THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
NORTHERN DISTRICT

New Hampshire Electric Cooperative, Inc.

v.

Consolidated Communications of Northern New England Company, LLC

Docket No. 216-2020-CV-00555

ORDER

Plaintiff has brought this action alleging claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment/quantum meruit. Plaintiff also seeks a number of declaratory judgments pertaining to the timing, effect, and scope of the termination of an agreement between the parties. Defendant has filed a counterclaim, seeking its own declaratory judgments and alleging claims for rescission, breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. Plaintiff now moves for summary judgment on two of its own counts for declaratory judgment as well as Defendant's declaratory judgment counterclaims. Defendant objects. The Court held a hearing on March 2, 2021. For the reasons that follow, Plaintiff's motion is GRANTED in part and DENIED in part.

Factual Background

The following facts are undisputed. Plaintiff is a not-for-profit, member-owned and -governed utility cooperative that provides retail electricity services in New Hampshire. (Def.'s Resp. to Statement of Material Facts ("SOMF") at ¶ 1.) On July 1, 1977, Plaintiff and New England Telephone and Telegraph Company ("NETTC")

entered into an agreement titled General Agreement Joint Use of Wood Poles (hereinafter the "JUA"). (*Id*. ¶ 9; Bakas Aff. I, Ex. A.) The stated purpose of the JUA was for the parties to cooperate in the joint use of their respective utility poles, and it set forth the parties' respective rights and obligations concerning pole specifications and the installation, maintenance, repair, replacement, and removal of poles and the equipment attached thereto. (Def.'s Resp. SOMF at ¶¶ 9, 11, 12.) The general goal was to obviate the need for duplicate pole networks. (*Id*. ¶ 13.)

At some point, NETTC was acquired by Verizon – New England, Inc. d/b/a Verizon – New Hampshire. (*See id*. ¶ 5.) On August 7, 2003, Plaintiff and Verizon amended the JUA. (*Id*. ¶ 14; Bakas Aff. I, Ex. B.) The amendment made three adjustments to the JUA and specifically noted that "the parties desire to make certain specific amendments in the existing Agreement without substantively changing the majority of the provisions within." (Bakas Aff. I, Ex. B.)

Verizon was subsequently acquired by FairPoint Communications, Inc. (*See* Def.'s Resp. SOMF at ¶ 5.) In November 2007, while that acquisition was pending, Plaintiff and FairPoint entered into a second amendment of the JUA. (*Id*. ¶ 15; Bakas Aff. I, Ex. C.) This second amendment was more extensive than the first, but still contained a provision ratifying the original JUA, noting specifically that "the terms, conditions, covenants, agreements, warranties and representations contained in the Agreement shall remain unchanged and, except as so amended, shall continue in full force and effect." (Bakas Aff. I, Ex. C at ¶ 13.) This second amendment had an effective date of March 31, 2008.

Most recently, FairPoint was acquired by Defendant. On May 24, 2018, Defendant sent a letter to Plaintiff stating that it wished to renegotiate various terms of the JUA and its associated Intercompany Operating Procedures ("IOPs") pursuant to Article XX of the JUA. (Bakas Aff. I, Ex. E.) Although Defendant expressed confidence that the parties could reach a mutual agreement, it also provided formal notice of termination of the JUA pursuant to Article XX. (*Id*.) Article XX of the JUA reads, in its entirety:

> Subject to the provisions of Article XIII, Defaults, herein, this Agreement shall be continued in force so far as concerns further granting of joint use by either party until terminated by one year's notice in writing by either party to the other party, provided, however, that notwithstanding such termination, this Agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination.

(*Id*., Ex. A at 13.)

By letter dated December 17, 2018, Plaintiff acknowledged that based on the provisions in Article XX, it was in both parties' best interest to reach agreement regarding the joint use of new poles installed on and after May 24, 2019, the effective date of the termination. (*Id*., Ex. F.) Plaintiff requested a proposed draft of a new JUA governing those new poles. (*Id*.) Plaintiff also indicated it was open to discussion on other portions of the JUA once agreement was reached on the Article XX issue. (*Id*.)

While discussions were ongoing, the parties entered into a Termination Date Suspension Agreement. In pertinent part, that agreement provides:

> NHEC and Consolidated (together, the "Parties" and each a "Party") hereby acknowledge and agree that the effective date of any termination of the JUA or parts thereof that may have been triggered by Consolidated's letter dated May 24, 2018 and that might otherwise occur on May 24, 2019 (the "Termination Date"), is suspended for a period of

> ninety (90) days from May 24, 2019 until August 22, 2019 (the "Suspension"), subject to the following conditions:
>
> (i) The Suspension has no effect on Consolidated's claim that all obligations under the JUA and any or all IOPs, excluding any payment obligations incurred prior to the Termination Date, terminated effective on the Termination Date;
>
> (ii) The Suspension has no effect on NHEC's claim that any or all obligations under the JUA and any or all IOPs, as they relate to poles in joint use prior to the Termination Date, survived the Termination Date;
>
> . . . .
>
> (v) The Parties acknowledge that this Suspension is simply an accommodation by each Party to the other Party to maintain the status quo while they attempt to potentially resolve any outstanding issues between the Parties on or before the expiration of the Suspension.

