STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Docket No. DT 08-146

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

segTEL's OBJECTION TO PSNH's MOTION TO DISMISS

December 15, 2008

I. INTRODUCTION

On November 14, 2008, segTEL, Inc. (segTEL) filed a Request for Arbitration Regarding Failure to Provide Access to Utility Poles by Public Service Company of New Hampshire (segTEL's Request) with the New Hampshire Public Utilities Commission (Commission) describing how PSNH has unlawfully denied segTEL access to PSNH utility poles. segTEL's Request was acknowledged and docketed by secretarial letter dated November 19, 2008. The Public Service Company of New Hampshire (PSNH) filed a Motion to Dismiss (Motion) on December 4, 2008. segTEL objects to PSNH's Motion for the following reasons:

1. The Commission has the authority and obligation to consider segTEL's Request.
2. There is no legal or factual basis for PSNH's Motion.
3. segTEL's Request is ripe.
4. PSNH's claim that it has not denied segTEL's Applications is false.
5. PSNH's argument that the Commission is not the appropriate forum for adjudicating this matter is without merit.

6. There are no questions of fact in dispute requiring a full adjudication of the issues. The record and the law are sufficient for the Commission to determine that segTEL has been denied rightful access under 47 USC § 224, RSA 374:34-a, and under Commission rules.

7. The Pole Agreement predates the Commission's temporary rules regarding pole attachments.

8. The Pole Agreement cannot be presumed to be reasonable or voluntary; nonetheless, the terms of the Pole Agreement on this issue support segTEL's Request.

9. There is nothing in the Pole Agreement that would suggest that segTEL must obtain its own rights-of-way.

10. segTEL is not required to obtain its own rights-of-way in order to gain access to PSNH's poles.

11. Federal and state law and the orders of the FCC support segTEL's request.

12. PSNH did not act in compliance with the Commission's interim administrative rules regarding pole attachments when it failed to respond to segTEL's application and failed to negotiate in good faith.

II. ARGUMENT

1. The Commission has the authority and obligation to consider segTEL's Request.

This is a dispute between a CLEC (segTEL) and an electric utility (PSNH) regarding segTEL's right to access utility poles that are solely owned by PSNH. All of the utility poles at issue in segTEL's Request are solely owned by PSNH. PSNH has denied segTEL access to these poles since early in 2008.

In July, 2007, the New Hampshire Legislature enacted SB 123, an Act relative to pole attachments (RSA Chapter 320) which required that (a) the Commission expeditiously

promulgate rules to carry out the provisions of the RSA, and (b) the rules "be consistent with the regulations adopted by the Federal Communications Commission under 47 USC § 224 ... for a period of two years." RSA 374:34-a:VII confers broad authority to the Commission on issues regarding pole attachments, stating, "[t]he commission shall have the authority to hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments."

Therefore, New Hampshire law provides the Commission with the authority to regulate pole attachments as well as access to poles and to rights-of-way, and this Commission has notified the FCC of its readiness to do so. RSA 374:34-a explicitly includes poles owned by an electric utility, saying, in pertinent part: "a 'pole' means any pole, duct, conduit, or right-of-way that is used for wire communications or electricity distribution and is owned in whole or in part by a public utility."

As required by RSA 374:34-a, the Commission promulgated N.H. Code of Administrative Rules Part Puc 1300. Pursuant to Puc 1304.03, the Commission has 180 days to complete its consideration of segTEL's Request and issue an order resolving the complaint.

2. There is no legal or factual basis for PSNH's Motion.

On November 14, 2008, segTEL requested that the Commission appoint an arbitrator in this matter, citing earlier orders of the Commission regarding the resolution of pole disputes. segTEL believes arbitration is an efficient and effective way to resolve such disputes. However, segTEL also explicitly requested that, in the event this Commission determines that arbitration is not appropriate in this instance, segTEL's Request be treated as a complaint under RSA 365:1, the authorizing statute for all complaints against a utility.

Inasmuch as this docket is specific to access to utility poles, the Commission may also consider segTEL's Request under Puc 1304 regarding Dispute Resolution for utility pole attachments.

