use its right of way" so long as the use is reasonable. *Arcidi v. Town of Rye*, 150 N.H. 694, 700-01 (2004) *citing Henley v. Continental Cablevision*, 692 S.W.2d 825, 828 (Mo.Ct.App.1985). Reasonable use may include use by tenants, guests and invitees of the dominant estate holder. *Id*. at 701 *citing Gowen v. Cote*, 875 S.W.2d 637, 641 (Mo.Ct.App.1994); J. Bruce & J. Ely, Jr., *The Law of Easements and Licenses in Land*, § 8:4, at 8-15 (2001), see also 28 A. C.J.S. *Easements* §164 (1996) (stating that an appurtenant easement may be used "by all persons lawfully going to or from [the dominant estate]").

Here, PSNH, as the dominant estate holder of the substation parcel, may authorize others, such as other electric utilities, to use the appurtenant easement over the private property stated above. To the extent that PSNH could itself attach 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.

2. 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

Some of the easements in this parcel convey title of the utility easement to PSNH. The 1972 Easements are quitclaim[3] covenants, granting the *perpetual right* and easement over private property to construct, repair, rebuild, operate, patrol and remove overhead and underground lines consisting of wires, cables, ducts, manholes, poles and towers together with foundations,

[3] Quitclaim: ***noun*** *Law*.
1. a transfer of all one's interest, as in a parcel of real estate, esp. without a warranty of title.***–verb (used with object)***
2. to quit or give up claim to (a possession, right, etc.).

crossarms, braces, anchors, guys, grounds and other equipment, for transmitting electric current and/or intelligence." The 1972 Easements with quitclaim covenants guarantee that the grantor is conveying *whatever title he has* and that he has done nothing to impair or encumber that title. *See* Eno & Hovey, Real Estate Law § 31.22 , §§ 4.5-4.11 (3d ed.1995); *White v. Ford*, 124 N.H. 452 (1984). Moreover, the deed complies in its form with the statutory requirements for a quitclaim deed, RSA 477:28,[4] and accordingly has the "force and effect of a deed in fee simple" containing covenants. *White, supra.*

Therefore, to the extent that the language of the 1972 Easements conveys title of the right-of-way located in these private parcels, PSNH has full ownership rights free of all incumbrances, and PSNH has the authority necessary to grant segTEL a license to attach to its poles in this matter.

3. Where PSNH holds an easement in gross, it holds an alienable, and thus transferable, property right which is sufficient for PSNH to license segTEL's attachments.

Alternatively, should the Commission determine that despite the existence of PSNH property, PSNH holds the Early Easements in gross, such easements still confer on PSNH the

[4] 477:28 Statutory Form of Quitclaim Deed. – A deed in substance following the form appended to this section shall, when duly executed and delivered, have the force and effect of a deed in fee simple to the grantee, heirs, successors and assigns, to their own use, with covenants on the part of the grantor, for himself, or herself, heirs, executors and administrators with the grantee, heirs, successors and assigns, that at the time of the delivery of such deed the premises were free from all incumbrances made by the grantor, except as stated, and that the grantor will, and the heirs, executors and administrators shall, warrant and defend the same to the grantee and heirs, successors and assigns forever against the lawful claims and demands of all persons claiming, by, through or under the grantor, but against none other.
(Form for quitclaim deed)
_____, of _____ County, State of _____, for consideration paid, grant to _____, (complete mailing address) _____, of _____ Street, Town (City) of _____ County, State of _____, with quitclaim covenants, the _____ (Description of land or interest therein being conveyed.

authority necessary to license segTEL's attachments. Although this is a case of first impression in New Hampshire, several states have held that easements in gross, if of a **commercial** character, are alienable property interests and thus assignable.[5] *See, e.g., Johnston v. Michigan Consolidated Gas Co.*, 337 Mich. 572, 582, 60 N.W.2d 464 (1953). Most states focus their attention on whether the easement is exclusive or nonexclusive in reaching their conclusions. In *Zhang v. Omnipoint Communications Enterprises, Inc.*, 272 Conn. 627, 642, 866 A.2d 588 (2005), the Connecticut court explained:

