

**STATE OF NEW HAMPSHIRE**

**Before the**

**PUBLIC UTILITIES COMMISSION**

**Docket No. DT 22-047**

**CHARTER COMMUNICATIONS, INC., COGECO US FINANCE, LLC  
d/b/a BREEZELINE, AND COMCAST CABLE COMMUNICATIONS, LLC**

**Petition for Resolution of Rate Dispute**

**PETITIONERS' POST-HEARING BRIEF**

**February 9, 2023**

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## I. INTRODUCTION

Charter Communications, Inc. (“Charter”), Cogeco US Finance, LLC d/b/a Breezeline (“Breezeline”) and Comcast Cable Communications, LLC (“Comcast”) (collectively, “Petitioners”) respectfully submit this post-hearing brief in accordance with the Procedural Order issued February 3, 2023 in this docket. Pursuant to RSA 374:34-a, VII and N.H. Code Admin. R. Puc 1303.03, Petitioners seek resolution of their dispute with Consolidated Communications of Northern New England Company, LLC (“Consolidated”) over Consolidated’s pole attachment rates and Joint Use (“JU”) charges which Petitioners assert are unjust and unreasonable. The Commission has recognized that these rates are subject to the Commission’s jurisdiction,<sup>1</sup> and that it has the authority to resolve the issues presented in the Petition for Resolution for Rate Dispute filed August 22, 2022 (“the Petition”) and to determine whether the rates in Consolidated’s pole attachment agreements with Petitioners are unjust or unreasonable.<sup>2</sup>

Petitioners’ dispute with Consolidated over pole attachment rates and JU charges dates back to October 2021 when they, through their membership organization, the New England Connectivity and Telecommunications Association (“NECTA”),<sup>3</sup> initially disputed Consolidated’s invoices for the second half of 2021, and requested that Consolidated provide rate calculations and other information in Consolidated’s possession to support its pole attachment rates.<sup>4</sup> In 2022, Petitioners continued to pursue their rate dispute with Consolidated, again requesting information in Consolidated’s possession needed to perform rate calculations, and

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<sup>1</sup> Order No. 26,729 (Nov. 18, 2022), p. 19.

<sup>2</sup> Order No. 26,764 (Jan. 23, 2023), p. 5.

<sup>3</sup> Note that at the time the Petition was filed, NECTA was known as the New England Cable and Telecommunications Association.

<sup>4</sup> See Exhibit 2, Bates p. 03. A description of this dispute is contained in the Petition for Resolution of Rate Dispute, Exhibit 1, which is incorporated herein by reference.

offering rates they were willing to accept to resolve the dispute, and for future billing periods.<sup>5</sup> To date, Consolidated has failed to provide all of the rate-related information that it has in its possession and that Petitioners have requested. Instead, in response to an order<sup>6</sup> compelling Consolidated to provide information in Docket DE 21-020 (“the Pole Transfer Docket”), Consolidated provided the 2020 ARMIS Report containing cost and pole count data that could be used to calculate Consolidated’s pole attachment rates. However, Consolidated never provided Petitioners with the requested plant records on pole height. Moreover, Consolidated refused to negotiate a resolution to the rate dispute, insisting instead that termination of Petitioners’ pole attachment agreements was a prerequisite for changing the rates.<sup>7</sup> Consolidated’s actions left Petitioners with no choice but to file their Petition on August 22, 2022.

The record in this docket demonstrates that Consolidated’s current pole attachment rates, which are not set according to any cost-based formula,<sup>8</sup> are not just and reasonable, and that Consolidated’s JU charges for Petitioners’ attachments to poles in which Consolidated has no ownership interest, and for which Petitioners also pay the “joint use” pole owner a solely-owned pole attachment rate, are not just and reasonable. Consolidated’s rates greatly exceed the rates produced using the Federal Communications Commission’s (“FCC’s”) cable rate formula<sup>9</sup> and the methodology for calculating the net book value of these poles as determined by the Commission in Order No. 26,729 in the Pole Transfer Docket. Petitioners have demonstrated that the FCC’s cable rate formula complies with the Commission’s rate review standards,<sup>10</sup> and have calculated just and reasonable rates using that formula, the same 2020 ARMIS data

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<sup>5</sup> Exhibit 2, Bates pp. 04-05.

