EXHIBIT 1

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

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S
OBJECTION TO REQUEST FOR ARBITRATION
AND
MOTION TO DISMISS

NOW COMES Public Service Company of New Hampshire ("PSNH"), by its undersigned attorney, and objects to and moves to dismiss the segTEL Request for Arbitration Regarding Failure to Provide Access to Utility Poles by Public Service Company of New Hampshire, dated November 14, 2008, and in support thereof says as follows:

1. There is no legal basis supporting segTEL's request for arbitration by the Public Utilities Commission ("Commission") in this matter. The Commission has not by order or otherwise established a process for the arbitration of pole attachment disputes between electric utilities and CLECs. The Commission's prior orders cited by segTEL as support for its arbitration request in this instance (Dockets DE 96-265 and DE 97-229) were orders implementing provisions of the Federal Telecommunications Act of 1996, specifically 47 USC §251 and 47 USC §252, which relate to the duties of incumbent local exchange carriers (ILECs) to negotiate and provide for interconnection with competing telecommunications carriers (such as CLECs), and the establishment by State utility commissions of mandatory arbitration procedures to hear and resolve open interconnection issues between ILECs and CLECs. segTEL's belief that such arbitration "is appropriate" in disputes between CLECs and incumbent electric utilities is incorrect.

is incorrect. As segTEL has demonstrated no valid legal basis for the Commission to act as an arbitrator in this matter, the request should be dismissed by the Commission outright.

2. There is also no factual or supportable legal basis for segTEL's complaint against PSNH of a failure to provide access to PSNH's utility poles.

3. First and foremost, PSNH has not denied segTEL access to its poles. What segTEL fails to distinguish is that the poles to which it desires access in this case are part of a 34.5kV electric power line situated in a private right of way, not on a public highway. PSNH's placement of its poles in a private right of way is pursuant to, and subject to, individual private property easements previously granted by each underlying property owner. Unlike utility poles and wire or cable attachments to those poles situated in a public highway right of way[1], permissible attachments to poles in a private property right of way can only be allowed if permitted by the private property rights granted to the pole owner. The Federal Pole Attachment Act (47 USC §224) (the "Pole Attachment Act" or the "Act")), and the FCC's regulations promulgated thereunder, only mandate that a utility provide non-discriminatory access to any pole, duct, conduit or right of way "owned or controlled" by the utility. 47 USC §224(f); 47 CFR §1.1403(a).

4. In its interpretation of the Pole Attachment Act, the FCC has given clear meaning to the use of the phrase "owned or controlled". The FCC has determined that, in order for a right of access to be triggered under the Act, "the property to which access is sought not only must be a utility pole, duct, conduit or right-of-way, but it must be owned or controlled by the utility". *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Fifth Report and Order and Memorandum*

[1] All such installations in New Hampshire, inclusive of those made by attaching parties such as CLECs, are subject to State or municipal licensing of rights to use and occupy the public right of way pursuant to RSA 231:159, et seq..

Opinion and Order in CC Docket No. 96-98, 15 FCC Rcd 22983, 23022, P 85 (October 25, 2000) (hereinafter *Local Competition Fifth Report and Order).* In the right of way context, the FCC has ruled that "the scope of a utility's ownership and control of an easement or right-of-way is a matter of state law", meaning that the access obligations of 47 USC §224(f) apply "when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order in CC Docket No. 96-98, First Report and Order [Part 4 of 5],* 11 FCC Rcd 15499, 16082, P 1179 (August 8, 1996). If this were not clear enough, the FCC has elaborated on its interpretation by concluding that, consistent with the purposes of the Act, "utility ownership or control of rights-of-way and other covered facilities exists only if the utility could voluntarily provide access to a third party and would be entitled to compensation for doing so", and again, "state law determines whether, and the extent to which, utility ownership or control of a right-of-way exists in any factual situation within the meaning of Section 224." *Local Competition Fifth Report and Order,* at 23023, P 87; see also, *UCA, LLC, d/b/a Adelphia Cable Communications v. Lansdowne Community Development, LLC, et al.,* 215 F. Supp. 2d 742 (E. D. Va. 2002) (upholding reasonableness of FCC's interpretation as giving effect to reality that a utility can only grant access to easement rights that it has and which derive solely from state law.)

5. segTEL has chosen to ignore the application of this key provision of the Pole Attachment Act in its Request for Arbitration in this matter. It has also failed to mention anywhere in its filing the fact that, under the terms of its existing pole attachment agreement with PSNH, it is contractually obligated to obtain such private

property rights as may be required before it is entitled to receive any consideration of its application for a license to attach to PSNH poles located on private property.

6. Utility pole owners PSNH and FairPoint (as successor to Verizon New England, Inc.), and segTEL, are parties to a voluntary Pole Attachment Agreement dated April 6, 2004, which is currently in effect (hereinafter the "PAA"). The PAA establishes the rights, responsibilities and obligations of the parties with respect to the licensing of segTEL attachments to the solely or jointly owned poles of PSNH and FairPoint. segTEL's applications for licenses to attach to PSNH utility poles in Sunapee and New London which are at issue in this matter were submitted pursuant the procedures established and agreed to under the PAA, and are subject to all of the terms and provisions of the PAA. Under the relevant provisions of the PAA (attached hereto as Appendix I), the agreement of the pole owning utilities to issue licenses to attach to their poles is expressly made subject to the provisions of the PAA (Article II – Scope of Agreement, Section 2.1). Article VI – Specifications and Legal Requirements, Section 6.2 of the PAA states as follows:

> "Licensee shall be responsible for obtaining from the appropriate public and/or private authority any required authorization to construct, operate and/or maintain Licensee's Facilities on public and private property at the location of Licensor's poles."

Thus, by the express terms of the PAA it has signed with PSNH, segTEL is contractually obligated to obtain the required authorization to install its attachments on private property where PSNH's poles are located. PSNH has no obligation whatsoever under the PAA to issue segTEL any license to attach unless and until such time as that authorization has been obtained.

7. The Commission's present interim rules with regard to pole attachments fully protect the provisions of pole attachment agreements voluntarily entered into. Rule Puc

1303.04 specifies that "any pole attachment agreement entered into voluntarily under this part shall be presumed to be just, reasonable and nondiscriminatory". The rule further directs that the Commission "shall not alter the terms of any such agreement." The provision in the PAA obligating segTEL to obtain required authorizations to place its attachments on the private property where PSNH's poles are situated, is presumptively valid and binding on segTEL, and shall not be altered by the Commission.

8. PSNH was entitled to consider segTEL's access request in light of the private property location of the poles which were the subject of the attachment request. PSNH was entitled to assess the scope and extent of its right of way easements in these locations. PSNH was entitled to make the determination that it did not own or control right of way easement rights sufficient to allow it to grant segTEL's attachment request to its poles in the right of way. PSNH was entitled to inform segTEL of this determination, and to further inform segTEL that it (segTEL) needed to obtain the required private property rights to allow segTEL's attachments to PSNH poles in these locations before PSNH could proceed further with the consideration and processing of segTEL's attachment request. None of those actions by PSNH violated segTEL's rights under any Federal or state law or regulation, and in fact all were entirely consistent with the Pole Attachment Act and FCC regulations, and with the provisions of the PAA in place between PSNH and segTEL.[2]

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[2] segTEL asserts that, under FCC regulations, PSNH had 45 days to deny segTEL access to its poles, after which, if not denied, access is "deemed to be granted". The applicable FCC regulation, 47 CFR §1.1403 (b), specifies a 45 day time period for denial of access, but nowhere states that failure to meet that time period results in granting of the access request. This assertion is irrelevant, in any event, as PSNH's letter to segTEL was not a denial of access to PSNH's poles, and in fact clearly invited segTEL to resubmit its license applications once the needed private property rights were obtained. Moreover, this assertion is not dispositive of the underlying issue

9. segTEL contends it is entitled to the benefit of a presumption that "the rights of way owned, rented or utilized by incumbent utilities are compatible with communications attachments" (segTEL November 14, 2008 Letter, p. 4). However, the authority cited by segTEL in its filing to support this contention does not warrant such a sweeping notion. segTEL cites first to the nondiscriminatory access provisions of 47 USC §224(f)(1) as if this ends the inquiry, when in fact such a simplistic analysis entirely fails to acknowledge the meaning given by the FCC to the phrase "owned or controlled" found in the same statute. Next, segTEL cites to a reported ruling by the FCC in which the FCC is claimed to have found that attachers are entitled to "unfettered access to utility rights of way", and to have "rejected . . . outright" utility claims similar to the ones made by PSNH in this matter (segTEL November 14, 2008 Letter, p. 4, citing to *In the Matter of The Cable Television Association of Georgia, et al. v. Georgia Power Company, Order,* 18 FCC Rcd 16333 (August 8, 2003)). However, the *Georgia Power* ruling did not involve a situation where the electric utility claimed it did not own or control right of way easement rights sufficient to permit third party attacher access. At issue in *Georgia Power* was a proposed provision in a pole attachment agreement in which the utility sought to impose a requirement that the attacher separately negotiate with and separately pay the utility for accessing and using the utility's private property easements. Such a requirement was declared by the FCC to be unreasonable because the FCC's rate formula assured the utility just compensation, and therefore the utility was not entitled to additional or different payment from the attacher for access to private easements. Of course, in this case PSNH has made no such demand of segTEL, or sought to impose any such requirement for access. Nothing in the FCC's *Georgia*

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regarding the need for obtaining property rights from the underlying landowners before any attachment request could be approved.

Power ruling affects in any respect the FCC's prior determinations that a utility need only grant access to rights of way which it owns or controls sufficient to permit access under applicable state law.

10. Additionally, segTEL cites to section 621(a) (2) of the Federal Cable Communications Policy Act of 1984 (47 USC §541(a) (2) of the so-called "Cable Act") for the proposition that electric utility rights of way are declared compatible with fiber optic telecommunications use. That Federal law grants franchised cable companies rights over "public rights-of-way" and "through easements . . . which have been dedicated for compatible uses." 47 USC §541(a) (2). However, in the case of private property easements, this statute has been interpreted to apply only when the landowner has so relinquished his rights in the property as to amount to a public dedication of the easement to general utility use by any utilities. *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F. 2d 600 (11th Cir. 1992), cert den, 506 U.S. 862 (1992), reh, en banc, den, 988 F. 2d 1071 (11th Cir. 1993). The PSNH private property power line easements in this case are not so broad or inclusive as to fall into a category of easements dedicated to general public utility uses, as might be the case involving a residential subdivision or the development of an industrial or business park.

11. Since the question of when a utility owns or controls the right of way to the extent necessary to permit access is a matter of state law, the easement law of the State of Hampshire must control the outcome in this case.[3] There is certainly no presumption under New Hampshire law hat a right of way owned and used by an electric utility for power line purposes may be made available to third parties for telecommunications use unrelated to the electric utility's business. Indeed, there is not a single reported case in

[3] Because the interpretation of the New Hampshire easement rights in this case depends upon the application of New Hampshire law, segTEL's citation to rulings and case law interpreting easement questions in other states such as Georgia or Alabama are not controlling.

New Hampshire which supports such a presumptive trampling of private property interests.