> "Courts have generally concluded [however] that an easement in gross is capable of division when the instrument of creation so indicates or when the existence of an 'exclusive' easement gives rise to an inference that the servitude is apportionable." In this context, "exclusive" means that the "easement holder has the sole right to engage in the type of use authorized by the servitude." In other words, the grantor does not retain common rights with the easement holder to engage in the same activity for which the easement is granted.
>
> See *Hoffman v. Capitol Cablevision Systems, Inc.*, 52 A.D.2d 313, 315, 383 N.Y.S.2d 674 (1976) (finding easement exclusive because grantor never had attempted to engage in distribution of electricity).
>
> This common versus exclusive rights distinction is predicated on the notion that one who grants to another the right to use the grantor's land in a particular manner for a specified purpose but who retains no interest in exercising a similar right himself, sustains no loss if, within the specifications expressed in the grant, the use is shared by the grantee with others.. **We agree that the grant of an exclusive easement implicitly confers the authority to apportion those easement rights to third parties**. (Internal citations omitted). [Emphasis added.] *Id.*

Similar to the facts of the present case is *Jackson v. City of Auburn*, 971So.2d 696 (2006) (Ala.Civ.App., 2006). In *Jackson*, the plaintiff acquired property in 1978 on which the Alabama

[5] That the Court made a distinction when such easements are commercial would distinguish these easements from those discussed in similar New Hampshire cases such as *Gill v. Gerrato*, 154 NH 36 (2006) involving residential rights of way. Distinction may also be based on the fact that this docket concerns public utility rights of way and access to those rights of way by another public utility. *See White Mountain Power v. Maine Central Railroad Company*, 106 NH 443 (1965).

Power Company (APCo) maintained a power pole and power lines. Over the years, plaintiff sent several letters to APCo requesting that the power lines and pole be removed. APCo made no effort to rectify the situation. Then Lightwave Technologies, Inc. (Lightwave), entered into a pole-sharing agreement with APCo and, sometime in late 2000 or early 2001, began installing fiber-optic cable to the existing power pole on the property. In 2003, the plaintiff sued APCo and Lightwave (and others), primarily for trespass. The trial court found that APCo had acquired a prescriptive easement in gross over the property and next considered "whether APCo has the right to apportion its easement in gross and whether its apportionment to Lightwave was within the scope of the easement." *Id.* The Jackson court agreed that "**exclusive easements in gross**, like APCo's **are apportionable**," *Id*.

Another comparable case is *Hise v. BARC Electric Cooperative*, 254 Va. 341, 492 S.E.2d 154 (1997). In that case, a power company operated an electric power line pursuant to an alleged 30-foot prescriptive right of way across the plaintiffs' property. In an eminent domain proceeding, the power company acquired the rights to relocate its poles and to widen its prescriptive right of way. Since the power company had previously allowed a telephone company and a cable television company to use the easement for the power lines to string the lines for their services, these companies planned to relocate their lines to the new power company lines. The plaintiffs sued all three companies to compel the removal of the original poles and to enjoin the telephone and cable companies from transferring their lines to the new poles. The trial court determined that the telephone and cable companies could transfer their lines pursuant to their agreements with the power company, and the plaintiffs appealed. On appeal, the Virginia Supreme Court noted that "[i]f the [express] easement in gross is exclusive,

the owner of the easement may have the right of apportionment which is described as one of 'so dividing [an easement in gross] as to produce independent uses or operations' " and " '[w]hen an easement in gross is created by prescription, the question of its apportionability is decided in the light of the reasonable expectation of the parties concerned in its creation as inferred from the nature of the use by which it was created.' " *Id.* at 344-346, quoting 5 Restatement Property, § 493, comments a and b. The Appeals Court affirmed the trial court, holding that "the evidence supports a conclusion that the 30-foot prescriptive easement was apportionable, thereby giving the power company the right to permit the attachment of the telephone and cable lines to its poles within that area." *Id.* at 346-347.