(Bakas Aff. I, Ex. G.) As the parties continued to engage in discussions, the Termination Date Suspension Agreement was extended twice, first from August 22, 2019, to October 22, 2019, (*Id*., Ex. H), then from October 22, 2019, to February 22, 2020, (*Id*., Ex. I.)

Ultimately, the parties were unable to resolve their differences and Defendant went through with its termination of the JUA.

Analysis

In deciding whether to grant summary judgment, the Court considers the pleadings, affidavits, and other evidence, as well as all inferences properly drawn from them, in the light most favorable to the non-moving party. *See Amica Mut. Ins. Co. v. Mutrie*, 167 N.H. 108, 111 (2014). In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath sufficient to indicate that a genuine issue of material fact exists." *Brown v. Concord Grp. Ins. Co.*, 163 N.H. 522, 527 (2012). An issue of fact is "material" for purposes of summary judgment if it affects

the outcome of the litigation under the applicable substantive law. *Macie v. Helms*, 156 N.H. 222, 224 (2007) (quoting *VanDeMark v. McDonald's Corp.*, 153 N.H. 753, 756 (2006)). "If there is no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, the grant of summary judgment is proper." *Town of Barrington v. Townsend*, 164 N.H. 241, 244 (2012) (quoting *Bates v. Vt. Mut. Ins. Co.*, 157 N.H. 391, 394 (2008)); *see also* RSA 491:8-a, III.

I. Termination of the JUA

In Count I of its complaint, Plaintiff seeks a declaratory judgment that Defendant's termination of the JUA was effective as of February 22, 2020, the date of the latest extension of the Termination Date Suspension Agreement. In Count I of Defendant's counterclaim, Defendant seeks a declaratory judgment that its termination of the JUA was effective May 24, 2019, one year from its notice of termination pursuant to Article XX. The dispute is largely over whether Defendant is obligated to pay its share of fees, including vegetation maintenance fees, under the JUA and relevant IOPs for the period between May 24, 2019, and February 22, 2020.

The interpretation of a contract is a question of law for the Court to resolve. *See Mountain View Park, LLC v. Robson*, 168 N.H. 117, 119 (2015). "When interpreting a written agreement, [the Court] give[s] the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole." *Id*. "Absent ambiguity, the parties' intent will be determined from the plain meaning of the language used in the contract." *Id*. "The language of a contract is ambiguous if the parties to the contract could reasonably disagree as to the meaning of that language." *Found. for Seacoast Health*

v. Hosp. Corp. of Am., 165 N.H. 168, 173 (2013). "The determination of whether contractual language is ambiguous is also a question of law [for the Court.]" *Id*.

Here, the Suspension was explicitly made subject to several conditions, the very first of which provides that "[t]he Suspension has no effect on Consolidated's claim that all obligations under the JUA and any or all IOPs, excluding any payment obligations incurred prior to the Termination Date, terminated effective on the Termination Date." (Bakas Aff. I, Ex. G.) The fact that this condition specifically excludes payment obligations incurred *prior to* the Termination Date—which the Suspension Agreement defined as May 24, 2019—supports the conclusion that the condition's purpose was to disclaim responsibility for any payment obligations under the JUA that arose *after* May 24, 2019. The Court finds this provision unambiguous, and any interpretation of the Suspension Agreement suggesting that Defendant agreed to pay amounts due during the suspension period runs directly counter to the language in condition (i).

Plaintiff points to condition (v), specifically the reference to "maintain[ing] the status quo," and argues that this would entail both parties continuing to act as if the JUA was in full force and effect. However, to the extent the reference to "status quo" in condition (v) is read to require Defendant to continue to make all payments during the pendency of the negotiations, it directly conflicts with condition (i). Essentially, Plaintiff's argument would completely negate any beneficial effect of the Suspension Agreement to Defendant, and eliminate the need for many if not all of the other conditions.