12. New Hampshire law recognizes the basic premise that an easement is distinct from ownership. An easement is a nonpossessory right to the use of another's land; it grants the holder the right to enter and make use of the property of another for a particular purpose. *Arcidi v. Town of Rye,* 150 N.H. 694 (2004). The leading case in New Hampshire on the interpretation of the scope and permissible use of electric utility easements is *Lussier v. N. E. Power Co.,* 133 N.H. 753 (1990). In *Lussier,* the New Hampshire Supreme Court affirmed a lower court ruling that the utility easements in question permitted the construction of a third transmission line and an electrical switching station in a right of way continuously occupied with only two lines for the previous sixty years. *Lussier* holds that the question of permissible use of an easement is one of determining the intent of the parties at the time of the original easement grant; the words used in the easement deed control, and where clear and unambiguous, there is no need to resort to outside facts or circumstances, or to rely upon the interpretive test of the "rule of reason" to ascertain whether the use is a reasonable one.

13. The PSNH right of way corridor to which segTEL is seeking access to run its fiber optic telecommunications cables and related hardware and facilities is a 100 foot wide corridor established by easement grants in the early 1900's. The easements were granted in the 1915-to-1916 time frame by the then current landowners to the Sunapee Electric Light and Power Company.[4] Two representative examples of these easement deeds are attached as Appendix II. The language in these deeds grants to Sunapee

[4] Sunapee Electric Light and Power was later acquired by New Hampshire Power Company in 1924, and PSNH became the holder of the original Sunapee Electric easement rights when, ten years after PSNH's own formation in 1926, PSNH acquired New Hampshire Power Company in 1936.

Electric, and its successors and assigns, the perpetual right and easement "to erect, repair, maintain, operate and patrol a line of poles or towers and wires strung upon the same, and from pole to pole and tower to tower for the transmission of high or low voltage electric current with all necessary anchors, guys and braces to properly support and protect the same, over and across the lands owned by the first party. . .". Obviously, the words used reflect that the purpose and intent of the easement grant does not go beyond lines for the transmission of electric current. In the early 1970's, PSNH purchased additional easement rights from the then current landowners in certain portions of the same 100 foot wide corridor; a representative sample of these easement deeds is also attached as part of Appendix II. The language in these deeds grants to PSNH the right and easement "to construct, repair, rebuild, operate, patrol and remove overhead and underground lines consisting of wires, cables, ducts, manholes, poles and towers together with foundations, crossarms, braces, anchors, guys, grounds and other equipment, for transmitting electric current and/or intelligence over, under and across . . ." the 100 foot wide strip described in the grant. Again, the words used clearly reflect an intended use of the easement for lines transmitting electric current and related data transmission.[5]

14. There is no wording or language in any of these easement deeds which expressly or impliedly allows for the additional installation of telecommunications wires, cables, equipment or hardware of any cable company, telecommunications carrier or services provider, or any other third party. There is also no wording or language in any of these easement deeds which would even suggest that PSNH, as the holder of those easements, is authorized or permitted to allow access to the lands encumbered by these

[5] Transmission of intelligence data with respect to SCADA systems, electronic controls, and other similar internal communications functions is a fundamental aspect of the operation and control of a modern electric utility transmission and distribution system.

conclude, consistent with the FCC's standard as expressed in the *Local Competition Fifth Report and Order,* that it owns and controls the right of way in question to the extent that it "could voluntarily provide access to a third party and would be entitled to compensation for doing so".

15. Given the clear and unambiguous limitations of PSNH's easement rights in the right of way to which segTEL sought access, PSNH's determination that it did not own or control rights sufficient to allow segTEL's access was entirely justified, reasonable and lawful. As the FCC has plainly recognized, an electric utility may not grant access to what it does not own or control. PSNH owns its poles, but it does not own the land upon which those poles have been placed – it has only the rights to use that land for the purposes of its power lines.

16. To the extent segTEL would disagree with or dispute PSNH's determination of the permissible scope of its easement rights in the right of way in question, that is a matter involving the adjudication of private property rights and interests which belongs in another forum, not before the Commission. It is axiomatic that the Commission must act within the scope of its delegated powers. *Re Exeter and Hampton Electric Company,* 69 N.H.P.U.C. 259, 261 (1984). While the legislature has delegated the authority to the Commission to adjudicate private real property rights in certain limited circumstances (e.g., RSA 371:1, involving the exercise eminent domain by public utilities), the Commission does not generally have the jurisdictional authority to determine real property issues or disputes. The resolution of private property disputes in New Hampshire is within the general jurisdictional purview of the Superior Court. See, *Gray v. Seidel,* 143 N.H. 327 (1999) (holding that dispute over whether a particular use was a reasonable use of property rights granted in an easement properly belonged before the Superior Court). The Commission's newly delegated jurisdictional authority over pole

reasonable use of property rights granted in an easement properly belonged before the Superior Court). The Commission's newly delegated jurisdictional authority over pole attachments contained in RSA 374:34-a is not so broad as to extend to the Commission the jurisdiction to require access to private property. The Commission's authority is constrained under RSA 374:34-a to consideration of pole attachment matters in accordance with the Federal Pole Attachment Act, 47 USC §224, and the FCC's regulations thereunder. Both the Federal law and regulations, and the prior rulings by the FCC, mandate consideration of the ownership and control limitation upon requests for access. Where, as here, the issue of ownership and control must turn upon a private property rights determination under New Hampshire law, the Commission should resist segTEL's invitation to run roughshod over the relationship between landowner and easement holder by declaring all CLECs presumptively entitled to access to incumbent utility rights of way for their fiber attachments.

WHEREFORE, PSNH respectfully objects to segTEL's request for arbitration and moves that segTEL's complaint against PSNH be dismissed in its entirety.

Respectfully submitted,

Public Service Company of New Hampshire

Dated: 11/24/08.

By: _____

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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket DT 08-146

segTEL, Inc.

Request for Arbitration Regarding Access to Utility Poles

BRIEF OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Public Service Company of New Hampshire ("PSNH"), by its undersigned attorney, files the following brief of the issues pursuant to the direction contained in the Secretarial Letter of Public Utilities Commission ("Commission") Executive Director and Secretary Debra A. Howland, dated April 20, 2009:

I. Preliminary Statement

The parties have been directed by the Commission to brief the following issues in this matter:

1. Whether the underlying easements provide PSNH with the authority necessary to grant segTEL a license to attach to its poles in this matter;

2. Whether PSNH has a legal obligation to grant segTEL a license to attach to the poles regardless of whether or not PSNH has sufficient authority under the easements; and,

3. Is segTEL obligated pursuant to Section 6.2 of the Pole Attachment Agreement, to obtain authorization to construct, operate and/or maintain wires on the poles at issue from the owners of the land where the poles are located?

On May 14, 2009, PSNH and segTEL, Inc. ("segTEL") filed a Stipulation of Facts as to certain uncontested facts in this matter (the "Stipulation"). Previously, on February 23, 2009, each of the parties also served and filed responses to data requests propounded to each other, and propounded by Commission Staff to each of the parties.

II. Factual Background

PSNH and segTEL are parties to a Pole Attachment Agreement dated April 6, 2004, which among other things provides for a process and procedure whereby segTEL may apply for and be granted a license to attach wires to PSNH's solely or jointly owned utility poles in the State of New Hampshire. (Stipulated Exhibit 1). Since executing the Pole Attachment Agreement in 2004, segTEL has never filed any complaint with the Federal Communications Commission ("FCC") challenging any term or provision of the Agreement as unfair, unreasonable or unenforceable on any grounds. (segTEL Response to PSNH Data Request 1-2). Likewise, other than the present proceeding, segTEL has never made any complaint to the Commission involving the Pole Attachment Agreement or any of it terms.

Pursuant to the Pole Attachment Agreement, segTEL submitted two pole attachment license applications to PSNH dated January 18, 2008, for licenses to attach to 90 PSNH poles in New London, and 11 PSNH poles in Sunapee, New Hampshire. (Stipulated Exhibit 3).

Unlike all other such applications and attachment licenses requested by segTEL and granted by PSNH for poles in numerous locations throughout New Hampshire, which to the best of both parties' knowledge and belief were for poles located exclusively within the public highway right of way, most or all of the 101 poles which are the subject of segTEL's pole attachment license applications in this matter are located within PSNH right of way on private property. (Stipulation, Nos. 4 and 5). PSNH has easements for its right of way on the private property where these poles are located, all of which easements the parties have agreed to mark as Stipulated Exhibit 2 (copies of the easements were included as attachments to PSNH's Response to Staff's Data Request 1-

004). The poles are part of a 34,500 volt (34.5 kV) electrical distribution power line designated as the PSNH 316 line. (Stipulation, No. 9). The PSNH easements and the poles which are the subject of this matter are used by PSNH in its electric utility business of distributing electric power and delivering electric service to its customers. (Stipulation, No. 9).

segTEL's pole attachment applications are for the attachment of fiber optic lines for telecommunications purposes; these fiber optic lines will be owned, operated and maintained by segTEL, and will be used entirely in its business of providing telecommunications and information services, independent of PSNH's electric utility business. (Stipulation, No. 12).

After PSNH's receipt of segTEL's pole attachment applications and the required prepayments for a pre-construction survey, the parties are not in agreement as to what steps were then taken by PSNH in processing the applications. PSNH maintains that it performed an initial field survey of the PSNH 316 line poles involved, but did not complete a pre-construction survey with segTEL representatives to determine the need for make-ready work. segTEL acknowledges it did not receive any make-ready cost estimate from PSNH. (segTEL Response to PSNH Data Request 1-14). Instead, PSNH responded to segTEL's pole attachment applications by a letter dated August 6, 2008. (Stipulated Exhibit 4).

In its letter, PSNH informed segTEL that it had completed a review of segTEL's pole attachment applications and the easement rights owned by PSNH in the private property locations of the poles, had determined that its easements "do not clearly allow PSNH to grant a third party telecommunications company . . . permission to use and occupy PSNH's easement corridor for the installation and operation of its private telecommunication line or cable", and concluded that it did not "own or control the

rights in these locations" that would allow PSNH to grant segTEL's pole attachment applications. (Stipulated Exhibit 4). segTEL was further informed that if it wished to pursue attachment to PSNH's poles in these locations, it would be necessary for segTEL to first secure the necessary private property rights sufficient to allow it to install and operate its facilities on PSNH's poles in PSNH's right of way, and then to resubmit its attachment applications for processing. (Stipulated Exhibit 4).

III. Legal Arguments

A. The PSNH easements do not provide PSNH with the authority necessary to grant segTEL a license to attach to PSNH's poles in this matter.

The question of when an incumbent utility owns or controls a right of way to the extent necessary to permit attachment access is a matter of state law[1]. Therefore, the easement law of the State of Hampshire must control the question of whether the PSNH easements do or do not provide PSNH the authority necessary to grant segTEL authorization by license to attach to PSNH's poles in this matter.[2]

There is no presumption under New Hampshire law that a right of way owned and used by an electric utility for power line purposes may be made available to third parties for telecommunications uses unrelated to the electric utility's business. There is not a single reported case in New Hampshire which supports such a presumptive trampling of the private property ownership rights of the underlying landowners whose land is encumbered by a power line right of way.

New Hampshire law recognizes the basic premise that an easement is distinct from ownership. An easement is a nonpossessory right to the use of another's land; it merely grants the easement holder the right to enter and make use of the property of

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[1] Please see the arguments set forth by PSNH in Section III.B. of this Brief.

