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February 10, 2025

Town of Charlemont Selectboard
Charlemont Town Hall
57 Main St.
Charlemont, MA 01339
selectboard@townofcharlemont.org

Re: **My Clients:** Jonathan Mirin and Godeliève Richard
Clients' property addresses: 224 Avery Brook Road
Subject property address: 224 Avery Brook Road and additional property across the road.
Applicant: National Grid
Subject: Opposition to the application for utility pole installation and replacement on Avery Brook Road ostensibly pursuant to M.G.L.A. 166 § 22

Second Memorandum in Opposition to the Application of National Grid Ostensibly Pursuant to M.G.L.A. 166 § 22 four Utility Pole Installation and Replacement on Avery Brook Road Special

I. My Clients, the National Grid Application and my Clients' Opposition to the Application

As this Board may recall, I represent Jonathan Mirin and Godeliève Richard ("my clients"). My clients own the property known as 224 Avery Brook Road where their home is located. They also own the property across the street where the barn/theater building for the Piti Theater is located. My clients are the Artistic Directors of the Piti Theater Company, Inc., a not-for-profit company which has been serving people in the Charlemont area for more than 20 years.

National Grid intends to increase its electrical transmission capabilities in Charlemont and the surrounding towns. In furtherance of this goal, National Grid has started a project to install 263 new utility poles. The new poles will all be larger than the existing and aesthetically more utilitarian. Most of the new poles will be replacing smaller existing poles but some of the new poles are not

replacements, they will be in new locations. All of the new poles will be located within the layouts of the Town's roadways, including the portion of Avery Brook Road in front of my clients' property. The road layout property is owned by the citizens of Charlemont.

While the subject property is owned by the citizens, this Board controls access and utilization of the area within where the road is laid out (the "Town Road property") for the citizens. National Grid has applied to this Board, pursuant to M.G.L.A. 166 § 22, to have this Board, essentially grant National Grid an easement, to place the new 263 utility poles located in the Town Road property.

On December 9, 2024, on behalf of my clients, I filed a written Memorandum in Opposition to National Grid's application on a number of grounds including: (a) the aesthetics of the new larger poles will change the scenic, rural appearance of the Piti Theater's facility and this would be detrimental to their not-for-profit business which has been a benefit to this community; (b) any use of wireless communications with the new poles would be harmful to my client, Godeliève Richard, who suffers from electromagnetic radiation syndrome and it would be extremely harmful to the children's programs at Piti Theater's because many of the children specifically attend these programs because the scenic area is free of radio communications; and (c) a specific legal argument questioning the ability of this Board pursuant to M.G.L.A. 166 § 22 to grant an easement to National Grid for installing wireless facilities on the new poles. My clients still object to the application. I incorporate by reference my prior Memorandum in Opposition as modified by the statements contained herein.

II. The First Hearing of December 9, 2024, and the Questions.

At the first hearing many citizens and I, on behalf of my clients, asked many questions of National Grid's representatives who were at the hearing. Those questions were not answered at the hearing. Instead, National Grid's representatives told this Board that National Grid would respond to the questions in writing before the next hearing which was scheduled for February 10, 2025.

On Thursday, February 5, 2025, two business days before the hearing, I received a copy of a letter from Joanne DeRose of National Grid to this Board. A copy of Ms. DeRose's letter is attached hereto as **Exhibit A**. I was hoping to see written answers to the numerous questions asked by the citizens and myself at the first hearing and some legal analysis in response to the legal issues I raised. While I don't have a copy of any written communication from this Board to National Grid, it appears that Ms. DeRose did not answer all of the questions I heard asked at that hearing and there is no real legal analysis response to my legal claims.

Some of the most critical questions which have gone unanswered pertain to costs. Questions were asked requesting detailed, realistic numbers as to how much would it cost to place the line serviced by the subject 263 utility poles underground as compared to installing the new utility poles. Questions were also asked as to what kind of income National Grid is obtaining from Charlemont. Without this information, is difficult to understand how this Board can make an informed decision on whether to grant the application allowing the use of the subject poles or to condition the grant on the line going underground.

III. Legal Argument

Also, as I mentioned, I raised a legal issue about the scope of M.G.L.A. 166 § 22, suggesting that, on its face, the statute did not appear to empower this Board to grant an easement to National Grid to enable National Grid to place wireless facilities, such as wireless data collection devices, on the subject poles. To date, I have seen no legal analysis pertaining to my legal arguments.

Ms. DeRose's response to my legal argument was, "There is no wireless equipment being installed as part of this project and no switches being installed on poles near 224 Avery Brook Rd." Obviously, this response does not address the merits of my legal contentions. Also, the fact that National Grid will not use wireless equipment during this "project" does not mean that they don't still

intend to ultimately use wireless communications on these new poles at some point in the future.

Please understand that because National Grid is the applicant they have the burden of showing you that they are entitled to the relief they are seeking. They should, at least: make legal arguments; cite to case law; cite to statutes; or cite to pertinent regulations to thwart my suggestion that this Board doesn't have the power pursuant to M.G.L.A. 166 § 22, to grant National Grid an easement to install wireless communication devices on the Town Road property.

My argument pertains to the interaction of three particular statutes. The statutes are all located in the section of the Massachusetts laws known as Chapter 166, "Telephone and Telegraph Companies, and Lines for the Transmission of Electricity." The three statutes are:

1. M.G.L.A. 166 § 21, "Location of construction of electric transmission lines," a copy of which is attached hereto as **Exhibit B**. This statute gives companies operating telephone, telegraph, electric, cable television and electric railroad transmission lines the right to construct those facilities in public ways but specifically says that the facilities constructed are to be "necessary to sustain or protect the wires of its lines."
2. M.G.L.A. 166 § 22, "Consent of municipal officers to construct or alter lines," a copy of which is attached hereto as **Exhibit C**. This statute starts with the language "A company desiring to construct a line for such transmission," a phrase which has been construed to be the "transmission" lines referenced in the prior statute, § 21 (see below). The statute then mandates that the operators of transmission lines must get local approval to place these lines in the public way.
3. M.G.L.A. 166 § 25A, "Attachments; authority to regulate," a copy of which is attached hereto as **Exhibit D**. This statute specifically provides that utilities operating transmission lines must allow a "wireless provider" to install wireless communication devices on utilities transmission facilities and the statute set up revisions to regulate the interactions between utilities and the

wireless providers. Interestingly, the “wireless provider” referenced in the statute is defined as “any person, firm or corporation *other than a utility*, which provides telecommunications service.” (Emphasis added).

