

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 08-146

segTEL, Inc.

Request for Arbitration Regarding Access to Utility Poles

Procedural Order

ORDER NO. 24,944

February 27, 2009

APPEARANCES: Jeremy L. Katz, on behalf of segTEL, Inc.; Christopher J. Allwarden, Esq. on behalf of Public Service Company of New Hampshire; Scott Wade, on behalf of Unitil Energy Systems, Inc.; and F. Anne Ross for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

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 (PSNH). On November 24, 2008, PSNH objected to segTEL's request for arbitration and moved to dismiss. On December 15, 2008, segTEL filed a response to PSNH's motion to dismiss. Subsequently, on December 23, 2008, PSNH filed a motion to strike segTEL's response to the motion to dismiss as untimely.

On December 16, 2008, segTEL filed a Pole Attachment Agreement, dated April 6, 2004. On February 10, 2009, segTEL filed Appendix 2, segTEL's application for pole attachments SUNP-New London-A001 and Appendix 3, segTEL's application for pole attachments SUNP-New London-A002. segTEL requested confidential treatment for both filings.

On January 16, 2008, an Order of Notice was issued scheduling a prehearing conference for February 3, 2009. On February 2, 2009, UES filed a petition to intervene. On February 3,

2009, Edward N. Damon, Esq., acting as hearings examiner, presided over the Prehearing Conference pursuant to RSA 363:17 and N.H. Code Admin. Rules Puc 203.14(c), and submitted his recommendations to the Commission on February 12, 2009.

II. PREHEARING CONFERENCE AND TECHNICAL SESSION

At the Prehearing Conference, segTEL asserted that, as a competitive local exchange carrier (CLEC), it has the right to attach wires to certain utility poles owned or controlled by PSNH pursuant to federal and state laws and regulations. It claimed that PSNH unlawfully denied such access and that such denial was untimely.

PSNH stated that it has not technically denied segTEL access to the poles. Instead, PSNH contended that it has insufficient property rights under applicable private property easements to grant a license for segTEL to attach. PSNH relied, in part, on its Pole Attachment Agreement with segTEL, which PSNH claims requires segTEL to obtain authority from the landowners where the poles are located prior to attaching. PSNH also cited N.H. Code Admin. Rules Puc 1300 as support for the presumption that the Pole Attachment Agreement is just, reasonable and nondiscriminatory. PSNH further argued that the extent of its ownership or control of the easements is a matter of state private property law and that this issue is outside the Commission's jurisdiction.

segTEL filed an objection 21 days after PSNH filed its motion to dismiss. SegTEL did not seek a waiver of the Puc 203.07 (e) requirement that objections to motions be filed within 10 days and gave no reason to excuse its late filing. In its response segTEL argued that the Commission has jurisdiction over this matter pursuant to 47 U.S.C. § 224 and RSA 374:34-a. segTEL also took the position that Puc 1300 et seq cannot be retroactively applied. PSNH filed a motion to strike segTEL's untimely objection.

Following the Prehearing Conference, the parties and staff met in a technical session and filed a report on February 9, 2009. They agreed upon several matters:

- i. Although arbitration is not appropriate, the case should be treated as a petition for dispute resolution under N.H. Code Admin. Rules Puc 1304.02, 1304.03 and 203.
- ii. Certain listed documents should be admitted as full exhibits;
- iii. A preliminary schedule, including a round of discovery and a technical session to be held on February 27, 2009;
- iv. If the Commission denies PSNH's motion to dismiss, the current property owners of the real estate subject to PSNH's easements should be identified and given at least 30 days notice of the proceeding and an opportunity to participate.

The participants also agreed to the following proposed procedural schedule:

Feb. 11, 2009	Data requests via electronic service;
Feb. 23, 2009	Responses to data requests due via electronic service;
Feb. 27, 2009	10:00 a.m. technical session to establish remainder of procedural schedule;
Late March 2009	Tentative proposed date for a public hearing, if necessary.

III. HEARING EXAMINER'S REPORT

Mr. Damon recommends that UES's petition for intervention be granted. With regard to the motion to strike segTEL's response to the motion to dismiss, Mr. Damon indicates that, despite its lateness, the response may assist the Commission in ruling on the motion to dismiss and may reduce the need for further related filings and arguments. He also recommends adoption of the proposed schedule, and opines that the other agreements of the parties and Staff were reasonable. Mr. Damon further recommends that the parties report by March 4, 2009 the results of their February 27, 2009 technical session.

