

THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

Docket No. DE 21-020

Joint Petition to Approve Pole Asset Transfer

OBJECTION TO NECTA’S MOTION TO COMPEL RESPONSE TO DATA REQUESTS

NOW COMES Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications (“Consolidated”) and hereby respectfully objects to the Motion to Compel Consolidated to Response to Data Requests filed on Friday, August 13, 2021, by New England Cable and Telecommunications Association, Inc. (“NECTA”).

I. BACKGROUND AND JOINT PETITION

1. On February 10, 2021, Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource” and together with Consolidated, the “Joint Petitioners”) and Consolidated jointly petitioned the New Hampshire Public Utilities Commission (the “Commission”) for approval of the transfer of certain utility pole assets from Consolidated to Eversource (the “Joint Petition”) pursuant to a Settlement and Pole Asset Purchase Agreement between the Parties dated as of December 30, 2020 (the “Settlement Agreement”). As described in more detail in the Joint Petition, the Joint Petitioners requested that the Commission find the transfer of assets to be in the public interest because the transfer of Consolidated’s utility poles to Eversource (as the sole owner) would result in significant electric grid reliability and operational

benefits, with minimal impacts on customer bills, and is otherwise consistent with New Hampshire law. *See* Joint Petition at p.1.

2. Since the filing of the Joint Petition and the Prehearing Conference, there have been three rounds of extensive data requests filed on the Joint Petitioners, four technical sessions held all followed (or to be followed) by data requests, with another technical session proposed by the Department of Energy for a date to be determined. *See generally* Commission Order Approving of Amended Procedural Schedule, July 9, 2021, Docket DE 21-020.¹ During these various rounds of discovery, NECTA has propounded data requests seeking data which Consolidated does not possess. By NECTA's own admission in its Motion to Compel, at paragraph 5, NECTA seeks information related to Federal Communications Commission ("FCC") ARMIS based accounting for fiscal years 2018 through 2020 because it is a form of accounting previously utilized by FairPoint Communications, Inc. ("FairPoint") (*see id.*, at p. 6), a company which no longer exists. Apparently, FairPoint had been required to file ARMIS reports for New Hampshire with the FCC. In response to the data requests, Consolidated answered and advised NECTA that it does not employ accounting methods previously utilized by FairPoint and that it does not have the requested data. These answers are true and accurate, and there is no (and there was never any) need to object to the data requests.

3. Consolidated generally agrees with NECTA's characterization of the present dispute, albeit Consolidated notes that it in fact has responded to the NECTA data requests at issue in the Motion to Compel. For example, the entirety of NECTA data request 2-019 is as follows:

¹ The potential for another technical session depends upon how the Commission rules on the Consumer Advocate's Motion to Dismiss Petition, filed August 4, 2021.

Request:

Please refer to the 2017 ARMIS Report by FairPoint Communications for NH and provide figures updated to 12/31/2000 for the following categories: Gross Investment in Poles, Accumulated Depreciation - Poles, and Depreciation Rate – Poles.

Response:

Consolidated Communications believes ARMIS data of December 31, 2000, is not in any way relevant to the matters at issue in Docket No. DT 21-020. To the extent the referenced date should have been December 31, 2020, Consolidated Communications does not have said data as it ceased filing ARMIS reports.

4. The above referenced data request followed after NECTA’s original request for FCC based ARMIS data. The following is the entirety of NECTA data request 1-045:

Request:

Please provide copies of Consolidated’s ARMIS report for NH for the years 2020, 2019 and 2018.

Response:

Consolidated Communications has not filed ARMIS reports for these years. Consolidated is not required to file these reports for its New Hampshire study area.