There is statutory authority that allows wireless *providers* (other than the utilities) to install wireless devices on utility poles. Indeed, the agencies of the Commonwealth and utilities themselves have moved forward with installing Small Cell wireless communication attachments for wireless providers on the utilities’ facilities. Additionally, utilities have started to use wireless data collection devices for their own use on their facilities.

The issue I am raising is that § 21 and § 22 were never amended to accommodate the inclusion of these wireless attachments on the utilities’ facilities contemplated in § 25A. That means that § 21 still references that the facilities to be constructed are to be “necessary to sustain or protect the wires of its lines.” It is difficult to see how one could argue that the subject wireless attachments are necessary to sustain or protect the wires of the transmission lines. More significantly, an appellate court has stated that a local board, pursuant to § 22, cannot approve an easement over a town way for a structure or apparatus that is not “necessary to sustain or protect the wires of its lines.” See *Public Service Co. of New Hampshire v. Town of West Newbury*, 835 F.2d 380 (1987), a copy of the *West Newberry* case is attached hereto as **Exhibit E**.

In the *West Newberry* case, pursuant to § 22, the selectboard of West Newberry granted a New Hampshire utility company the right to construct the poles for the installation of siren warning devices in the town’s public ways. These warning devices were related to the Seabrook nuclear power plant which was located just over the state line in New Hampshire. Eventually, the town realized that the warning device facilities were not necessary to sustain or protect the wires of utilities transmission lines. The town believed that the town did not have the power to authorize the utility company to use

the public way for the warning devices and the board withdrew the permit. The New Hampshire electric company appealed to the Federal District Court which upheld the local board. The electric company then appealed that decision to the First Circuit Court of Appeals. The appellate court upheld the District Court saying:

The first is M.G.L. c. 166, § 21 and § 22. Section 21 gives authority to utilities to construct poles “necessary to sustain or protect the wires of its lines [for the transmission of electricity].” Section 22 sets forth the procedure governing the issuance of location permits for such transmission poles. The function of the poles at issue in this case is to transmit not the “electricity for lighting, heating or power” referred to in section 21, but rather, the sound of warning sirens. The Company attempts to bring this within a broad reading of section 21 by saying that the poles were erected “in connection with the efforts of Public Service and others to transmit electricity from Seabrook Station into the Massachusetts power grid.” Main brief, p. 18.

The Town responds by stressing the lack of fit between the statutory language and the purpose of the permits, and by citing the history of the statute. That history is characterized by incremental amendments keeping pace with evolving technology, broadening the authorized uses of poles to include not only the originally envisioned telegraph lines, but also telephone lines, then electricity for lighting, then electricity for heating, then lines for railways, and finally television lines. The Town argues that this history, where the legislature has acted with such incremental specificity, indicates that the statute is not to be expansively interpreted.

As to this issue, both statutory language and legislative treatment of pole use authorizations militate against the Company’s position. We observe in addition that the five poles in this case, perhaps twice the height of ordinary poles, and constituting no part of a “transmission line” as it is commonly understood, arguably differ significantly from the prior statutorily authorized uses of poles under ch. 166, § 21.²

Even though a Massachusetts utility can now install wireless attachments for wireless providers on the utilities’ transmission facilities, the statutes which are utilized to give this Board the power to grant an easement to a utility do not appear to allow you to grant easement to install wireless devices on the transmission facilities. The wireless attachments are not necessary to protect transmission lines. This Board does not appear to have the power to grant an easement to National Grid which would include giving National Grid the authority to place the wireless attachments on their facilities in the public way. Again, this Board should insist that National Grid respond to my legal argument or, alternatively, expressly condition your grant with the statement that your grant does not include the

authority for National Grid to install any type of wireless facility, including wireless data collection devices.

IV. Medical issues

As I stated above, I incorporate my prior memorandum. In that memorandum I stated in 2021 Dr. Stephanie McCarter, M.D. diagnosed Ms. Richard as having a severe case of electromagnetic radiation syndrome. I request that you review Dr. McCarter's written diagnosis which was an exhibit to my first memorandum. Allowing National Grid to, at some point in the future, to install wireless facilities on their poles near 224 Avery Brook Road would have a serious detrimental health effect on my client.

Also, I want to inform this Board that my clients went before the Charlemont Board of Health at a meeting held on January 28, 2025, setting forth their health-related issues pertaining to the application before this Board. At the end of the hearing, the Board of Health voted unanimously to support my clients' request that there be no wireless facilities on the poles near 224 Avery Brook Road and that fiberoptics be used as an alternative. A copy of the written decision of the Board of Health is attached hereto as **Exhibit F**.

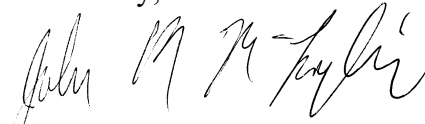
V. Conclusion

We have set forth good grounds as to why this Board should require National Grid's wires to be placed underground for the entire project, or at least near 224 Avery Brook Road. We have also provided good grounds as to why this Board should, at a minimum, not allow for the use of wireless facilities near 224 Avery Brook Road. Accordingly, if this Board decides to grant National Grid an easement to construct the new poles, the grant should include an explicit condition that there shall be no wireless communications installed or utilized near 224 Avery Brook Road.

Alternatively, before this Board makes a its decision on this application, this Board should

require: (a) National Grid to answer all of the financial questions that were unanswered. This will enable the Board to make an educated decision pertaining to possibly requiring the entire line to be placed underground; (b) National Grid to respond to the legal claims which, on their face, appear to question the ability of the Board to grant National Grid an easement which would include the right to use wireless facilities; and (c) ask National Grid if they would be willing to pay for a peer review engineering expert for the benefit of the Board. Such an expert could assist this Board in analyzing any engineering information National Grid may give pertaining to the feasibility of placing the subject line underground.