[2] Because the interpretation of the New Hampshire easement rights in this case depends upon the application of New Hampshire law, segTEL's citation to rulings and case law interpreting easement questions in other states such as Georgia or Alabama are not controlling.

another for a particular purpose. *Arcidi v. Town of Rye,* 150 N.H. 694 (2004). Whether the easement is "appurtenant" (i.e., of benefit to an identifiable parcel of land) or "in gross" (i.e., of benefit to the holder personally as opposed to an identifiable land parcel), the axiom is the same -- an easement creates only a right to use the land of another. Id. at 698-99; see also, *Tanguay v. Biathrow,* 156 N.H. 313 (2007). It does not equate to ownership of the land burdened by the easement, nor does it allow the holder of the easement to act under its easement as if it were the owner of that land. PSNH was therefore not free to ignore the private property rights of the underlying landowners in assessing whether or not it owned or controlled easement rights sufficient to allow segTEL to attach to PSNH's poles situated in right of way on private property

The leading case in New Hampshire on the interpretation of the scope and permissible use of electric utility easements is *Lussier v. N. E. Power Co.,* 133 N.H. 753 (1990). In *Lussier,* the underlying landowners, whose property was encumbered by sixty year old power line right of way easements granted to the predecessor of New England Power Company, brought an action seeking a determination of whether an expanded use of the easements was permissible. The New Hampshire Supreme Court affirmed the lower court's ruling that the wording contained in the utility easements in question permitted the construction of a third transmission line and an electrical switching station in the right of way, which had been continuously used for two power lines for the previous sixty years. *Lussier* holds that the question of permissible use of an easement is one of determining the intent of the parties at the time of the original easement grant; the words used in the easement deed control, and where the words used are clear and unambiguous, there is no need to resort to outside facts or circumstances, or to rely upon the interpretive test of the "rule of reason" to ascertain whether the use is a reasonable one.

The PSNH right of way corridor to which segTEL is seeking access to run its fiber optic telecommunications cable is a 100 foot wide corridor established by easement grants in the early 1900's. The easements were granted in the 1915-to-1916 time frame by the then current landowners to the Sunapee Electric Light and Power Company.[3] Two representative examples of these easement deeds, which are included in Stipulated Exhibit 2, are attached to this Brief as Appendix I. The language in these deeds grants to Sunapee Electric, and its successors and assigns, the perpetual right and easement "to erect, repair, maintain, operate and patrol a line of poles or towers and wires strung upon the same, and from pole to pole and tower to tower for the transmission of high or low voltage electric current with all necessary anchors, guys and braces to properly support and protect the same, over and across the lands owned by the first party. . ." Obviously, the words used reflect that the purpose and intent of the easement grant does not go beyond lines for the transmission of electric current.

In the early 1970's, PSNH purchased additional easement rights from the then current landowners in certain portions of the same 100 foot wide corridor; a representative sample of these easement deeds, which are included in Stipulated Exhibit 2, is attached to this Brief as Appendix II. The language in these deeds grants to PSNH the right and easement "to construct, repair, rebuild, operate, patrol and remove overhead and underground lines consisting of wires, cables, ducts, manholes, poles and towers together with foundations, crossarms, braces, anchors, guys, grounds and other equipment, for transmitting electric current and/or intelligence over, under and across"

[3] Sunapee Electric Light and Power was later acquired by New Hampshire Power Company in 1924. PSNH became the holder of the original Sunapee Electric easement rights when, ten years after PSNH's own formation in 1926, PSNH acquired New Hampshire Power Company in 1936.

the 100 foot wide strip described in the grant. Again, the words used clearly reflect an intended use of the easement for lines transmitting electric current and/or intelligence.[4]

There is no wording or language in any of these easement deeds which expressly or impliedly allows for the additional installation of telecommunications wires, cables, equipment or hardware of any cable company, telecommunications carrier or services provider, or any other third party. There is also no wording or language in any of these easement deeds which would even suggest that PSNH, as the holder of those easements, is authorized or permitted to allow access to the lands encumbered by these easements for a CLEC such as segTEL to install and operate its fiber optic cable. Certainly, there is nothing expressed in these easement grants which would allow PSNH, or the Commission in this case, to conclude, consistent with the FCC's standard as expressed in the *Local Competition Fifth Report and Order,* that PSNH owns and controls the right of way in question to the extent that PSNH "could voluntarily provide access to a third party and would be entitled to compensation for doing so".[5]

The clear and unambiguous wording specifying the allowable uses of PSNH's easement rights and right of way ends the inquiry under the New Hampshire Supreme Court's holding in *Lussier v. N.E. Power Co.,* supra p. 5. PSNH's determination that it did not own or control rights sufficient to allow segTEL access to PSNH's right of way was entirely justified, reasonable and lawful under New Hampshire law. As the FCC has plainly recognized, an electric utility may not grant access to what it does not own or control. PSNH owns its poles, but it does not own the land upon which those poles have

[4] Transmission of intelligence data with respect to SCADA systems, electronic controls, and other similar internal communications functions is a fundamental aspect of the operation and control of a modern electric utility transmission and distribution system.
[5] Please see the arguments set forth by PSNH in Section III.B. of this Brief.

been placed – it has only the rights to use that land for the purposes of its power lines and its related facilities consistent with its easement rights.

segTEL has raised several contentions in its previous filings in this matter disputing PSNH's interpretation of the scope of its easement rights and its authority under those easements. All of those contentions are without merit.

segTEL has asserted that there is no wording in the PSNH easements which prohibits, or purports to prohibit, the attachment of the telecommunications wires of a third party, and no clause in the easements that would result in a forfeiture of PSNH's right of way if such attachments were allowed. Therefore, segTEL maintains, it has the right to make its attachments under PSNH's easements and should not be required to obtain its own right of way. (segTEL's Objection to PSNH's Motion to Dismiss, p. 9). However, the law of easements in New Hampshire is devoid of any reported case which holds that a particular use of an easement is permissible simply because that use or purpose has not been expressly prohibited, or because the wording in an easement is silent on the subject.

In an analogous easement case, the New Hampshire Supreme Court has already addressed and determined this issue adverse to segTEL's contention. In *Gill v. Gerrato*, 154 N.H. 36 (2006), the Court addressed a question about the permissible use of an access easement for ingress and egress over one parcel of land (the servient tenement), for the benefit of another parcel (the dominant tenement). The owners of another parcel (the non-dominant, third party tenement) sought to use the access easement for their benefit, over the objection of the servient and dominant tenement owners. The trial court ruled that, since there was no wording in the easement deed indicating an intention to prevent use of the access easement by a non-dominant third party tenement, the non-dominant third party tenement owners had a right to use the easement for their

benefit over the servient tenement. The Supreme Court in *Gill* reversed, stating: "Simply because there is no language in a deed that indicates an intention by the parties to prevent non-dominant, third party tenements from benefiting from the easement does not mean that the deed creates an independent right to the easement in a non-dominant, third party tenement." Id. at 41. The Court went on to state: "Because we find no language in the deed establishing an independent easement for the benefit of the [non-dominant, third party tenement] property, we reverse the trial court's ruling . . . ". Id. at 40. Thus, under the holding in the *Gill* case, the absence of any language in the PSNH easements preventing or prohibiting a third party's telecommunication use may not to be taken as any authority for PSNH to allow to such use, or as any basis for segTEL to use PSNH's easements for segTEL's purposes.

segTEL has further contended that it is entitled to the benefit of a presumption that "the rights of way owned, rented or utilized by incumbent utilities are compatible with communications attachments" (segTEL November 14, 2008 Letter, p. 4). However, that is not the law in New Hampshire, and the authority cited by segTEL to support this contention does not warrant such a sweeping notion.

segTEL cites first to the nondiscriminatory access provisions of 47 USC §224(f)(1) of the Federal Pole Attachment Act as if no further analysis is needed, when in fact such a simplistic analysis entirely fails to acknowledge the meaning given by the FCC to the phrase "owned or controlled" found in the same statute.[6] Nondiscriminatory access is only required with respect to a pole, duct, conduit or right of way owned or controlled by the utility.

segTEL also cites to a reported ruling by the FCC in which the FCC is claimed to have found that attachers are entitled to "unfettered access to utility rights of way", and

[6] Please see the arguments set forth by PSNH in Section III.B. of this Brief.

to have "rejected . . . outright" utility claims similar to the ones made by PSNH in this matter (segTEL November 14, 2008 Letter, p. 4, citing to *In the Matter of The Cable Television Association of Georgia, et al. v. Georgia Power Company, Order,* 18 FCC Rcd 16333 (August 8, 2003)). However, the *Georgia Power* ruling did not involve a situation where the electric utility claimed it did not own or control right of way easement rights sufficient to permit third party attacher access. At issue in *Georgia Power* was a proposed provision in a pole attachment agreement in which the utility sought to impose a requirement that the attacher separately negotiate with and separately pay the utility for accessing and using the utility's private property easements. Such a requirement was declared by the FCC to be unreasonable because the FCC's rate formula assured the utility just compensation, and therefore the utility was not entitled to additional or different payment from the attacher for access to private easements. Of course, in this case PSNH has made no such demand of segTEL, or sought to impose any such requirement for access. Nothing in the FCC's *Georgia Power* ruling affects in any respect the FCC's prior determinations that a utility need only grant access to rights of way which it owns or controls sufficient to permit access under applicable state law.

Additionally, segTEL cites to section 621(a) (2) of the Federal Cable Communications Policy Act of 1984 (47 USC §541(a) (2) of the so-called "Cable Act") for the proposition that electric utility rights of way are declared compatible with fiber optic telecommunications use. That Federal law grants franchised cable companies rights over "public rights-of-way" and "through easements . . . which have been dedicated for compatible uses." 47 USC §541(a) (2). However, in the case of private property easements, this statute has been interpreted to apply only when the landowner has so relinquished his rights in the property as to amount to a public dedication of the easement to general utility use by any utilities. *Cable Holdings of Georgia, Inc. v.*

McNeil Real Estate Fund VI, Ltd., 953 F. 2d 600 (11th Cir. 1992), cert den, 506 U.S. 862 (1992), reh, en banc, den, 988 F. 2d 1071 (11th Cir. 1993). There is no language in any of the PSNH easements in this matter which would allow PSNH or the Commission to conclude that the original grantors of those easements intended to dedicate their property to general utility use for any and all utility purposes. Nothing in the wording of those easements can support a finding or determination that the grantors of those easements intended to relinquish their ownership rights to such an extent as to permit use of their lands for anything other than PSNH's (or its predecessor's) electric utility lines and related facilities.

B. PSNH does not have the legal obligation to grant segTEL a license to attach to PSNH's poles in this matter regardless of whether or not PSNH has sufficient authority under its easements.

The Commission's jurisdictional authority over pole attachments contained in RSA 374:34-a is not so broad as to extend to the Commission the jurisdiction to require access to private property. The Commission's authority is constrained under RSA 374:34-a to consideration of pole attachment matters in accordance with the Federal Pole Attachment Act, 47 USC §224, and the FCC's regulations thereunder.[7] Both the Federal law and regulations, and prior rulings by the FCC, mandate consideration of the ownership and control limitation upon requests for access. Where, as here, the issue of ownership and control must turn upon a private property rights determination under New Hampshire law, the Commission should resist segTEL's invitation to run roughshod over the relationship between landowner and easement holder by declaring

[7] Chapter 340:2 of the 2007 Laws, effective July 16, 2007, requires that for a period of at least 2 years after the effective date of the act, the Commission's rules to carry out the provisions of RSA 374:34-a shall be consistent with the regulations adopted by the Federal Communications Commission under 47 U.S.C section 224.

all CLECs presumptively entitled to access to incumbent utility rights of way for their fiber optic cable attachments.