II. LEGAL STANDARD

5. The standard of review is well settled. In addressing a motion to compel discovery responses, the Commission considers whether the information being sought is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. *See Public Service Company of New Hampshire, Investigation of Merrimack Station Scrubber Project and Cost Recovery*, Docket DE 11-250, Order No. 25,398, at p. 2 (August 7, 2012) citing *Investigation into Whether Certain Calls are Local*, Order 23,658 (2001) at 5. “[I]n general, discovery that seeks irrelevant or immaterial information is not something we should require a party to provide.” *Id.*

citing *City of Nashua*, Order 24,681 (2006) at p. 2 (Commission citing to NH Superior Court Rule 35(b) regarding scope of discovery).

6. Administrative Rule Puc 203.09 addresses discovery. Per subsection 203.09(c), it is clear that “[d]ata requests shall identify with specificity the information or materials sought.” The Commission also may “... authorize other forms of discovery, including technical sessions, depositions and any other discovery method permissible in civil judicial proceedings before a state court when such discovery is necessary to enable the parties to acquire evidence admissible in a proceeding.” Puc 203.09(j). The Commission’s administrative rules, however, contain no requirement for a party to manufacture evidence that it does not possess.

7. The standards set in Federal and State Court rules are instructive for the present dispute. Federal Rule of Civil Procedure 34 governs the production of documents and electronically-stored information. It requires a party to litigation “... to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following **items in the responding party's possession, custody, or control.**” Fed. Rl. Civ. Procedure 34(a)(1) (emphasis added). Similarly, N.H. Superior Court Rule 24 (“Production of Documents”) contains a requirement that the information sought be in the responding party’s “possession, custody or control.” See Fed. R. Civ. P. 34(a)(1); compare N.H. Sup. Ct. R. 24(a) (“... and which are in the possession, custody or control of the party upon whom the request is served.”). Courts have consistently construed this language to mean that the responding party must only produce documents that are already in existence (and within the responding party’s possession, custody, or control); “a party does not have to create a document in response to a request for production.” See *Harris v. Advance Am. Cash Advance Ctrs.*, 288 F.R.D. 170, 174 (S.D. Ohio 2012); see also *Florer v. Johnson-Bales*, No. C06-5561, 2010 U.S. Dist. Lexis 20911 at *14 (W.D. Wash. Feb. 16, 2010)

(“Defendants are required to produce documents in their possession. They are not obligated to create a new document containing the information sought by Plaintiff. Plaintiff’s dissatisfaction with the response to his query is not grounds for a motion to compel.”); *Blair v. CDCR*, No. 1:14-cv-01156, 2018 U.S. Dist. Lexis 69828 at *19 (E.D. Cal. Apr. 24, 2018) (request requiring defendant to create a new document “is not a proper request under Rule 34”); *Alexander v. FBI*, 194 F.R.D. 305, 310 (D.D.C. 2000) (“Rule 34 only requires a party to produce documents that are already in existence.”) (citing *Rockwell Int’l Corp. v. H. Wolfe Iron and Metal Co.*, 576 F. Supp. 511, 513 (W.D. Pa. 1983) and 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2210 (2d ed. 1994)).

III. ARGUMENT

The Commission should deny the Motion to Compel as a party to a proceeding before the Commission is under no duty or requirement to produce that which it does not possess.

8. While Consolidated does not take issue with the fact that New Hampshire views discovery on a liberal basis, Courts and this Commission have not found discovery to impose endless requirements on parties to proceedings. Here, NECTA requested data that Consolidated does not possess. NECTA admits the same in that it stated “... it may be true that Consolidated does not presently ‘have’ the requested information...” Motion to Compel at para. 9, p. 3. Nonetheless, NECTA claims that Consolidated has information to provide calculations that NECTA seeks. *Id.* In other words, NECTA demands that Consolidated manufacture evidence that does not exist. Such a requirement does not exist.

9. NECTA fails to mention that Consolidated and Eversource have provided a plethora of financial data related to pole valuation from Consolidated and Eversource’s financial books and records. This data includes GAAP based information on Eversource’s utility poles and

the Consolidated owned poles subject to the Joint Petition. Further data has been provided to all parties in the Docket related to both Consolidated's and Eversource's regulatory accounting for the utility poles at issue. The Consolidated data rolls forward from its acquisition of FairPoint in July 2017 through December 31, 2020.