Sincerely,

A handwritten signature in black ink, appearing to read "John M. McLaughlin". The signature is written in a cursive style with a large initial "J" and "M".

John M. McLaughlin
Green Miles Lipton, LLP



nationalgrid

February 5, 2025
National Grid
170 Data Drive
Waltham, MA 02451

Select Board of the Town of Charlemont
157 Main Street
Charlemont, MA 01339
Attention: Jared Bellows, Kim Blakeslee, and Valentine Reid

Dear Select Board of the Town of Charlemont:

On December 9, 2024, National Grid presented the Charlemont to Heath Improvement Project to the Select Board at a pole petition hearing. The meeting resulted in a continuance, as the Select Board required more information about the project. The subsequent portion of this letter identifies the questions addressed to National Grid by the Select Board, and National Grid's responses to those questions.

Project Concerns

1. Broadband Relocation

- This project includes 263 new/replaced poles in the town of Charlemont to improve reliability and safety to our stakeholders. A final strand map and detailed lists of all poles being replaced and installed is attached with this correspondence. Any new poles being petitioned should be staked in the field.
- The Aerial License Agreement – Agreement 1709 Section 8.3 & 8.4 between the Town of Charlemont/ Charlemont MLP (Licensee) and Massachusetts Electric Company d/b/a National Grid (Licensor) details that the Licensee shall not be entitled to reimbursement of any amount for transfer of pole attachments. The agreement clearly outlines the requirement for the Town of Charlemont to relocate and bear the cost of relocation of attachments due to the infrastructure improvements. It is not legally appropriate for National Grid to assume the associated relocation costs in advance. The agreement was negotiated to ensure the respective responsibilities of each party.
 - However, we understand the Town's concerns with this matter with the ability to self-perform the relocation. Per Section 8.5 of the agreement, if the Town does not relocate assets after 15 days of notice, National Grid can self-perform the relocation. If relocation does not occur within the appropriate period after notice, National Grid will complete the relocation with our resources. After completion of this work, we will discuss any costs incurred with the Town.
- Please note, Eversource has a different third-party agreement than National Grid.

2. Project Need, Design and Routing

- The driver for this project is to increase reliability to a poor performing feeder and the residents the feeder services. This work is independent of any other customer requests. This project will affect all towns currently served by this feeder: Charlemont, Heath, Rowe, Hawley, and Monroe.
- The proposed design closes a loop near the Heath and Charlemont line that provides the 1019W1 feeder redundancy and the ability to perform switching to back feed areas experiencing an outage in either town.

- National Grid is required to provide safe, reliable, and cost-effective service to our customers and the proposed route meets all the required specifications to increase reliability for the residents of Charlemont while being cost effective. National Grid has designed and will construct this project to meet the National Electric Safety Code (NESC) specifications, for the safety of the crews constructing and maintaining the assets and the public.
- Drawings provided for pole petition hearings are only required to show new poles and poles being replaced further than 3 feet away from its existing pole locations. Poles that are being replaced in the same location (i.e. Pole 27 referenced during the meeting) are not required to be shown on petition drawings.
 - Therefore, as part of this project, poles on Mountain Rd will be replaced due to asset condition and to meet design specifications but are not included in the petition as they are all replacements within 3ft of their current location.
- Additionally, there are multiple mid-span poles being proposed as part of this scope. The existing length for some pole spans is longer than National Electric Safety Code (NESC) specifications allow, so the design calls for installing a new pole in between to increase safety and accessibility of the assets. (i.e. P28-50).
- Investment recovery for this project will be through standard rate recovery mechanisms as approved by appropriate regulatory agencies.

3. Aesthetics

- Double Poles
 - The National Grid and Verizon Joint Ownership Procedure (JOP) states that Verizon is responsible for all removals of jointly owned poles. In this process, other Third Party Attachers are required to transfer their assets and are notified through the NJUNS system. National Grid can create a copy account that will allow the town to be copied on all notifications to other attachers thus providing a direct contact with the next party responsible for completing their work. This will enable Verizon to be able to remove the pole sooner by expediting the transfer work necessary prior to Verizon being ready. Additionally, the town would have a direct contact to Verizon through the NJUNS system.
- Pole Height
 - The NESC specifies clearances required, which are used to determine pole heights based on the proposed load and attachments.
 - National Grid understands the concern regarding the aesthetics of pole replacements. Attached to this letter is a visual simulation of the updated infrastructure on Avery Brook Rd.

4. Overhead/Underground

- National Grid has carefully reviewed the technical and financial implications of burying the lines in this area and determined it would not be the safest, most reliable and cost-effective option for the customer. This includes benchmarking with other peer utilities including Green Mountain Power and Eversource, to understand their undergrounding programs.
 - The effort to install an underground system also includes a large environmental impact due to the larger footprint of the infrastructure necessary. The larger

underground footprint can cause more damage to vegetation such as root damage and drainage issues.

- The closest National Grid crews that can install and maintain underground assets are in Worcester MA. In the case of an event, the distance the crews must travel will greatly increase any outage durations the residents of Charlemont will experience.
- Additionally, most of the properties on Avery Brook Rd currently have overhead service. Any underground service from the transformer to the house is customer owned; therefore, if National Grid were to convert this area to underground, all affected customers would be required to contract a private electrician and incur any costs related to a new underground service.

5. Land & Easement Rights

- National Grid has the right to maintain and replace existing infrastructure. Any new asset being proposed in the public way is subject to approval by the Town Selectboard at a Pole Hearing which began on 12/9. The public right of way on Avery Brook Rd is approximately 49.5' wide. All proposed assets are within the public way. If there are any assets being proposed on private property, a formal easement would need to be signed and recorded with the property owner and Registry of Deeds.
- Property Values
 - National grid is not aware of any evidence of distribution lines or EMF impacting property values.