Here, PSNH holds easements for the purpose of installing and maintaining 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. PSNH having that sole privilege, its easement, like APCo's in *Jackson,* is an exclusive easement in gross.[6] *See* 5 Restatement Property, § 493, comment c. 2 Restatement Property, Servitudes, 3d § 5.9, p 61 states that "[t]ransferable benefits in gross may be divided unless contrary to the terms of the servitude, or unless the division unreasonably increases the burden on the servient estate." An easement in gross is an alienable, and thus transferable, property right. *See Johnston v. Michigan Consol. Gas Co., supra; Heydon v. Mediaone,* 275 Mich.App. 267, 739 N.W.2d 373 (2007); *Johnston v. Michigan Consolidated Gas Co.,* 337 Mich. 572, 582, 60 N.W.2d 464 (1953).

Taking into account that PSNH acquired express commercial easements in gross, and finding guidance from other states which have ruled on this issue, it is clear that a commercial,

[6] Unlike here, it should be noted that *Jackson* concerned an easement in gross that was merely *prescriptive*.

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.

4. No undue burden will be created or increased by allowing segTEL to attach fiber optic cable to PSNH's poles.

While there are cases outside this jurisdiction to support the position that placing additional cable or wire in a utility easement imposes a new burden on the servient estate, they are not relevant here because under New Hampshire law, the determination of whether the additional burden is allowed is subject to the test of reasonableness.

Other states have reached the conclusion that the addition of communications facilities to electric utility poles does not create an additional burden. In *Centel Cable Television Co. of Ohio, Inc. v. Cook,* 58 Ohio St.3d 8, 567 N.E.2d 1010 (1991), the court found that the transmission of television signals through coaxial cable by a cable television company constitutes a use similar to the transmission of electric energy through a power line by an electric company, because companies broadcasting television signals through coaxial cable use electrical power or "electric energy." *Id.* at 11, 567 N.E.2d 1010. The court thus held that the "stringing of coaxial cable by a cable television company along an easement owned by a public utility constitutes no additional burden to the owner of the servient estate." *Id.* at 12, 567 N.E.2d 1010.

A Michigan court resolved a similar case in like manner. In *Mumaugh v. Diamond Lake Area Cable TV Co.,* 183 Mich.App. 597, 456 N.W.2d 425 (1990), the plaintiffs owned certain properties subject to an easement their predecessors granted to an electric company to construct and maintain poles and lines. The defendant, a cable television company, entered into an

agreement with the electric company to use the poles to string cable wires. The plaintiffs did not consent to the defendant's use of the poles and brought suit against the cable company based on theories of trespass and unjust enrichment or *quantum meruit*. The trial court found in the defendant's favor, ruling that the Cable Communications Policy Act (CCPA), 47 U.S.C. 541 *et seq.,* granted the cable company a right of access to easements of compatible use, such as the that of electric company. The Court also expressly rejected the plaintiffs' contention that attachment of defendant's cable television wires to the poles on a utility easement materially increased the burden on plaintiffs' servient estate and violated the rule that the use of an easement is strictly confined to the purpose for which it was intended. "Defendant's use of the easement is clearly consistent with those uses expressly set forth in the easement itself. Furthermore, the enactment of 47 U.S.C. 541(a)(2) may be seen as a legislative determination that the use of preexisting utility easements for cable television service does not materially overburden these easements." *Id.* at 607-608, 456 N.W.2d 425.

