STATE OF NEW HAMPSHIRE

BEFORE

THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

DT 08-146

segTEL, Inc.

Request for Arbitration Regarding Access to Utility Poles

REPLY BRIEF

I. INTRODUCTION

In its brief, PSNH alleges that it cannot provide segTEL a license to attach to the poles at issue in this docket because it does not own and control the underlying rights of way on which those poles are located. In support of its allegation, PSNH claims that the deeds conveying those rights of way do not expressly grant PSNH the authority to provide access to a third party. Further, PSNH alleges that the deeds do not indicate that the landowners intended to relinquish their ownership rights to such an extent as to permit the use of their lands for anything other than PSNH's (or its predecessor's) electric utility lines and related facilities.

PSNH's claims, however, are predicated on the assertion that these deeds do not *expressly allow* a third party to attach communications facilities within the deeded rights-of-way, not that the deeds expressly *prohibit* such uses. This is a false predicate. The standard for access, as discussed *infra*, does not rely on a deed's explicit permission but rather whether a deed expressly *restricts* a particular use. In enacting the Telecommunications Act of 1996, Congress and the Federal Communications Commission (FCC) intended to give access to poles on private

property, including rights-of-way. Were this Commission to accept PSNH's position that an incumbent with deeded rights-of-way dating back more than a century may grant access to its facilities only where the deed expressly permits such access, such a decision would effectively eliminate the federally-mandated obligations of incumbents to grant access for pole attachments on private property unless there is explicit language that approves it. In other words, access would depend on the ability of the grantor nearly one hundred years ago to anticipate the evolutions in technology and utility competition. Such language does not and will not ever exist. By implying that it could, PSNH is attempting to ensure that it can deny all access to its poles except those situated in public rights-of-way. This is a subversion of federal law.

The deeds in this instance contain no prohibition on the uses that segTEL is requesting. PSNH's arguments in response to the Commission's questions are flawed, and segTEL respectfully replies to these questions in the order of #2, #1, and #3 as adumbrated below.

II. COMMISSION QUESTION #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.

Contrary to the assertions of PSNH, federal law occupies the field of pole attachment rules and regulations except in extremely limited circumstances. PSNH, as an incumbent utility with existing poles, ducts, conduits, and rights of way, is obligated to provide access to its facilities to CLECs such as segTEL. Although the relevant state law on this matter supports segTEL and will be addressed further in this reply brief, segTEL wishes to reiterate that, under federal law, a dispute regarding access is subsidiary to state law only when the incumbent utility is *explicitly restricted* by deed or other conveyance from providing access to its facilities.

A. Absent a valid and sustainable restriction to access contained in the easement deeds, federal law requires PSNH to grant segtel access to its rights-of-way.

The Federal Pole Attachment Act, 47 U.S.C. § 224 (2000) (the "Pole Attachment Act"), and the FCC's regulations promulgated thereunder, require that a utility provide non-discriminatory access to any pole, duct, conduit or right of way "owned or controlled" by the utility. 47 USC § 224(f); 47 CFR § 1.1403; *see also* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; (*Local Competition First Order on Remand*), Fifth Report and Order and Memorandum of Opinion and Order in CC Docket No. 96-98, 15 FCC Rcd 22983, 23022, p. 85 (October 25, 2000) (*Local Competition Fifth Report and Order.*) In this regard, the FCC has held that the utility's obligations to provide access to its facilities are expansive and not limited. Absent a valid and sustainable *prohibition* from providing access, access must be granted. In the event that a prohibition interferes with the right of way, the interpretation of said prohibition in relation to that utility's ownership or control of an easement or right-of-way is a matter of state law. *Local Competition Fifth Report and Order*, p. 26.

