STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DT 08-146

segTEL, Inc.

Request for Arbitration Regarding Access to Utility Poles

REPLY BRIEF OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Public Service Company of New Hampshire ("PSNH"), by its undersigned attorney, files the following brief Reply Brief to the Brief of segTEL, Inc. dated May 15, 2009 in this matter:

A. segTEL has failed to demonstrate any convincing legal authority in New Hampshire which supports a conclusion that the underlying PSNH easements provide PSNH with the authority necessary to grant segTEL a license to attach.

segTEL has asserted a number of arguments in its Brief to support the position that PSNH has sufficient authority under its easements in this matter to grant segTEL's license to attach to PSNH's poles in the PSNH 316 line right-of-way. Ultimately, these arguments remain unconvincing.

segTEL contends that PSNH's easements are "appurtenant easements" because of PSNH's fee ownership of a parcel acquired in 1953 for the construction of a substation, and situated in Mile 2 of the 316 line right-of-way. segTEL chooses to identify this parcel as the "dominant estate" benefitted by the PSNH easements. segTEL contends, in turn, that as the holder of "appurtenant easements" benefitting PSNH's "dominant" estate (the fee owned substation parcel), PSNH may as matter of law license or authorize others to use its appurtenant easement rights. segTEL's analysis is incorrect for two reasons.

First, this concept would only apply to the extent the proposed licensee or authorized other user (segTEL, in this case) would be similarly using the appurtenant easement in some respect in relation to the dominant estate which it benefits. The benefit of an appurtenant easement can be used only in conjunction with the ownership or occupancy of the particular parcel of land benefitted by the easement (the dominant estate). *Arcidi v. Town of Rye,* 150 N.H. 694, 698 (2004). Here, segTEL is seeking the use of all of PSNH's easement's throughout the 316 line corridor for its own use, and not for any use or purpose related to use of the so-called "dominant estate" (the substation parcel) of PSNH. In other words, segTEL's proposed use will have absolutely nothing to do with the parcel identified by segTEL as the "dominant estate".

Second, it is fundamental to the legal creation of a servitude (such as an easement) appurtenant to benefitted land, that there be "a showing that the parties to the original promise intended to benefit a particular lot and that the promise touches and concerns the lot." *Traficante v. Pope,* 115 N.H. 356, 359 (1975). Obviously, none of the original grants of the so-called "early" PSNH easements (granted between 1915 and 1917) could have met this requirement because PSNH did not even acquire ownership of the so-called "dominant estate" until more than 35 years later. There is also no showing made by segTEL of any language in the later, 1972 PSNH easements, which evidences any intent by the parties to those easements to benefit, either generally or specifically, the PSNH substation parcel earlier acquired in 1953.

Alternatively, segTEL contends that PSNH's easements must be "easements in gross", and thus apportionable to segTEL for segTEL's use under holdings in other jurisdictions outside of New Hampshire. While it is probably more correct to classify PSNH's easements in this case as "in gross" as opposed to "appurtenant", it is also correct, as segTEL concedes, that there is no direct legal authority in New Hampshire

which has expressly adopted as a rule that easements in gross are apportionable to other parties.[1] Thus, PSNH's determination that it did not own or control rights sufficient under New Hampshire law to allow segTEL the use of its right-of-way to attach fiber to PSNH's poles was not unreasonable.

segTEL also contends that the conveyance of the 1972 easements to PSNH with "quitclaim covenants" somehow invests PSNH with the ownership authority to grant segTEL the right to attach to its poles in the right-of-way. segTEL has misconstrued the meaning of title covenants in a conveyance. The operative New Hampshire statute regarding the nature of the interest conveyed by a deed is RSA 477:24, which states in relevant part: "A deed or reservation of real estate shall be construed to convey or reserve an interest in fee simple unless a different intention clearly appears in the deed." The language universally used in all of the PSNH easements expressly conveys a "right and easement" to the grantee, thus evidencing a clear intent to convey something different than fee simple title to the underlying land encumbered by the easement grant. The New Hampshire conveyance of an easement with the words "with quitclaim covenants" merely invokes the statutorily defined title covenants deemed to be made by the grantor in accordance with RSA 477:28. Such covenants represent the promises or assurances made by the grantor with respect to the state and quality of the title being conveyed by the grantor. *See generally,* 17 CHARLES SZYPSZAK, NEW HAMPSHIRE PRACTICE- REAL ESTATE § 5.06 (First Ed. 2003). They do not affect the purpose or permissible scope of the easement, or the language used by the original parties in the easement grant itself.