10. However, Consolidated has not created ARMIS reports since it is not under an obligation to file ARMIS reports with the FCC. The FCC had granted forbearance to relieve price cap Incumbent Local Exchange Carriers from Form 43-01 filing responsibilities. The FCC reasoned in part: (¶ 104) “We find that forbearance from this requirement is warranted under section 10, subject to the same conditions imposed on the BOCs. We agree with US Telecom’s claims that the Commission’s justifications for granting forbearance to the BOCs apply equally to all price cap carriers – namely, ‘ARMIS Report 43-01 is unnecessary in determining whether the carrier’s rates are just, reasonable, and nondiscriminatory, . . . price cap regulation of that carrier’s rates will remain in place to protect consumers, [and] there are sufficient sources of necessary data other than the ARMIS reports that provide accounting information that may be needed by the Commission.’” *In the Matter of Petition of USTelecom for Forbearance Under 47 U.S.C. §160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, Released May 17, 2013, FCC 13-69. Furthermore, with respect to pole attachment data the FCC indicated “For those states that have certified that they will regulate pole attachments themselves (and thus where the Commission no longer has jurisdiction), filing of pole attachment cost data with the Commission is no longer necessary on an ongoing basis.” *Id.* At ¶109

11. NECTA also retained an alleged expert witness, Ms. Patricia D. Kratvin. Ms. Kratvin is an Economic Consultant who “Specializ[es] in telecommunications and energy regulation and markets, providing full range of advisory, technical and expert witness services.” See <https://www.linkedin.com/in/patricia-kratvin-90899a4/>. Ms. Kratvin has agreed to the terms of the parties’ Protective Agreement dated as of May 9, 2021. See Protective Agreement Schedule I attached hereto as Exhibit 1. To the extent that NECTA needs additional financial analysis of the data already in its possession, NECTA can generate such analysis. However, there is no legal basis for requiring Consolidated – or any party – to manufacture evidence the party does not possess.

IV. CONCLUSION

12. For the foregoing reasons, Consolidated respectfully requests that the Commission deny NECTA’s Motion to Compel.

Dated: August 25, 2021

Respectfully submitted,

**CONSOLIDATED COMMUNICATIONS OF
NORTHERN NEW ENGLAND COMPANY, LLC
D/B/A CONSOLIDATED COMMUNICATIONS**

By its Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached to be served on the parties to Docket DE 21-020 via the Service List on file with the Commission.

August 25, 2021
Date

/s/ Patrick C. McHugh
Patrick C. McHugh

EXHIBIT ONE

SCHEDULE I TO PROTECTIVE AGREEMENT

PATRICIA D. KRATVIN

SCHEDULE I
STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DE 21-020

I, Patricia Kravtin _____ (name) serve as Economic Consultant _____
(title or advisory capacity) NECTA ____ (Party) in the above-captioned proceeding before the
New Hampshire Public Utilities Commission. In connection with the work done for NECTA
____ (Party), I request to be given access to certain confidential Information of Consolidated
Communications & Eversource _____ (the "Submitting Party") pursuant to and under a
Protective Agreement dated as of May 9, 2021, by and among Consolidated Communications
of Northern New England Company, LLC, Public Service Company of New Hampshire and
New England Cable and Telecommunications Association, Inc. A copy of the Protective
Agreement has been delivered to me. I have read this Protective Agreement, understand the
terms of the Protective Agreement and agree to comply with and be bound by its terms. I agree
that this Schedule I does not authorize my access to the Confidential Information until it is
executed, delivered to and approved by counsel for the Submitting Party.

Signed:



Name:

Dated: 5/12/21 _____

Title: Principal & Owner

Employer: Patricia D. Kravtin Economic Consulting