

November 14, 2008

Debra Howland, Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, N.H. 03301-2429

Re: Request for Arbitration Regarding Failure to Provide Access to Utility Poles by Public Service Company of New Hampshire

Dear Ms. Howland:

segTEL, Inc. ("segTEL") is a duly authorized Competitive Local Exchange Carrier (CLEC) in the state of New Hampshire. As a public utility and a CLEC, segTEL has rights and privileges including access to utility poles owned by other utilities. The Public Service Company of New Hampshire (PSNH) is an electric utility in New Hampshire, and the owner of certain utility poles in New Hampshire, to which it has denied segTEL access.

segTEL is requesting that the Commission appoint an arbitrator in this matter, pursuant to the Commission's orders in DE 96-252 and DE 97-229 regarding disputes for space on utility poles. In DE 96-252, the Commission foresaw the need for an arbitration process between CLECs and incumbent telephone companies. When the Commission expanded the arbitration process to include dark fiber, it said more generally, "We approved this process in Docket DE 96-252 for reservation of space in rights-of-way, conduits and poles." See 81 NH PUC 919. segTEL believes that arbitration is appropriate when the dispute is between a CLEC and an incumbent electric utility as well. However, should this Commission determine that arbitration is not appropriate in this instance, segTEL requests that this letter be treated as a complaint under RSA 365:1.

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

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New Hampshire law provides the Commission with the authority to regulate pole attachments and access to poles and rights of way in RSA 374:34-A, and this Commission has notified the FCC of its readiness to do so. The Commission's authority under that statute includes the regulation of poles and rights of way owned or controlled by an electric utility.

At issue in this complaint are two requests made by segTEL in January of 2008, for access to approximately 100 PSNH-owned "transbution" poles in New Hampshire.¹ (Attachment 1 – CONFIDENTIAL)

segTEL's applications to PSNH included advance payment for field surveys which PSNH requires;² PSNH accepted the prepayment, and presumably performed the surveys. Under FCC rules, with which, by authorizing statute, this Commission's rules must be consistent, PSNH had 45 days to deny segTEL's request, after which access is deemed to be granted. At no time during the forty-five day survey and response period did PSNH report to segTEL that attachments could not be made.

segTEL repeatedly requested updates on status along the way, and was informed by PSNH field crews that although attachments could be safely made, the applications had been diverted to PSNH's legal department and the field personnel instructed to take no further action on them. segTEL contacted PSNH's legal department directly, and eventually received a denial letter from PSNH (Attachment 2 - CONFIDENTIAL) on August 6, 2008, more than 6 months after segTEL's application. PSNH's denial was based on the following:

Upon a review of the easement rights owned by PSNH in these locations, PSNH has determined that its easements do not clearly allow PSNH to grant a third party telecommunications company, such as segTEL, Inc., permission to use and occupy PSNH's easement corridor for the installation and operation of its private telecommunications line or cable. Accordingly, PSNH has concluded that it does not own or control the rights in these locations which would allow it to grant your company's pole attachment license applications.
PSNH letter to segTEL dated August 6, 2008.

¹ PSNH field representatives use the term "transbution" to define a pole carrying low-voltage facilities that can accommodate both distribution and intrastate transmission needs.

² The requirement of prepayments from prospective attachers has been determined to be an improper act by the Federal Communications Commission. See *In the Matter of The Cable Television Association of Georgia, et al. v. Georgia Power Company*, Order, 18 FCC Rcd 16333, ¶ 20 (2003).

PSNH's denial of access is improper, discriminatory and anticompetitive, violates state and federal law and misapprehends relevant statutes and interpretations. 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."

As mentioned above, under applicable pole application regulations, PSNH had 45 days to provide a detailed reason for rejection of the proposed attachments for reasons of safety, reliability, or generally accepted engineering purposes. PSNH did not deny access for these reasons, and, in fact, they could not, as the proposed attachments can be safely made.

An electric utility might deny access, on a nondiscriminatory and competitively neutral basis, to facilities used *exclusively* for interstate transmission facilities since exclusively interstate transmission facilities may not be subject to the Pole Attachments Act's provisions.³ This is not the case here, and PSNH could not allege it to be, as the Pole Attachments Act generally 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.]

PSNH is not making the claim that access is being denied to interstate transmission facilities, and it could not make that claim, since these poles are used in part for distribution. Transmission facilities are compatible with shared uses and there is evidence that PSNH poles of similar nature carry communications attachments in other parts of the State.

Instead, PSNH has denied segTEL's attachment request for unpersuasive reasons, without pretense that its denial is related to safety, sound engineering practice or compatibility of use. Specifically, PSNH is claiming that it cannot extend the easement rights it owns in these locations to segTEL. PSNH is wrong. Federal Law is unambiguous in this instance:

(f) Nondiscriminatory access

(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.*
47 U.S.C.A. § 224 (f)(1) [Emphasis added.]

³ The status of access to facilities used exclusively for interstate transmission has been the subject of litigation, but has not been definitively determined.

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Just as segTEL is entitled to the presumption that an attachment request not rejected within 45 days is deemed granted, all cable TV and CLEC attachers are entitled to the presumption that the rights of way owned, rented or utilized by incumbent utilities are compatible with communications attachment. This entitlement is supported by the FCC, Federal law, and case law in other jurisdictions.

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.

Federal law supports segTEL's position. Under 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.

Finally, case law in other jurisdictions recognizes that the addition of a telecommunications cable to existing utility easements does not affect any property right retained by the owner of the underlying property. See, e.g., *Municipal Elec. Authority of Georgia v. Gold-Arrow Farms, Inc.*, 276 Ga. App. 862, 869, 625 S.E.2d 57, 63 (2005), cert. denied, (May 8, 2006) (*express easement for electric communications lines encompassed use for fiber optic communications as accommodation to new technology*) and *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); *Wittman v. Jack Barry Cable TV*, 192 Cal. App. 3d 1619, cert. denied 484 U.S. 1043 (1988).

Of particular interest is the case of *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.

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For the reasons set forth herein, segTEL believes it already has presumptive access to the poles it applied for in January, 2008, simply by virtue of PSNH taking more than 45 days to respond to segTEL's request. segTEL, however, prefers to make fully licensed attachments, and, therefore, is asking the Commission to ensure that segTEL may do so.

Until this issue is resolved segTEL is unable to extend its fiber optic network to meet actual and prospective customer demand, improve network redundancy and reliability, and promote the public good through the deployment of innovative services and the investment of substantial resources throughout Sullivan County, New Hampshire.

Therefore, segTEL respectfully requests that this Commission:

1. Accept segTEL's request for arbitration in this matter;
2. Determine that PSNH's denial of access is contrary to state and federal law;
3. Order PSNH to issue licenses to segTEL without further delay;
4. Make a determination that CLEC attachers are entitled to access to incumbent utility rights of way;
5. Make a determination that electric utility rights of way are presumptively compatible with the deployment of fiber-optic cable, and
6. Grant any additional relief this Commission may provide.

Sincerely,



Kath Mullholand
Director of Operations
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Fax 978 856-2687

Please note that my phone numbers have changed.