

October 25, 2012

Debra A. Howland, Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429



Re: *Electric and Telephone Utilities — Review of Utility Pole Access Issues*, DT 12-246,
Comments of BayRing, segTEL, and Otel Telekom

Dear Ms. Howland:

Freedom Ring Communications, LLC, d/b/a BayRing Communications, segTEL, Inc., and G4 Telecom NH, Inc., d/b/a Otel Telekom (collectively, the “CLECs”), are grateful for the opportunity to comment on the recommendations set forth in the October 9, 2012 Staff Recommendation and Report of Stakeholder Meeting (“Staff Recommendation”).

The CLECs appreciate the work done by the Staff to conduct the August 29 stakeholder meeting, summarize the lengthy and wide-ranging discussion that occurred, and develop the Staff Recommendation. The CLECs respectfully point out, however, that the Staff Recommendation either does not fully reflect the discussion or makes no recommendation on two important threshold issues that the Commission should resolve before any significant time, effort, and resources are spent in this proceeding: the pending NECTA Motion to Dismiss (now joined by a second NECTA motion, the October 22 Motion to Stay); and the issue of the Commission’s jurisdiction to regulate the relationships among third-party pole attachers.

If the Commission resolves the threshold questions in a way that permits this docket to proceed, then, again respectfully, the CLECs disagree with the narrow scope that the Staff recommends. As the Staff Recommendation points out, numerous issues were raised at the stakeholder meeting; only some of them had to do with third-party issues and the Staff Recommendation recommends action on only a subset of these. If this docket does get past the threshold issues, the Commission should take the opportunity to examine pole attachment issues generally.

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Introduction. The CLECs are registered telecommunications providers in New Hampshire. They are among the earliest post-Telecommunications Act entrants into the telecommunications market in the State, one having been authorized to provide services as early as 1997.¹ In addition to providing innovative and high-value telecommunications and broadband services to New Hampshire customers and bringing advanced services to unserved and underserved areas throughout the State, the CLECs have participated in numerous Commission proceedings that have established rights, obligations, rules, procedures, policies, and practices governing the functioning of the State's wholesale and retail telecommunications markets.² Thus, for over fifteen years, the CLECs have contributed to the development, shaping, and operation of the State's telecommunications marketplace and its economic development.

One or more of the CLECs own and operate their own utility poles, attach facilities to poles owned by electric and incumbent telephone utilities, and move their existing attachments to accommodate attachment by other attachers. The CLECs hope that this experience and expertise will be helpful as the Commission considers the issues in this docket as well as in DT 12-107.

Pending Motions. Before proceeding any further in this docket, the Commission should address the two motions filed by NECTA: the Motion to Dismiss dated August 13, 2012 (filed in both this docket and DT 12-107) and the Motion to Stay dated October 22, 2012.

Under the existing regulatory regime governing pole attachments, relationships between attachers for the most part are left to the parties. A regime of private interactions, negotiations, compromise, and mutual accommodation governs attachers' relationships among themselves. Parties have learned to live with and operate under this system, which, while not perfect, has worked fairly smoothly. As NECTA pointed out, third-party attachments have been occurring in New Hampshire for years without major incident. NECTA Motion to Dismiss at 4. The fact that few incidents have escalated to the point where Commission involvement was necessary is testament to the ability of responsible New Hampshire providers to work together. It is only with the advent of a new entrant, which has proven unwilling or unable to work cooperatively within the existing system, that the Commission has had to get involved in third-party pole attachment issues in any significant way.

As a result, the Commission now has two dockets open: DT 12-107, which is intended to address allegations by that new entrant, and this docket, which apparently is to examine generic

¹ See, e.g., *In re Freedom Ring Communications, LLC*, DE 96-165, Order No. 22,530 (Mar, 24, 1997) (granting authority to operate as a competitive provider); *In re segTEL, Inc. — Petition for Authority to Provide Local Telecommunications Services*, DT 99-048, Order Nisi Granting Authorization, Order No. 23,208 (May 3, 1999).

² See, e.g., *In re Bell Atlantic — Petition for Approval of Statement of Generally Available Terms Pursuant to the Telecommunications Act of 1996*, DE 97-171, Order Granting in Part and Denying in Part, Order No. 23,738 at 9 (July 6, 2001) (BayRing was granted intervenor status on November 4, 1997).

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third-party attachment issues based on the same allegations by the same new entrant that the Commission is examining in DT 12-107.