PSNH has not denied segTEL access to PSNH's poles. What segTEL continually fails to distinguish is that the poles to which it desires access in this case are part of a 34.5kV electric power line situated in a private right of way, not on a public highway. PSNH's placement of its poles in the private right of way is pursuant to, and subject to, individual private property easements previously granted by each underlying property owner or their predecessors in title. Unlike utility poles, and wire or cable attachments to those poles, situated in a public highway right of way, PSNH maintains that attachments to poles in a private property right of way can only be allowed if permitted by the private property rights granted to the pole owner.

The Federal Pole Attachment Act (47 USC §224) (the "Pole Attachment Act" or the "Act")), and the FCC's regulations promulgated thereunder, only mandate that a utility provide non-discriminatory access to any pole, duct, conduit or right of way "owned or controlled" by the utility. 47 USC §224(f); 47 CFR §1.1403(a). In its interpretation of the Pole Attachment Act, the FCC has given clear meaning to the use of the phrase "owned or controlled" found in the law and in its regulations. The FCC has declared that, in order for a right of access to be triggered under the Act, "the property to which access is sought not only must be a utility pole, duct, conduit or right-of-way, but it must be owned or controlled by the utility". *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98,* 15 FCC Rcd 22983, 23022, P 85 (October 25, 2000) (hereinafter *Local Competition Fifth Report and Order).* In the right of way context, the FCC has ruled that "the scope of a utility's ownership and control of an easement or right-of-way is a matter of state law", meaning that the access

obligations of 47 USC §224(f) apply "when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order in CC Docket No. 96-98, First Report and Order [Part 4 of 5],* 11 FCC Rcd 15499, 16082, P 1179 (August 8, 1996). If this were not clear enough, the FCC has elaborated on its interpretation by concluding that, consistent with the purposes of the Act, "utility ownership or control of rights-of-way and other covered facilities exists only if the utility could voluntarily provide access to a third party and would be entitled to compensation for doing so", and again, "state law determines whether, and the extent to which, utility ownership or control of a right-of-way exists in any factual situation within the meaning of Section 224." *Local Competition Fifth Report and Order,* at 23023, P 87; see also, *UCA, LLC, d/b/a Adelphia Cable Communications v. Lansdowne Community Development, LLC, et al.,* 215 F. Supp. 2d 742 (E. D. Va. 2002) (upholding reasonableness of FCC's interpretation as giving effect to reality that a utility can only grant access to easement rights that it has and which derive solely from state law.)

segTEL has simply chosen to ignore the existence, the meaning and the application of this fundamental provision of the Pole Attachment Act in its complaint in this matter.

Since the question of ownership and control is a legally relevant and applicable consideration in requests for access both under the Pole Attachment Act, and under RSA 374:34-a, PSNH was entitled to consider segTEL's access request in light of the private property location of the poles which were the subject of the attachment request. PSNH was entitled to assess the scope and extent of its right of way easements in these locations. PSNH was entitled to make the determination that it did not own or control right of way easement rights sufficient to allow it to grant segTEL's attachment request

to its poles in the right of way. PSNH was entitled to inform segTEL of this determination, and to further inform segTEL that it (segTEL) needed to obtain the required private property rights to allow segTEL's attachments to PSNH poles in these locations before PSNH could proceed further with the consideration and processing of segTEL's attachment request. None of those actions by PSNH violated segTEL's rights under any Federal or state law or regulation, and in fact all were entirely consistent with the Pole Attachment Act, FCC regulations, and RSA 374:34-a.

segTEL has argued that it is entitled to attach to the PSNH poles in this matter because the Pole Attachment Act and RSA 374:34-a, and the regulations promulgated thereunder, only permit a utility pole owner to deny access where there is insufficient capacity, or for reasons of safety, reliability and generally applicable engineering purposes. As PSNH has raised none of these reasons here, segTEL concludes it must be allowed to attach to PSNH's poles as requested. segTEL also has contended that PSNH had only 45 days from segTEL's application to deny access to its poles, and when it failed to do so, segTEL became entitled to attach to PSNH's poles.[8]

First, these arguments fail to accept the fact that PSNH has not denied segTEL access to PSNH poles. PSNH's letter to segTEL informs segTEL of PSNH's review and determination of the ownership and control of its easement rights covering the right of way where the poles to which segTEL desired accessed were located, but it does not deny or refuse access to those poles. (Stipulated Exhibit 4). It further informed segTEL that segTEL may re-submit its pole attachment applications for processing by PSNH once segTEL secured the necessary rights to allow its facilities to be attached to PSNH's poles

[8] The applicable FCC regulation, 47 CFR §1.1403(b), specifies a 45 day time period for a utility denial of access, but does not state either the consequences of a failure to meet that that time period, or that the access request will be deemed granted if not denied within the 45 day period.

in PSNH's right of way. (Stipulated Exhibit 4). Nowhere in PSNH's letter is there a statement that PSNH is refusing or denying access to PSNH's poles.

Secondly, these arguments raised by segTEL conveniently ignore that, under any reasonable reading of the applicable law and regulations, there can be no denial of access to a pole, duct, conduit or right of way which is not "owned or controlled" by the utility to the extent sufficient for the utility to even allow or deny access. This is precisely the issue which PSNH has raised with respect to segTEL's attachment request, and which segTEL does not want to acknowledge in this matter.

C. segTEL is contractually obligated under Section 6.2 of the Pole Attachment Agreement to obtain authorization to construct, operate and maintain its wires on the PSNH poles in this matter from the owners of the land where those poles are located.

PSNH and segTEL are parties to a Pole Attachment Agreement dated April 6, 2004, which is currently in effect (Stipulated Exhibit 1, hereafter referred to as the "PAA").[9] The PAA establishes the rights, responsibilities and obligations of the parties with respect to the licensing of segTEL attachments to PSNH's poles. In accordance with the PAA, segTEL has applied for and been granted licenses for attachment to PSNH poles in numerous locations throughout the State of New Hampshire. (Stipulation, No. 4).[10] segTEL's applications for licenses to attach to PSNH utility poles in Sunapee and New London which are at issue in this matter were submitted pursuant the procedures established and agreed to under the PAA, and are subject to all of the terms and provisions of the PAA.

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[9] FairPoint Communications, as successor to Verizon New England, is also a party to the PAA as a licensor, with respect to poles jointly owned with PSNH, or solely owned by FairPoint. None of the PSNH poles involved in this matter are jointly owned with FairPoint.

[10] To the best of both parties' knowledge and belief, these pole attachment applications and licenses have been for poles located exclusively within the public highway right of way, and not for poles located within PSNH right of way on private property. (Stipulation, Nos. 4 and 5).

Under the provisions of the PAA, the agreement of the pole owning utilities to issue licenses to attach to their poles is expressly made subject to the provisions of the PAA (PAA, Article II – Scope of Agreement, Section 2.1). Article VI of the PAA, entitled "Specifications and Legal Requirements", Section 6.2, states as follows:

> "Licensee shall be responsible for obtaining from the appropriate public and/or private authority any required authorization to construct, operate and/or maintain Licensee's Facilities on public and private property at the location of Licensor's poles."

Thus, by the express terms of Section 6.2 of the PAA it has signed with PSNH, segTEL is contractually obligated to obtain any required authorization to construct, operate and maintain its attachments on private property where PSNH's poles are located. PSNH has no obligation whatsoever under the PAA to issue segTEL any license to attach unless and until such time as that authorization has been obtained.

PSNH has taken the position in this matter, and argues in this Brief, that it does own or control easement rights sufficient to allow segTEL's attachments to PSNH poles in PSNH's right of way, and that such authority must be obtained by segTEL from the private property owners affected by segTEL's request before its pole attachment request need be further considered. Under these circumstances, Section 6.2 of the PAA is applicable and may be invoked by PSNH to require compliance by segTEL before PSNH can be compelled to address segTEL's request for a license to attach.

segTEL has attempted to avoid the plain meaning and applicability of Section 6.2 of the PAA by asserting two strained, and ultimately unconvincing, arguments. The first of these is the assertion by segTEL in its response to a Commission Staff data request that it was "under the belief" that the "required authorization" specified in the wording of Section 6.2 referred to segTEL's authorization to engage in business as an FCC registered telecommunications utility and as a CLEC in New Hampshire. (segTEL

Response to Staff's Data Request 1-6). This assertion unreasonably fails to give any meaning or context to the other words in the same sentence of Section 6.2, which defines the needed "required authorization" in relation to the construction, operation and maintenance of a licensee's facilities "on public and private property at the location of Licensor's poles." Clearly, what this sentence of Section 6.2 is referring to is needed authorizations for the construction, operation and maintenance of a licensee's facilities on the physical public or private property where the poles of the licensor are located, and not a general regulatory authorization to do business as a utility or carrier. Moreover, such an interpretation of Section 6.2 is inconsistent with the other provisions of Article IV, which address construction and maintenance specifications (Section 6.1), permissions from other joint owners or joint users of the poles (Section 6.2), and forfeitures of the rights of a licensor, joint owners or joint users to occupy the property on which the subject poles are located (Section 6.3). When read as a whole, Sections 6.1, 6.2 and 6.3 of Article VI of the PAA refer to construction specifications and legal requirements pertaining to the construction, operation and maintenance of a licensee's facilities in relation to the property locations of the poles to which those facilities will be attached. segTEL's belief as to the meaning of Section 6.2 lacks any credence or support and should be soundly rejected by the Commission.

segTEL also seeks to avoid the obligations of Section 6.2 by challenging, on a broader basis, its voluntary assent to the terms and provisions of the PAA. Suggesting there is disparate bargaining power and citing to FCC rulings supposedly condoning a "sign and sue" policy, segTEL claims it is entitled to a presumption that the PAA and its terms are neither voluntary nor reasonable.

Notwithstanding this claim, the fact is that segTEL did sign the PAA over five years ago, and has stipulated that it has, under the PAA, applied for and obtained

licenses to attach to PSNH poles in numerous locations throughout New Hampshire pursuant to its terms. It is also a fact that, since entering into the PAA, segTEL has never filed a complaint with the FCC challenging any term or provision of the PAA as unfair, unreasonable or unenforceable on any grounds. (segTEL Response to PSNH Data Request 1-2). Similarly, other than the complaint made by segTEL in this docket, there has been no prior complaint made by segTEL to the Commission regarding its Pole Attachment Agreement with PSNH, or any of its terms. The reality is that segTEL, despite its protestations about not voluntarily entering into the PAA, has utilized its contractual rights under the PAA to grow its telecommunications business, and has benefitted by its terms.

segTEL does not want to be bound to comply with Section 6.2 of the PAA, yet it has not put forth any specific reasons or authority for why the Commission should find that provision to be unreasonable, unjust or unenforceable. On its face, Section 6.2 does no more than allocate to the party seeking to attach to the utility's poles the responsibility to obtain any required authorizations to install, operate and maintain its facilities on the public or private property where the poles are situated. This is simply a reasonable recognition of the fact that every pole to which attachment is requested will be situated in the ground, in a physical location, on public or private property, where authorization or permission for the installation and maintenance of the attaching party's facilities may be necessary or required. Furthermore, the FCC has ruled that the Pole Attachment Act does not create any requirement on the part of a utility to exercise its eminent domain authority to expand its rights in an existing right of way over private property in order to accommodate a request for access by third party attachers. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Order on Reconsideration of Local Competition Order,*

14 FCC Rcd 18049, 18059-18063 (October 26, 1999). Therefore, Section 6.2's allocation of responsibility to the party seeking to attach is prima facie reasonable and consistent with the FCC's interpretation of the Pole Attachment Act, particularly in circumstances where expanded or additional right of way easement rights may be needed as a matter of state law.