Whether this Commission treats segTEL's request as an arbitration, or as a complaint under RSA 365:1, or as a request for dispute resolution under Puc 1304, segTEL's Request is nonetheless a matter which requires Commission action and may not be dismissed without consideration of the issues.

3. segTEL's request is ripe.

segTEL first requested access to PSNH's poles in January, 2008. Under all FCC rules and under the rules of this Commission, as well as pursuant to the Pole Agreement, PSNH had 45 days to deny segTEL's Applications. PSNH did not do so. Therefore, segTEL's request that the Commission intervene in this matter is within the parameters established by the Legislature and by the rules of this Commission. *See* Puc 1304.03.

4. PSNH's claim that it has not denied segTEL's Applications is false.

While PSNH claims that it did not reject segTEL's Applications, its claim is false; the act of withholding approval for an indefinite and extended period of time is *de facto* rejection. PSNH cannot have it both ways. It cannot insist that approval is required before segTEL may attach to its poles while, at the same time, it indefinitely fails to act on requests to attach. These actions fail to comply with either Commission rules or the requirements of RSA 374:74-a for non-discriminatory access.

PSNH had 45 days to deny segTEL's request, and did not do so. Further, pursuant to Commission rules, PSNH could only deny for the following reasons: "The owner or owners of a pole shall provide access to such pole on terms that are just, reasonable and nondiscriminatory.

Notwithstanding this obligation, the owner or owners of a pole may deny a request for attachment to such pole when there is insufficient capacity on the pole or for reasons of safety, reliability and generally applicable engineering purposes." *See* Puc 1303.01. PSNH's failure to act is a failure to provide access, which denies segTEL the opportunity to attach, in violation of Commission rules. Any other interpretation would simply give broad license for utilities to simply ignore attachment applications and remove any recourse for complaints about this activity. Pole Attachment Rules, as with any regulation, cannot be interpreted in a way that brings about an absurd result.

5. PSNH's argument that the Commission is not the appropriate forum for adjudicating this matter is without merit.

segTEL's Request is a complaint regarding denial of access. As stated above, the Commission has the authority and the obligation to resolve such complaints. segTEL does not agree with PSNH that this matter is about property rights, but to the extent that the Commission believes that PSNH has a legitimate argument about property rights, the Commission also has explicit authority to determine matters regarding utility rights-of-way, and PSNH has itself, in fact, requested and used the Commission's authority in that capacity on numerous occasions.

6. There are no questions of fact in dispute requiring a full adjudication of the issues. The record and the law are sufficient for the Commission to determine that segTEL has been denied rightful access under 47 USC 224 and under Commission rules.

segTEL attached copies of its Applications to its initial Request. segTEL submitted those Applications to PSNH in January, 2008. PSNH does not dispute that it received segTEL's applications more than 300 days ago.

segTEL and PSNH agree that the relevant agreement underlying segTEL's application is the Pole Agreement segTEL filed under confidential cover December 15, 2008.

There is no dispute as to when PSNH received the segTEL's Applications, and there is no dispute that PSNH failed to act on segTEL's Applications. Accordingly, there are no facts in dispute. At issue here is whether PSNH acted in accordance with its obligations under its agreement with segTEL, the rules and orders of this Commission, and the relevant law. segTEL asserts that PSNH has not. To the extent any additional information is necessary or desired both parties should be invited to brief the relevant legal issues.

7. The Pole Agreement predates the Commission's temporary rules regarding pole attachments.

The Pole Agreement was executed prior to the promulgation of Puc 1300 rules regarding utility pole attachments. To the extent that Puc 1300 et seq. purport to regulate agreements that predate the rules, segTEL suggests that such rules would be retroactive rulemaking.

8. The Pole Agreement cannot be presumed to be reasonable or voluntary; nonetheless, the terms of the Pole Agreement support segTEL's Request.

