DRM 08-004

RULEMAKING, PUC 1300 POLE ATTACHMENTS, REGULAR RULES

COMMENTS OF segTEL, INC.

December 5, 2008

At the technical session regarding the adoption of permanent regular rules for pole attachments, Staff requested that segTEL provide support for segTEL's assertions that there is precedent for revisions to the rules that segTEL has suggested. segTEL does so in these comments.

segTEL wishes to point out that the technical session in this docket included several people representing entities who have not requested intervention in this docket, nor in its predecessor, DT 07-119. segTEL is aware that comments have been submitted which were not supplied to segTEL, and presumably not to others who are parties to this docket. However, to the extent that segTEL has seen the comments submitted by these individuals, segTEL has also incorporated responses to those comments.

1. Municipal rights of way. The municipal argument seems to be that when an incumbent utility receives a license for utility poles in the municipal right of way, its license simply allows the utility to place a pole in the ground; that no license has been granted for the wires that utility attaches to those poles. Therefore, a CLEC seeking to attach, according to the municipal theory, must license the wires it intends to run between existing poles, and the municipalities argue that they are entitled to review these attachments and determine if they are in the public good. However, when the incumbent utility wishes to place new lines between its duly-licensed poles, or otherwise alter its occupation of its licensed rights of way, no new license or determination is required.

Under federal law, segTEL has an existing entitlement to attach to utility poles in accordance with a congressional mandate that has found that CLEC deployment is in the national interest. The NHPUC's CLEC authorization is a finding of public good in compliance with Federal law and is the exclusive authorization that a CLEC requires to seek attachments to existing facilities. The same law that brought competitive telecommunications into existence created the obligation of incumbent utilities to provide access to their poles, ducts, conduits and ***rights-of-way***. See Title 47 of the United States Code.

Although the municipalities seem to believe that RSA374:34-a has replaced the FCC's exclusive regulatory authority of CLEC pole attachments with approximately 200 "mini PUCs" located throughout the State, they are seriously overstating their authority. The change of law that mandated competitive access to rights of way happened in 1996 and was enacted by Congress; and was not (could not be) amended by the legislature in 2007.

The New Hampshire Supreme Court has repeatedly reinforced the concept that municipalities may not overreach their allocated authority. Towns are merely subdivisions of the state and have only those powers that are expressly or impliedly granted to them by the legislature. *See* Town of Hooksett v. Baines, 148 N.H. 625, 813 A.2d 474, N.H.,2002.

The NH Supreme Court expressly applied this concept to pole attachments in Town of Rye v. Public Service Co. of New Hampshire, 130 N.H. 365, 540 A.2d 1233, N.H.,1988. The case revolved around the placement of warning sirens onto existing utility poles. The Court concluded: "A subdivision of RSA chapter 231 provides for 'Lines of Telegraph and Other Companies in Highways,' and RSA 231:159 makes the provisions of that subdivision applicable to all cities and towns. RSA 231:161, VI states that '[t]he holder of such a license [to erect poles], shall ... be entitled ... to erect ... poles [and] structures ... and to place upon such poles and structures the necessary ... attachments and appurtenances which are required in the reasonable and proper operation of the business carried on by such licensee....' We conclude that sirens are "attachments" within the meaning of RSA 231:160 and RSA 231:161, VI. The selectmen of Rye lack authority to revoke the licenses they granted to PSNH, or to deny applications for licenses to erect three siren poles on town-maintained highways ***for any reason other than a reason relating to 'the safe, free and convenient use for public travel of the highway ...,'*** which is the criterion for the exercise of the selectmen's authority under the statute; and no safety-based justification for the revocation was articulated by the town. RSA 231:168." [Emphasis added.]

Not only is a municipality's authority proscribed by statute, it is the only remaining local authority that exists over telecommunications services under Federal law:

(c) STATE AND LOCAL GOVERNMENT AUTHORITY.--Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government. 47 USC 253(c).

