

STATE OF NEW HAMPSHIRE

Inter-Department Communication

DATE: August 24, 2015
AT (OFFICE): NHPUC

ML

FROM: Michael Ladam, Assistant Director of Telecommunications

SUBJECT: CRS 15-206, CRS 15-245, CRS 15-249: Confidentiality Motions for RSA 371:17-b Crossing Filings

TO: Commissioners
David Wiesner
Debra Howland, Executive Director

Executive Summary

Three companies have made filings in these dockets for licenses under New Hampshire RSA 371:17-b of existing crossings on existing poles. These filings request confidential treatment of the geographic locations of such crossings. Crossing petitions have not sought or been granted confidential treatment in the past. Based on the particular nature of New Hampshire RSA 371:17-b, an examination of the support for confidential treatment of certain filings under state law, and the competitive environment of these petitioners, Staff recommends that these requests for confidential treatment be granted in an order *nisi*.

RSA 371:17, 371:17-a, and 371:17-b

New Hampshire RSA 371:17 requires public utilities and other entities to obtain Commission approval before constructing “a line of poles or towers and wires and fixtures thereon, over, under, or across any of the public waters of this state, or over, under, or across any of the land owned by this state.” Pursuant to RSA 231:160-161, electrical and telecommunications crossings of roads and highways are licensed by the New Hampshire Department of Transportation and/or local governments rather than by the Commission. Commission Staff has historically reviewed the vertical clearances of cables in RSA 371:17 petitions, and has often required the petitioner to revise plans to meet code requirements.

In 2013, RSA 371:17-a took effect, providing utilities “other than electric or gas” an accelerated review and approval process for new attachments on existing utility poles. The “other than” language effectively limits this law to the addition of new telecommunications cables to an existing group of cables attached to existing poles or towers. Under this accelerated process, the applicant declares that the crossing shall be completed in accordance with the relevant agreement with the pole owner and with the National Electrical Safety Code, and the Commission makes no further inquiries or investigation before granting a license.

In 2013, RSA 371:17-b also took effect. This statute grants temporary licenses to “existing crossings on existing poles” that were in place as of June 19, 2013. The statute also provides a process under which owners of existing crossing facilities may obtain a permanent license by notifying the Commission of the existence of such crossings by June 19, 2015. The Commission makes no further inquiry or investigation before granting a license. 371:17-b does not include the language of 371:17-a limiting its applicability to utilities “other than electric or gas.” However, this law is limited to “existing crossings on existing poles.” In Staff’s experience, a gas utility will generally not construct crossings “on poles,” and an electric utility will generally deploy at least one new pole for a crossing, rather than attach to two existing poles. RSA 371:17-b clearly applies to some telecommunications cables; its applicability to other crossings is less clear.

Scope of RSA 371:17-b License

Licenses issued by the Commission under RSA 371:17 are complementary to, not replacements for, reviews and approvals by other state, federal, and local authorities. For example, water crossings authorized by the Commission under RSA 371:17 may also require approval by the United States Army Corps of Engineers, or also require wetlands evaluations and permitting by the New Hampshire Department of Environmental Services. Commission approval is required for crossings of state lands (other than electrical and telecommunications crossings of roads and highways), but the state authority maintaining that land may have its own independent authorization process for such use of the property.

In Staff’s analysis, nothing in RSA 371:17-a or RSA 371:17-b changes this relationship of Commission licensing to the power of other authorities; in particular, an RSA 371:17-b license issued by the Commission does not appear to satisfy statutory requirements for approvals by other agencies.

RSA 371:17-b Filings Summary

The deadline for making a filing under RSA 371:17-b was June 19, 2015. No new filings are allowed after that date. The Commission received twelve filings under the statute. None of the other nine petitioners has requested confidentiality. The other petitioners generally serve the residential market, which is discussed below.