There is no reason to reach a different conclusion in this case than was reached in *Mumaugh*. First, here the rights held by PSNH are express, not prescribed. Under an express grant, a grantee takes by implication whatever rights are reasonably necessary to enable it to enjoy the easement beneficially. *White v. Hotel Co.*, 68 N.H. 38, 43 (1894). This includes the right to make improvements that are reasonably necessary to enjoy the easement. Bruce, *supra* § 8:36, at 8-84; *see, e.g.*, *White*, 68 N.H. at 42, 34 A. 672 (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"). PSNH clearly acquired an express right to string and maintain lines on utility poles located on the easement property. There is no evidence presented to establish that the stringing

of additional wires on the same poles by an attacher is unreasonable. The apportionment of PSNH's easement allows for similar transmission and uses the original purpose of the easement; therefore, the apportionment is not contrary to the terms or prior use of the servitude. *See, e.g., Municipal Elec. Authority of Georgia v. Gold-Arrow Farms, Inc*., 276 Ga. App. 862, 869 (2005) (express easement for electric communications lines encompassed use for fiber optic communications as accommodation to new technology); *Tuthill Ranch, Inc. v. United States*, 381 F.3d 1132, 1137-1139 (Fed. Cir. 2004) (a federal agency's installation of fiber optic cables in a power line easement was within the terms of the easement and did not increase the burden on the servient estate); *Laubshire v. Masada Cable Partners, C/A* No.: 95-CP-04-988 (South Carolina Ct. of Comm. Pleas Apr. 24, 1996); *Witteman v. Jack Barry Cable TV*, 192 Cal. App.3d 1619, *cert. denied* 484 U.S. 1043 (1988); *see also, Cousins v. Alabama Power Co*., 597 So.2d 683 (Ala.1992), in which the Alabama Power Co. obtained a unanimous Alabama Supreme Court opinion that electric utilities had the right to use electric rights-of-way and easements for fiber optic cable and telecommunications.

Even if, *arguendo,* PSNH's easement deeds did not contemplate the installation of fiber optic utility facilities, "it is well established that an easement may be maintained for a purpose not contemplated when it was created." *Kalman v. Hutcheson,* 111 N.H. 36, 41 (1971). "In this state the respective rights [of easement holders] are determined by reference to the rule of reason." *Sakansky v. Wein*, 86 N.H. at 339, 169 A. at 2. The use to which an easement may be put depends upon what is reasonable, under all of the surrounding circumstances. *Delaney v. Gurrieri,* 122 N.H. 819, 821 (1982); *Sakansky v. Wein, supra*, 86 N.H. at 339-40, 169 A. at 2. *See also Heydon v. Mediaone, supra,* 739 S.W.2d at 381 (finding that fiberoptic cable does not

unreasonably or materially increase the burden on the utility easement held by Detroit Edison electric company).

Thus, there is no New Hampshire precedent for the Commission to find that segTEL's attachments used for communications would unreasonably or materially increase the burden on the utility easement held by PSNH, and there is ample precedent from other jurisdictions to support a finding that fiber optic cable does not increase the burden on a utility easement held by an incumbent electric company.

5. Telecommunications is presumptively compatible with the distribution of electricity.

PSNH wants the Commission to distinguish electric utilities from telephone utilities to support its claim, but, in fact, PSNH routinely uses its facilities for telecommunications and signaling on many of its other similarly situated poles not relating to the instant easements. As such, any claim that segTEL's telecommunications and signaling facilities would be incompatible with the original grant must fail.

Even if, *arguendo*, PSNH does not use similar facilities for telecommunications and signaling, Congress has determined that telecommunications attachments are presumptively compatible with all utility facilities. Under § 621(a)(2) of the Cable Act, electric rights-of-way and easements are declared to be compatible and apportionable with fiber optic cable and telecommunications use. The Committee Report accompanying the Pole Attachments Act explains that this includes easements or rights-of-way used for utility transmission. *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.

6. 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.