As the only change created by NH RSA 374:34-a is a change of primary venue for enforcement from the Federal Communications Commission to the New Hampshire Public Utilities Commission, there is no need for any municipal right of way issues to be addressed. The forum has changed but the laws remain the same.

2. Municipal licensing. Any municipal claim that the pole placement licenses granted under RSA 231 are exclusive to the incumbent utility and cannot be sub-licensed is misguided. There was no prohibition of sub-licenses in the legacy agreements between municipalities and incumbent utilities prior to 1996, and such a prohibition cannot be put in place today, as to do so would run afoul of both 47 USCA 253 et.al., as well as the pro-competitive provisions of the New Hampshire Constitution.

3. Unregulated attachments. The municipals also claim that their own attachments exist for the public good and are exempt from regulation. In support of their claim, the municipals state that these attachments must be for the public good, because they are needed by municipalities. The overreaching and circular logic that any municipal action must be in the public good because the municipality thinks it is important has no basis in law or in fact. Using the municipal logic, there could be no prohibition that would prevent a municipality from operating its own nuclear power plant, running its own airline, or establishing its own currency, all of which (like interstate telecommunications) are subject to a complex and preemptive body of federal law.

In the arena of utility pole attachments there are, indeed, findings of public good that apply. However, they are not established in City Hall or at town meeting, rather they are mandated by the United States

Congress, and implemented by the FCC and the NH PUC in the ordinary course of their regulation and authorization of public utilities. To the extent that municipalities a wish to make attachments to utility facilities, municipalities are subject to the same policies and procedures that apply to other unregulated third parties, which the three largest electric utilities in the state, along with Verizon, supported as the appropriate policy with regard to municipal attachments in Docket No. DT 05-172.

4. Presumptive compatibility of telecommunications facilities with utility easements and other rights of way. Staff requested support for segTEL's assertion that telecommunications attachments are presumptively compatible with utility facilities. Under § 621(a)(2) of the Cable Act, electric rights-of-way and easements are declared to be compatible and apportionable with fiber optic cable and telecommunications use. The Committee Report accompanying the Act explains that this includes easements or rights of way used for utility transmission. *See* Cable Communications Policy Act of 1984, H. R. Rep. No. 934, 98th Cong., 2d Sess. 59, 1984 U.S.C.C.A.N. 4655, 4696. The Telecommunications Act of 1996 expanded the Cable Act by applying similar rights to CLECs under 47 USC § 224 and by entering in substantial preemption of state and local regulation of interstate and intrastate commerce under 47 USC § 253.

The FCC has applied its rules to uphold that declaration. In the course of arbitrating a pole agreements, the power company argued that the CATV operator must "acquire in [their] own name and at [their] expense any and all easements." The FCC disagreed, on the basis that Section 224 of the Act expressly mandates that "[a] utility shall provide a cable television system ... with nondiscriminatory access to *any* ... right-of-way owned or controlled by it." [Emphasis added by FCC.] The FCC continued its analysis that confirms that rights of way and easements it is discussing are both public and private, saying, "the Commission's rate formula assures that Georgia Power receives just compensation under the Constitution, the utility is not entitled to additional payment for private easements." *See* Cable Television Association of Georgia v. Georgia Power Company, 18 F.C.C.R. 16333, 2003 (*Georgia Power*).

5. Access to CLEC utility poles. Staff requested citations for segTEL's assertion that access to CLEC utility poles not be mandated, because CLEC poles represent private investment made at the CLEC's own risk. The CLEC assesses that risk, knowing that there is no "rate of return" that will ensure profit on its poor decisions at the same rate as that on its good decisions. The FCC has acknowledged that requiring access to CLEC utility poles runs counter to its desire to encourage CLEC investment.

47 USC 224(f)(1) provides that "A utility shall provide ... any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." In this section, the definition of "utility" includes all local exchange carriers, but the definition of "telecommunications carrier" specifically excludes ILECs. *See* 47 USC 224(a)(1) and (5).