The FCC has dealt with issues of third party owners consistently. In 1996 the FCC stated:

> Section 224(f)(1) mandates that the utility grant access to any pole, duct, conduit, or right-of-way that is "owned or controlled by it." Some utilities and LECs argue that certain private easement agreements, when interpreted under the applicable state property laws, deprive the utilities of the ownership or control that triggers their obligation to accommodate a request for access. Moreover, they contend, access to public rights-of-way may be restricted by state law or local ordinances. Opposing commenters contend that the addition of cable television or telecommunications facilities is compatible with electric service and therefore does not violate easements that have been granted for the provision of electric service. These commenters also assert that the statute does not draw specific distinctions between private and public easements. Further, some cable operators contend that utility easements are accessible to cable operators pursuant to section 621(a)(2) of the Communications Act as long as the easements are physically

> compatible with such use, regardless of the terms of a written easement agreement. Another commenter suggests utilities are best positioned to determine when access requests would affect a private easement, foreclosing the need to determine whether a private owner would consent to the requested attachment. As for local ordinances restricting access to public rights-of-way, one commenter suggests that such restrictions would violate section 253(a) of the Act, which blocks state or local rules that prohibit competition.
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> The *scope* of a utility's ownership or control of an easement or right-of-way is a matter of state law. We cannot structure general access requirements where the resolution of conflicting claims as to a utility's control or ownership depends upon variables that cannot now be ascertained. *We reiterate that the access obligations of section 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.*
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> *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 ¶ 1178-79 (1996) (*Local Competition Order*)

Four years later, in the *Local Competition Fifth Report and Order*, the FCC addressed access to Multiple Tenant Environments (MTEs). Here the issues of access can depend entirely on the physical structure and on the language of documents that proscribe access by the incumbent. But the FCC's statements here are illustrative in that they reiterate that state law determination of ownership and control is only relevant when there are restrictions or prohibitions in the deeds themselves.

> In the *Local Competition First Report and Order*, we considered arguments that *certain private consent agreements*, when interpreted under the applicable state property laws, *deprive the utilities of the ownership or control that triggers their obligation to accommodate a request for access*. Some commenters in that proceeding argued that under such circumstances, Section 224 does not provide a right of access. Other commenters argued that the statute does not draw distinctions between situations where a private consent agreement exists and situations where one does not exist, and thus provides access regardless of the terms of an agreement or state law. We concluded that the scope of utility ownership or control is a matter of state law. Thus, obligations 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. ¶ 86

The FCC's analysis should not be read to imply that where no prohibitions or restrictions exist to the utility's unfettered use of its right of way, the utility still may not have adequate ownership or control to trigger the obligations of section 224. Access to incumbent facilities has been federally mandated because incumbents did not voluntarily provide access to cable companies and CLECs. Congress specifically intervened to ensure that all utility rights of way would be available to competitors.

The FCC considers this point as well in the *Local Competition Fifth Report and Order*:

> We note that existing utility rights-of-way in MTEs [Multiple Tenant Environments], whether created by force of law, by written agreement between the parties, or by tacit consent, *generally originated in an era of monopoly utility service*. Thus, the purpose behind these rights of access was to ensure that end users could receive service from the single entity capable of providing, or legally authorized to provide, such service. *The parties that established the terms of these rights of access would rarely, if ever, have considered the effect their actions might have on hypothetical future competition. Section 224 addresses the ability of utilities to act anticompetitively with respect to telecommunications competitors as a result of these developments. Id. ¶ 88*

While PSNH would have the Commission believe that the FCC and federal law draws clear distinctions between poles that are on land that PSNH owns outright, poles that are on public rights of way, poles that are on private rights of way deeded to "general utility use" and poles that are on private rights of way deeded only to PSNH, no such distinction exists. As the FCC has said, "The purpose of Section 224 of the Communications Act is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers." In the Matter of Implementation of Section 703(E) of the Telecommunications Act of 1996, 13 F.C.C.R. 6777,

CS Docket No. 97-151, February 06, 1998.

