

THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION
DE 21-020
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
d/b/a EVERSOURCE ENERGY and
CONSOLIDATED COMMUNICATIONS OF NORTHERN NEW ENGLAND
COMPANY, LLC d/b/a CONSOLIDATED COMMUNICATIONS

NECTA's Motion for Rehearing and/or Clarification of Order No. 26, 729

NOW COMES Intervenor New England Cable and Telecommunications Association, Inc. (“NECTA”)¹, by and through its attorneys, pursuant to N.H. RSAs 541:3 and 541:4, and respectfully moves the New Hampshire Public Utilities Commission (“the Commission”) to reconsider, rehear, and clarify Order No. 26, 729 (“the Order”) issued November 18, 2022 in the above-captioned docket. NECTA moves for rehearing and/or clarification of the Order because it: 1) applied an incorrect standard of review; 2) did not decide whether the rates Eversource proposes to charge for attachments to the transferred poles are just and reasonable; 3) failed to specify that the regulatory net book value recommended by NECTA should apply to Eversource’s pole attachment rate calculations; 4) did not decide the issue of whether the pole attachment rates charged by Eversource to Consolidated discriminated against other attachers; and 5) failed to adopt NECTA’s recommendations for service, billing and application processing requirements designed to avoid harm to NECTA Members. In support of this Motion, NECTA states as follows:

¹ As of October 19, 2022, NECTA has rebranded and changed its name from the New England Cable and Telecommunications Association to the New England Connectivity and Telecommunications Association.

I. REHEARING STANDARD

Pursuant to RSA 541:3 and 541:4, a party may move for rehearing of a Commission order within 30 days of the order by specifying every ground upon which it is claimed that the order is unlawful or unreasonable. The Commission may grant rehearing or reconsideration “for good reason” if the moving party demonstrated that an order is unlawful or unreasonable. *Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty*, DG 21-127, Order No. 26,712 (Oct. 24, 2022) at 2. Good reason may be shown by identifying specific matters that were overlooked or mistakenly conceived in the original decision. *Id.* citing *Dumais v. State*, 118 N.H. 309, 311 (1978). Within 30 days of the filing of a motion for rehearing, the Commission must grant, deny, or suspend the order or decision complained of pending further consideration, and the suspension may be upon such terms and conditions as the Commission may prescribe. RSA 365:21.

II. ARGUMENT

A. The Order Applied the Wrong Standard of Review

The Commission’s misinterpretation of RSA 374:30, II caused it to apply an incorrect standard of review to the proposed transfer of Consolidated’s pole assets to Eversource. The Order states “[t]he public good standard has not been applied by the Commission in authorizing this transfer.”² *Order* at 20. The Order also states that “RSA 374:30, II is the appropriate standard to apply because Consolidated is the type of transferor to which that statute specifically applies, *i.e.*,

² Notwithstanding that the statement that the Commission did not apply the “public good” standard in this case, the Order nonetheless applies a “public interest” standard, thereby implicitly recognizing that this is the type of transfer for which a public good determination should be made. For example, at page 7, the Order states “[w]e find that it is in the public interest for Eversource to recover incrementally higher vegetation management, pole placement, and inspection costs incurred...if Eversource consummates the Purchase Agreement. The public interest is served because we find that Eversource is an appropriate entity to solely own utility pole assets with electric facilities within its coextensive franchise area with Consolidated...”.

an ILEC³ operating as an ELEC.”⁴ *Order* at 13. RSA 374:30, II provides that an ILEC that is an ELEC may transfer or lease its franchise, works, or system, or any part thereof, “when the commission finds that the utility to which the transfer is to be made is technically, managerially, and financially capable of maintaining the obligations of an [ILEC] set forth in RSA 362:8 and RSA 374:22-p.” While it is correct that RSA 374:30, II applies to a transferor such as Consolidated because it is an ILEC operating as an ELEC, the statute does not apply in the instant proceeding because Eversource is not the type of *transferee* to which that statute specifically applies. As explained below, an electric distribution utility such as Eversource is not the type of utility that has the authority or capability of maintaining an ILEC’s obligations under RSA 362:8 or RSA 374:22-p.

RSA 362:8 concerns “Obligations on Excepted Local Exchange Carriers” and includes obligations relating to the provision of telecommunications services, *e.g.*: obligations arising under the Commission’s authority under the Communications Act of 1934; obligations relating to the availability of broadband services and soft disconnect processes; and obligations relating to services provided to competitive local exchange carriers, interexchange carriers and wireless carriers. Because Eversource is not an ELEC, it is incapable of meeting the obligations of RSA 362:8.