The FCC's rules in 47 CFR 1.402 and 1.403 currently echo the statute. Therefore, while CLECs may choose to grant ILEC access to CLEC poles and conduits, ILEC access to poles and conduits is not regulated by the FCC and, therefore, CLECs are not required to provide nondiscriminatory access to ILECs under the statute or FCC rules.

6. 45-day response time to requests for access. The rules must state that an incumbent utility must respond to requests for access by CLEC/CATV requestors promptly and non-discriminatorily. 45 days is the maximum time a utility may take to deny a request for access. This should not be an invitation for a

utility to delay affirmative or negative responses to use the full statutory period. Responses must be made as promptly as possible, in an order that does not prefer the utility's own business over a CLEC request but under no circumstances more than 45 days later. A utility routinely taking exactly 45 days to respond to all requests for access should not be in compliance with the rules.

7. Failure to provide timely response to requests for access. If a CLEC/CATV request for access is not denied within 45 days, for reasons that are consistent with the stated reasons a utility pole owner may deny access, that is, "for reasons of safety, reliability or generally applicable engineering purposes" the request must be considered granted and the applicant may attach without penalty or fear of removal of its facilities.

Staff might use the rules promulgated by the Oregon PUC as a model: "If the owner does not provide the applicant with notice that the application is approved, denied, or conditioned within 45 days from its receipt, the applicant may begin installation. Applicant must provide notice prior to beginning installation. Commencement of installation by the occupant will not be construed as completion of the permitting process or as final permit approval. Unpermitted attachments made under this section are not subject to sanction [under these rules]." *See* Re Amend and Adopt Rules in OAR 860 AR 506 AR 510 Order No. 07-137, Oregon Public Utility Commission, April 10, 2007, slip copy.

8. Make-ready time frames. Despite protests at the technical session by the electric utilities that time frames proposed in these rules (which are consistent with those that the FCC has imposed) are unreasonable on their face, these same utilities already comply with such requirements in other jurisdictions. The NY PSC requires, in its Policy Statement, that all work, from surveys to make-ready to the provision of a final license must be completed in 105 days." *See* Re Commission Concerning Certain Pole Attachment Issues, Case 03-M-0432, New York Public Service Commission, August 6, 2004 (Attachment thereto: Policy Statement). In the technical session National Grid objected to Staff's proposed timelines as being unreasonable and too aggressive. However, Niagara Mohawk, a major subsidiary of National Grid, complies with the New York requirements, which are substantially more strict than Staff's initial recommendations.

Similarly, the CT DPUC has "determined that a 90-day time interval should be the objective for the pole attachment process. This includes a 45-day interval for the estimate process and a 45-day time period to complete the make-ready work. This process includes allowing each attacher 14 days as opposed to 20 days to move its facilities." *See* Re The State's Public Service Company Utility Pole Make-Ready Procedures -Phase I Docket No. 07-02-13 Connecticut Department of Public Utility Control. April 30, 2008, *slip copy*. PSNH, like National Grid, brought up objections in the Technical Session that Staff's recommended timeframes were too aggressive. However, Northeast Utilities, the parent of PSNH, complies with those requirements in Connecticut.

Maine has set the time frame at 45 days, unless the make-ready requires more than "a limited number" of pole replacements. Vermont developed sliding time frames as follows: Make-ready work on fewer than 0.5% of owner's poles or attachments shall be completed within 120 days; on 0.5% or more but less than 3% of owner's poles, within 180 days; and on more than 3% of owner's poles or attachments within a time to be negotiated between all the affected owners and attachers. *See* Re Vermont Electric Cooperative, Inc., Docket No. 6655, Vermont Public Service Board, October 9, 2002, slip copy.

The New Hampshire rules should require that make ready be performed in the order received and in the same workflow queues that the incumbent utilities use for their retail service orders and internal construction scheduling. Make ready timelines should be the maximum amount of time allowable, not the standard interval. Utilities should not be able to use the make-ready deadlines as a reason to delay their initiation of make ready jobs that can be completed earlier.