Pole agreements signed prior to the development of the Commission's interim pole attachment rules, including the Pole Agreement between segTEL and PSNH dated April 6, 2004, cannot be presumed to be reasonable or voluntary. The Supreme Court of the United States has recognized that utility poles are bottleneck facilities, which is the reason the United States Congress imposed regulation. *See National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 341 (2002). The FCC has consistently found that the two parties are not on equal terms at any time in contract negotiations regarding pole attachments, recognizing the

unequal bargaining power of the parties. *See Texas Cable & Telecommunications Ass'n v. Entergy Servs.*, Order, 14 FCC Rcd 9138, 9142, ¶ 12 (Cable Serv. Bur. 1999)

Ultimately, the CLEC who refuses to sign an unjust and unreasonable contract, or who must submit to exhaustive negotiations which consume resources in unequal proportion for competitor and utility, must abandon the prospect of getting into business, because ***there is no alternative to use of existing poles***. By comparison, the worst that can happen to a pole owner whose contract is revised after signing because of a regulator's review is that (a) the pole owner enjoys the negotiated rate, term or condition until it is overturned; and (b) the rate, term or condition is later modified to be just and reasonable. The pole owner forfeits nothing, and has an equal opportunity to demonstrate that the rate, term or condition is just and reasonable.

Accordingly, the FCC has taken the view that existing pole attachment contracts cannot be presumed to be either voluntary or reasonable. While detractors have labeled the FCC's policies with the pejorative "sign and sue" label, the policies exist because inequality exists. *Southern Co. Serv., Inc. v. FCC*, 313 F.3d 574, 583-84 (D.C. Cir. 2002) (affirming conclusion that attaching entities may sign a pole attachment agreement and later file a complaint with the FCC challenging an allegedly unfair element of the agreement.)

Even so, the terms of the Pole Agreement support segTEL's claims.

Article V; 5.3 states, "within 45 days of receipt of written notification in the form of a complete license application..." Article V then describes the three possibilities of what will happen within the 45 day period, namely, "[i]f no Make-ready Work is required, ***a license shall be issued*** for the attachment." [Emphasis added.] Alternatively, if Make-ready Work is required, "Licensor will provide Licensee with an itemized invoice for such anticipated Make-ready Work." Finally, the only other alternative, is "if Licensor determines that the pole may not

reasonably be rearranged or replaced to accommodate Licensee's facilities ***for reasons of capacity, safety, reliability or engineering***, the Licensor may refuse to grant a license for attachment. Licensor shall provide the specific reason(s) for such denial. Licensor shall not unreasonably exercise the right reserved hereunder."

Since no Make-ready Work is required, segTEL's assertion is that a license must be issued.

9. There is nothing in the Pole Agreement that would suggest that segTEL must obtain its own rights-of-way.

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, PSNH asserts that, "segTEL is contractually obligated to obtain the required authorization to install its attachments on private property where PSNH's poles are located." However, PSNH's claim is not only tardy, it is specifically contradicted by the language of the Pole Agreement. Moreover, if PSNH wanted to require segTEL to obtain its own rights-of-way, 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 priot to the Pole Attachments Act, utilities sought unsuccessfully to require Cable TV operators to obtain their own rights-of-way under the guise that CATV is not a utility. *See* 47 U.S.C. § 541. 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 utility use of rights-of-way.

10. segTEL is not required to obtain its own rights-of-way in order to gain access to PSNH's poles.

PSNH wants this Commission to believe that when an incumbent utility holds a particular easement for utility poles on private property, that easement is not the same thing as a right-of-way. Rather, PSNH would have this Commission believe that these contracts, typically decades old, simply allow PSNH to place a pole in the ground, that no additional rights have been conveyed, that there has been no condemnation, and, therefore, no utility right-of-way exists. Under this novel theory, PSNH now insists that segTEL must obtain its own rights-of-way, not to place poles, nor even to make changes to the poles, but simply to attach the wires it intends to run between existing poles. However, when PSNH wishes to place new lines on existing poles, do maintenance on its poles, or even replace its poles, it does not seek a new easement to do so.

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 all 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.

Despite PSNH's claims, there is no clause in the easements it holds that would result in PSNH's forfeiture of its rights-of-way. The easements that PSNH has provided do not help its cause, as none of them prohibit, or purport to prohibit, the attachment of telecommunications attachments. To the extent that such any such forfeiture might exist, however, this Commission has the authority to grant condemnation, and to convert, through eminent domain, an involuntary right-of-way where PSNH currently claims only a voluntary easement exists. This is, however, an unnecessary step.