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[1] To the contrary, see *Burcky v. Knowles,* 120 N.H. 244 (1980), in which the Supreme Court declared that an easement in gross is a mere personal interest, and vests only in the person to whom it is granted.

Moreover, there is no disagreement here that PSNH owns the easements which make up the right-of-way involved in this matter. The ownership of those easements by PSNH, however, does not equate to fee simple ownership of the underlying land, or allow PSNH to exercise its authority under those easements without regard to the purpose, permissible scope or the proposed third party use of those easements.

PSNH does not agree with segTEL's view that the question of PSNH's authority under its easements is dependent upon a classification of those easements as either "appurtenant" or "in gross", or on whether or not PSNH holds legal title to and ownership of its easements (which it clearly does). As PSNH has maintained in its original Brief, the question is whether or not those easements grant PSNH ownership and control of sufficient rights under New Hampshire law to permit it to allow segTEL access to the right-of-way for segTEL's use. It bears re-emphasis that the FCC has declared that such ownership and control exists only if the utility "could voluntarily provide access to a third party and would be entitled to compensation for doing so."[2] When considered under that test, PSNH continues to believe that the answer to the question must be no.

segTEL devotes considerable argument in its Brief to an analysis of the reasonableness of its proposed use. It contends for example that, since PSNH has rights to attach additional wires to its poles under the easements, segTEL's attachment of a fiber optic cable to the same poles would not result in an unreasonable burdening of the easements. It also argues the compatibility of its proposed telecommunications use with PSNH's electric utility use, and suggests that installation of it fiber optic telecommunication cable is permitted by wording in the easements authorizing wires for low voltage electric current, or for intelligence. These arguments miss the point. It is

[2]See Brief of Public Service Company of New Hampshire, p. 13.

not PSNH's past uses or future uses of the PSNH easement which are in issue. The fact that PSNH may have the authority under its easements, without overburdening them, to install additional wires, lines and facilities for its use consistent with the purposes of those easements, does not thereby invest PSNH with the authority to allow the use of those same easements by a third party, such as segTEL, for that third party's sole use. segTEL attempts to attribute significance to language in the PSNH easements conveying to the "successors and assigns" of the grantee, maintaining that such wording evidences an intent to allow assignment of PSNH's easement rights to others. However, segTEL again fails to draw the necessary distinction between an assignment by PSNH of its rights to another electric utility for that utility's use consistent with the electric utility purposes of the original easement grant, and the assignment by PSNH of its rights to a third party telecommunications carrier for that third party's exclusive telecommunications use.

Those landowners who have received the Commission's Landowner Notification in this proceeding and who have filed a comment with the Commission concerning this matter have been unanimous in their statements of concern regarding the proposed use of the PSNH right-of-way by segTEL for segTEL's fiber optic cable. Three of the five responding landowners have expressly stated their opposition to the proposed expanded use by segTEL of the PSNH easements on their property.[3] No landowner has filed a comment in support of segTEL's position that the use by segTEL for a fiber optic installation would be a reasonable one, or would not be an overburdening of the easement.

[3] One of these responding landowners is a land preservation trust which holds conservation easements on several of the parcels encumbered by the PSNH easements, and objects to expansion of the use of the PSNH easements on these parcels for segTEL's fiber optic cable.

Lastly, segTEL has referred to a public utility's eminent domain taking authority under RSA 371:1, as somehow supporting segTEL's arguments in this case. To the extent segTEL has asserted that it may seek to condemn PSNH's easements to allow for segTEL's use, PSNH takes no position except to note that in PSNH's opinion, any such condemnation action would have to be brought against the fee owner of the underlying land over which such rights would be sought. The novel notion that segTEL may condemn rights in PSNH easements to allow for segTEL's own use assumes, wrongly, that PSNH owns such rights in the first instance. Of course, that is the very issue in dispute in this matter. None of the PSNH easements in this matter were acquired by condemnation proceeding or order; all the easements here were privately negotiated, privately paid for, and expressly granted by voluntary deed of conveyance. PSNH's easements therefore do not depend upon the public utility eminent domain statute for their meaning or an interpretation of the scope of their permissible use.