NECTA is absolutely correct in its observations “that detailed factual information concerning New Hampshire pole attachments is currently being compiled and developed in DT 12-107” and “that the commonality of issues in both dockets means that the outcome of DT 12-107 will have a direct bearing on the issues in the instant docket.” NECTA Motion to Stay at 2. NECTA also is correct in predicting that “[i]nefficiency and inconsistency may likely result if both dockets proceed on parallel tracks.” *Id.* Inconsistent or contradictory outcomes are just one potential pitfall of dual-track proceedings. At the very least, carrying on two parallel and largely duplicative proceedings will unnecessarily tax the resources of the Commission and parties alike. *See id.*

Therefore, before taking any further action, the Commission should rule favorably on NECTA’s pending motions. Carrying on two parallel proceedings will distract the CLECs, other parties, and Commission from their primary responsibilities of ensuring the smooth operation of the State’s telecommunications networks and providing modern, high-quality telecommunications services to the State’s citizens.³

Commission Jurisdiction. If NECTA’s motions are not granted, the second threshold question that the Commission must address is that of its jurisdiction in this proceeding. The Staff Recommendation correctly notes that the issue was raised at the stakeholder meeting. Staff Recommendation at 2. Inexplicably, however, given the fundamental importance of the issue, the Staff Recommendation does not address the question of the Commission’s jurisdiction or make a recommendation on how to resolve it.

It is axiomatic that the Commission can only act within its statutory grant of authority. *E.g., State v. N.H. Gas & Electric Co.*, 86 N.H. 16, 29 (1932); *Appeal of New England Cable Television Assn.*, 126 N.H. 149, 152 (1985). In this matter, the Commission’s authority derives from RSA 374:34-a. By its plain language, RSA 374:34-a applies “[w]henver a pole owner is unable to reach agreement with a party seeking pole attachments.” RSA 374:34-a, II. That is not the situation that the Staff Recommendation purports to address. Instead, the Staff recommends that the Commission take action to address third-party attachment issues — that is, the relationship between attachers that are not pole owners rather than the relationship between attachers and owners. It is not at all clear that the statute grants the Commission the authority to regulate the relationship between attacher and attacher.

³ The CLECs’ recollection is that the consensus at the August 29 stakeholder meeting was that any list of issues and recommendations resulting from that meeting would be contingent only, in the event that the Commission denied NECTA’s pending motion to dismiss (the Motion to Stay had not been filed at the time). That outcome from the stakeholder meeting does not appear in the Staff Recommendation.

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The issue of the Commission's jurisdiction is a serious, potentially dispositive, threshold question that the Commission must resolve before it spends — and requires numerous parties to spend — time, effort, and resources addressing the issues set forth in the Staff Recommendation.

Scope of the Proceeding if It Goes Forward. If the Commission determines it has the authority to act in this area, it should not confine its inquiry to the narrow issues set forth in the Staff Recommendation. As the Commission is aware, in areas where the industry has adapted systems and processes over time in a relatively cooperative manner, there is negotiation, compromise and substantial give-and-take to make those systems and processes workable for everyone. For the Commission to step in on behalf of one entrant on a single issue or a handful of issues that is important to only that entrant will upset the delicate balance of cooperation that has been established through years of trial and error and give and take.

Instead, the CLECs believe that if the Commission undertakes a review of the pole attachment rules, it should examine the universe of pole attachment issues. There are many issues that were raised in the stakeholder meeting, and consideration of those issues will inevitably lead to additional items. Accordingly, the CLECs believe that if this proceeding surmounts the threshold questions set forth above (and any others that may exist), the scope of this docket should be broad enough to allow for a comprehensive review of all aspects of pole attachments. By way of example, the CLECs provide two areas of review that the Commission should include if the docket goes forward.⁴

Pole Attachment Agreements: The Staff Recommendation notes that the stakeholders discussed whether a uniform pole attachment agreement should be developed. As Staff is aware, many of the current pole attachment agreements between the larger pole owners and non-pole owning attachers are take-it-or-leave-it legacy agreements that have changed little since the first agreement was adopted years ago. Other pole attachment agreements are fully-negotiated agreements that reflect a more balanced partnership between pole owner and attacher. The CLECs would support adoption of a uniform pole attachment agreement between owners and attachers (or uniform attachment tariff) that encompasses the substantial attacher-friendly provisions that CLECs have achieved in arms-length negotiations. After a uniform owner/attacher agreement or tariff is developed, the parties could determine whether development of a uniform agreement (or tariff) between third-party attachers is necessary and appropriate.⁵

⁴ These are examples only. The CLECs do not waive, but expressly reserve, all rights to suggest a complete list of topics if the docket proceeds.

⁵ The comments regarding a uniform agreement or tariff, like the other comments in this section, assume that the Commission has jurisdiction over the issue.

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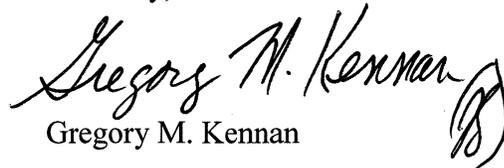
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Universal Safety Codes and Engineering Guidelines: The CLECs encourage the adoption of safety codes and engineering guidelines that are consistently and uniformly applied throughout the State.

Thus, if this docket moves forward, the Commission should weigh the most important issues from the point of view of the State and the industry as a whole, and should not confine its examination to a narrow set of issues set forth by one party.

Thank you for the opportunity to comment.

Sincerely,


Gregory M. Kennan

cc: Service list (by email or U.S. Mail)