RSA 374:22-p concerns “affordable telephone service” and includes 16 “basic service” obligations of a telecommunications utility, for example: safe and reliable single-party, single line voice service; ability to complete calls to any other telephone line; opportunity to presubscribe to interLATA and intraLATA toll carriers; dialing parity; number portability; enhanced 911; access

³ “ILEC” is the acronym for an incumbent local exchange carrier. *See* RSA 362:7, I(b).

⁴ “ELEC” is the acronym for an excepted local exchange carrier. *See* RSA 362:7, I(c).

to statewide directory assistance; telecommunications relay service; caller identification blocking options, etc. *See* RSA 374:22-p, I. (b) (1)-(16).

Given the specific telecommunications-related obligations set forth in RSAs 362:8 and 374:22-p, it is inconceivable that the legislature intended that RSA 374:30, II apply to transactions in which an ILEC operating as an ELEC proposes to transfer a portion of its works and system to an electric distribution company, which neither is responsible for, nor capable of, maintaining the very specific telecommunications services obligations of a transferor required by RSA 374:30, II and the statutes cited therein. Accordingly, a plain reading of the statute reveals that it does not apply to the instant transaction. Furthermore, the Order misconstrues the statute.

The Order, at pages 13 to 14, states that the Commission does “not understand the proposed transfer to change Consolidated’s obligations under RSA 362:8 and RSA 374:22-p. Therefore, the evaluation of the transferee’s ...capabilities is limited to its technical, managerial, and financial capabilities to maintain the utility poles and pole assets in a manner that ensures reasonably adequate safe and adequate utility services.” This analysis is significantly flawed as it violates fundamental principles of statutory construction by failing to give meaning to all of the words in the statute. When interpreting a statute, all parts of the statute must be construed together; “[t]he legislature is not presumed to waste words... and whenever possible, every word of a statute should be given effect.” *Garand v. Town of Exeter*, 159 N.H. 136, 141 (2009) (citations omitted). Because the Commission’s analysis overlooks that RSA 374:30, II expressly requires a finding that the obligations of RSA 362:8 and RSA 374:22-p can be met by the transferee (“the utility to which the transfer is to be made”), and because the transferee in this case cannot meet those obligations, rehearing is warranted under the appropriate standard of review described below.

B. The Public Good Standard Under RSA 374:30, I. Applies to the Transaction

The Joint Petitioners asserted that pole asset transfer transaction “is subject to review under the legal standard set forth in RSA 374:30” and quoted only section I of the statute. *Joint Brief of Public Service Company of New Hampshire d/b/a Eversource Energy and Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications* (June 3, 2002) at 6 -7. RSA 374:30, I provides as follows:

Any public utility may transfer or lease its franchise, works, or system, or any part of such franchise, works, or system, exercised or located in this state, or contract for the operation of its works and system located in this state, when the commission shall find that it will be for the public good and shall make an order assenting thereto, but not otherwise, except that commission approval shall not be required for any such transfer, lease, or contract by an excepted local exchange carrier. The commission may, by general order, authorize a public utility to transfer to another public utility a part interest in poles and their appurtenances for the purpose of joint use by such public utilities.

The Order notes that the foregoing statute “generally requires the Commission apply a public good standard when evaluating petitions to transfer public utility franchises, work, or systems, and further notes that RSA 374:30, I contains two exceptions to the requirement: 1) no Commission approval is required if the transferor is an ELEC; and 2) if the transferred asset is a partial interest in utility poles and their appurtenances for joint use by the transferor and transferee public utilities, the Commission may waive review by issuing a general order applicable to all wire using utilities. *Order* at 12. However, neither of these exceptions applies to the instant transaction.

The first exception to the public good determination required by RSA 374:30, I does not apply here because Consolidated is not simply an ELEC; it is an ILEC operating as an ELEC (as noted in the Order at page 13). The second exception also does not apply because, even though Consolidated proposes to transfer to Eversource a partial interest in many of Consolidated’s jointly-owned utility poles, the transaction also includes a transfer of some of Consolidated’s solely owned poles. *See Joint Petition to Approve Pole Asset Transfer*, ¶ 2. In view of the

foregoing, the Commission's failure to apply the public good standard of review under RSA 374:30, I constitutes legal error that warrants rehearing.