B. segTEL's position with respect to the question of PSNH's legal obligation to grant segTEL a license to attach continues to fail to recognize that the non-discriminatory access provisions of the Federal Pole Attachment Act only mandate access to rights-of-way owned or controlled by PSNH.

segTEL argues in its Brief that PSNH must provide access to its poles and rights-of-way under the provisions of the Federal Pole Attachment Act (47 USC §224), and may only deny access under that Act for reasons of insufficient capacity, or safety, reliability or generally applicable engineering purposes. In making its arguments, however, segTEL again completely ignores the wording in 47 USC §224 and in the FCC's regulations which clearly limit the access requirement to any pole, duct, conduit or right-of-way "owned or controlled" by the incumbent utility. segTEL further ignores the FCC's prior rulings regarding the meaning of this wording in the statute and regulations. A utility such as PSNH does not have to provide access to poles, ducts, conduits and rights-

of-way which are not owned or controlled by that utility, and the FCC has recognized not only that the question of ownership and control is a legitimate one, but is a question uniquely governed by the state law applicable in any factual situation within the meaning of 47 USC §224.[4] PSNH was legally and factually correct in raising the issue of the ownership and control of rights under its easements sufficient to allow segTEL's access, and does not have a legal obligation to grant segTEL's request for a license to attach to its poles regardless of the question of its authority under those easements.

segTEL further argues that, to the extent PSNH has denied segTEL access to its facilities, it carries the burden of proving, with specificity, why it is prohibited from allowing segTEL's attachment request.[5] segTEL cites to no legal authority for this proposition Even if it could be shown that PSNH does have or should have such a burden, PSNH met that burden to the extent possible by notifying segTEL of PSNH's determination that its easements did not clearly allow PSNH to grant a third party telecommunications company permission to use and occupy PSNH's easement corridor for installation and operation of a private telecommunications cable, and of PSNH's conclusion that it did not own or control rights sufficient to allow segTEL's access. (Stipulated Exhibit 4). The determination of an easement's intended meaning and legal effect is ultimately a question of law. *Lussier v. N.E. Power Co.,* 133 N.H.753, 756-757 (1990). Thus, the basis for PSNH's initial determination with respect to its easements was more a matter of legal interpretation of the wording of the easements in light of

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[4] See Brief of Public Service Company of New Hampshire, pp.12-13.

[5] In its Brief at page 23, segTEL improperly makes certain factual allegations regarding PSNH's handling of segTEL's applications to attach which have not been stipulated to, and which have not been the subjects of any hearing in this matter. These include allegations that after the license application was submitted, PSNH caused surveys to be performed at substantial expense to segTEL, and that PSNH assured segTEL that its attachments could be safely made. PSNH disputes these allegations.

applicable New Hampshire law, than a matter of production of factual justifications to meet an ostensible burden of proof.[6]

segTEL also suggests, again without any supporting legal authority, that to the extent an incumbent utility is prevented from granting third party access to its poles, the incumbent should be responsible to negotiate and obtain the necessary modification of easement rights to allow attachment. According to segTEL, this is because the incumbent is the owner of the information and affected facilities, and therefore "properly situated" to obtain the necessary modification. PSNH disagrees with this notion. PSNH's easements, like all valid land interests in New Hampshire, are a matter of public record in New Hampshire because they must be recorded in the applicable County Registry of Deeds to be valid against subsequent bona fide purchasers. RSA 477:3-a. A CLEC such as segTEL desiring to install its facilities within an incumbent utility's right of way knows that proposed route as well as the incumbent, and is free to do the title work necessary to research the public record to ascertain the incumbent's easement rights along that route. An incumbent utility will likely have no less of a burden in researching the land titles of the current property owners along the route than would the CLEC, because the incumbent's records would not necessarily include any information other than the historical information associated with the grant of the original easements. Furthermore, segTEL's suggested allocation of this responsibility to PSNH is in direct conflict with the provisions of Section 6.2 of the existing Pole Attachment Agreement between segTEL and PSNH (Stipulated Exhibit 1), which contractually allocates the responsibility to segTEL to obtain any authorizations needed for segTEL's attachments to PSNH's poles.