Thus the body of FCC decisions recognizes that while there may be rights-of-way that require a state law analysis to determine whether there is sufficient ownership and control to trigger the access requirements of Section 224, Section 224 nonethelessapplies to private rights-of-way that were conveyed prior to the advent of competition.

III. COMMISSION QUESTION #1 -- Whether the underlying easements provide PSNH with the authority necessary to grant segTEL a license to attach to its poles in this matter.

A. The underlying easements do not prohibit the installation of communications facilities and expressly permit the same.

The beginning and the end of this Commission's inquiry is found in the words of the easement deeds themselves. *Lussier v. New England Power*, 133 N.H. 753 (1990). 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. *See id.* 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**." segTEL agrees with PSNH that *Lussier* may be a leading case on the interpretation of scope and permissible use of electric company easements, but respectfully submits that *Lussier* stands for the proposition that the language of the deeds in the instant case, virtually identical to the language of the deeds considered in *Lussier*, unambiguously authorizes the construction of additional lines used for *both communication as well as the transmission of electricity.*

In *Lussier*, over the objections of private property owners, New England Power Co. sought to erect an additional tower, new transmission lines, and a new switching station on private property easements that had then been in place for more than sixty years. The Court held that "***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 two original transmission lines." *Lussier*, at 182. In other words, the issue is not whether the language of the easements *permits* the proposed use, but whether the language *prohibits* it. The Court then noted that "the drafters expressly contemplated and provided for future construction and expanded use of the easement" and that absent claims of "unreasonable interference or encroachment," New England Power Co. had sufficient rights to upgrade its facilities. The Court, in fact, concerned that its finding might be interpreted too broadly, warned:

> Lest our holding be interpreted to permit unlimited expansion by New England Power of its easement, we wish to emphasize that the parties involved must still *act reasonably under the terms of the grant* so as not to interfere with the use and enjoyment of each others' estates. See Donaghey v. Croteau, 119 N.H. 320, 324-25, 401 A.2d 1081, 1084 (1979)

Thus, the test of whether PSNH may license segTEL is whether the allowable use may be reasonably assigned to another, not to whether the deeds expressly permit the use. 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, the original grantee, or its successor PSNH, the drafters could have included such restrictive language. But they did not. Obviously, like the Court in *Lussier* held, the parties here intended to allow the future addition of wires and cables for transmitting low voltage electric

current and/or intelligence.[1] Under *Lussier*, when "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 our determination." The deeds each convey the necessary authority to "the second party, its successors and assigns;" according PSNH adequate authority to assign rights to segTEL.

Since the easement deeds specifically contemplated additions to the easement under the terms of the deeds by PSNH's assignees, such as segTEL, PSNH can therefore license access to segTEL.

B. Installing additional communications facilities is a reasonable use of the easements.

As discussed in segTEL's Brief, 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:

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[1] As segTEL argued in its Brief, the fact that these easement rights exist in perpetuity strongly suggests that the parties contemplated the addition of communication 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. 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.

> 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**....

The intent of the original parties to the Early Easements was to permit, *inter alia*, the erection of wires for low voltage current, which is consistent with the delivery of both electrical power and voice telephone services. 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. PSNH freely admits that it installs communications facilities and cables as a fundamental aspect of its utility system:

> "Transmission of **intelligence data** with respect to SCADA systems, electronic controls, and other **similar internal communications** functions is a fundamental aspect of the operation and control of a modern electric utility transmission and distribution system."
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> See PSNH Brief, footnote 4 at page 7 (emphasis added).

Thus, that PSNH itself may use the right-of-way for the installation and maintenance of communications facilities demonstrates the presumptive reasonableness of such a use. Moreover, 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.