C. The Commission Erred in Not Adopting NECTA's Recommendations To Avoid Post-Transfer Harm and By Not Deciding Each Issue Presented

The Commission's failure to apply the correct "public good" standard set forth above also led to another error – the failure to adopt NECTA's recommendations to prevent economic and operational harm if the pole assets are transferred from Consolidated to Eversource. As the Joint Petitioners concede, the public good standard under RSA 374:30, I is analogous to the "public interest" standard, and for acquisition cases, the Commission applies a "no net harm" test. *Joint Brief of Public Service Company of New Hampshire d/b/a Eversource Energy and Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications*, (June 3, 2022) at 7.

NECTA asserts that to avoid operational and economic harm as the result of the asset transfer, the Commission must order that: the Consolidated pole attachment rates (that Eversource proposes to charge for the transferred poles until such time as Eversource unifies its pole attachment rates to reflect inclusion of the transferred poles) be reduced to levels that are just and reasonable; Eversource must use a reasonable regulatory net book value of the transferred assets (rather than the full net purchase price that Eversource intends to pay for the assets) when it calculates unified pole attachment rates that reflect inclusion of the transferred poles; Eversource must not charge Consolidated lower pole attachment rates than those charged to NECTA members; and Eversource must be required to meet certain service, billing and application processing conditions described in Exhibit 28.

Because the Order does not include requirements suggested by NECTA to meet the public good standard under RSA 374:30, I, and because the Order violates RSA 363:17-b by not including a decision on each of these issues, rehearing is warranted.

1. Pole Attachment Rates Eversource Charges for the Transferred Poles Must Be Just and Reasonable

Until such time as Eversource unifies its pole attachment rates to reflect inclusion of the transferred poles, it intends to bill attachers Consolidated's rates for the transferred poles. *Exh. 51*; *see also Tr.*, Day 1 (Redacted), p. 43, lines 9-19. Paragraph 6 of the Joint Petition alleges that "upon closing, Eversource will receive third-party attachment revenues directly from all other third-party attachers under the terms of the contracts that are currently in place with Consolidated. In compliance with N.H. Code Admin. Rules Puc 1301.01 and RSA 374:34-a, the foregoing pole attachment fees are nondiscriminatory, just and reasonable." In making this factual assertion, the Joint Petitioners were required to prove that proposition by a preponderance of the evidence. *See* N.H. Code Admin. R. Puc 203.25 (the party seeking relief through a petition...shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence). However, the Joint Petitioners did not meet this burden, as they failed to put forth any substantive evidence to support their claim concerning the justness and reasonableness of Consolidated's pole attachment rates.

NECTA's witness, Patricia Kravtin, a leading expert in pole attachment rates, provided unrefuted, detailed testimony that clearly establishes that Consolidated's rates are not just and reasonable. *Exh. 39*, Bates pp. 14-20. Ms. Kravtin also calculated just and reasonable rates for the transferred poles using data provided by Consolidated in response to a Commission order⁵ on NECTA's Motion to Compel. *Id.* at Bates p. 19. Until they received that data, NECTA and

⁵ *See* Order No. 26, 534 (Oct. 22, 2021).

NECTA Members were not aware of the extent to which Consolidated's pole attachment rates exceed the just and reasonable rates produced using the FCC's cable formula, as Ms. Kravtin advocates. *Reply Brief of New England Cable and Telecommunications Association, Inc.* (June 17, 2022) at 12.

As noted on page 11 of NECTA's Reply Brief, there is no record evidence disputing the fairness or correctness of Ms. Kravtin's rate calculations, nor have the Joint Petitioners provided any evidence supporting their claim that Consolidated's rates are just and reasonable. And, although the Order recognizes that Consolidated's "pole attachment rates are subject to Commission jurisdiction pursuant to RSA 374:34-a and N.H. Code Admin. R. Puc Ch. 1300", *Order* at 19, the Order did not contain a finding as to whether those rates are just and reasonable. Instead, the Order states "Consolidated's existing pole attachment rates will not change as a result of this proceeding, a pole attachment rate dispute was not noticed in the Commission's order of notice." *Id.* at 20. NECTA respectfully submits that the fact that the order opening this docket does not specifically identify the issue of the justness and reasonableness of Consolidated's pole attachment rates is an insufficient reason for the Commission's failure to determine whether those rates -- the rates that Eversource proposes to charge for the transferred poles-- are just and reasonable.

First, as noted above, the Joint Petitioners, themselves, put the issue of the justness and reasonableness of Consolidated's rates squarely before the Commission in this docket.