IV. COMMISSION ANALYSIS

The parties submitted a Pole Attachment Agreement dated April 6, 2004, between segTEL and PSNH (PAA). The parties disagree on the interpretation of the PAA and upon the rights and duties established by that agreement. This dispute presents a set of threshold issues regarding the application of RSA 374:34-a, II, VI and VII, which state:

II. Whenever a pole owner is unable to reach agreement with a party seeking pole attachments, the commission shall regulate and enforce rates, charges, terms, and conditions for such pole attachments, with regard to the types of attachment regulated under 47 U.S.C. section 224, to provide that such rates, charges, terms and conditions are just and reasonable. This authority shall include but not be limited to the state regulatory authority referenced in 47 U.S.C. section 224(c).

VI. Any pole owner shall provide nondiscriminatory access to its poles for the types of attachments regulated under this subdivision. A pole owner may deny access to its poles on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes;

VII. The 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.

We will treat segTEL's petition as a complaint under RSA 365:1 and RSA 374:34-a, II, VI and VII raising issues, inter alia, as to whether the terms and conditions of the PAA are just, reasonable and nondiscriminatory.¹ Furthermore, we deny PSNH's motion to dismiss as facially insufficient regarding the threshold issues; segTEL's objection to the motion to dismiss and PSNH's motion to strike the objection are therefore moot.² In addition, we agree that arbitration is not appropriate for this docket, given that the parties have not agreed to arbitration and that we

¹ PSNH refuses to allow segTEL to attach to the poles unless segTEL complies with Section 6.2 of the Pole Attachment Agreement. PSNH's refusal is based on its interpretation of the applicable easement documents, therefore, the Commission will review those documents as a component of its analysis of whether the terms and conditions of the Pole Attachment Agreement are just, reasonable and nondiscriminatory.

² Should the scope and interpretation of the language of the underlying easements become a direct issue for determination of this dispute, PSNH shall be without prejudice to renew its motion to dismiss at that time, and affected landowners shall be provided with proper notice and an opportunity to be heard.

have taken jurisdiction pursuant to RSA 365:1 and 374:34-a. Finally, we agree with the hearings examiner's reasoning and recommendations as to UES's petition to intervene.

Based upon the foregoing, it is hereby

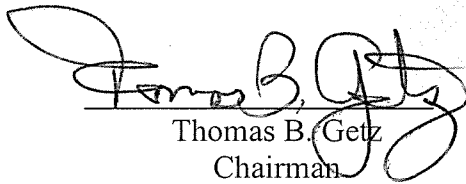
ORDERED, that the motion by Unitil Energy Services, Inc. to intervene is granted; and it is

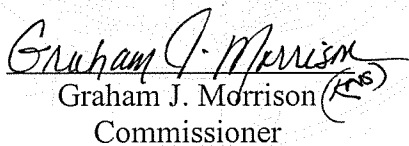
FURTHER ORDERED, that the motion to dismiss is denied, and it is

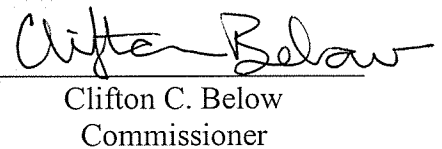
FURTHER ORDERED, that the initial procedural schedule recommended by the parties and described in this order is approved; and it is

FURTHER ORDERED, that the parties shall file a proposed procedural schedule for the balance of this docket directed toward a hearing as to all issues raised in the initial pleadings and their proposed process for providing notice and opportunity to be heard for affected landowners.

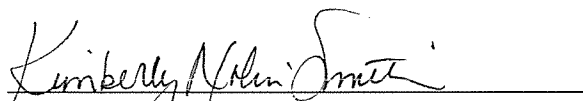
By order of the Public Utilities Commission of New Hampshire this twenty-seventh day of February, 2009.


Thomas B. Getz
Chairman


Graham J. Morrison
Commissioner


Clifton C. Below
Commissioner

Attested by:


Kimberly Nolin Smith
Assistant Secretary

CHRISTOPHER J ALLWARDEN
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02/27/09 Order No. 24,944 issued and forwarded
to all parties. Copies given to PUC
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Docket #: 08-146

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FILING INSTRUCTIONS: PURSUANT TO N.H. ADMIN RULE PUC 203.02(a),

WITH THE EXCEPTION OF DISCOVERY, FILE 7 COPIES (INCLUDING COVER LETTER) TO:

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