While the PAA does predate the effective date of the Commission's authority to regulate pole attachment matters under RSA 374:34-a and the Commission's Puc 1300 interim rules, segTEL's position that the PAA is presumptively involuntary and unreasonable is totally at odds with the spirit and intent of the Commission's regulatory authority and rules. RSA 374:34-a, V, clearly expresses the New Hampshire Legislature's desire to protect pole attachment agreements which have been voluntarily entered into, by declaring that nothing in the statute shall prevent parties from entering into such agreements without Commission approval. The Commission's interim rules fully protect the provisions of pole attachment agreements voluntarily entered into, and do not validate a presumption of unreasonableness. To the contrary, Puc 1303.04 specifies that "Any pole attachment agreement entered into voluntarily under this part shall be presumed to be just, reasonable and nondiscriminatory." The rule further directs that the Commission "shall not alter the terms of any such agreement." These provisions reflect a regulatory scheme which presumes that the terms of a pole attachment agreement voluntarily entered into are fair and reasonable, not one which favors the opposite presumption urged upon the Commission by segTEL in this matter.

IV. Conclusion

PSNH's private property easements covering the right of way and poles involved in segTEL's attachment request do not, as a matter of law, provide PSNH with the authority to allow segTEL's access to and use and occupancy of the right of way for

attaching its facilities to PSNH's poles. PSNH is not legally obligated to grant segTEL a license to attach to PSNH poles unless it owns or controls easement rights for the private property right of way where such poles are located to the extent necessary or sufficient to allow such access, and PSNH does not own or control such rights in this case. In accordance with the terms (Section 6.2) of the Pole Attachment Agreement contractually in effect between PSNH and segTEL, PSNH may require and segTEL is obligated to obtain the necessary authorizations from the owners of the private property where the PSNH poles are located, before PSNH has any legal or contractual obligation to grant segTEL's attachment request.

Respectfully submitted,

Public Service Company of New Hampshire
By Its Attorney

Date: 5/15/09.

Christopher J. Allwarden, Esq.
Senior Counsel, Legal Department
780 North Commercial Street
Manchester, NH 03101
603-634-2459

APPENDIX I

mortgaged premises for sale, by publication of notice in some newspaper printed at Concord in said County three weeks successively before such sale, and may sell the same by public auction to the highest bidder; and its Deed thereof, in pursuance of such sale, shall convey to the purchaser an indefeasible title to the same, discharged of all rights of redemption by the mortgagor or any other person claiming under her. And the mortgagee shall apply the proceeds of said sale in payment of said mortgage debt, and pay over the balance, if any, to the mortgagor, after deducting the expense of notice and sale.

In witness whereof we have hereunto set our hands and seals, this 30 day of Nov. in the year of our Lord nineteen hundred and fifteen.

Signed, sealed and delivered
in the presence of us:
Ira E. Lovering — Viola Bird (Ls)
Arthur E. Bird (Ls)

State Of New Hampshire Hillsborough, ss. Nov 30, 1915.

Then the above-named Viola E. Bird and Arthur Bird personally appearing, acknowledged the above instrument to be their free act and deed. Before me,

Ira E. Lovering Justice of the Peace.

Received Nov. 23, 1-30 P.M. 1915.
Recorded and examined, Attest,
Edmund L. Brown
Register.

New London

Know All Men By These Presents

That We, Fred B. Gay and Agnes D. Gay his wife, both of New London County of Merrimack and State of New Hampshire, (hereinafter called the "first party") in consideration of One Dollar to us in hand paid by the Sunapee Electric Light and Power Company, a corporation duly established by law and having its principal place of business in Sunapee, in the county of Sullivan and State of New Hampshire, (hereinafter called the "second party"), the receipt whereof is hereby acknowledged; do hereby give, grant, bargain, sell and convey unto the second party, its successors and assigns, the perpetual right and easement to erect, repair, maintain, operate and patrol a line of poles or towers and wires strung upon the same, and from pole to pole and tower to tower for the transmission of high or low voltage electric current with all necessary anchors, guys and braces to properly support and protect the same, over and across the lands owned by the first party in the town of New London County of Merrimack and State of New Hampshire, bounded and described as follows:

being a parcel or tract of pasture land lying north of the main road

MCRD
COPY: ✓
BOOK 421
PAGE 448

leading from New London to Sunapee.

To have and to hold to the said second party its successors and assigns forever.

MCRD
COPY: ✓
BOOK 421
PAGE 449

The exact location of the transmission lines and its poles and towers is to be selected by the second party, after its final surveys have been completed, within the above limitations.

Permission is given to trim or remove such trees and underbrush as in the judgment of the second party interfere with or endanger said line when erected. The second party covenants and agrees for itself, its successors and assigns to pay all taxes that may be assessed on the poles, towers or wires erected hereunder on the premises of the first party.

The second party agrees that before transmitting electricity over the transmission line, rights for which are granted in this instrument, it will pay or tender to said first party the sum of $50.00; and the first party hereby agrees to accept said sum as full payment for all rights granted hereunder and as full compensation for any damage done to the property by the exercising of the rights herein granted.

The first party covenants and agrees that they have full right, title and authority to convey the foregoing rights and privileges and will defend same to said grantee against the claims or demands of all persons.

Witness the hand and seal of the first party this 18th day of November 1915.

In the presence of

Fred Lacey
L. L. Sanborn Jr.

Fred B. Gay (Ld)
Agnes D. Gay (Ld)

State of New Hampshire County of Merrimack ss.

On this 18th day of November A. D. 1915 before me, a Justice of the Peace, personally appeared Fred B. and Agnes D. Gay to me known to be the same persons described in and who executed the foregoing instrument, who acknowledged the same to be their free act and deed.

Isaac L. Sanborn Jr. Justice of the Peace

Received Nov. 23, 9-45 A. M. 1915.
Recorded and examined. Attest. Edmund H. Bowers
Register.

New London

Know All Men By These Presents

That I, Susan A. Herrick of New London County of Merrimack and State of New Hampshire (hereinafter called the "first party"), in consideration of One Dollar to me in hand paid by the Sunapee Electric Light and Power Company, a corporation duly established by law and having its principal place of business in Sunapee, in the county of Sullivan and State of New Hampshire, (hereinafter

VOL. 434.

Know All Men by These Presents

THAT WE, George Hayes, and Alice M Hayes his wife, both of New London County of Merrimack and State of New Hampshire (hereinafter called the "first party"), in consideration of One Dollar to us in hand paid by the SUNAPEE ELECTRIC LIGHT AND POWER COMPANY, a corporation duly established by law and having its principal place of business in Sunapee, in the County of Sullivan and State of New Hampshire (hereinafter called the "second party"), the receipt of whereof is hereby acknowledged; do hereby give, grant, bargain, sell and convey unto the second party, its successors and assigns, the perpetual right and easement to erect, repair, maintain, operate and patrol a line of poles or towers and wires strung upon the same, and from pole to pole and tower to tower for the transmission of high or low voltage electric current with all necessary anchors, guys and braces to properly support and protect the same, over and across the lands owned by the first party in the town of New London County of Merrimack and State of New Hampshire, bounded and described as follows:

See Plan No. 308.

— extending from line of lands of P. Barrett, Southerly, to line of lands of Mrs. J. Dean. Said line was surveyed in March, 1915 and is shown on a plan entitled "Transmission Line, Sunapee Electric Lt. & Pr. Co., New London to Roby, N. H., Scale-100 ft. to the inch, Sheet #". Said plan is recorded in the Merrimack County Registry of Deeds.

It is a part of the understanding of this agreement that the trimming or removal of trees and underbrush as hereafter mentioned shall not extend beyond a distance of fifty feet on each side of said surveyed line.

To have and to hold to the said second party, its successors and assigns forever.

The exact location of the transmission lines and the poles thereon to be selected by the second party, after its final surveys have been completed, within the above limitation.

Permission is given to trim or remove such trees and underbrush as in the judgment of the second party interfere with or endanger said line when erected. *The second party covenants and agrees for itself, its successors and assigns to pay all taxes that may be assessed on the poles, towers and wires erected hereunder on the premises of the first party.*

The second party agrees that before transmitting electricity over the transmission line, rights for which are granted in this instrument, it will pay or tender to said first party the sum of $ two per pole or tower for each pole or tower erected on the land of said first party; and said first party hereby agrees to accept said sum as full payment for all rights granted hereunder and as full compensation for any damage done to his property by the exercising of the rights herein granted. except that the second party at the same time agrees to pay and the first party agrees to accept the further sum of forty two (42) dollars as special damage to wood and timber

The first party covenants and agrees that they have full right, title and authority to convey the foregoing rights and privileges and will defend same to said grantee against the claims or demands of all persons.

Witness the hand and seal of the first party this fifteenth day of May 191_.

In the presence of

M F Collins

George Hayes (L.S.)

Alice E. Hayes (L.S.)

State of New Hampshire
County of Merrimack } ss.

On this 15th day of May A. D. 1916 before me, a Justice of the Peace, personally appeared George E. and Alice E. Hayes to me known to be the same persons described in and who executed the foregoing instrument, who acknowledged thesame to be their free act and deed.

Isaac H. Sanborn Jr

Justice of the Peace

Received Sept 7, 3-45 P M: 1916.
Recorded and Examined.

Attest: _____ Register.

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APPENDIX II

ARTHUR S. LITTLE, JR.

of New London, County of Merrimack,

in The State of New Hampshire

(hereinafter called the Grantor) for consideration paid, grant(s) to Public Service Company of New Hampshire, a corporation having its principal place of business at 1087 Elm Street, in Manchester, in the County of Hillsborough, and The State of New Hampshire (hereinafter called the Grantee), with Quitclaim covenants, the RIGHT and EASEMENT to construct, repair, rebuild, operate, patrol and remove overhead and underground lines consisting of wires, cables, ducts, manholes, poles and towers together with foundations, crossarms, braces, anchors, guys, grounds and other equipment, for transmitting electric current and/or intelligence over, under and across a Strip of land 100 feet in width in the town ~~city~~ of New London, county of Merrimack in The State of New Hampshire.

Said 100 foot Strip shall extend 50 feet westerly and 50 feet easterly of a line or extension of a line, described as follows:

Beginning at a point in Grantor's southerly boundary line at lands of Edith Perkins and Town of New London, said point being located 5 feet, more or less, northeasterly measuring along Grantor's southerly boundary line from Grantor's most southerly corner; thence, North 16° West, 593 feet to the northerly boundary line of Grantor's land at land of Mary C. Barrett.