Second, the Order of Notice dated March 18, 2021 is worded broadly enough to include this issue within the scope of the docket: "[t]he filing raises, inter alia, issues related to whether the proposed sale of the Tranferred Poles and **related rights and interests**... are in the public good and should be approved pursuant to RSA 374:30..." DE 21-020, Order of Notice (Mar. 18,

2021) at 2. Certainly, NECTA Members' rights under RSA 374:34-a and Commission Rules to be charged just and reasonable rates by Eversource for attachments on the transferred poles post-transfer are "rights and interests" related to the proposed sale of the Transferred Poles. As such, those rights and interests are covered by the Order of Notice, and are properly within the scope of this docket.

Lastly, NECTA put forth comprehensive testimony and exhibits supporting its position on the pole attachment rates that Eversource proposes to charge for the transferred poles, and the Joint Petitioners were given an opportunity to rebut it. In view of the foregoing, the Commission should have included a decision on the issue in its Order. *See* RSA 363:17-b, II (Commission "shall issue a final order on all matters presented to it"; a final order shall include, but not be limited to "[a] decision on each issue including the reasoning behind the decision").

To the extent the Commission's rationale for its decision not to adjudicate the justness and reasonableness of Consolidated's pole attachment rates in this docket is based on due process concerns (*i.e.*, that the Petitioners were not provided with notice and an opportunity to be heard on the pole attachment rate issue), NECTA respectfully submits that such due process concerns are misplaced. Notwithstanding that the Order of Notice did not expressly mention the issue of pole attachment rates, when Ms. Kravtin's prefiled testimony was submitted on January 31, 2022, all parties to this docket, including Consolidated and Eversource – the real parties in interest concerning the issue of what pole attachment rates should be charged for the transferred poles – received *actual* notice of NECTA's position that Consolidated's pole attachment rates are excessive. Both Consolidated and Eversource were afforded the opportunity to file rebuttal testimony, however neither of their rebuttal testimonies provided any substantive information to rebut Ms. Kravtin's detailed testimony that calculated just and reasonable pole attachment rates

for the transferred poles, and that demonstrated that such calculations comply with the Commission's pole attachment rate standards under N.H. Code Admin. R. Puc 1300. Moreover, as explained above, because the Joint Petitioners themselves asserted that Consolidated's pole attachment rates (*i.e.*, the rates that Eversource petitioned the Commission to charge for the transferred poles) are just and reasonable, the Joint Petitioners bore the burden of proving the truth of those assertions, but failed to do so.

In short, all parties to this proceeding had actual notice of the Joint Petitioners assertions regarding the justness and reasonableness of Consolidated's pole attachment rates, as well as Ms. Kravtin's specific position. The Joint Petitioners had the opportunity to rebut that position, and to cross-examine Ms. Kravtin on her rate calculations, but failed to do so. That Eversource and Consolidated made a strategic decision to forego their due process rights to substantively counter Ms. Kravtin's testimony with evidence that would also meet their burden of proving that Consolidated's rates are just and reasonable, does not mean that the Joint Petitioners were deprived of their due process rights. In these circumstances, the Order's reliance on the lack of express language in the Order of Notice regarding pole attachment as justification for not deciding the justness and reasonableness of Consolidated's pole attachment rates is unreasonable. Moreover, it is unlawful, as the Order improperly relieves the Joint Petitioners of their burden of proof under N.H. Code Admin. R. Puc 203. 25, and deprives NECTA of its rights under RSA 363:17-b, II to obtain a decision on this issue. Rehearing is therefore warranted.

In the alternative, as requested in NECTA's Reply Brief at page 12 and as requested here, the Commission should clarify the Order to provide that if Consolidated's rates are reduced (as the result of Docket No. DT 22-047 or through settlement) before Eversource computes new unified pole attachment rates reflecting the inclusion of the transferred poles, Eversource must bill the new

Consolidated rates (for the transferred poles) retroactively to the date of any such settlement or the date the Petition in DT 22-047 was filed. *See* N.H. Code Admin. R. Puc 1303.07 (eff. 11/29/22).

2. Regulatory Net Book Value Should Be Used In Calculating Eversource's Pole Attachment Rates

NECTA argued that if the Commission were to approve the proposed transaction, “it should require that Eversource’s pole attachment rates reflect a reasonable regulatory net book value for the transferred poles rather than the full net purchase price that Eversource intends to pay for these assets.” *Initial Post-Hearing Brief of New England Cable and Telecommunications Association, Inc.* (June 3, 2022) at 13. Although the Commission ordered Eversource to utilize NECTA’s methodology formula for calculating a net book value for the utility poles and pole assets, the Order did not specify that Eversource was to utilize that net book value for purposes of calculating Eversource’s pole attachment rates when Eversource ceases charging Consolidated’s rates for the transferred poles, and begins charging a unified rate that reflects inclusion of the transferred poles.