C. If PSNH can install cables used for communication, it must allow CLECs to install cables used for communication

Although PSNH would like to distinguish the cables and communications services it installs for itself and those used for other services, such distinction has been squarely rejected by the FCC. Part XI.B of the Local Competition Order discussed the exact situation that is being considered here.[2] The FCC noted that "Electric utilities, in their comments, request that distinctions be made between facilities used for electric power and those used for other services, including telecommunications services." *Id.* at 1127. In response, the FCC stated in no uncertain terms that use by an electric utility of **any of** its facilities for communications triggers the requirement that access be accorded:

> We see no statutory basis, however, for the argument made by some utilities that they should be permitted to devote a portion of their poles, ducts, conduits, and rights-of-way to wire communications without subjecting all such property to the access obligations of section 224(f)(1). Those obligations apply to any "utility," which section 224(a)(1) defines to include an entity that controls "poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." The use of the phrase "in whole or in part" demonstrates that Congress did not intend for a utility to be able to restrict access to the exact path used by the utility for wire communications. We further conclude that use of any utility pole, duct, conduit, or right-of-way for wire communications triggers access to **all poles, ducts, conduits, and rights-of-way owned or controlled by the utility, including those not currently used for wire communications.**
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> **We reject the contention that, because an electric utility's internal**

[2] Although significant portions of the FCC's *Local Competition Order* were remanded, since the filing of segTEL's initial brief, the FCC issued its Report on a Rural Broadband Strategy, 2009 WL 1480862, May 22, 2009. In its report the FCC discusses the current state of access to rights of way, and enumerates the underlying decisions that comprise current federal policy: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15449, 16058-107, paras. 1119-240 (1996) (*Local Competition Order*) (Part XI.B. "Access to Rights of Way"). The FCC states that "[t]imely and reasonably priced access to poles and rights of way is critical to the buildout of broadband infrastructure in rural areas."

> **communications do not pose a competitive threat to third party cable operators or telecommunications carriers, such internal communications are not "wire communications" and do not trigger access obligations. Although internal communications are used solely to promote the efficient distribution of electricity, the definition of "wire communication" is broad and clearly encompasses an electric utility's internal communications.**
> Emphasis added. *Id.* at ¶¶ 1172-1174; footnotes omitted.

Under section 224, then, if PSNH uses any of its facilities for communication, *including internal communication*, it must provide access to competitive telecommunications carriers such as segTEL.

D. As a matter of state law PSNH owns or controls the rights of way to the extent necessary to grant segTEL access.

As stated above, in the event that a prohibition interferes with the right of way, the interpretation of any prohibition that might exist in relation to that utility's ownership or control of an easement or right-of-way is a matter of state law. *Local Competition Fifth Report and Order*, p. 26. Although this is a case of first impression in New Hampshire, existing case law supports the view that PSNH indeed has sufficient ownership or control of the poles and rights of way at issue to permit PSNH itself, as well as third parties, to install cables for the purpose of communications. If PSNH has sufficient ownership and control to install such facilities for itself, it is required by federal law to extend those rights to segTEL.

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

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]").

As described in segTEL's initial brief, 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 v. Knowles,* 120 N.H. 244, 247 (1980). 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.)

Although segTEL does not agree that PSNH's excerpt from the *Local Competition Fifth Report and Order* that refers to MTEs is relevant here, segTEL nonetheless asserts that PSNH, as the dominant estate holder of the substation parcel, has the necessary rights to voluntarily provide access to a third party and would be entitled to compensation for doing so. *Local Competition Fifth Report and Order*, at 27.

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 pursuant to state law.

Some of the easements in this parcel convey title of the utility easement to PSNH. The 1972 Easements are quitclaim 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, 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). Therefore, to the extent that the language of the 1972 Easements conveys title of the right-of-way located in these private parcels, New Hampshire law provides PSNH with full ownership rights free of all incumbrances; PSNH, thus has the authority necessary to grant segTEL a license to attach to its poles in this matter.