<sup>6</sup> Order No. 25, 534 (Oct. 22, 2021), granting NECTA’s Motion to Compel.

<sup>7</sup> Exhibit 2, Bates p. 06.

<sup>8</sup> See Exhibit 4, Bates p. 016 (Consolidated’s pole attachment rates were inherited as part of its acquisition of FairPoint Communications in 2017; its current rates are not calculated using a specific formula).

<sup>9</sup> See Exhibit 3, Bates p. 024.

<sup>10</sup> See Exhibit 3, Bates pp. 012-022.

provided by Consolidated in response to Commission Order No. 25, 534 (Oct. 22, 2021), and actual pole height data provided by Eversource in the Pole Transfer Docket (*i.e.*, Exhibit 15).

This is the only rate calculation in the instant record.<sup>11</sup>

In the Pole Transfer Docket, the Commission relied on the 2020 ARMIS data in determining the manner in which Consolidated's poles should be valued for purposes of setting Eversource's rates, including its pole attachment rates.<sup>12</sup> Petitioners respectfully submit that the valuation of Consolidated's pole assets in the instant docket for the purpose of setting pole attachment rates cannot differ from the methodology valuation established in the Pole Transfer Docket.<sup>13</sup> Accordingly, Petitioners respectfully request that the Commission order Consolidated to reduce its annual pole attachment rates from \$11.67 to \$5.33 for attachments on solely owned poles, and from \$6.84 to \$2.67 for attachments on jointly owned poles, and order that these rates would apply to poles transferred by Consolidated to Eversource pursuant to the transaction contemplated in the Pole Transfer Docket, if that transaction is consummated.

In addition, Petitioners request that the Commission order Consolidated to cease billing Petitioners for JU charges, or any similar charges, for poles in which Consolidated has no ownership interest. Petitioners also request that, in accordance with N.H. Admin. R. Puc 1303.07 and 1303.08, the Commission order Consolidated to refund with interest to Petitioners the amounts they paid in excess of the just and reasonable rates and charges established by the Commission in this docket as of the date the Petition was filed, and adjust any unpaid invoices issued on or after that date to reflect the rates established in this docket.

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<sup>11</sup> See Exhibit 3, Bates pp. 024.; *see also* Exhibit 13, Bates pp. 07-012.

<sup>12</sup> Order No. 26,772 (Feb. 8, 2023), p. 7.

<sup>13</sup> This is particularly so, given that Eversource proposes to continue to charge Consolidated's current rates for the transferred poles. *See* DE 21-020. Exhibit 51. It is Petitioners' understanding that these rates will be in effect for at least two years after the transfer occurs.

## II. THE COMMISSION'S JURISDICTION AND AUTHORITY

The Commission's jurisdiction over Consolidated's pole attachment rates exists pursuant to 47 U.S.C. §224 (c), as the Commission has certified to the FCC that appropriate rules implementing the Commission's regulatory authority over pole attachments are effective.<sup>14</sup> The Commission's authority under RSA 374:34-a, II includes the regulation and enforcement of pole attachment rates, charges, terms, and conditions that are just and reasonable. The Commission's regulatory authority allows it to review pole attachment rates after parties have entered into and begun performance of an attachment agreement, and to review the agreement with particular emphasis on the rate setting provisions, to determine if they are just and reasonable.<sup>15</sup> "To the extent any terms may be found to be unjust or unreasonable, the Commission will...order revisions to the agreement."<sup>16</sup>

The Commission's jurisdiction to hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments<sup>17</sup> exists with respect to a particular matter only insofar as the Commission takes final action on a complaint regarding such matter within 180 days after the complaint is filed with the Commission, or within the applicable period prescribed in its rules for such final action, if such period does not extend beyond 365 days after the filing of the complaint.<sup>18</sup> Because the Commission's pole attachment rules do not contain a deadline for deciding rate disputes, the

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<sup>14</sup> *States That Have Certified That They Regulate Pole Attachments*, Public Notice, 35 FCC Rcd. 2784 (2020); *see also New Hampshire Joins States That Have Certified That They Regulate Pole Attachments*, 23 FCC Rcd 2796 (2008).