The 100 foot wide strip of land herein described is intended to include all or part of the same strip of land described in deed of George Hayes to the Sunapee Electric Light and Power Company dated May 15, 1916 and recorded in the Merrimack County Registry of Deeds, Book 434, Page 541.

Said Strip of land being a part of the premises of the Grantor(x) described in deed of Marion S. Little & Winifred L. Williams to Arthur S. Little, Jr. dated August 26, 1968 and recorded in the Merrimack County Registry of Deeds, Book 1036, Page 10.

This conveyance shall, ~~subject to the right hereinafter reserved for a specified period~~ include the right to clear and keep clear the Strip of all trees and underbrush by such means as the Grantee may select, to remove all structures or obstructions which are now found within the limits of the Strip, and the right to cut or trim such trees on the above-mentioned premises of the Grantor(x) as in the judgment of the Grantee may interfere with or endanger said lines or their maintenance or operation.

The Grantor(s) for him sel f and his heirs, executors, administrators, successors and assigns, covenant(s) and agree(s) to and with the Grantee, its successors and assigns, that they will not erect or maintain any building or other structure, or permit the erection or maintenance of any building or other structure of any kind or nature upon the Strip, or change the existing grade or ground level of the Strip by excavation or filling.

~~There is reserved to the Grantor(s) for a period of from the date hereof the right to cut and remove all standing wood and timber located upon the Strip, but at the termination of said period, the Grantor's rights to cut and remove shall terminate, and all wood and timber shall become the property of the Grantee.~~

6019 3/68 No. 72083

And I, Beverly R. Little, wife of Arthur S. Little, Jr.,
release to said Grantee all rights of dower, ~~curtesy~~ and homestead and other interest therein.

WITNESS our hands and seals this 15th day of June, 19 72

In the presence of

Leighton A. White
Barbara Bruce

Arthur S. Little
Beverly R. Little

The State of New Hampshire

Merrimack SS.

June 15, 19 72

Arthur S. Little, Jr. and
Beverly R. Little
Personally appeared and acknowledged the foregoing instrument to be
their voluntary act and deed.
Before me.

Consideration is less than $100.

My commission expires: 1/21/77

Leighton A. White
Notary Public ~~Justice of the Peace~~

~~SS.~~

~~19~~

~~Personally appeared and acknowledged the foregoing instrument to be~~
~~voluntary act and deed.~~
~~Before me.~~

~~Notary Public~~ ~~Justice of the Peace~~

MERRIMACK COUNTY RECORDS
Received Sept.8,9-00A.M.1972
Recorded Vol. 1144 Page 149
Examined: Kathleen M Roy
Register.

New London

.72083

EXHIBIT 2

FOLEY HOAG LLP

Seaport West
155 Seaport Boulevard
Boston, MA 02210-2600

617 832 1000 *main*
617 832 7000 *fax*

Memo

Date:	November 5, 2015
To:	Dan Dolan, President, NEPGA
From:	Mary Beth Gentleman Tad Heuer
Regarding:	NPT/PSNH NHSEC Application: Completeness Deficiencies

OVERVIEW

This memorandum summarizes two deficiencies we have identified in the Application for a Certificate of Site and Facility ("Application") filed on October 19, 2015 by Northern Pass Transmission LLC ("NPT") and Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH") with the New Hampshire Site Evaluation Committee ("SEC").[1] The first is with respect to the new Affiliate Transaction Rules of the New Hampshire Public Utilities Commission ("PUC"), Chapter Puc 2100 (the "Rules"), and their applicability to the relationship between PSNH and NPT. The second pertains to the Application's failure to make a threshold demonstration that PSNH or NPT currently have or will have adequate interests in the proposed right of way for NPT to construct the project as proposed.

As to the first deficiency, PSNH and NPT are "affiliates" as that term is defined by New Hampshire statute and rules. Based on our review of the Rules, we believe that, at minimum, the nondiscrimination, separation, and regulatory oversight provisions apply to any agreement between PSNH and NPT that would grant NPT the right to utilize or acquire interests in PSNH rights-of-way.[2,3] We conclude that NPT's application to the SEC must

[1] Joint Application of Northern Pass Transmission LLC and Public Service Company of New Hampshire d/b/a Eversource Energy, Docket No. 2015-06 (Oct. 19, 2015).

[2] The term "rights-of-way" as used herein includes both rights-of-way owed in fee by PSNH and easements granted to PSNH by other fee owners.

[3] While we note the existence of parallel Federal Energy Regulatory Commission regulations governing certain utility-affiliate transactions, this memorandum does not address such regulations. The subject matter at issue here is not preempted by FERC. The question is instead how may an affiliate utilize or acquire retail distribution assets, specifically rights-of-way, and under what circumstances — exactly the issue the New Hampshire affiliate rules are intended to address.

include a demonstration of compliance with the Rules in order for the application to be deemed complete.

As to the second deficiency, it is our conclusion that in order to demonstrate that the requisite adequate site control necessary to commence an SEC proceeding, a detailed understanding of the specific rights granted to (or withheld from) PSNH in each individual easement along the proposed right-of-way — as well as the rights or approvals NPT may be required to obtain in order to underground portions of the right-of-way below public ways — is necessary. We conclude that the Application must include such a demonstration of adequate site control in order for the application to be deemed complete.

I. NPT IS A COMPETITIVE AFFILIATE OF PSNH

On May 22, 2015, the PUC adopted revised Affiliate Transactions Rules, N.H. Admin. Rules, Puc 2100 *et seq*., which establish the standards of conduct "governing the relationship between a utility and its affiliates transacting business in New Hampshire," *id*. at 2101.01.[4] After receiving conditional approval from the Joint Legislative Committee on Administrative Rules, the PUC accepted the conditional changes and finalized the Rules on July 28, 2015.[5] These Rules provide further detail and clarification regarding the existing statutory provisions governing affiliates of utilities (including but not limited to RSA 366).

PSNH is a subsidiary of Eversource Energy[6], and operates in New Hampshire as a public utility as defined by RSA 362:2. NPT is owned by Eversource Energy Transmission Ventures, LLC, which is a wholly owned subsidiary of Eversource Energy.[7] Thus, PSNH and NPT are "affiliates" as that term is defined in RSA 366.1, and as that term is applied under the Rules.

PSNH has itself expressly affirmed that NPT is its affiliate. In responding to inquiries of the PUC in Docket IR-14-196, PSNH acknowledged that "Northern Pass and PSNH are affiliated entities under the definition of RSA 366:1 II and Rule Puc 2102.01," and that "as a

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[4] Minutes of the New Hampshire Public Utilities Commission (May 22, 2015), *at* http://www.puc.state.nh.us/Regulatory/Agendas-Minutes/min052215.pdf.

[5] Letter of Martin P. Honigberg to Hon. Carol M. McGuire (July 28, 2015).

[6] *See* Eversource Energy, Press Release (Feb. 2, 2015), ("All of the company's subsidiaries, including . . . Public Service Company of New Hampshire (PSNH) . . . will immediately adopt and operate under the Eversource brand."), *available at* http://www.psnhnews.com/content/eversource; Letter of Robert A. Bersak to Debra A. Howland, New Hampshire Public Utilities Commission (Mar. 3, 2015) (noting that Eversource Energy is a "d/b/a" and that "the legal names of the operating companies [including] Public Service Company of New Hampshire . . . will remain unchanged.") *available at* http://www.puc.state.nh.us/Regulatory/Docketbk/2014/14-196/LETTERS-MEMOS-TARIFFS/14-196%202015-03-03%20NU%20REBRANDING%20TO%20EVERSOURCE.PDF.

[7] The Northern Pass, *Company Profile*, *at* http://northernpass.us/company-profile.htm (last accessed Aug. 23, 2015) ("All of the Northern Pass transmission lines and facilities in New Hampshire will be owned by Northern Pass Transmission LLC—a New Hampshire limited liability company owned by Eversource Energy Transmission Ventures, LLC, which is a wholly owned subsidiary of Eversource Energy.").

result, the following substantive portions of PUC Chapter 2100 appear to apply to the relationship, between PSNH and Northern Pass: 2103.01, 2103.02, 2105.01 and 2105.09."[8] Similarly, in the PSNH *Powerline Change Application*, filed in 2013 with the United States Forest Service, PSNH stated that "[a]s described in this Application, Northern Pass Transmission LLC, a PSNH affiliate, has proposed to construct the Northern Pass Transmission Line within the Current WMNF PSNH ROW" (emphasis supplied).[9]

In a letter of October 16, 2012, PSNH issued a "Right-of-Way Access Authorization" to all property owners on PSNH rights-of-way, granting temporary "permission to Northern Pass Transmission, LLC . . . to access and enter upon PSNH's right-of-way corridor on your property established by easement," noting that NPT "is planning the potential routing and siting of a new electric power transmission line within PSNH's right-of-way."[10] This "Site Access and Entry Agreement" between PSNH and NPT was executed on April 28, 2010, and amended on at least six subsequent occasions, although disclosed publicly only on March 17, 2014 in response to an investigation by the PUC.[11] Finally, on October 19, 2015, PSNH submitted to the PUC a petition for approval of a lease agreement between PSNH and NPT ("Lease Agreement"). Under the Lease Agreement, NPT would lease certain right-of-way real estate interests held by PSNH.[12] The fact that PSNH found it necessary (as a matter of law) to affirmatively authorize access across its easements to NPT and engage in a formal lease agreement indicates clearly that NPT is a distinct legal entity from PSNH.

Based on these written statements and acts by PSNH, we conclude that NPT and PSNH are affiliates as that term is defined in RSA 366.1, and as that term is applied in the Rules. In specific, under the Rules, NPT is a "competitive affiliate." The Rules define a "competitive affiliate" as "any affiliate of a utility that is engaged in the sale or marketing of products or services on a competitive basis and includes any competitive energy affiliate," *id.* at 2102.03 (emphasis supplied). A "competitive energy affiliate," in turn, is defined as "any competitive affiliate of a utility that is engaged in . . . the development of an energy related generation, transmission, or distribution project . . . ." *Id.* at 2102.04 (emphasis supplied). Notably, the prior version of Puc 2102.04 defined Competitive Energy Affiliate more

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[8] Report of Steven E. Mullen to Debra A. Howland, New Hampshire Public Utilities Commission (Nov. 5, 2013), at 8, *available at* http://www.puc.state.nh.us/Regulatory/Docketbk/2014/14-196/LETTERS-MEMOS-TARIFFS/14-196%202013-11-05%20STAFF%20REPORT.PDF

[9] PSNH Powerline Change Application, Special Use Permits WTM0759 and WTM0771(Nov. 4, 2013) at 7, *available at* http://northernpass.us/assets/permits-and-approvals/PSNH-Powerline-Change-Application-Final.PDF.

[10] Letter of PSNH, Right-of-Way Access Authorization, (Oct. 16, 2012), *at* http://media.northernpasseis.us/media/row_authorization_letter__10_16_2012.pdf.