Non-Project National Grid Concerns

1. Wireless Infrastructure

- There were questions asked regarding wireless equipment, including data collection, technical specifications, etc. There is no wireless equipment being installed as part of this project and no switches being installed on poles near 224 Avery Brook Rd.

Thank you for your continued partnership as we work towards improving the reliability of the electric infrastructure within the region. I'm available for any additional questions or comments you may have.

Sincerely,

Joanne DeRose

Joanne DeRose
Director, Community & Customer Management

Cc: Sarah Reynolds
Robert P. Ide
Pat Shea

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Proposed Legislation

[Massachusetts General Laws Annotated](#)

[Part I. Administration of the Government \(Ch. 1-182\)](#)

[Title XXII. Corporations \(Ch. 155-182\)](#)

[Chapter 166. Telephone and Telegraph Companies, and Lines for the Transmission of Electricity \(Refs & Annos\)](#)

M.G.L.A. 166 § 21

§ 21. Location of construction of electric transmission lines

[Currentness](#)

A company incorporated for the transmission of intelligence by electricity or by telephone, whether by electricity or otherwise, or for the transmission of television signals, whether by electricity or otherwise, or for the transmission of electricity for lighting, heating or power, or for the construction and operation of a street railway or an electric railroad, may, under this chapter, construct lines for such transmission upon, along, under and across the public ways and, subject to chapter ninety-one, across and under any waters in the commonwealth, by the erection or construction of the poles, piers, abutments, conduits and other fixtures, except bridges, which may be necessary to sustain or protect the wires of its lines; but such company shall not incommode the public use of public ways or endanger or interrupt navigation. This section shall apply to a company incorporated under the laws of another state for the transmission of intelligence by electricity or by telephone, or television, whether by electricity or otherwise, and which is engaged in interstate commerce within the commonwealth. This section shall apply to a municipal lighting plant or cooperative that operates a telecommunications system outside the limits of its service territory pursuant to [section 47E of chapter 164](#), but only for construction that is outside its service territory.

Credits

Amended by St.1939, c. 161; St.1951, c. 476, § 1; [St.2000, c. 12, § 8A](#).

[Notes of Decisions \(42\)](#)

M.G.L.A. 166 § 21, MA ST 166 § 21

Current through Chapter 196 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

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Proposed Legislation

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XXII. Corporations (Ch. 155-182)

Chapter 166. Telephone and Telegraph Companies, and Lines for the Transmission of Electricity (Refs & Annos)

M.G.L.A. 166 § 22

§ 22. Consent of municipal officers to construct or alter lines

[Currentness](#)

A company desiring to construct a line for such transmission upon, along, under or across a public way shall in writing petition the board of aldermen of the city or the selectmen of the town where it is proposed to construct such line for permission to erect or construct upon, along, under or across said way the wires, poles, piers, abutments or conduits necessary therefor. A public hearing shall be held on the petition, and written notice of the time and place of the hearing shall be mailed at least seven days prior thereto by the clerk of the city or by the selectmen of the town to all owners of real estate abutting upon that part of the way upon, along, across or under which the line is to be constructed, as such ownership is determined by the last preceding assessment for taxation. After a public hearing as aforesaid, the board of aldermen or the selectmen may by order grant to the petitioner a location for such line, specifying therein where the poles, piers, abutments or conduits may be placed, and in respect to overhead lines may also specify the kind of poles, piers or abutments which may be used, the number of wires or cables which may be attached thereto, and the height to which the wires or cables may run.

After the erection or construction of such line, the board of aldermen or selectmen may, after giving the company or its agents an opportunity to be heard, or upon petition of the company without notice or hearing, by order permit an increase in the number of wires or cables, and direct an alteration in the location of the poles, piers, abutments or conduits or in the height of the wires or cables. The board of aldermen or selectmen may, on written petition by two or more companies subject to this chapter, and having locations in any of the public ways of such city or town, without notice or hearing, by order transfer any such location from one of such companies to either or any of the other petitioners, or by order authorize any such company to attach its wires and fixtures to existing poles, piers or abutments of either or any of the other petitioners, or to maintain its wires or cables in the conduits of either or any of said other petitioners, or by order grant to said companies joint or identical locations for the maintenance of said existing poles, piers, abutments or conduits, to be used in common by them. The board of aldermen or selectmen may, on written petition by a company subject to this chapter having a location, or by two or more such companies having joint or identical locations, in any of the public ways of a city or town, in any case where a private way has been accepted as a public way, by order, without notice or hearing, grant a location or joint or identical locations to such company or companies for the maintenance of its or their poles, piers, abutments or conduits which were being maintained in such private way at the time of its acceptance as a public way. The board of aldermen or selectmen may, on written petition by two or more companies subject to this chapter, and after notice to abutting land owners and a hearing as hereinbefore provided, by order grant to said companies joint or identical locations for the erection or construction of poles, piers, abutments or conduits, to be owned and used in common by them. No order of the board of aldermen or selectmen shall be required for renewing, repairing or replacing wires, cables, poles, piers, abutments, conduits or fixtures once erected or constructed under the provisions of law, or for making house connections or connections between duly located conduits and distributing poles.

§ 22. Consent of municipal officers to construct or alter lines, MA ST 166 § 22

The order granting a location or an alteration or transfer thereof, or authorizing an increase in the number of wires or cables or attachments, such as are hereinbefore described, shall be recorded by the city or town clerk in books kept exclusively therefor, and where notice has been given as hereinbefore provided the clerk of the city or the chairman or a majority of the selectmen shall certify on said record that the order was adopted after due notice and a public hearing as hereinbefore prescribed, and no such order shall be valid without such certificate. The company or companies in whose favor the order is made shall pay for such record the fees provided by clause (62) of [section thirty-four of chapter two hundred and sixty-two](#).