<sup>15</sup> Order No. 26,764 (Jan. 23, 2023), p. 4 citing *Time Warner Entm't Co., L.P.*, Order No. 25,387 (July 3, 2012).

<sup>16</sup> *Id.*

<sup>17</sup> RSA 374:34-a, VII; N.H. Code Admin. R. Puc 1303.03.

<sup>18</sup> 47 U.S.C. §224 (c)(3).

Commission must resolve this dispute within 180 days of the date the Petition was filed, *i.e.* on or before February 17, 2023.

### III. THE COMMISSION'S RATE REVIEW STANDARDS

N.H. Code Admin. R. Puc 1303.06(a) requires that the Commission consider the following six factors in determining just and reasonable rates for the pole attachments of cable operators such as Petitioners:<sup>19</sup>

- (1) Relevant federal, state, or local laws, rules, and decisions;
- (2) The impact on competitive alternatives;
- (3) The potential impact on the pole owner and its customers;
- (4) The potential impact on the deployment of broadband services;
- (5) The formulae adopted by the FCC in 47 C.F.R. § 1.1406(d) in effect on October 1, 2022; and
- (6) Any other interests of the subscribers and users of the services offered via such attachments or consumers of any pole owner provide such attachments, as may be raised.

Petitioners' witness, Patricia Kravtin, a leading expert<sup>20</sup> on pole attachment rates, has discussed at length all six rate review factors and why the FCC's cable rate formula, discussed in more detail in Section IV. A. below, satisfies each.<sup>21</sup> Specifically, Ms. Kravtin's prefiled direct testimony (Exhibit 3) at Bates pages 12 through 22, comprehensively addresses each of the six rate review standards and explains that the FCC's cable rate formula meets each one. Ms.

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<sup>19</sup> Petitioners are all cable television operators. *See* Exhibit 5, Bates p. 002, ¶ 3; Exhibit 6, Bates p. 002, ¶ 3; and Exhibit 7, Bates p. 02, ¶ 3.

<sup>20</sup> *See* Exhibit 3, Bates pp. 04-05 and Exhibit 4, Bates pp. 01-015 for a detailed description of Ms. Kravtin's background, experience and qualifications.

<sup>21</sup> Exhibit 3, Bates pp. 012-022; *see also* Exhibit 1, Bates pp. 020-030.

Kravtin has explained in comprehensive detail why the rates produced by the widely-used FCC cable rate formula are just and reasonable. Specifically, Ms. Kravtin explains that the cable rate formula is appropriate for setting just and reasonable pole attachment rates because it is designed in a manner that is fully consistent with principles of cost causation and economically efficient pricing, is fully compensatory to the pole owner, and can be applied transparently in a simple, expeditious and unified manner (assuming that the pole owner provides necessary information in its possession).<sup>22</sup> The rates produced by the cable rate formula, when combined with the initial up-front make-ready charges that cover a pole owner's true incremental costs for accommodating third-party attachers, provide contribution over and above economically efficient prices,<sup>23</sup> and therefore those combined rates and charges are more than just and reasonable.