[11] Letter of Robert A. Bersak to Debra A. Howland, New Hampshire Public Utilities Commission (Mar. 17, 2014) and Attachments, *available at* http://www.puc.state.nh.us/Regulatory/Docketbk/2014/14-196/LETTERS-MEMOS-TARIFFS/14-196%202014-03-17%20PSNH%20RESPONSE%20TO%20SEC%20LTR%20REQUEST%20FOR%20INFORMATION.PDF

[12] Petition for Approval of Lease Agreement Between Public Service Company of New Hampshire d/b/a Eversource Energy and Northern Pass Transmission LLC, Docket No. DE 15-464 (Oct. 19, 2015), *available at* http://www.puc.nh.gov/Regulatory/Docketbk/2015/15-464.html.

narrowly, only as "any competitive affiliate that is engaged in the sale or marketing of natural gas, electricity, or energy-related services on a competitive basis." The 2015 amendments expressly include an affiliate engaged in development of a transmission project. On that basis we conclude that transactions between PSNH and NPT are subject to all provisions of the Rules applicable to dealings between a utility[13] and a competitive affiliate.

II. COMPLIANCE WITH THE RULES IS A PREREQUISITE TO NPT'S USE OF RIGHTS-OF-WAY OF PSNH

NPT and PSNH have formally represented both in their public statements and to permitting authorities that NPT intends to locate a substantial portion of its proposed transmission facilities in rights-of-way of PSNH. According to NPT, 68.5 miles of the project will be installed in existing PSNH rights-of-way.[14] In addition, as noted above, NPT obtained temporary access to PSNH's rights-of-way in order to evaluate the viability of utilizing them for the construction of the NPT project, and has entered into the Lease Agreement with PSNH for long-term access to those rights-of-way.

However, before NPT can use those rights-of-way, both entities must comply fully with RSA 366 and the Rules. The Rules prohibit utilities from, among other things, taking any action "either directly or indirectly through an affiliate to circumvent these rules or RSA 366." *Id*. at 2101.04(c). The Rules impose a number of important restrictions and process requirements on utility-affiliate transactions, including specific requirements for Nondiscrimination (Puc 2103), Separation (Puc 2105), and Regulatory Oversight (2106).

While PSNH and NPT have submitted their petition for approval of the Lease Agreement to the PUC "pursuant to RSA 374:30, Puc 202.01(a), and Puc 203.06,"[15] that petition makes no reference to — much less a demonstration of compliance with — the affiliate transaction rules. In the absence of demonstrated compliance with the affiliate rules, the petition before the PUC is incomplete, and should thus not be relied upon by the SEC as an indication that NPT either has (or is likely to obtain) access to the PSNH right-of-way. In the absence of a demonstration of compliance with the PUC's Rules in this regard, we contend that any consideration by the SEC of the Joint Application is premature.

A. Nondiscrimination

One of the key principles articulated under the Rules is that of nondiscrimination. That principle is consistent with RSA 378:10 which provides that "No public utility shall make or give any undue or unreasonable preference or advantage to any person or

[13] Under the Rules, a "utility" is a "public utility" as defined in RSA 362:2 that provides natural gas or electric distribution services subject to the commission's jurisdiction." As PSNH provides electric distribution services subject to the commission's jurisdiction, it is a "utility" under the Rules.

[14] *See* Executive Summary of Joint Application at http://blog.northernpass.us/wp-content/uploads/2015/10/NP_SEC_EXEC_SUMMARY_PRINT.pdf (last accessed Oct. 27, 2015).

[15] Petition for Approval of Lease Agreement, at 1.

corporation, or to any locality, or to any particular description of service in any respect whatever or subject any particular person or corporation or locality, or any particular description of service, to any undue or unreasonable prejudice or disadvantage in any respect whatever."

Puc 2103.02 expressly prohibits "preferences to competitive affiliates regarding products and services, distribution system information, and customer information." In specific, the Rules require utilities to "provide its products and services, including but not limited to terms and conditions, pricing, and timing, to competitive affiliates, and to non-affiliated competitors in a non-discriminatory manner" (emphasis supplied). *Id*. at 2103.02(c). Similarly, the Rules require that if utilities provide their competitive energy affiliates with "any product or service," the utilities "shall make the same products or services available to non-affiliated energy competitors in a non-discriminatory manner." *Id.* at 2103.04. Turning to distribution facilities, Puc 2103.05 mandates that utilities "shall provide competitive energy affiliates and non-affiliated energy competitors access to its distribution facilities on the same terms and conditions," *id.* at 2103.05(a). Finally, the Rules prohibit a utility from giving "preference of any kind for regulated utility services to its competitive energy affiliates or their customers." *Id.* at 2103.07(b).

In order for NPT to file permit applications with the SEC and other agencies to locate its facilities on PSNH rights-of-way, PSNH would need to determine from an engineering, environmental and real estate perspective whether the colocation of NPT's lines and PSNH's lines in the same rights-of-way would be feasible. PSNH has conducted such analyses, which constitute a "service" provided to NPT.[16] Even if that service was paid for by NPT, payment alone would not cure the obvious preference PSNH has given to its competitive affiliate. This is because, to our knowledge, that service has not been made available or provided to other transmission developers, pipeline companies or other industries that develop lateral facilities. Indeed, PSNH's own appraiser declared in his prefiled testimony before the PUC that "there is no demonstrated demand that extends beyond Northern Pass Transmission LLC interest in this corridor" (emphasis supplied), without providing any indication or evidence that such interest had ever been solicited.[17] In addition to any other requirements the PUC might impose, the cure for this exercise of preference by PSNH would be for PSNH to, at minimum, make the same services available to non-affiliated energy competitors. We believe that the absence of such a demonstration of compliance makes the review of the Joint Application at the SEC premature.

[16] *See, e.g.,* Petition for Approval of Lease Agreement, at 3 ("Prior to reaching agreement on the terms of the Lease, the PSNH Transmission Engineering Department conducted an extensive review of the proposed location and design of the NPT Line within the PSNH rights of way" and noting that "the review and approval of these matters was a coordinated process between PSNH and NPT engineers and designers. . . ." (emphasis supplied)).

[17] Prefiled Testimony of Robert P. LaPorte, Jr., DE 15-464, at 13, *available at* http://www.puc.nh.gov/Regulatory/Docketbk/2015/15-464.html.

B. Separation

In promulgating Puc 2105, the PUC draws upon its statutory authority to adopt rules governing "[s]tandards and procedures for matters related to the proper administration of RSA 366 relative to utility relations with affiliates." RSA 365:8, VIII. In specific, the Rules require that in the event that a transfer of goods, services, or assets between a utility and an affiliate is not otherwise prohibited outright, such transfers are subject to certain detailed "pricing provisions." *Id*. at 2105.09. Specifically, a utility may "sell, lease, or otherwise transfer to an affiliate an asset" or "provide services to the affiliate" only if the "price charged the affiliate is the highest of the [a] net book value, [b] fully loaded cost, and [c] the current market value," as applicable. *Id*. at 2105.09(a)(1)-(2).

In order for NPT to locate its transmission facilities in rights-of-way of PSNH, it would need to acquire sufficient interests in those rights-of-way to finance and construct the project. Based on the facts cited above, we understand that a significant portion of the rights-of-way and easements that NPT intends to use are assets of PSNH. The assets involved are exceptionally unique: nearly two hundred linear miles of easements or other rights-of-way access across five counties, traversing private property, public property, and a National Forest.[18] For PSNH to transfer an interest in those assets to its affiliate NTP, PSNH must abide by Puc 2105.09(a)(1)-(2) which requires that it charge the highest of net book value, fully loaded cost and the current market value. Importantly, Puc 2105.7 provides that "[f]or purposes of this section, the market value of any asset sold, leased or otherwise transferred, shall be determined based on the highest price that the asset could have reasonably realized after an open and competitive sale."[19]

A prerequisite for complying with Puc 2105.09(a)(1)-(2) and 2105.7 is a determination of net book value, fully loaded cost and current market value for the interests that NPT seeks to acquire. While PSNH has provided an appraisal of what it asserts is the current market value of the PSNH right-of-way, we are not aware of any demonstration from PSNH that the interests in the PSNH rights-of-way required for the NPT project have been valued on all three parameters required by the Rules, or that PSNH intends to charge NPT (as required) at the highest of the three values.

Furthermore, while the Rules do not explicitly require that PSNH conduct an open and competitive sale or auction, an actual open and competitive sale process may be necessary in order for PSNH to overcome the presumption of preference for its affiliate that a sole-source transaction — such as that proposed by the Lease Agreement — would create.

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[18] *See generally* Draft EIS.

[19] In the context of valuing public utility assets generally, the Court has observed that there are five general appraisal techniques: "original cost less depreciation (rate base or net book), comparable sales, cost of alternative facilities, capitalized earnings, and reproduction cost less depreciation," conceding that "all of the enumerated approaches are valid, but all also have weaknesses." *Appeal of Pennichuck Water Works, Inc.*, 160 N.H. 18, 38 (2010). However, the case of valuation of utility property in a proposed transaction between a utility and its affiliate, the more specific requirements of Puc 2105.09(a)(1) would apply.

Under these unique circumstances, any other substitute methodology used by PSNH may generate the basis for regulatory and judicial challenges under the affiliate transaction rules.[20]

C. Regulatory Oversight

In order for the PUC to ensure that utilities and their affiliates are complying with the Rules, each utility is required to file a compliance plan with the PUC that identifies "all affiliates with which the utility has a contract or arrangement" subject to the Rules or RSA 366, as well as "copies of all written contracts and arrangements [and] detailed descriptions of all unwritten contracts and arrangements." Puc 2106.01(d). The PUC retains the authority to investigate on its own motion, whether a "utility is in compliance with these [R]ules," *id.* at 2106.05(a).

Per Puc 2105.09(a)(1), the transfer of interests in PSNH's rights-of-way to NPT can only be made upon a filing of a contract or contracts with the PUC with a demonstration that NPT is being charged the higher of the net book value, fully loaded cost, or current market value of the asset. Absent a compliant PUC filing, any representation by NPT to the SEC that it has or will have the right to such interests would be premature, and should be deemed sufficient grounds to stay SEC proceedings until the PUC has either taken appropriate action or a filing compliant with the affiliate regulations is made with the PUC.

III. NPT MUST DEMONSTRATE REASONABLE LIKELIHOOD OF ACTUAL SITE CONTROL

It is our understanding that there are approximately 700 separate parcels involved in the right-of-way that NPT proposes to utilize for this project, including several hundred individually-negotiated easements. It is our opinion that without a detailed understanding of the specific rights granted to (or withheld from) PSNH in each individual easement along the proposed right-of-way, it is impossible to know whether NPT has the requisite adequate site control under the SEC regulations to construct what it wishes to construct, in the places where NPT wishes to construct it. It is also our understanding that while significant portions of the proposed right-of-way involves undergrounding below municipal ways, it is not evident that NPT has demonstrated a reasonable expectation of obtaining the necessary approvals to do so.

The burden should be on NPT, not on the individual landowners, to demonstrate prospectively that the easement and access rights NPT wishes to utilize are sufficient for its intended purposes. We believe that it is premature for the SEC to open this proceeding until at least a threshold demonstration has been made by NPT.

[20] A competitive auction process would not, however, extinguish the remaining legal question of whether PSNH can, under New Hampshire law, transfer material interests in land it acquired by eminent domain or otherwise, to entities that are not "utilities" as defined in RSA 362:2 and are not providing distribution service to the customers of PSNH.