Commercial Sensitivity of Network Maps

New Hampshire RSA 91-A:5, IV exempts “confidential, commercial, or financial information” from the obligation to make records available for public inspection. This is a broadly worded exemption. It is difficult to imagine a filing that does not include some element of “financial information,” yet the law appears to consider confidential treatment the exception rather than the rule for filings. Consequently, requests for confidential treatment under RSA 91-A:5, IV require analysis and the balancing of interests under judicial precedent and Commission practice.

In their filings and in discussions with Staff, the three parties requesting confidential treatment under RSA 91-A:5 of their RSA 371:17-b filings assert that public disclosure of the locations for which they are seeking crossing licenses effectively discloses significant portions of their network topologies, which is commercially sensitive non-public information, and such disclosure could place them at a competitive disadvantage.

Staff has concluded that, in a narrow set of circumstances, there is indeed a substantial commercial interest at stake in such disclosure. Three related criteria are involved in making this determination:

- 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.
- Is the petitioner operating in a competitive market environment? If not, claims of “commercial sensitivity” require substantial explanation.
- 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.

The petitioners in these three dockets each provide only non-residential telecommunications services. None of them has a “provider of last resort” obligation. The markets for commercial and wholesale telecommunications services are strongly competitive, and Staff has confirmed that obtaining the geographic coordinate data for the crossings in these dockets enables the reader to interpolate and construct a substantial network map.

It is useful to consider two hypothetical providers: one targeting the medical center vertical market, and another offering wholesale Internet transport service.

The provider targeting the medical center market may well consider any plans it has to offer service in a new town to be highly sensitive information: competitors could quickly pinpoint the targeted medical center, pull together a competing offer, or perhaps even seek to create roadblocks for the provider.

The Internet transport provider would be concerned about disclosure of its network topology for a different reason. The network map would show what options the provider has for routing real-time traffic: perhaps always going through a particular city, or perhaps reaching a particular destination only through a “spur.” This information

could easily be used by competitors to sell against, or perhaps even create disruption for, the provider.

Public Interest in Disclosure

As noted earlier, the broad language of RSA 91-A:5, IV and relevant precedent require a balancing of the commercial and public interests. In the case of a petition to construct a new crossing under RSA 371:17-a, for example, any commercial interest must be weighed against substantial and specific public interests, including concerns that the construction process itself could disrupt traffic and affect the landscape. Neither this public interest in disclosure nor the commercial interest in confidentiality is easily quantifiable, and balancing them could be difficult.

A filing under RSA 371:17-b is a different matter. The crossings involved were constructed no later than June 2013; there is no longer any opportunity to revise the construction plan to benefit traffic or landscape. Under RSA 371:17-b, filing for a license does not provide any opportunity for removal or relocation if the existing crossing is suboptimal. The statute also provides minimal discretion to the Commission or Staff in acting upon such filings: if the filing describes a crossing under the Commission's jurisdiction and provides the required information, a license shall be issued. The specific methodology used by Staff in determining the completeness of a filing, for example the treatment of filings that lack pole numbers, will be made clear in public Staff letters to parties in these dockets. The disclosure of the particular geographic information for which the petitioners seek confidential treatment would not shed any further light on the "workings of government" regarding such licenses.

In light of these simple facts, Staff has identified no specific public interest in disclosure for such filings. The balance in these circumstances therefore favors confidential treatment, in Staff's view: the petitioners 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.

Staff therefore recommends that the Commission issue an order granting confidential treatment of the geographic information in these three filings and in any license attachments that may be issued in response to the filings. Staff further recommends that the order be issued on a *nisi* basis, giving members of the public an opportunity to raise any concerns that have not been anticipated.

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.

Executive.Director@puc.nh.gov

amanda.noonan@puc.nh.gov

david.wiesner@puc.nh.gov

gmk@fhllplaw.com

~~kate.bailey@puc.nh.gov~~

michael.ladam@puc.nh.gov

ocalitigation@oca.nh.gov

rick.thayer@level3.com

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FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:**

DEBRA A HOWLAND
EXECUTIVE DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429

- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.**
- c) Serve a written copy on each person on the service list not able to receive electronic mail.**