3. Commercial, exclusive utility easement in gross acquired by express grant can be apportioned to segTEL.

PSNH, having adequate rights to install facilities identical to those which segTEL seeks to install, has sufficient authority to convey those rights, even if, *arguendo*, the easements at issue are found to be easements in gross. As segTEL showed in its initial brief, although this is a case of first impression in New Hampshire, several states have held that 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.[3] *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, e.g., Hise v. BARC Electric Cooperative,* 254 Va. 341, 492 S.E.2d 154 (1997); *Jackson v. City of Auburn,* 971So.2d 696 (2006) (Ala.Civ.App., 2006); *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, 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.

[3] 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).

IV. COMMISSION QUESTION #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?

segTEL's pole agreement with PSNH was made through Verizon based on a template agreement that the two incumbent utilities offered. Since then, segTEL has submitted applications in accordance with the terms of the pole agreement, despite many aspects of the agreement that are contrary to what the FCC considers to be unfettered access to poles, ducts, conduits and rights of way. The fact that segTEL never filed a complaint is without bearing on whether the agreement was voluntary or reasonable. PSNH wishes for the Commission to turn segTEL's voluntary business decision to build its network, service its customers, and forego a prolonged legal battle into an involuntary admission by segTEL that the agreement was therefore voluntary and reasonable. PSNH's argument just doesn't wash. Throughout the course of Docket No. DM 05-172, Investigation into Utility Poles at the Commission, and since the passage of the RSA 374:34-A, segTEL has consistently argued that "take or leave it" agreements, including segTEL's current agreement with PSNH, entered into because there are *no other options*, are neither voluntary nor reasonable.

To the extent, however, that this Commission finds that the agreement is relevant to its determinations in this docket, segTEL reiterates its interpretation of Section 6.2 of the agreement. PSNH states that Sections 6.1 through 6.3 all discuss construction and must be read as a complete unit. segTEL disagrees. Article 6 of the agreement is about specifications and legal requirements and is, in fact, followed by Article 7 which is about construction. Article 6 is the only section that discusses segTEL's authority to attach as a utility. For PSNH to imply that

the agreement does not require segTEL's continued authority to do business in New Hampshire as a utility is naive.

Section 6.1 deals with the relevant codes to which segTEL's attachments must comply. Section 6.3 deals with those instances where the granting a license to attach to segTEL would create a forfeiture of rights to the incumbent. Section 6.2 fits neatly between those two concepts, detailing the requirement that segTEL maintain its authority as a CLEC to construct operate and maintain attachments, and to request licenses before attaching. PSNH instead argues that the simple language of Section 6.2 carries with it a requirement for segTEL to independently obtain its own easements and rights of way to poles that the incumbent *already owns and controls*, a requirement that is completely at odds with federal law in existence at the time the agreement was made.

As segTEL stated in its initial brief, and despite any deficiencies of the Agreement, the Agreement can only cover those poles, ducts, conduits and rights of way that PSNH owns or controls. If this Commission should find that PSNH does not own or control the poles at issue in this docket, the Agreement itself is then irrelevant.

V. CONCLUSION

Pursuant to federal and state law, PSNH has sufficient ownership or control of the poles and rights of way at issue ***to permit PSNH to install its own communication cables and facilities***. Further, nothing in the deeds limits its ability to license to third parties the ability to attach cables and facilities to the extent PSNH is permitted to do so. Thus, it must, pursuant to the Pole Attachment Act, permit third parties, such as segTEL, to attach similar facilities to its

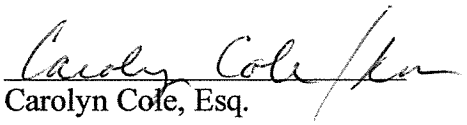
poles. Any different reading of the parties' respective rights is improper, discriminatory and anticompetitive, violates state and federal law and misapprehends relevant statutes and interpretations because PSNH is providing segTEL with a lower level of access to its facilities than what it provides itself. Unless the Commission can unequivocally find that PSNH does not have the right to install communication wires within its right of way, the Commission must find that federal law requires PSNH to extend that right to segTEL.

Respectfully submitted,

SEGTEL, INC.

By its general counsel,

June 10, 2009



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