Where two provisions of a contract conflict, the more specific provision controls. *See Parkhurst v. Gibson*, 133 N.H. 57, 63 (1990) ("The generally accepted interpretive rule is that a general, preliminary clause should not ordinarily take precedence over

specific provisions of a contract."); 11 Williston on Contracts § 32:10 ("When general and specific clauses conflict, the specific clause governs the meaning of the contract."). Here, the language in condition (i) is more specific than the general reference to maintaining the status quo in condition (v). Therefore, while the JUA continued in full force and effect in all other applicable respects until February 22, 2020, Defendant's obligations thereunder terminated effective May 24, 2019.

Accordingly, for the foregoing reasons, Plaintiff's motion for summary judgment on Count I of both the complaint and the counterclaim as they pertain to the Suspension Agreement is DENIED.

II. Article XX of the JUA

In Count II of its complaint, Plaintiff seeks a declaratory judgment that Article XX—specifically as it applies to Defendant's ongoing obligations with respect to "all poles jointly used by the parties at the time of such termination"—remains in full force and effect despite Defendant's termination of the JUA. In Count II of its counterclaim, Defendant seeks a declaratory judgment that Article XX of the JUA constitutes an unenforceable perpetual contract. As set forth above, Article XX provides:

> Subject to the provisions of Article XIII, Defaults, herein, this Agreement shall be continued in force so far as concerns further granting of joint use by either party until terminated by one year's notice in writing by either party to the other party, provided, however, that notwithstanding such termination, this Agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination.

(Bakkas Aff. I, Ex. A at 13.)

Perpetual contracts are generally disfavored in the law. As at least one court has observed:

> "Forever" is a long time and few commercial concerns remain viable for even a decade. Advances in technology, changes in consumer taste and competition mean that once profitable businesses perish regularly. Today's fashion will tomorrow or the next day inevitably fall the way of the buggy whip, the eight-track tape and the leisure suit. Men and women of commerce know this intuitively and achieve the flexibility needed to respond to market demands by entering into agreements terminable at will.

Jespersen v. Minnesota Min. and Mfg. Co., 700 N.E.2d 1014, 1017 (Ill. 1998). However, the New Hampshire Supreme Court, like some other jurisdictions, has indicated that perpetual contracts are enforceable provided the parties' intent to create one is clear from the agreement. *See Bussiere v. Roberge*, 142 N.H. 905, 909 (1998) ("We have enforced parties' intent to create a perpetual leasehold where, despite the absence of formal language in the grant, the agreement of the parties clearly showed such an intent."); *see H&R Block Tax Servs., LLC v. Franklin*, 691 F.3d 941, 944 (8th Cir. 2012) ("The Missouri Supreme Court has made clear that, to be enforceable, a contract which purports to run in perpetuity must be adamantly clear that this is the parties' intent.").

Plaintiff maintains that Article XX does not constitute a perpetual contract because it only applies to poles that were jointly used at the time of termination. Because utility poles have a finite lifespan, these poles will eventually be replaced over time as they fail due to natural wear and tear or intervening circumstances such as weather events. Therefore, Plaintiff maintains that Defendant's obligations under Article XX will diminish over time until they are eventually completely terminated once the last pole that was jointly used at the time of termination is replaced. Plaintiff claims it has a sophisticated tracking system in place to monitor the replacement of poles, ensuring that Defendant is only responsible for original joint use poles.

Defendant argues that Plaintiff's interpretation impermissibly adds language to Article XX, as the plain language of that provision makes no mention of any limitation of its application to joint poles until they have been replaced. *See Technical Aid Corp. v. Allen*, 134 N.H. 1, 21 (1991) ("A court may not add language to a contract so that it will be more consistent with the court's view of the contract's 'thrust.'"). However, while Defendant is correct that Article XX does not contain specific language regarding the replacement of poles, the Court does not agree that such language needs to be read into the provision in order to have the effect that Plaintiff advances.

As referenced above, certain aspects of the JUA were governed by IOPs. (*See generally* Bakkas Aff. I, Ex. A, D.) Specifically, IOP #3, entitled "Maintenance of Poles and Attachments," contains the following terms:

> When replacing a jointly used pole carrying terminals of aerial cable, underground connection, or transformer equipment, the new pole shall be set in the same hole which the replaced pole occupied unless special conditions make it necessary or mutually desirable to set it in a different location.
>
> Whenever it is necessary to replace or relocate a jointly used pole, the Owner shall, before making such replacement or relocation, discuss its plans with the other party reviewing such items as the amount of pole space each party requires, pole size and class, construction dates, *and the desirability of continuing Joint Use.* . . .
>
> . . . .
>
> *If the pole is to be continued in Joint Use*, the party replacing or relocating the pole shall send the other party a written notice (Form 601) at least 30 days before the work is scheduled to begin, where practical . . . .