The beginning and end of this inquiry is found in the words of the Exhibit 2 Easements. *See Lussier v. New England Power Company*, 133 N.H. 753, 756 (1990). The task is to determine the parties' intent in light of the surrounding circumstances at the time the easements were granted. *Id., citing Bisson v. Laconia Investment Properties, Inc.,* 131 N.H. 704, 707 (1989); *Sakansky v. Wein, supra* 86 N.H. at 339, 169 A. at 2. When, however, the words of the deed are clear and their meanings unambiguous, there is neither a need to resort to extrinsic facts and circumstances to aid the Commission's determination, *see* 2-A R. Powell, *The Law of Real Property* 293[3], at 24-16 n. 10 (1990); Annotation, *Extent and Reasonableness of Use of Private Way in Exercise of Easement Granted in General Terms,* 3 A.L.R.3d 1256, 1262 (1965), nor a need to rely on *Sakansky v. Wein*'s "rule of reason."

As discussed *supra*, while there are several deed instruments conveying rights to PSNH, there are but two statements of conveyance. The Early Easements allow:

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

The pertinent language contained in the 1972 Easements, also contemplates telecommunications, stating:

> 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** ...

and granting same to:

> themselves and their heirs, executors, administrators, successors and assigns, covenant and agree to and with the Grantee, its successors and **assigns**....

Contrary to PSNH's argument, nothing in the deeds indicates that the intended use of the easement 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. In fact, the drafters expressly contemplated and provided for future construction and expanded use of the easement by giving the grantee the right to "erect and maintain" "wires" "strung from pole to pole and tower to tower" and allows the transfer of those rights to the grantee's "successor or **assigns**." To the extent that each of these easements contemplated the word "assigns," PSNH's claim that the deeds do not permit further assignment of its rights fails when examined under the test set out by *Lussier*. Had these easements been intended for the exclusive use of Sunapee Electric Light and Power Company, or PSNH, the drafters could have included such other restrictive language. But they did not.

Under these circumstances, where the language clearly expresses the parties' intent, it is unnecessary to utilize the interpretative tool of the "rule of reason" set out in *Sakansky*. The intent of the original parties to the Early Easements was to permit the erection of communications wires. 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 historically been transmitted by low voltage electric current, only recently being supplanted by technology that does the same function using different technology.

This means that the parties contemplated the inclusion of wires carrying all levels of electric current, which would necessarily have included, in those times, copper telecommunications wires. This view is consistent with the Early Easements being supplanted by the 1972 Easements which include the transmission of "intelligence." Obviously, the parties intended to allow the **future addition of wires and cables** for transmitting low voltage electric current and/or **intelligence**. Not surprisingly, there is no language in the Early Easements specifically permitting "fiber optic" attachments, since fiber optic technology did not exist at the time these deeds were executed. However, the fact that these easement rights exist in perpetuity strongly suggests that the parties contemplated the addition of wires in their logical evolutionary uses. Where these easements silent on the type of cable capable of transmitting "low-voltage electric current" or "intelligence," fiber optic cable is a logical evolution of the copper cable that would have existed at the time of the easements and transmitted voice using low voltage electric current for signaling at that time. 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. Finally, lest it be forgotten, fiber optic cable transmits intelligence.[7] As such, the installation of fiber optic cable is a logical permissible use of the utility easement and PSNH, therefore, can make no allegations of unreasonable interference or encroachment.

[7] As an Ohio Court found, it is "apparent that companies broadcasting television signals through coaxial cable utilize electrical power or 'electric energy.'" *Centel Cable Television Co. of Ohio, Inc. v. Cook*, 58 Ohio St.3d 8, 567 N.E.2d 1010 (1991).

Accordingly, the easement deeds specifically contemplated additions to the easement under the terms of the deeds by PSNH's assignees, such as segTEL, and, therefore, PSNH has the right to grant segTEL licenses to install its fiber optic cable on the poles at issue.

7. As a public utility with rights of eminent domain, to the extent that sufficient rights do not exist on the right of way, the right of way is subject to condemnation and taking for the public good.

