STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

CRS 15-245

SEGTEL, INC. D/B/A FIRSTLIGHT FIBER
LICENSE BY NOTIFICATION OF EXISTING CROSSINGS ON EXISTING POLES

Order Denying Motion for Confidential Treatment

O R D E R N O. 25,825

October 13, 2015

In this Order, we deny the Motion for Confidential Treatment filed by segTEL, Inc. d/b/a FirstLight Fiber, with respect to the detailed and specific existing crossing lists submitted with a Request for Licenses by Notification Pursuant to RSA 371:17-b. We find that the public interest in disclosure of such information outweighs the private commercial interests of the movant.

I. PROCEDURAL HISTORY

On June 18, 2015, segTEL, Inc. d/b/a FirstLight Fiber (FirstLight) filed a Request for Licenses by Notification Pursuant to RSA 371:17-b (Request) that the Commission issue permanent licenses for a list of FirstLight's existing facilities crossing public waters and lands owned by the State in New Hampshire. Those facilities were in place as of the effective date of the statute, June 19, 2013. FirstLight simultaneously filed a Motion for Confidential Treatment pursuant to RSA 91-A:5, IV (Motion) of the detailed lists of locations of its facility crossings attached to the Request (collectively, Crossing Lists).

On August 24, 2015, Commission Staff (Staff) filed a memorandum (Staff Memo) recommending that the Motion and the similar motions filed by two other telecommunications carriers for confidential treatment be granted in an order *nisi*.

II. POSITIONS OF MOVANT AND STAFF

A. FirstLight's Motion

FirstLight asserted that it has a strong privacy interest in protecting the confidentiality of its Crossing Lists, which were compiled solely for the purpose of the Request filing and which show numerous specific and precise locations of its facilities throughout the State of New Hampshire. Motion at 2. FirstLight emphasized that the Crossing Lists comprehensively compile in one place precise, highly granular information concerning its New Hampshire facilities throughout the State, and that such information presented in this format and in the aggregate is not otherwise publicly available. *Id.* According to FirstLight, the detailed information in those aggregate lists would enable competitors to learn the locations of its facilities with pinpoint accuracy. Motion at 2-3. FirstLight argued that, like utility network maps that the Commission has protected from disclosure in other instances, the specific, precise, and aggregated company network information included in the Crossing Lists implicates a strong commercial privacy interest that should be afforded protection. Motion at 1-3.

FirstLight further maintained that there is no public interest in disclosure of the Crossing Lists, primarily because RSA 371:17-b provides that, upon the filing of a list of existing pole line crossings, "no further inquiries or investigations by the commission shall be undertaken." Motion at 3. Therefore, according to FirstLight, there are no governmental activities to observe, and citizens will learn nothing about the workings of government, through release of the existing crossing location information contained in the Crossing Lists. *Id.*

FirstLight argued that, even if there were some modicum of benefit to the public from the disclosure of the Crossing Lists information, any such benefit would be far outweighed by the competitive harm to FirstLight from the release of such comprehensive lists containing precise

geographic locations of numerous facilities in the State. *Id.* FirstLight concluded that, under the relevant balancing test applied by the Commission when considering requests for confidential treatment, "the scales tip clearly on the side of treating [the Crossing Lists] information as confidential." *Id.*

B. Staff's Recommendation

In the Staff Memo, Staff described and summarized the Commission's authority to issue crossing licenses to telecommunications carriers in three separate contexts: new pole construction, new crossings on existing poles, and existing crossings on existing poles as of June 19, 2013, as well as the different levels of review and investigation that are involved in licensing in each of these three contexts. Staff Memo at 1-2. Staff noted that petitioners for crossing licenses have not sought or been granted confidential treatment in the past, and that nine other RSA 371:17-b existing crossing notifications had been filed by telephone utilities and other telecommunications companies that did not include a request for confidential treatment of the specific crossing information covered by the notification. *Id.*

Staff maintained, however, that there may be a substantial commercial interest at stake with respect to detailed crossing information that would disclose significant portions of a carrier's network topologies, which is commercially sensitive non-public information, and that such disclosure could place the carrier at a competitive disadvantage. Staff Memo at 3. Staff identified a narrow set of circumstances implicating three related criteria involved in making this determination:

> [1] Is the petitioner subject to "provider of last resort" obligations to provide a network throughout a franchise area? If so, the network topology should generally not be considered commercially sensitive, since the topology is in large part driven by publicly known legal obligations rather than by business strategy.

> [2] Is the petitioner operating in a competitive market environment? If not, claims of "commercial sensitivity" require substantial explanation.
>
> [3] Is the petitioner targeting the broad residential market, rather than a more limited commercial or wholesale market? If the petitioner is serving residential areas, the network topology will generally cover wide swaths of territory and its details will generally not be commercially sensitive. Many residential providers even publish maps of their network coverage areas as a marketing tool.