Ms. Kravtin also explains that the FCC's cable rate formula is preferable to the FCC's "telecom" formula (which is not binding on states such as New Hampshire that regulate pole attachment rates), because the cable rate formula involves a less complicated calculation of the space allocation factor.<sup>24</sup> In addition, because the FCC brought the two formulae into parity in 2015 such that there is effectively very little difference between them, there is no need for this Commission to apply the more complicated telecom formula in lieu of the more widely applied cable rate formula.<sup>25</sup>

Consolidated, on the other hand, has not presented any analysis or substantive discussion of how its current rates meet all six of the Commission's rate factors. Consolidated also has not provided a detailed rate calculation or a fact-based rate analysis that can compare with the cost-based, principled analysis provided by Ms. Kravtin. Instead, Consolidated argues that when the

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<sup>22</sup> Exhibit 3, Bates p. 011, lines 10-14.

<sup>23</sup> Exhibit 3, Bates p. 09, lines 13-18.

<sup>24</sup> Exhibit 4, Bates pp. 022-023.

<sup>25</sup> *Id.*, see also Exhibit 3, Bates p. 010, lines 1-5; Transcript, pp. 38-40.



Commission promulgated its pole attachment rules, it had the ability to dictate that the FCC cable rate formula was the only method for determining a just and reasonable rate, but it did not.<sup>26</sup> In addition, Consolidated argues that because its rates and JU charges appear in its pole attachment agreements with the Petitioners, the Petitioners must continue to pay those rates and charges even if they are unjust and unreasonable, and the only mechanism for setting new rates and charges is for the Petitioners to terminate their pole attachment agreements and renegotiate them. Consolidated also argues that the FCC's cable rate formula unfairly allocates a small percentage of Consolidated's total annual pole costs to the attaching entity. Consolidated asserts that this allocation does not reflect the attacher's actual use of the pole because it only allocates costs associated with the attacher's proportion of usable space, including safety space which Consolidated asserts is not actually usable to Consolidated. Each of these arguments falls woefully short for several reasons.

First, as noted above, Consolidated has not presented any detailed analysis or substantive discussion of how its rates meet all six of the Commission's rate review factors, nor has it provided any rate analysis that compares substantively to the rate analysis provided by Ms. Kravtin in her prefiled direct testimony and surrebuttal testimony. In addition, at hearing, Ms. Kravtin explained in detail why the use of the FCC's cable rate formula provides a level playing field for attachers that must both compete against the pole owner, and depend on the pole owner for access to a facility that is essential for providing services.<sup>27</sup> On the other hand, Ms. Davis's defense of Consolidated's current non-cost based rates<sup>28</sup> is inconsistent with the

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<sup>26</sup> Exhibit 19, Bates p. 010, lines 9-12. While it may be true that the Commission did not adopt the FCC's cable rate methodology as the only rate standard, Consolidated has not provided any evidence, factual support or quantification justifying an adjustment to the rate produced by the FCC's cable rate formula.

<sup>27</sup> Transcript, pp. 34-36.

<sup>28</sup> See Exhibit 19, Bates p. 012, line 19- p. 013, line 14.

fundamental economic principle that the closer rates are set to their true underlying economic costs, the more efficient and equitable the market outcome will be for all stakeholders.

Moreover, during her testimony, Ms. Davis failed to recognize the fact that Consolidated, as sole and joint pole owner, enjoys rights and privileges of access to its poles that are not available to Petitioners as lessees.<sup>29</sup> Consolidated's refusal to negotiate a resolution of the instant rate dispute further underscores this leverage. When Ms. Kravtin's testimony is compared with Ms. Davis's, it is clear that the weight of the evidence in this case supports a finding that the FCC's cable rate formula produces a pole attachment rate that is not only just and reasonable, but also consistent with all of the factors the Commission must consider under its rate review standards.<sup>30</sup>

Second, Consolidated's argument that the Petitioners' pole attachment agreements require that Petitioners must terminate and renegotiate their pole attachment agreements in order to obtain modification of the rates and charges specified in the agreements is unreasonable and has been properly rejected by the Commission in Order No. 26,764 (Jan. 23, 2023). In denying Consolidated's Motion to Dismiss the instant proceeding, the Commission correctly found that it has the authority under RSA 374:34-a and Puc 1303.02 and 1303.03 to review the terms of the parties' pole attachment agreements to determine if the rates contained therein are just and reasonable in light of relevant and applicable federal law, and can order revisions to the

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<sup>29</sup> Transcript, p. 71- p, 72, line 12.