Presumably the Commission’s rationale for ordering the above-described net book value was to protect Eversource’s electric ratepayers from the economic harm associated with allowing Eversource to include the higher net purchase price in its rate base. The same rationale and protection should be afforded to all of Eversource ratepayers, including NECTA Members who pay Eversource pole attachment rates. Therefore, the Commission should either grant rehearing, or clarify the Order to specify that the methodology and formula for calculating the net book value of the transferred pole assets set forth in the Order is to be used for purposes of calculating Eversource’s pole attachment rates when it ceases charging Consolidated’s rates for the transferred poles, and begins charging a unified rate that reflects inclusion of the transferred poles.

3. Eversource Cannot Discriminate Against NECTA Members By Charging Lower Rates for Consolidated's Pole Attachments

NECTA has argued that under the public good standard and RSA 374:34-a, the Commission should not allow Eversource to discriminate against NECTA Members by charging them higher pole attachment rates for their attachments to the transferred poles than the rates Consolidated pays for its attachments. *Initial Post-Hearing Brief of New England Cable and Telecommunications Association, Inc.*, (June 3, 2022) at 21-22. However, the Order fails to do that. Instead, the Order, at page 20, permits Consolidated to pay a flat fee for its attachments for two years post-transfer, which NECTA asserts results in a per attachment rate that is less than what NECTA Members will pay Eversource for their attachments. *Id.* Instead of probing the discriminatory rate issue, the Order states that it is not apparent that the actual number of poles being transferred is known, and that such a figure is needed to determine accurate billing (rates). The Order goes on to say that “[i]f the proposed transaction is consummated, Eversource shall accurately determine Consolidated’s actual number of attachments by performing an attachments survey within two years of closing the transaction, the point at which Eversource would begin charging Consolidated based on updated pole attachment rates.” *Order* at 20. The Order basically gives short shrift to NECTA’s discriminatory rate argument, and gives Eversource a two-year pass on providing Consolidated with more favorable rates than those charged to its competitors. Because such treatment is unlawful and unreasonable, and inconsistent with the public good and the anti-discrimination provisions of RSA 374:34-a, rehearing is warranted.

4. NECTA’s Recommendations for Service, Billing and Application Processing Requirements Are Needed to Prevent Net Harm

NECTA made several recommendations to address its concerns regarding service, billing and application processing post-transfer. *See* Exhibit 28, and *Initial Post-Hearing Brief of New*

England Cable and Telecommunications Association, Inc. (June 3, 2022) at 9-11. NECTA also explained the reasons underlying its concerns, some of which stem from Comcast’s negative experience in Vermont when Consolidated transferred pole assets to Green Mountain Power. *Id.* at 5 – 9. Eversource’s Reply Brief notes that the Company has agreed to many of these recommendations as set forth in its rebuttal testimony (Exhibit 10), and that “Eversource’s agreement to satisfy these recommendations consistent with its rebuttal testimony remains unchanged should the Transaction be approved.” *Reply Brief of Public Service Company of New Hampshire d/b/a Eversource Energy* (June 17, 2022) at 9.

Notwithstanding the foregoing concerns by NECTA and commitments by Eversource, the Order did not include any of NECTA’s proposed conditions because the “public good standard has not been applied by the Commission.” *Order* at 20. Because the Commission erroneously failed to apply the public good standard, the Order’s failure to include NECTA’s recommendations (or at least to memorialize Eversource’s commitments regarding NECTA’s recommendations) is unlawful and unreasonable, and therefore rehearing is warranted.

WHEREFORE, NECTA respectfully requests that the Commission:

1. Grant rehearing of Order No. 26, 729 and issue an order consistent with NECTA’s arguments set forth above;
2. Clarify that the net book value of the transferred pole assets required by Order No. 26, 729 shall apply when Eversource unifies its pole attachment rates to reflect inclusion of the transferred poles;
3. Clarify that if Consolidated’s rates are reduced as the result of Docket No. DT 22-047 or through settlement before Eversource computes new unified pole attachment rates reflecting the inclusion of the transferred poles, Eversource must bill the new

Consolidated rates for the transferred poles retroactively to the date of any such settlement or the date the Petition in DT 22-047 was filed: and

4. Grant such further relief as it deems appropriate.

NECTA

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Dated: December 16, 2022

Certificate of Service

I hereby certify that on the date set forth above a copy of the foregoing Motion was sent electronically to the Service List.



Susan S. Geiger