Id. Staff concluded that FirstLight and each of the other two carriers seeking similar confidential treatment had met these three criteria because each such carrier provides only non-residential telecommunications services, none of them has a "provider of last resort" obligation, and the markets for commercial and wholesale telecommunications services in which each carrier operates are strongly competitive. *Id.* Staff further noted it had confirmed that obtaining the geographic coordinate data for the crossing locations included in the Crossing Lists and the similar information provided by the other two carriers would enable a reader to interpolate and construct a substantial network map of the carrier's network facilities in New Hampshire. *Id.*

Staff identified no specific public interest in disclosure of filings such as the Crossing Lists, emphasizing that the crossings involved were all constructed more than two years earlier, that there is no longer any opportunity to revise construction plans to benefit traffic or landscape, that filing for a permanent license does not provide any opportunity for removal or relocation if an existing crossing is suboptimal, and that the statute provides no investigatory authority and minimal discretion to the Commission or Staff in acting upon such filings. Staff Memo at 4. In Staff's view, disclosure of specific geographic information such as that contained in the Crossing Lists would not shed any further light on the "workings of government" regarding licenses issued under RSA 371:17-b. *Id.*

Based on its analysis of these circumstances, Staff concluded that the balance favors confidential treatment of such specific geographic information, because the carrier "will

plausibly suffer a significant competitive disadvantage if the detailed crossing information is disclosed, while the public interest in such disclosure is limited to the general principle of government transparency." *Id.* Staff therefore recommended that the Commission issue an order granting confidential treatment of the specific geographic information contained in the Crossing Lists and the other two similar filings, and in any license attachments that may be issued in response to these filings, and that the order be issued on a *nisi* basis to provide members of the public an opportunity to raise any concerns that have not been addressed. *Id.*

III. COMMISSION ANALYSIS

Under RSA 91-A:5, IV, records of "confidential, commercial or financial information" are exempted from disclosure, and the New Hampshire Supreme Court has adopted a three-step balancing test for determining whether certain documents meet this designation. *See, e.g.*, *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 552-54 (1997); *Lambert v. Belknap County Convention*, 157 N.H. 375, 382-83 (2008).

We must first consider whether disclosure of the information FirstLight seeks to protect involves a privacy interest. We find that FirstLight has a legitimate privacy interest in the specific, precise, and aggregated information regarding its New Hampshire facilities network that is contained in the Crossing Lists. We agree with Staff that this information may be considered "confidential, commercial, or financial" information as contemplated by RSA 91-A:5, IV. We are led to this conclusion in particular because FirstLight operates in a highly competitive segment of the telecommunications market, and the detailed information regarding its crossing locations is presented on a comprehensive and aggregate basis in the Crossing Lists, thereby providing a substantial disclosure of its network facilities in New Hampshire.

We next consider whether the public has an interest in disclosure of this information. We conclude that the public has a substantial interest in disclosure of specific information regarding line crossings of public waters and state lands by utilities and other entities. We note that this type of information has never been treated as confidential in the past, nor have other telephone utilities sought confidential treatment when submitting detailed and extensive crossing lists to obtain permanent licenses under RSA 371:17-b. We find the public has a substantial interest in knowing which utilities and other entities have obtained licenses to cross public waters and state lands and the specific locations of these licensed crossings.

Finally, we balance the public's interest in disclosure against the privacy interests at stake to determine whether disclosure is warranted. In this case, we find that the public interest in disclosure of the Crossing Lists outweighs FirstLight's privacy interest in the Crossing Lists. We note in particular that RSA 371:17-b is effectively an "amnesty" statute that provides a licensing opportunity for entities that were required to have filed petitions for pre-construction licensing under RSA 371:17, but failed to do so. If such crossing petitions had been filed when required, they most likely would not have been treated as confidential under the Commission's practice and precedent. We do not believe that the aggregated nature of the information contained in the Crossing Lists filed under RSA 371:17-b tips the balance in favor of non-disclosure as argued by FirstLight and recommended by Staff.

Based on this analysis, we deny FirstLight's Motion. Pursuant to N.H. Code Admin. Rules Puc 203.08(i), if the Commission denies a motion for confidential treatment, the information that was the subject of the motion "shall not be disclosed until all rights to request rehearing and to appeal have been exhausted or waived." This affords the movant an opportunity to seek rehearing and judicial review of an adverse decision of the Commission. We therefore

order FirstLight to file unredacted copies of its Crossing Lists on or before the later of November 12, 2015, or the date upon which all rights to request rehearing and to appeal have been either exhausted or waived.

Based upon the foregoing, it is hereby

ORDERED, that FirstLight's Motion for Confidential Treatment is DENIED; and it is

FURTHER ORDERED, that FirstLight shall file unredacted copies of the Crossing Lists on or before the later of November 12, 2015, or the date upon which all rights to request rehearing and to appeal have been either exhausted or waived.

By order of the Public Utilities Commission of New Hampshire this thirteenth day of October, 2015.

Martin P. Honigberg
Chairman

Robert R. Scott
Commissioner

Attested by:

Debra A. Howland
Executive Director

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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