<sup>30</sup> If the Commission finds that the FCC's cable rate formula produces rates that are just and reasonable, but does not meet all six of the rate review standards in its rules, the Commission may nonetheless apply that formula to resolve the instant dispute and set Consolidated's rates in this docket, as the Commission has the authority to waive its rules if it finds the waiver serves the public interest and will not disrupt the orderly and efficient matters before the Commission. N.H. Code Admin. R. Puc 201.05.(a). The public interest standard can be met if the purpose of the rule would be satisfied using an alternate method. N.H. Code Admin. R. Puc 201.05(b)(2). Here, because the purpose of the rules is to provide standards for setting just and reasonable pole attachment rates, and because the Petitioners have amply demonstrated that the FCC's cable rate formula provides a widely-accepted and appropriate formula for calculating just and reasonable rates, the Commission may properly adopt that formula to resolve the parties' dispute in lieu of applying or analyzing all six rate review standards. Further underscoring the point that the FCC's cable rate methodology is consistent with the public interest is the fact that the neighboring states of Maine, Vermont and Massachusetts, as well as Connecticut, New York and New Jersey, all apply the FCC's cable rate formula. Exhibit 3, Bates p. 015, lines 1-3.

agreements if the Commission finds any terms to be unjust or unreasonable.<sup>31</sup> In addition, Consolidated's argument ignores the fact that the "terminate and renegotiate" provision of section 3.1.2 of the pole attachment agreements only applies when Consolidated changes its rates.<sup>32</sup> This argument also overlooks the dispute resolution and severability provisions of the Petitioners' pole attachment agreements, all of which support the Petitioners' position that they may dispute Consolidated's pole attachment rates as unjust and unreasonable, notwithstanding that those rates appear in Petitioners' pole attachment agreements.<sup>33</sup> Consolidated's position would mean that, as pole asset values and characteristics changed over time, a pole attacher would never be able to challenge its rates even if they were substantially higher than the just and reasonable pole costs, unless Consolidated voluntarily chose to change the rates. This result is unjust and unreasonable, and therefore should be rejected.

Further, Consolidated's position that the only mechanism for setting new rates and charges is for Petitioners to terminate and renegotiate their entire pole attachment agreements is very concerning, given Consolidated's refusal to negotiate<sup>34</sup> a resolution to the instant dispute, and refusal to provide Petitioners with information solely within its possession that is required to perform rate calculations.<sup>35</sup> Although Ms. Davis testified that Consolidated has never removed attachments without explicit approval of any commission,<sup>36</sup> she also admitted that Consolidated could take that action in the event a pole attachment agreement was no longer in effect and a new one had not been executed.<sup>37</sup> In fact, such removal authority is expressly stated in paragraphs

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<sup>31</sup> Order No. 26, 764 (Jan. 23, 2023) citing *Time Warner Entm't Co., L.P.*, Order No. 25,378 (July 3, 2012).

<sup>32</sup> See Exhibit 5, Bates pp. 011-012; Exhibit 6, Bates pp. 018-019; and Exhibit 7, Bates pp. 011-012.

<sup>33</sup> See Exhibit 1, ¶¶ 80-83.

<sup>34</sup> Order No. 26, 764 (Jan. 23, 2023), p. 3 ("Consolidated has refused to negotiate new rates with the Petitioners.")

<sup>35</sup> Exhibit 1, Bates p. 016, ¶ 31.

<sup>36</sup> Transcript, p. 101, lines 16-17.

<sup>37</sup> Transcript, p. 100, lines 11-23.