The board of aldermen or selectmen may under this section authorize the attachment of the wires and fixtures of a street railway or electric railroad company to the poles, piers and abutments of another owner, or the attachment of the wires and fixtures of another owner to the poles, piers and abutments of such company, and may grant joint or identical locations for the erection or construction of poles, piers, or abutments to be owned and used in common by such company and other owners, and locations for the transmission lines and telephone, signal and feed wires of such company in public ways or parts thereof, other than those public ways in which the tracks of such company are laid, and locations for additional poles to support, or alterations of locations for existing poles supporting, trolley or span wires; and all locations granted to a street railway or electric railroad company hereunder shall be subject only to revocation as provided in [sections seventy-seven and eighty-two of chapter one hundred and sixty-one](#); but nothing contained in this section save as hereinbefore expressly set forth shall be held to apply to the poles, wires and other appliances and equipment which a street railway or electric railroad company, by a grant of location, or extension or alteration thereof, under any general or special law now or hereafter in force relating to street railways or electric railroads may be authorized to construct, maintain and operate in a public way; and no terms, restrictions and obligations, other than those imposed upon a grant of location for a street railway or electric railroad, or an extension or alteration thereof, under any general or special law now or hereafter in force relating thereto, shall be imposed upon locations granted to a street railway or electric railroad company hereunder, save locations for its transmission lines or telephone, signal or feed wires in public ways other than those public ways in which the tracks of such company are laid.

Credits

Amended by St.1932, c. 36; St.1948, c. 550, § 36.

[Notes of Decisions \(61\)](#)

M.G.L.A. 166 § 22, MA ST 166 § 22

Current through Chapter 129 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

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Proposed Legislation

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XXII. Corporations (Ch. 155-182)

Chapter 166. Telephone and Telegraph Companies, and Lines for the Transmission of Electricity (Refs & Annos)

M.G.L.A. 166 § 25A

§ 25A. Attachments; authority to regulate

[Currentness](#)

The following terms as used in this section shall have the following meanings:

“Utility”, means any person, firm, corporation or municipal lighting plant that owns or controls or shares ownership or control of poles, ducts, conduits or rights of way used or useful, in whole or in part, for supporting or enclosing wires or cables for the transmission of intelligence by telegraph, telephone or television or for the transmission of electricity for light, heat or power.

“Attachment”, means any wire or cable for transmission of intelligence by telegraph, wireless communication, telephone or television, including cable television, or for the transmission of electricity for light, heat, or power and any related device, apparatus, appliance or equipment installed upon any pole or in any telegraph or telephone duct or conduit owned or controlled, in whole or in part, by one or more utilities.

“Licensee”, means any person, firm or corporation other than a utility, which is authorized to construct lines or cables upon, along, under and across the public ways. For the purposes of this section, the term shall also include a municipal lighting plant or cooperative that operates a telecommunications system outside the limits of its service territory pursuant to [section 47E of chapter 164](#), but only for those attachments that are outside its service territory.

“Usable Space”, means the total space which would be available for attachments, without regard to attachments previously made, (i) upon a pole above the lowest permissible point of attachment of a wire or cable upon such pole which will result in compliance with any applicable law, regulation or electrical safety code or (ii) within any telegraph or telephone duct or conduit.

“Wireless provider”, any person, firm or corporation other than a utility, which provides telecommunications service.

A utility shall provide a wireless provider with nondiscriminatory access to any pole or right-of-way used or useful, in whole or in part, owned or controlled by it for the purpose of installing a wireless attachment. Notwithstanding this obligation, a utility may deny a wireless provider access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis only

§ 25A. Attachments; authority to regulate, MA ST 166 § 25A

for reasons of inadequate capacity, safety, reliability and generally applicable engineering standards; but upon denial of access for reasons of inadequate capacity, the utility shall, at the expense of the wireless provider, expand the capacity of its poles, ducts, conduits, or rights-of-way to allow access by the wireless provider where such capacity may be reasonably expanded by rearrangement or replacement. This paragraph shall not apply to municipal lighting plants.

The department of telecommunications and energy shall have authority to regulate the rates, terms and conditions applicable to attachments, and in so doing shall be authorized to consider and shall consider the interest of subscribers of cable television services and wireless telecommunications services as well as the interest of consumers of utility services; and upon its own motion or upon petition of any utility or licensee said department shall determine and enforce reasonable rates, terms and conditions of use of poles or of communication ducts or conduits of a utility for attachments of a licensee in any case in which the utility and licensee fail to agree.

No attachments shall be made without the consent of the utility to the poles, towers, piers, abutments, conduits, manholes, and other fixtures necessary to sustain, protect, or operate the wires or cables of any lines used principally for the supply of electricity in bulk.

Said department, pursuant to the provisions of this section, shall determine a just and reasonable rate for the use of poles and communication ducts and conduits of a utility for attachments of a licensee by assuring the utility recovery of not less than the additional costs of making provision for attachments nor more than the proportional capital and operating expenses of the utility attributable to that portion of the pole, duct, or conduit occupied by the attachment. Such portion shall be computed by determining the percentage of the total usable space on a pole or the total capacity of the duct or conduit that is occupied by the attachment.

Credits

Added by St.1978, c. 292, § 1. Amended by [St.1997, c. 164, §§ 265, 266](#); [St.2000, c. 12, § 8B](#); [St.2006, c. 123, §§ 73, 75](#), eff. June 24, 2006; [St.2006, c. 143](#), eff. July 8, 2006.


[Notes of Decisions \(7\)](#)

M.G.L.A. 166 § 25A, MA ST 166 § 25A

Current through Chapter 196 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

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835 F.2d 380

United States Court of Appeals,
First Circuit.

**PUBLIC SERVICE COMPANY OF NEW
HAMPSHIRE, Plaintiff, Appellant,**
v.
**TOWN OF WEST NEWBURY, Thomas E.
Pulkkinen, and Patricia Wells Knowles,
Defendants, Appellees.**

No. 87-1395.

|
Heard Sept. 14, 1987.

|
Decided Dec. 16, 1987.