To the extent that other states have adopted more aggressive timeframes for make-ready segTEL hopes that Staff will consider appropriate measures to ensure timely and efficient access to poles.

9. Make-ready and survey prepayments. Staff requested citations regarding where the FCC has found prepayment of make ready and attachment survey fees to be unreasonable. *See Georgia Power*, ¶20. "In deciding an analogous question under section 224(h) of the Act, the Commission stated that 'a utility may require an inquiring entity to reimburse the utility, on an actual cost basis, for the actual labor and administrative costs incident to providing maps, plats, and other data to entities making inquiries regarding access ....' Applying the Commission's rationale to the instant matter, we find to be unreasonable [the power utility's] up-front make-ready fee, as well as the utility's practice of denying access to its poles until such fee is paid. [The utility] first should incur the costs attendant to make-ready, and then seek reimbursement for its actual make-ready costs."

The analogous question the Bureau refers to is from FCC's Local Competition Order on Reconsideration, which states: "We further clarify that a utility may require an inquiring entity to ***reimburse*** the utility, on an actual cost basis, for the actual labor and administrative costs incident to providing maps, plats, and other data to entities making inquiries regarding access, because such one-time expenses would not typically be provided for in an attaching entities' rent." 18 Communications Reg. (P&F) 376, 1999.

10. Just and reasonable rates. The rules should state that "no rates, terms, and conditions in 1304.05(b) may be offered that are preferential to those offered to regulated entities under 1304.05(a)" In particular, a rate that is less than the cost-based rates to which CLECs and CATVs are entitled is on its face unjust and unreasonable. Any rate that is less than the cost-based rates to which CLECs and CATVs are entitled that is provided to any attaching entity must therefore be made available to CLEC and CATV. Other attachers, however, are not entitled to cost-based rates; the FCC has consistently refused to hear cases regarding rates for entities other than CLECs and CATVs which are significantly higher than the cost-based rates afforded to CLECs and CATVs.

Offering equal or lower rates to entities that are not CATV or CLEC frustrates the entire point of competitive deployment for numerous reasons. First, it creates a discriminatory regime where incumbent owners may offer unentitled attachers preferential treatment over parties with mandatory access. This not only violates federal and state law but is also bad public policy. Second, to the extent that CLEC and CATV rates are simply compensatory reimbursements based upon actual underlying costs any preferential rate scheme would undermine the point of cost-based pricing. Third, it would create a system of subsidized access for certain unregulated parties at the expense of the utility's general rate-payers. Finally, it frustrates the Congressional intent of the Telecommunications Act by allocating limited resources to third parties at the expense of a stated Congressional objective, namely that of CLEC deployment of fiber-optic networks and innovative services.

Cost-based rates are required for attachments that are made pursuant to the market-opening provisions of the Telecommunications Act. The only logical conclusion for this is that cost-based rates were mandated to further a federal objective and are a privilege intended exclusively to the CLEC and CATV parties that Congress has identified. The federal government would not mandate "cost based" rates to promote CLEC deployment if lower rates were already available to all parties. The Commission's rules, in order to be consistent with FCC regulations, should acknowledge that rates for all attachments other than those made by CATV and CLECs are reasonably and legitimately priced at commercial rates. Rate review for CATV and CLEC attachments, in accordance with FCC regulations, would be undertaken according to a non-discriminatory, cost-based analysis, whereas rate review for other attaching entities would be undertaken according to the standards of commercial rate-setting.

11. Burden of proof. As discussed at the technical session, section (b) under the Burden of Proof heading should state, "A signed pole attachment agreement ***dated after the effective date of these rules*** shall be presumed to have been entered into voluntarily." To do otherwise retroactively sets conditions on contracts that were not entered into under these rules.

Thank you again for the opportunity to comment. segTEL additionally reincorporates all of its prior submissions into its submission to the extent that they are helpful in furthering the creation of permanent rules for pole attachments. segTEL is ready to provide further information and support for its positions to Staff if necessary.