The Supreme Court of New Hampshire has spoken directly to this issue: *In re Opinion of the Justices*, 66 N.H. 629, 674, the Court made it plain that there is no distinction between

property taken from the landowners without their consent and property held by easement stating, "the public right is the same whether the landowners consent or object. If they give the easement by deed to induce the laying out and building of the way, the public right is what it would be if the landowners had unsuccessfully opposed the laying out, and contested the assessment of damages" insofar as eminent domain is concerned. *Id.*

Under state law, utility easements that will be used for similar purposes have routinely been granted. Once reasonable necessity is shown, New Hampshire law holds that one utility devoted to public service may take property from another that is similarly engaged. *See, e.g., Northern Railroad v. Concord & Claremont Railroad*, 27 N.H. 183. In that case, the Court upheld one railroad using an easement granted to another railroad and said that it was proper "so long as the taking is for the public good." *Id.*, 196.

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. But even if it did not, 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. Thus, segTEL is not required to obtain its own rights-of-way to gain access to PSNH's poles.

11. Federal and state law and the orders of the FCC support segTEL's request.

47 USC 224(f) regarding nondiscriminatory access reads: "**(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]

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.

Moreover, when the legislature enacted SB 123, an act relative to pole attachments (RSA Chapter 320) the session law required that (a) the Commission expeditiously promulgate rules to carry out the provisions of the RSA, and (b) the rules "be consistent with the regulations adopted by the Federal Communications Commission under 47 USC § 224, including the formulae used to determine maximum just and reasonable rates" for a period of two years.

Utility poles, utility rights-of-way, utility easements, and competitive or other attachments or changes thereto have been thoroughly litigated, and there exists an extensive body of law on all of the matters raised by PSNH in its Motion. In addition, 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 (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); *Witteman v. Jack Barry Cable TV*, 192 Cal. App. 3d 1619, cert. denied 484 U.S. 1043 (1988). Finally, in *Cousins v. Alabama Power Co.*, 597 So.2d 683 (Ala. 1992) the Alabama Power Company 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.

RSA 374:34-a authorizes the wholesale adoption of the federal scheme for pole attachments, while providing for local enforcement, appropriately vested in the New Hampshire Public Utilities Commission, of that body of law. As described above, the Commission should find that PSNH did not act in compliance with Federal law when it denied segTEL's request due for reasons unrelated to insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

12. PSNH did not act in compliance with the Commission's interim administrative rules regarding pole attachments when it failed to respond to segTEL's application and failed to negotiate in good faith.

Puc 1303.01 sets out the standard that PSNH was to follow: Access Standard. The owner or owners of a pole shall provide access to such pole on terms that are just, reasonable and nondiscriminatory. Notwithstanding this obligation, the owner or owners of a pole may deny a request for attachment to such pole when there is insufficient capacity on the pole or for reasons of safety, reliability and generally applicable engineering purposes. It was unjust and

unreasonable for PSNH to hold segTEL's request for more than six months before responding. Further, PSNH's denial was not for reasons of "insufficient capacity on the pole" nor "for reasons of safety, reliability and generally applicable engineering purposes."

Further, even if PSNH had the right to refuse segTEL access to the poles in question, it did not comply with Puc 1303.02 regarding the pole Owner Obligation to Negotiate. Puc 1303.02 states that "The owner or owners of a pole shall, upon the request of a person seeking a pole attachment, negotiate in good faith with respect to the terms and conductions for such attachment." Rather than negotiating in good faith, PSNH ignored segTEL's request for more than six months.

III. CONCLUSION

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:

- Accept segTEL's request for arbitration in this matter;
- In the alternative, consider segTEL's request as a complaint under RSA 365:1, and under Puc 1304, initiating appropriate proceedings;
- Determine that PSNH's denial of access is contrary to state and federal law;

- Order PSNH to issue licenses to segTEL without further delay;
- Make a determination that CLEC attachers are entitled to access to incumbent utility rights-of-way;
- Make a determination that electric utility rights-of-way are presumptively compatible with the deployment of fiber-optic cable, and
- Grant any additional relief this Commission may provide.

Respectfully submitted by segTEL, Inc. on December 14, 2008.