Synopsis

Owner of nuclear power plant brought action seeking injunctive relief to prevent town from removing utility poles bearing emergency warning sirens which owner had erected pursuant to permits issued by town board and later determined to be invalid. Owner also brought state law claims for declaratory relief and § 1983 claim alleging that threatened removal violated its constitutional rights. The United States District Court for the District of Massachusetts, Robert E. Keeton, J., denied plant owner's motion for preliminary injunction and it appealed. The Court of Appeals, Coffin, Circuit Judge, held that: (1) owner failed to show "irreparable harm" from removal of poles, absent showing that removal would have dispositive effect upon owner's application to Nuclear Regulatory Commission for operating license; (2) issuance of permits was not within statutory "inherent authority" of town board of selectmen and plant owner was not entitled to rely on permits issued ultra vires; and (3) threatened removal of poles was not such a deprivation of due process as to warrant § 1983 relief.

Affirmed.

West Headnotes (6)

[1] [Electricity](#) Removal or Change of Location of Poles and Other Apparatus

Owner of nuclear power plant failed to show that removal by town of owner's utility poles bearing emergency warning sirens was a per se "irreparable injury" to real property incapable of being reconveyed or restored, absent any allegation that if company were eventually to prevail, precise locations of poles would be unavailable, or that company would be unable to recover cost of poles, equipment and installation if they were removed.

[7 Cases that cite this headnote](#)

[2] [Electricity](#) Removal or Change of Location of Poles and Other Apparatus

Allegation by nuclear power plant owner that it was denied procedural due process did not, without more, automatically trigger a finding that owner would be "irreparably harmed" by town's removal of owner's utility poles bearing emergency warning sirens, for purposes of owner's action seeking injunction against removal of poles. [U.S.C.A. Const.Amend. 14](#).

[45 Cases that cite this headnote](#)

[3] [Electricity](#) Removal or Change of Location of Poles and Other Apparatus

Owner of nuclear power plant failed to show "irreparable harm" by threatened removal of its utility poles bearing emergency warning sirens, absent any showing that removal would have a dispositive effect or any effect upon owner's application to Nuclear Regulatory Commission for operating license, for purposes of owner's action seeking injunctive relief to prevent town board from removing the poles.

[52 Cases that cite this headnote](#)

owner of plant, to whom permits were originally issued. 42 U.S.C.A. § 1983.

[4] **Electricity** → Removal or Change of Location of Poles and Other Apparatus

1 Case that cites this headnote

Town board's issuance of permit for erection of utility poles bearing emergency warning sirens for nuclear power plant was not within its statutory authority to license construction of poles "necessary to sustain or protect * * * wires of * * * lines for the transmission of electricity," under Massachusetts law, and owner of plant was not entitled to rely on permits on that basis, since function of poles was not to transmit electricity but rather to sound warning sirens. M.G.L.A. c. 166, §§ 21, 22.

1 Case that cites this headnote

[5] **Electricity** → Removal or Change of Location of Poles and Other Apparatus

Owner of nuclear power plant failed to demonstrate that board of town selectmen acted within their statutory "inherent authority" in issuing permits for erection of utility poles bearing emergency warning sirens for the plant, under Massachusetts law, and owner was therefore not entitled to rely on the permits, later determined to have been issued ultra vires, for purposes of owner's action seeking declaratory relief from board's expressed intention to remove the poles. M.G.L.A. c. 40, § 3.

2 Cases that cite this headnote

[6] **Civil Rights** → Permits, Licenses, and Certifications

Expressed intent of town board of selectmen to remove utility poles bearing emergency warning sirens for nuclear power plant, based on board's determination that pole permits were invalid ab initio, did not amount to deprivation of due process redressable by § 1983 action brought by

Attorneys and Law Firms

*381 Robert J. Stillman with whom Thomas G. Dignan, Jr., Paul J. O'Donnell and Ropes & Gray, Boston, Mass., were on brief for plaintiff, appellant.

Judith H. Mizner with whom Silverglate, Gertner, Fine, Good & Mizner, Boston, Mass., R. Scott Hill-Whilton, Lagoulis, Clark, Hill-Whilton & McGuire, Newburyport, Mass., were on brief for defendants, appellees.

Before COFFIN, ALDRICH and TORRUELLA, Circuit Judges.

Opinion

COFFIN, Circuit Judge.

This is an appeal from the denial of a preliminary injunction sought by Public Service Company of New Hampshire (the Company), owner of the nuclear power plant in Seabrook, New Hampshire, to prevent the Town of West Newbury, Massachusetts (the Town), from removing five utility poles bearing emergency warning sirens. Such sirens are part of the Company's emergency preparedness plan in connection with its efforts to obtain an operating license for the power plant.

I.

In 1984 the Company applied for and received permits from the Town's Board of Selectmen to install the poles. Over a year later, in late 1985 and early 1986, the Company installed the poles, which stand 60 to 65 feet high. In March, 1987, the Board determined that it had proceeded without statutory authority, and ordered the Company to remove its poles. After a hearing and submission of legal memoranda, the Board voted, on April 22nd, to remove the poles.

The Company then brought this action, seeking a declaration that it was entitled under state law to maintain the poles *in situ*, and requesting damages, injunctive relief, and attorneys' fees, pursuant to 42 U.S.C. § 1983. On May 6, 1987, Judge McNaught refused to grant a temporary restraining order and, the next day, Judge Keeton denied the motion for a preliminary injunction. Both judges concluded that the Company had demonstrated neither irreparable harm nor a likelihood of success on the merits.

II.

^[1] The principal question on appeal is whether the Company sufficiently demonstrated that it would suffer irreparable harm if the injunction were not granted. The first ground urged is that any restraint on any interest in real property is per se irreparable injury. This argument confuses permanent alienation or destruction of real property, which is incapable of being reconveyed or restored, with a temporary action subject to reversal with compensation for loss suffered during the period of deprivation. Showing the irreplaceability and uniqueness of real property in the former case is also a showing of the irreparable nature of the harm. In the case at bar, however, if the Company were eventually to prevail, the permit could be reinstated and the poles reinstalled. There is no suggestion that the precise locations would be unavailable, nor is there any allegation or showing that the Company would be unable to recover the cost of the poles, equipment, and installation.