3.1.2 and 10.3.1 of the Petitioners' pole attachment agreements.<sup>38</sup> Given these facts, Petitioners cannot reasonably assume that if they terminated their pole attachment agreements, they would be able to negotiate new ones with Consolidated within 60 days, which would then expose them to the possibility of having to remove their facilities from Consolidated's poles.<sup>39</sup> In addition, the lack of a pole attachment agreement would mean that there would be no provisions governing the parties' business relationship, including the applicable pole attachment rate. This untenable position proves Ms. Kravtin's point that pole owners possess monopoly leverage over pole attachers.<sup>40</sup>

Lastly, Consolidated's argument that the FCC's cable rate formula is unfair to Consolidated because it only allocates a small percentage of Consolidated's total annual pole costs to an attaching entity fails to recognize that the FCC's cable rate formula has been repeatedly upheld by the courts as providing just and adequate compensation to pole owners.<sup>41</sup> Consolidated also claims its current rates are fair because they recover only 15% of the costs of a bare pole, leaving Consolidated (or joint owners, in some cases) to "absorb" 85% of the total costs of a bare pole.<sup>42</sup> However, this argument reflects Consolidated's misunderstanding of how the FCC's cable rate formula works. An overview of the entire formula is set forth below in Section IV. A. With respect to the particular issue of the formula's allocation of pole costs based on an attacher's usable space, Ms. Kravtin's surrebuttal testimony explains:

The defining feature of the FCC cable rate formula is that it allocates the entire cost of the pole (for *both* "usable" and "unusable" space on the pole) based on each attacher's direct occupancy of space in proportion to the total space on the pole which is available for attachments. This type of

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<sup>38</sup> Exhibit 5, Bates pp. 012 and 020-021; Exhibit 6, Bates pp. 018-019, and 029-030; and Exhibit 7, Bates pp. 011-012, and 022-023.

<sup>39</sup> *Id.*

<sup>40</sup> Transcript, p. 35, lines 10-15.

<sup>41</sup> See *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245, 253-54 (1987) and *Alabama Power Company v. Federal Communications Commission*, 311 F.3d 1357, 1368-69 (11th Cir. 2002).

<sup>42</sup> Exhibit 19, Bates p. 013, lines 3-9.

direct cost-based allocator is very commonly applied to leasing arrangements in other sectors of the economy, for example in the commercial and residential real estate sectors. By allocating the costs of the entire pole in direct proportion to the share of usable space occupied by each attacher (over and above any make-ready and other direct reimbursement fees the attacher already pays up front), the FCC cable rate assures full compensation for the costs associated with *both* the usable and unusable space on the pole attributed to the attacher. The proportionate allocator embodied in the FCC cable rate formula is both economically fair and efficient, a feature that underlies its widespread adoption in setting pole attachment rates nationwide historically.<sup>43</sup>

At hearing, there was a discussion about what constitutes “usable space” on a pole.<sup>44</sup> The meaning of the term “usable space” for application of the FCC’s pole attachment formulae is well settled. Under the FCC definition, “usable space means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility.”<sup>45</sup> The portions of a bare pole below ground and up to ground clearance cannot be used for any attachments at any time. The rest of the pole is usable.<sup>46</sup>

With respect to the 40-inch safety space, the FCC determined “[i]t is the presence of the potentially hazardous electric lines that makes the safety space necessary and but for the presence of those lines, the space could be used by cable and telecommunications attachers. The space is usable and is used by the electric utilities.”<sup>47</sup> Ms. Davis acknowledged the potential for attachments to be made in the safety space.<sup>48</sup> However, whether or to what degree the pole

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<sup>43</sup> Exhibit 13, Bates p. 04, lines 7-18.

<sup>44</sup> *See, e.g.*, Transcript, p. 26, lines 10-19; p. 42, lines 11-16; p. 43, lines 4-11. For the sake of clarity, the Petitioners have included a short discussion above regarding the meaning of the term.

<sup>45</sup> 47 C.F.R. §1.1402(c).

<sup>46</sup> Report and Order, FCC 00-116, In the Matter of Amendment of Rules and Policies Governing Pole Attachments, CS Docket 97-98 (rel. Apr. 3, 2000) at ¶22. For the Commission’s convenience, paragraphs 16-24 of the Report and Order are attached.