In New Hampshire, once a reasonable necessity is shown, one utility devoted to public service may under eminent domain statute take property from another utility engaged in public service. *See White Mountain Power v. Maine Central Railroad Company,* 106 NH 443 (1965). PSNH's permanent easements are already devoted to public use. RSA 371:1 grants to public utIlities the right to condemn in very broad and general language. *See Public Service Co. v. Shannon,* 105 NH 67 (1963). "The NH Supreme Court has recognized 'the equality of owners of railroads and the owners of other property...' (Opinion of the Justices, 66 NH 629, 674, 33 A 1076, 1100) in so far as eminent domain is concerned." *Id*.

To the extent that PSNH does not hold sufficient rights to allow segTEL to attach, segTEL, upon a showing of reasonable necessity, could request that the Commission condemn PSNH's easements and allow this additional public use. Such a protracted and expensive requirement to obtain rights that are otherwise already licensable would be unduly burdensome, and antithetical to the progressive intent of the Telecommunications Act.

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.

B. 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.

segTEL is a duly authorized public utility with rights and privileges including access to utility poles owned by other utilities. CLECs have been granted broad access to poles, conduits and rights of way by Federal Law under 47 USC § 224. Federal rules have established that CLEC access includes poles and rights of way owned solely by an electric utility:

> Definitions.
> (a) The term utility means any person that is a local exchange carrier or an *electric*, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person that is cooperatively organized, or any person owned by the Federal Government or any State.
> *47 C.F.R. § 1.1402*

Under federal law, segTEL has an existing and unfettered entitlement to attach to utility poles that includes access to rights-of-way. The same law that brought competitive telecommunications into existence created the obligation of incumbent utilities, including electric utilities, to provide access to their poles, ducts, conduits and ***rights-of-way***. See Title 47 of the United States Code. 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 also govern, in the exact same manner, access to rights of way. 47 USC 224(f) regarding nondiscriminatory access states:

> **(1)** A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

> **(2)** Notwithstanding paragraph (1), a utility ***providing electric service*** may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is ***insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.*** [Emphasis added]

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 TV companies that wish to attach cables or wires. Under the Pole Attachments Act, an owner may deny space "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." The Pole Attachments Act covers all "poles, ducts, conduits and rights-of-way, and all local distribution facilities are covered by the Act, *regardless of whether they are used in part for transmission wires or other transmission facilities*." *See Southern Co. v. F.C.C.*, 293 F.3d 1338, C.A.11, 2002. [Emphasis added.]

Cable TV and CLEC attachers are entitled to the <u>presumption</u> that the rights of way owned, rented or utilized by incumbent utilities are compatible with communications attachment. To the extent that PSNH could, as described in section I, attach wires and cables for communication, PSNH must, under federal law, extend those rights to segTEL. The FCC has found that attachers are entitled to unfettered access to utility rights of way. 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. See *In the Matter of The Cable Television Association of Georgia, et al. v. Georgia Power Company*, Order, 18 FCC Rcd. 16333. In fact, the FCC has ruled repeatedly and consistently on denial of access with the effect that the only reasons an incumbent utility can deny competitive attachments made by 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.

Under applicable pole 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. PSNH did not deny access for these reasons, and, in fact, they could not, as the proposed attachments can be safely made.

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. 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. 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. Instead, after the license application was submitted, PSNH caused surveys to be performed at substantial expense to segTEL, assured segTEL that the attachments could be safely made, and then rejected the applications almost seven (7) months later on the premise that it did not believe it had the right to issue the licenses. Moreover, PSNH has the burden of proving with specificity why it is prohibited from granting third party licenses to each individual pole, rather than issuing a blanket statement that the poles in the entire utility corridor are off limits.