The Company's argument on this point is ill-supported. It relies principally on cases like *Crowley v. J.C. Ryan Construction, Inc.*, 356 Mass. 31, 247 N.E.2d 714 (1969), which dealt with an infringement of an easement. Easements are interests, the Company notes, recognized in Massachusetts *382 law as akin to permits.¹ (Main brief, p. 40.) In *Crowley*, the Massachusetts Supreme Judicial Court upheld a permanent injunction requiring plaintiff's neighbor to undo his unilateral raising of the surface of a roadway between the two as to which each had an easement of passage. The case is relevant to this one only in that if the Company finally prevails, it will be entitled to an injunction ordering the Town to restore the poles and sirens.

^[2] The Company's second contention is that it made a sufficient showing of irreparable harm by alleging a

deprivation of constitutional right. Cases so holding, however, are almost entirely restricted to cases involving alleged infringements of free speech, association, privacy or other rights as to which temporary deprivation is viewed of such qualitative importance as to be irreparable by any subsequent relief. We have even gone so far as to say, in *Rushia v. Town of Ashburnham*, 701 F.2d 7, 10 (1st Cir.1983), that "the fact that [plaintiff] is asserting First Amendment rights does not automatically require a finding of irreparable injury." The alleged denial of procedural due process, without more, does not automatically trigger such a finding. Moreover, as we hold below, the allegations fail as a matter of law to comprise a cause of action for deprivation of a constitutional right.

^[3] The Company's more substantial argument is that "the likely loss is not readily susceptible of calculation and likely would not be recovered from the defendants." Its reasoning is that in its effort to bring the Seabrook facility to the point where it can begin operations, its emergency procedure plan must be approved by the Nuclear Regulatory Commission (NRC) before the NRC will issue an operating license, and that West Newbury's permit for five poles and sirens is a key element of that plan. If, therefore, the removal of the poles were to be an identifiable cause of NRC disapproval, thus causing delay in commencing operations, the possible loss to the company of multiple hundreds of millions or even billions of dollars would be far beyond the ability of the Town to pay.

The problem with this argument lies with the absence of the necessary predicate, a showing that there is a likelihood of delay in operations being caused by the Town's action. We have searched the record and have found no such showing. The four affidavits submitted by the Company show only that the pole-siren system was chosen as the optimal evacuation warning method, that appropriate sites were selected, and that \$75,000 was spent in purchase and installation. There are no facts alleged which demonstrate that a present lack of sirens in West Newbury would have any effect on the NRC's decision, let alone dispositive effect. There is even the suggestion that alternative sitings "would have been arranged" if the Town had not agreed to the particular sites involved here. (A62, Affidavit of David Keast.) There was the candid statement of the Company representative at the hearing on the motion for preliminary injunction that "we cannot come to you and say irreparable harm, bang, in the classic sense ... because I can't represent to you that, absent these poles, the Commission will withhold ... [the] license. There are, frankly, technological fixes, portable sirens, that sort of

thing, that can be utilized to provide the reasonable assurance, which is the standard under which the Commission operates.” (A. 142.) Moreover, sirens might not even be necessary for NRC approval. As of the time of submission of the Company’s main brief, a rule had been proposed by the Commission “uncoupling the siren poles from the licensing effort.” (Main brief, p. 19, n. 10.)

Perhaps even more important is the lack of any indication that the merits of this case would not be decided before the critical time for the NRC’s decision as to an operating license. The district court denied the motion for preliminary injunction on May 7, 1987. Nearly half a year has since *383 elapsed, within which time it might be presumed that decision could have been reached on the merits. Perhaps of even greater weight is the fact that even as of the time when the Company’s reply brief was submitted to us, the Company had no emergency plan on file with the Nuclear Regulatory Commission. (Reply brief, p. 7, n. 6.)

All of these considerations convince us that the prospects of any irreparable damage were speculative. Speculative injury does not constitute a showing of irreparable harm. *See, e.g., Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency and Office of Emergency Preparedness of Massachusetts*, 649 F.2d 71, 74 (1st Cir.1981) (“mere possibility” of threat insufficient); *Goldie’s Bookstore v. Superior Court of California*, 739 F.2d 466, 472 (9th Cir.1984); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2948, at 436–37 (1973). We therefore hold that the district court did not err or abuse its discretion in ruling that the Company had not made a sufficient showing of the likelihood of irreparable damage.

III.

Because of our analysis as to irreparable harm, we need not reach the question of likelihood of success on the merits. Yet it is an additional criterion, generally required, and “has loomed large in cases before this court.” *Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273, 277 (1st Cir.1981). *See also Lancor v. Lebanon Housing Authority*, 760 F.2d 361, 362 (1st Cir.1985) (“The probability-of-success component in the past has been regarded by us as critical.”) As an independent ground for decision, therefore, we also hold that the district court did not err or abuse its discretion in ruling that the Company had not made a sufficient showing of

likelihood of success on the merits.

a. The Company’s State Law Claim for Declaratory Relief

The Company claims, based on *New England Power Co. v. Amesbury*, 389 Mass. 69, 449 N.E.2d 648 (1983), that the Town may not revoke the permits where the Company has acted in reliance on them. In *Amesbury*, however, the original actions of the selectmen were valid. No authority has been cited for the proposition that a municipality is estopped from nullifying an action invalid from the beginning. Indeed, the Company acknowledges that “reliance cannot cure action that was *ultra vires*.” (Reply brief, p. 12.)

^[4] Thus, if the selectmen had no authority to issue the permits in the first instance, then the Company’s reliance thereon is arguably not of legal significance. The Company advances two bases of authority for the issuance of the 1984 permit by the Town’s Board of Selectmen. The first is M.G.L. c. 166, § 21 and § 22. Section 21 gives authority to utilities to construct poles “necessary to sustain or protect the wires of its lines [for the transmission of electricity].” Section 22 sets forth the procedure governing the issuance of location permits for such transmission poles. The function of the poles at issue in this case is to transmit not the “electricity for lighting, heating or power” referred to in section 21, but rather, the sound of warning sirens. The Company attempts to bring this within a broad reading of section 21 by saying that the poles were erected “in connection with the efforts of Public Service and others to transmit electricity from Seabrook Station into the Massachusetts power grid.” Main brief, p. 18.