A. Easements and Takings

While the Lease Agreement recites book and page numbers of hundreds of recorded rights,[21] neither the lease nor any of the thousand-plus pages of supporting documentation provide any evidence that PSNH has sufficient rights in each property in the proposed right-of-way to enable the project NPT proposes to construct. Indeed, the PSNH appraiser concedes that it did not have such information available when it conducted its appraisal:

> No legal description [of the parcels appraised] was provided or is available as of the writing of this report. Sample easement descriptions were provided by sample deeds from the assemblage of the existing easement corridor; excerpts of the easement rights obtained were previously shown.[22]

It is clear from our review of even a small sample of PSNH easements that while the language used therein is occasionally boilerplate, it is frequently bespoke – indicating a negotiated position between the landowner and PSNH that reflects the specifics of the property in question and the extent of the rights that the landowner was willing to grant. For instance, we are aware of an easement from the 1950s that contains language granting PSNH and its successors the right to "erect, repair, maintain, rebuild, operate, patrol and remove electric transmission and distribution lines consisting of suitable and sufficient poles and towers, with suitable foundations, together with wires strung upon and extending between the same, for the transmission of electric current" (emphasis supplied) In sharp contrast, we are aware of a more recent easement from the mid-2000s granting PSNH the right to "construct, repair, rebuild, inspect, operate, patrol, maintain and remove overhead and underground lines and facilities . . ." (emphasis supplied).

As a sophisticated party bargaining with individual landowners for the property rights it wished to acquire, PSNH is presumed to have negotiated for (and more importantly, paid for, either via contract or through eminent domain), only the specific property rights it desired to obtain. The fact that one PSNH easement grants the express right to construct underground lines, while another PSNH easement refers only to "poles and towers," indicates that PSNH was not only well aware of how to draft an easement to acquire undergrounding rights if so desired, but that PSNH recognized the legal importance of doing so expressly if it wished to acquire those rights.[23] It will thus be imperative for NPT to demonstrate that, at all points where they wish to underground the project or build it above ground, they have the legal right to do so. Similarly, it is imperative that NPT demonstrate that its proposed

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[21] Lease Agreement (Oct. 19, 2015), Appendix A.

[22] Attachment to Prefiled Testimony of Robert P. LaPorte, Jr., DE 15-464, Volume I, Northern Pass Transmission Project (Nov. 14, 2014) at 10; *see also* Prefiled Testimony of Robert P. LaPorte, Jr., DE 15-464, at 8 (noting that "[w]e also reviewed a sampling of the subject deeds to ascertain the property rights that are the subject of our appraisal,").

[23] *See* Order Denying in Part and Granting in Part segTEL's Motion for Rehearing, DT 08-146 (June 4, 2010) (crediting PSNH's contention that where easement language is clear, "the Commission did not need to resort to extrinsic evidence in order to determine the reasonable meaning of the words used in the easement deeds.").

activity over every parcel complies with conditions of the individual easements that it wishes to utilize — whether those easements limit the number of towers allowed on a property, the height of the towers allowed, the right to allow for transmission as well as distribution, or myriad other factors.

We also believe it likely that certain easements or fee transfers were not negotiated voluntarily, but were instead taken by PSNH via eminent domain. Because just compensation is required to be paid for property rights taken by eminent domain, *Appeal of Pennichuck Water Works*, 160 N.H. 18 (2010), we expect that PSNH — acting in the best interest of its ratepayers — would take only the minimum easement or fee necessary to accomplish its desired purpose, in order to minimize the expenditure of ratepayer funds necessary to acquire that easement or fee. *See Daly v. State*, 150 N.H. 277, 279 (2003) (just compensation in an eminent domain taking reflects "the price which in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy, taking into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining."). To the extent that such takings limited or prohibited features of the project that NPT proposes, it is essential that the SEC have a clear understanding of the scope and terms of those takings at the outset of these proceedings.[24]

B. Municipal Rights of Way and Trees

A separate but related issue is that NPT proposes to underground approximately 60.5 miles of the right-of-way below public ways in certain locations.[25] NPT claims that its authority to do so derives from RSA 231:160, which governs the placement of utilities on public highways.[26] To the extent NPT believes that its legal authority to underground under public ways derives from the public nature of the roadway, we note that there are myriad different types of way, road, and highway in New Hampshire, each laid out pursuant to different rules and each consisting of different rights.[27] The rights to the subsurface below the public way are often owned by the abutting landowners to the center-line of the way; as the New Hampshire Supreme Court has held, the presumption is that "conveyance of property bounded by a street or highway normally conveys title to the center of the boundary street."[28]

Although the municipality may have the authority to provide a grant of location under certain circumstances, the mere existence of a public way does not necessarily authorize such undergrounding.[29] Furthermore, in order to obtain such, an application for a permit or license must be made to the municipality (RSA 231:161), which has six months to "make a

[24] There is also an open legal question as to whether the 2012 amendments to RSA 371:1 (prohibiting public utilities from utilizing eminent domain for the construction or operation of a electric transmission projects ineligible for regional cost allocation) should be interpreted to prohibit PSNH from transferring certain recently-acquired easement rights to NPT. Without an understanding of the dates of each easements involved and the manner in which those easements were first acquired by PSNH, it is impossible for the SEC to know whether any easements within the proposed right-of-way would be potentially precluded by law from being transferred to NPT.

return of their proceedings and their decision thereon" (RSA 231:164). It is unclear whether NPT has commenced such proceedings, much less obtained approvals. In order for the Application to be deemed complete, we believe it must contain a demonstration that PSNH or NPT has the legal authority to underground below the public way in each such location where this issue is relevant and that where necessary, such authority can be lawfully assigned, leased or otherwise transferred to NPT.

Similarly, to the extent that NPT seeks to underground underneath a municipal right-of-way, in the event such undergrounding will adversely impact certain shade or ornamental trees located within the right-of-way, NPT would be required to comply with, among other statutory provisions, RSA 231:172, which requires "consent of the owner of the land on which such tree grows" prior to "erecting or maintaining poles or structures or installing wires or other attachments or appurtenances thereto." Without owner consent, a public hearing before the board of Selectmen is required, who "shall determine whether the cutting, pruning, or removal is necessary." In the absence of a comprehensive assessment of whether the proposed NPT route would adversely impact trees specifically protected by statute, an indication of the consent of the owners of those trees for such adverse impact, and (absent such consent) an indication of approval of the local Board of Selectmen for such adverse impact, the Application lacks a sufficient demonstration of either PSNH's or NPT's control of the proposed right-of-way.

Moreover, should the proposed right-of-way impact a scenic road as designated by RSA 231:157-158, the statute specifically bars any action by a utility or other party to "erect, install or maintain poles, conduits, cables, wires, pipes or other structures" that involves "the cutting, damage or removal of trees" in excess of fifteen inches in circumference or "the tearing down or destruction of stone walls" without the prior written consent of the planning board, following a public hearing. Each municipality is also authorized to "impose provisions with respect to such [scenic] road which are different from or in addition to those set forth" in RSA 231:158, including "protections for trees smaller than those described" therein. NPT

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[25] Filing Letter for Joint Application at 1 ("Approximately 60.5 miles will be located underground in public roads in three separate segments.").

[26] Joint Application at 6. The Joint Application also asserts that RSA 162 give "the SEC has exclusive authority to grant permission to an energy utility to utilize locally-maintained highways," yet simultaneously acknowledges that "the authority to erect electric transmission lines and underground cables in state and local highways is codified at RSA 231:160" — which reserves this authority to municipal authorities. Joint Application at 82-83. The lack of clarity in NPT's legal position in this regard appears to result from (among other things) a misreading of *Public Service Company of New Hampshire v. Town of Hampton,* 120 N.H. 68 (1980), and is a further reason for the SEC to deem the Application incomplete.

[27] *See* Paul J. Alfano, *Roads Revisited: Creation and Termination of Highways in New Hampshire*, N.H. BAR J. (Fall 2005), *available at* https://www.nhbar.org/publications/display-journal-issue.asp?id=308.

[28] *Duchesnaye v. Silva*, 118 N.H. 728, 732 (1978).

[29] In the event the municipality controls only the passage easement in the highway and the abutting landowner retains the fee under the highway to the center line, there is an open legal question as to whether the exercise of RSA 231:160 by the municipality without consent of the abutter effects a taking (and thus either requires just compensation and/or is barred entirely under these circumstances due to the 2012 amendments to RSA 371:1).

does not identify the locally-designated scenic roads that would be impacted by the proposed right-of-way. Instead, NPT complains that "there does not appear to be a master list of all locally-designated scenic roads in the State of New Hampshire,"[30] without making any effort to identify the scenic roads that it does know about that would be impacted, acknowledge its own burden to determine whether its proposed route impacts scenic roads absent the convenience of a "master list," or explain the approvals that it may be required to obtain to construct the proposed route in such areas. In the absence of a comprehensive assessment of whether the proposed NPT route would adversely impact protected trees or existing stone walls along designated scenic roads, as well as an indication of the approval of the local planning board in each such instance, the Application is deficient.

IV. IMPLICATIONS FOR NH SEC APPLICATION REVIEW PROCESS

Our review of the newly-revised Rules has led us to conclude that NPT has no reasonable basis at this time for representing to the SEC that it has acquired or will acquire the necessary interests in PSNH's rights-of-way to build the project if approved by the SEC. Under SEC rules (N.H. Admin. Rules Site 300), an application to the SEC must indicate "whether the applicant is the owner or lessee of the site or facility or has some legal or business relationship to it," *id.* at 301.03(b)(6).[31] The application must also contain information identifying all "state government agencies having jurisdiction . . . to regulate any aspect of the construction or operation of the proposed facility," as well as "documentation that demonstrates compliance with the application requirements of such agencies." *Id*. at 301.03(d)(1)-(2). If NPT is to utilize PSNH's rights-of-way, the Rules require that any agreement between NPT and PSNH meet the substantive requirement of non-discrimination and separation (including pricing) under the PUC Rules. Where such a petition is pending before the PUC (and on its face makes no reference to the compliance with the affiliate Rules) NPT cannot demonstrate its "legal or business relationship" to the proposed right-of-way, rendering any SEC application premature.

Moreover, even if the SEC had the discretion to open such a proceeding, it would seem contradictory to basic principles of administrative law for the SEC to begin a lengthy and time-consuming process of granting a site assignment under RSA 162-H and N.H. Admin. Rules Site 100 et seq., only to subsequently learn that the site assignment was premature (or indeed, impossible) due to a lack of actual site control over the locus subject to the application, whether due to the inability of NPT to acquire such control from PSNH, or due to the fact that the rights to be obtained are insufficient to allow NPT to construct what it wishes to construct. Indeed, if a non-affiliate of PSNH applied to the SEC for a site assignment to site transmission lines within PSNH's rights-of-way in the absence of such a

[30] Appendix 41, *Review of Land Use and Local, Regional and State Planning*, at 23.

[31] Should the new SEC rules be approved in their current form, those rules will apply to this application, and will further require "[e]vidence that the applicant has a current right, an option, or other legal basis to acquire the right, to construct, operate, and maintain the facility on, over, or under the site." Proposed Admin. Rules Site 301.03(c)(6). While we believe for the reasons articulated above that the Joint Application fails to comply with even the existing SEC rules pertaining to site control, the clarifications provided by the proposed rules make the lack of such compliance even more pronounced.

demonstration, such an application would properly be rejected as premature. Under the SEC's regulations, there is no basis for providing preferential treatment to affiliates of PSNH. Indeed, affiliates and non-affiliates should be treated exactly the same as they are required to be under the PUC's Rules.

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