Finally, if PSNH can prove the prohibitions that prevent it from granting third party access to its poles, there should be an opportunity for prospective attachers to pay the incumbent its reasonable expenses to engage the landowner to modify the easement. The incumbent is the owner of the information and the owner of the existing facilities; it is therefore properly situated

to negotiate the modification of existing rights. Although segTEL believes that in the instant case PSNH cannot show such rights do not exist, segTEL respectfully submits that a prospective attacher be provided with the opportunity to pay the reasonable costs of the incumbent to modify easement language when necessary to create rights that do not currently exist.

Federal law mandates that an incumbent utility give CLEC the rights and benefits that the incumbent itself enjoys. 47 U.S.C. § 224 *et seq*. State and federal law prohibit utilities from discriminating against competitors and wholesalers in favor or 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. The Committee Report accompanying the Act provides clarification, although it is not strictly applicable here, that the declaration of compatibility includes easements and rights of way used for utility transmission as well as those used for distribution. *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. In 1996, amendments to these statutes reiterated and strengthened access to easements.

C. segTEL is not obligated, pursuant to section 6.2 of the segTEL/PSNH 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.

More than six months after segTEL's Applications, PSNH suddenly 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. 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." If PSNH wanted to

require segTEL to obtain its own rights-of-way, even if PSNH already held sufficient rights to license segTEL attachments, PSNH could have written such language into the contract in plain and ordinary words that conveyed that exact meaning. PSNH did not do so, because it knew it could not do so.

For approximately ten years prior to the Pole Attachments 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. For CATV, the approval from a Local Franchise Authority ("LFA") conveys the right to access incumbent poles, conduits, ducts, and rights of way. Likewise, the CLEC authority granted to segTEL by the PUC and the FCC convey the necessary "approvals" segTEL requires to seek to attach to incumbent facilities. Now PSNH wants this Commission to not only go along with PSNH's tortured reading of its own contract, but to disregard years of Federal and State precedent regarding permissible use of utility rights-of-way.

1. The segTEL/PSNH Agreement does not control poles, ducts, conduits and rights of way that PSNH does not own.

If PSNH does not have sufficient rights to attach its own cable and wires to its poles, it has no rights to convey to segTEL. If, for example, segTEL wished to install wires on poles that PSNH does not own, such poles would not be subject to the segTEL/PSNH Agreement, and therefore no entitlement to seek rights could accrue to segTEL *under the terms of the Agreement*. Poles which segTEL itself installs are not included in its agreement with PSNH. The segTEL/PSNH Agreement, rather, only covers those poles to which PSNH holds rights that it can, in turn, grant to segTEL for the purpose of attaching its cables and wires. For those poles

which PSNH does control, the relevant question is whether or not PSNH holds rights to attach additional cable or wire to those poles, not whether segTEL is required to independently obtain such rights.

When PSNH wishes to place new lines on existing poles, do maintenance on its poles, or even replace its poles, it does not need to seek a new easement to do so. Therefore PSNH owns or controls the rights for which segTEL is seeking a license.

2. segTEL's applications are requesting that PSNH provide a license to segTEL, not that PSNH convey its easement to segTEL.

segTEL here is applying for a license, not an easement. "the basic distinction between an easement and a license: 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." *See Waterville Estates Assoc. v. Town of Campton*, 122 N.H. 506 (1982) (quotation omitted) taken from *New England Tel. & Tel. Co. v. City of Franklin*, 141 N.H. 449. segTEL is requesting no more and no less than access to the authority under the easements that PSNH already has to string wires and cables.

III. CONCLUSION

PSNH's denial of access is improper, discriminatory and anticompetitive, violates state and federal law and misapprehends relevant statutes and interpretations. PSNH is providing segTEL with a lower level of access to its facilities than what it provides itself. Access to electric utility poles and rights of way was established by Congress under the Pole Attachments Act 47 U.S.C. § 224 which provided that the owners of poles and conduits have an obligation to

lease space to telephone utilities and cable TV companies that wish to attach cables or wires. Under the Pole Attachments Act, an owner may deny space "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."

Respectfully submitted,

SEGTEL, INC.

By its general counsel,

May 15, 2009

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