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[6] The Commission may wish to consider seeking a ruling on the underlying legal issue from the New Hampshire Supreme Court pursuant to RSA 365:20 and Sup. Ct. Rule 9, *Interlocutory Transfer Without Ruling.*

C. segTEL misinterprets Section 6.2 of the Pole Attachment Agreement, which requires segTEL to obtain authorization to construct, operate and maintain its fiber optic cable on the PSNH poles in this matter from the owners of the land where those poles are located.

In an effort to avoid the obvious meaning and applicability of Section 6.2 of the Pole Attachment Agreement, segTEL engages in several strained attempts to argue that Section 6.2 does not apply to the circumstances in this case. These are all without merit.

segTEL asserts that PSNH has engaged in a "tortured reading" of its own contract by reading Section 6.2 to require that segTEL obtain its own rights in this case, and accuses PSNH of having failed to write such language into the contract in "plain and ordinary words that conveyed that exact meaning." Brief of segTEL, Inc, p. 25. PSNH maintains that the wording of Section 6.2 is clear enough -- it allocates to the Licensee under the contract (segTEL) responsibility for obtaining from the appropriate public 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." This wording neither lacks clarity, nor is it ambiguous. A reasonable reading of this provision is that if any authorization is required for segTEL to run its cable on private property at the location of PSNH's poles, segTEL must obtain it. PSNH is not responsible for segTEL's unfamiliarity with or misinterpretation of the meaning of this contractual provision.

segTEL argues, by analogy to a cable TV company franchisee, that it is protected from the applicability of Section 6.2 because it is a CLEC. Nothing in the wording of Section 6.2 supports such a notion. Moreover, nothing in segTEL's status as a CLEC invests it with any special authority or "approvals" so as to avoid the obligation of compliance with Section 6.2. There is no dispute in this case that segTEL, as a telecommunications provider and a registered CLEC in New Hampshire, falls within the

category of entities legally entitled under applicable law to rights of access to the poles, ducts, conduits, and rights-of-way owned or controlled by an incumbent utility. But that status, by itself, does not in any way exempt or insulate segTEL from compliance with its obligations under the Pole Attachment Agreement, inclusive of Section 6.2.

segTEL also contends that the provisions of the Pole Attachment Agreement do not apply to poles that PSNH does not own. Conversely, segTEL argues, the Agreement 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." Brief of segTEL, Inc., p. 25. segTEL then reasons that, since PSNH has rights under its easements to attach additional wires to its poles, it owns or controls the rights for which segTEL is seeking a license. PSNH concedes that the Pole Attachment Agreement does not apply to poles not owned by PSNH, either solely or jointly with another entity. The fact is that the Pole Attachment Agreement does apply to all poles owned by PSNH, solely or jointly with FairPoint Communications as successor co-licensor, in the State of New Hampshire, and the applicability of the Pole Attachment Agreement to those poles does not depend on the rights PSNH may or may not own with respect to those poles. Section 6.2 obviously addresses the situation where authorization from a public or private authority is required for a prospective licensee's attachment to PSNH poles on public or private property. Moreover, there is no dispute here that the poles to which segTEL has sought to attach are poles owned by PSNH. The point, however, which segTEL overlooks, is that each of those poles exists in a location on private property, in a PSNH right of way, pursuant to PSNH's easements. It is PSNH's ownership and control of that right of way, and its authority to allow segTEL's use and occupancy of that right of way for segTEL's use, which is the issue in this matter, not attachment to the PSNH poles themselves.

Finally, segTEL makes the argument that it is applying only for a license to attach to PSNH's poles, and not a conveyance of PSNH's easement rights to segTEL. While it is correct that segTEL is applying for a license to attach to PSNH's poles, it is a contractually defined and required license under the Pole Attachment Agreement which segTEL seeks, not a generic license for the use of another's real estate. The issuance of such a license by PSNH is expressly made subject to the provisions of that Agreement. (Stipulated Exhibit 1, Section 2.1). Therefore, Section 6.2 remains applicable to segTEL's license application. The PSNH poles for which segTEL is seeking a license to attach cannot be viewed as independent from their locations on the private property of others pursuant to the private property easement rights held by PSNH. Section 6.2 requires segTEL, not PSNH, to obtain the required authorizations on the private property where those poles are located for the purposes of segTEL' s attachments to those poles.

Respectfully submitted,

Public Service Company of New Hampshire
By Its Attorney

Date: 6/10/09.

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