(Bakkas Aff. I, Ex. D (emphasis added).) This language clearly indicates that even while the JUA was in effect, replacement poles were not automatically considered joint use poles. Rather, proper notice and an agreement were required with respect to each

pole replaced. Because the JUA has been terminated, this process will automatically fail, and no replacement pole will be a joint use pole. Therefore, over time, the number of joint use poles will diminish until none remain. This process occurs independently of Article XX. Accordingly, over time, despite Article XX not including any reference to this process, Defendant's obligations under that provision will eventually terminate. Because it has a finite duration, Article XX does not create a perpetual contract.

The Court next considers whether the term of Article XX is indefinite. "A contract for an indefinite term is not necessarily perpetual." 17A Am. Jur. 2d Contracts § 457. Generally, "contracts of indefinite duration are terminable at the will of either party." *Jespersen*, 700 N.E.2d at 1016; *see also Glacial Plains Cooperative v. Chippewa Valley Ethanol Co., LLLP*, 912 N.W.2d 233, 237 (Minn. 2018) ("A contract of indefinite duration is terminable at will upon reasonable notice to the other party after a reasonable time has passed."). In order to avoid indefiniteness, a contract need not set forth its duration in temporal terms; triggering events giving rise to termination of the contract, or a provision thereof, are sufficient. *See MS Real Estate Holdings, LLC v. Donald P. Fox Family Trust*, 864 N.W.2d 83, 93 (Wis. 2015); *Boland v. Boland*, 31 A.3d 529, 573 (Md. 2011) ("[E]ven absent any explicit length of time, the contract's duration may be defined by contingent future events.").

In analyzing this issue, the Court is mindful that every party to the JUA over the years has been a sophisticated entity well versed in complex, large-scale contracts. More specifically, each party to the JUA has been directly involved in the telecommunications industry. Therefore, each party has had an intimate understanding of utility poles, the associated costs of their maintenance, and their expected lifespans.

Moreover, despite being originally drafted in the 1970s, the terms of the JUA were amended twice: once in 2003 and once in 2008. On both occasions, the terms of the original JUA that were not being amended, including Article XX, were specifically reaffirmed. (*See* Bakas Aff. I, Ex. B & C.) At no point did any of Defendants' predecessors in interest object to or raise any concerns regarding Article XX or its post-termination effect. The language of Article XX is simple and straightforward, clearly indicating an ongoing responsibility for maintenance of joint use poles after termination of the contract. There can be no credible argument that these parties did not understand or appreciate the meaning of this provision when it was drafted and reaffirmed.

At the hearing, Plaintiff's counsel represented that a utility pole has an average lifespan of thirty to fifty years. While it is impossible to articulate a precise end date for the contract as the poles are not being replaced on a set schedule, the bulk of Defendant's obligations under Article XX have a relatively clear outer boundary of fifty years. Moreover, the cost to Defendant, and thus the burden imposed by the contract, will decline over time. Even assuming the existence of some outlier poles that last well beyond their expected lives, the cost to Defendant will likely be negligible beyond the fifty-year mark. Although there is naturally some uncertainty in the ultimate duration of Defendant's obligations under Article XX, the Court finds that the conditions for termination are sufficiently clear to avoid a finding that the contract is indefinite. Therefore, the contract is not terminable at will.

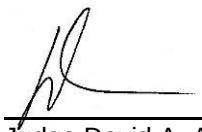
In its objection to summary judgment, Defendant raises a number of allegations regarding the imbalance in the JUA. For example, Defendant argues that due to

Plaintiff's failure to follow the procedures of the JUA, Plaintiff owns far more poles than Defendant and has subjected Defendant to significantly increased maintenance fees. Ultimately, however, these allegations fall outside the scope of the declaratory judgment counts on which Plaintiff has moved for summary judgment. The issues of the interpretation and effect of the Suspension agreement and Article XX do not require consideration of whether Plaintiff has breached the contract in other respects. Indeed, Defendant's counterclaim contains counts for rescission, breach of contract, and breach of the covenant of good faith and fair dealing in which these issues may be addressed.

Based on the foregoing, the Court finds that Article XX is an enforceable contract with a definite term. Under the terms of that provision, Defendant shall continue to remain responsible for all of its obligations as set forth under the JUA with respect to "all poles jointly used by the parties at the time of such termination." Consistent with the first section of this order, the time of termination is May 24, 2019. This responsibility will diminish as jointly used poles are replaced, and will terminate once the last jointly used pole is replaced. Accordingly, Plaintiff's motion for summary judgment with respect to Count II of the complaint and Counts I and II of the counterclaim as they pertain to Article XX is GRANTED.

SO ORDERED.

May 3, 2021
Date



Judge David A. Anderson

Clerk's Notice of Decision
Document Sent to Parties
on 05/04/2021