The Town responds by stressing the lack of fit between the statutory language and the purpose of the permits, and by citing the history of the statute. That history is characterized by incremental amendments keeping pace with evolving technology, broadening the authorized uses of poles to include not only the originally envisioned telegraph lines, but also telephone lines, then electricity for lighting, then electricity for heating, then lines for railways, and finally television lines. The Town argues that this history, where the legislature has acted with such incremental specificity, indicates that the statute is not to be expansively interpreted.

As to this issue, both statutory language and legislative treatment of pole use authorizations militate against the Company’s position. We observe in addition that the *384

five poles in this case, perhaps twice the height of ordinary poles, and constituting no part of a “transmission line” as it is commonly understood, arguably differ significantly from the prior statutorily authorized uses of poles under [ch. 166, § 21](#).²

^[5] In the alternative, the Company argues that the selectmen properly granted the permits pursuant to their “inherent power” under [M.G.L. c. 40, § 3](#). This section, so far as is pertinent to this issue, authorizes “selectmen ... duly authorized” to convey by deed town real estate; authorizes selectmen to lease for not more than ten years a public building; authorizes a town to make necessary orders “for the disposal or use of its corporate property”; and states that all real estate not placed in the charge of any particular board or officer “shall be under the control of the selectmen.” The Company asserts that the pole permits in this case are merely a form of “control” of property, a power given in the clause last quoted to the selectmen. It reasons that the statute limits this power only by the first two clauses—where either a deed or a lease for more than ten years must be authorized by town vote. It equates a pole permit with authorizing a charity to hold a benefit in the town hall or to conduct bingo games. *See, e.g., Worden v. New Bedford*, 131 Mass. 23 (1881) (town committee held authorized to let rooms in public building to a poultry association).

The Town points out that the permits in question were issued specifically under the authority of Chapter 166 and that there was never any invocation of other authority. The authority allegedly granted to the selectmen by [section 3](#) is, in addition, discretionary, and there has been no showing of any explicit reliance thereon. The Town also argues that, in any event, [c. 40, § 3](#) does not give power to a board of selectmen to give what is in legal effect an easement for the life of Seabrook to maintain poles in the five locations. The granting of such an interest, it argues, is a “disposition or use” of property reserved to a town. It cites, most pertinently, *Harris v. Wayland*, 392 Mass. 237, 243, 466 N.E.2d 822 (1984) ([section 3](#) does not become operative until transfer has been approved by town vote); *Oliver v. Mattapoisett*, 17 Mass.App.Ct. 286, 288, 457 N.E.2d 679 (1983) (“Except as qualified by other statutes, a majority vote of a town is sufficient to grant an easement or convey any other interest in land.”); *Bowers v. Board of Appeals of Marshfield*, 16 Mass.App.Ct. 29, 32, 448 N.E.2d 1293 (1983) (“[T]he perpetual incumbrance imposed upon the six lots by the then selectmen was an action which they were powerless to take.”)

The question of where along the continuum of actions involving town property the pole permits lie may very

well be a close one. It is not clear whether the permits are the sort of conveyance that needs to be approved by the Town as a whole. But we sense that Massachusetts law rather jealously reserves for towns, as opposed to selectmen acting without particular authorization, the power to impose on themselves significant long-term restrictions of use of real property. In any event, we cannot say that the Company has tipped the scales in its favor by showing a likelihood of success on this issue.

It cannot with confidence be said that the selectmen were authorized to grant the permits under either statutory section cited. Thus, the Company’s reliance on the permits is of no note, because it was relying on an action taken *ultra vires*. *Cf. Meader v. West Newbury*, 256 Mass. 37, 39, 152 N.E. 315 (1926) (“A person who enters into a contract with a public officer is bound at his peril to ascertain the extent of authority of such an officer with whom he deals.”). We have been alerted to no case where reliance was sufficient to establish a right to the property conveyance where the conveyance was not in the first instance legally authorized. The district court did not err in its holding.

***385 b. The Company’s Claim for Relief Under [42 U.S.C. § 1983](#)**

^[6] Rather inexplicably, the Company seeks to invoke [42 U.S.C. § 1983](#) as an alternative ground for relief. It asserts that it was facing a threat of deprivation of property without due process of law when the Town’s board of selectmen, having determined the permits to have been invalid *ab initio*, stated its intent to remove the poles. As we said in *Chiplin Enterprises v. City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir.1983), “[a] mere bad faith refusal to follow state law in such local administration matters [here, building permit proceedings] simply does not amount to a deprivation of due process where the state courts are available to correct the error.”

We have also made this point in *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir.1981), *Roy v. City of Augusta, Maine*, 712 F.2d 1517 (1st Cir.1983), and *Chongris v. Board of Appeals of Town of Andover*, 811 F.2d 36 (1st Cir.1987). The Company’s belated efforts to distinguish these cases merit no discussion. There clearly is no likelihood of success as to this claim.

Affirmed.

All Citations

835 F.2d 380

Footnotes

- 1 We find it difficult, in light of this observation, to understand the following statement in the Company's reply brief: "Defendants' half-hearted suggestion that what is at issue is an easement ... is just plain wrong." (Page 4, n. 4.)

- 2 The Company makes a secondary argument based on the fact that the poles also support wires "transmitting electricity" to "trickle charge" the batteries powering the sirens. But the purpose of those wires is to serve the sirens on the poles, and cannot convert the purpose of the poles or sirens themselves into that of serving the electrical "trickle" lines. The sirens and poles are not structures "for the transmission of electricity" within the meaning of the statute, and thus the trickle charger is not a transmission line within the meaning of that law.

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To: Select Board
From: Board of Health
Date: February 5, 2025
RE: Pole replacement in front of 224 Avery Brook Rd

At our meeting on January 28, 2025, we voted to support the request that the transmitters planned for the new poles in front of 224 Avery Brook Rd be replaced by fiber optic cable and that National Grid's fiber optic cable connect to the house to record the data from the electrical meter. This passed by a 2-0 vote.