<sup>47</sup> *Id.*

<sup>48</sup> Transcript, p. 76, lines 17-24; p. 77, lines 5-12.

owner chooses to make attachments within the safety space or any other usable space on the pole for that matter is irrelevant to the classification of space on a pole that can be used for attachments (*i.e.*, what is “usable” to the pole owner). Also, per the FCC, 18 feet is a “well established presumption of an average ground clearance.”<sup>49</sup> Combined with the standard 6 feet of below grade support for the average joint use pole, total unusable space for joint use poles is 24 feet. Accordingly, the usable space on an average 37.5-foot pole is 13.5 feet (37.5 feet less 24 feet), and usable space on a 39-foot pole is 15 feet (39 feet less 24 feet), and the space occupied by an attacher is presumed to be 1 foot.<sup>50</sup> These values are used in determining the “space allocation factor” in the FCC’s cable rate formula (*i.e.*, percentage of fully allocated costs recoverable from attachers) and equate to 7.41% for a 37.5 foot pole (1/13.5 ft), and 6.67% for a 39 foot pole (1/15 ft).<sup>51</sup> As explained below, Ms. Kravtin properly included a 39-foot average pole height in her rate calculation given that actual pole height data from Eversource was available to rebut the FCC’s 37.5-foot height presumption. Accordingly, a space allocation factor of 6.67% is appropriate for use in calculating Consolidated’s rates under the FCC’s cable rate formula.

Consolidated’s claim that it is not adequately compensated by rates produced using the FCC’s cable rate formula also ignores the value of the ownership, control, and access privileges and rights possessed by pole owners that far exceed those of a mere attacher/lessee. Consolidated’s pole ownership provides it with multiple competitive advantages in deploying broadband and other services. For example, Consolidated avoids the time, expense, and uncertainty associated with applying for the pole attachment licenses that third-party attachers

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<sup>49</sup> *Id.* at ¶24.

<sup>50</sup> Exhibit 4, Bates p. 021.

<sup>51</sup> *Id.*, Bates pp. 021-022.

must secure in order to make their attachments to Consolidated poles. In view of the foregoing, Consolidated's argument that its current rates treat both Consolidated and attachers equitably is unfounded.

#### **IV. PETITIONERS PROPERLY APPLIED THE FCC'S CABLE RATE FORMULA TO PRODUCE JUST AND REASONABLE RATES.**

##### **A. Overview of FCC's Cable Rate Formula**

The FCC's cable rate formula is set forth in 47 C.F.R. §1.1406(d)(1). An explanation of this widely used pole attachment rate methodology is contained in Exhibit 4, Bates pages 17 through 23. The formula calculates a *maximum* annual pole attachment rental rate for cable operators by taking the sum of the actual capital costs and operating expenses of the pole owner attributable to the entire pole, expressed on an annual basis, and allocates those costs to the attacher based on the attacher's occupancy of the pole as measured by the usable space on the pole occupied by the attacher.<sup>52</sup> The FCC's cable rate formula consists of three major components: (1) the net bare pole investment expressed on a per pole basis; (2) a carrying charge factor comprised of five distinct cost elements;<sup>53</sup> and (3) a space allocation factor, defined as the percentage of usable space on the pole occupied by an attacher.<sup>54</sup> Exhibit 4 provides a narrative description of how the formula uses each of these components, and explains how each component is calculated. The application of the formula expressed numerically is contained in Table 1 of Exhibit 3 at Bates page 024.

At hearing, Ms. Davis admitted that Exhibit 3, Table 1 shows all of the components of the FCC's cable rate formula and admitted that she had not performed a rate calculation using

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<sup>52</sup> Exhibit 4, Bates p. 018.

<sup>53</sup> These five expense factors are: maintenance; depreciation; administrative; taxes; and overall rate of return. Exhibit 4, Bates p. 020.

<sup>54</sup> Exhibit 4, Bates p. 018.

this same methodology.<sup>55</sup> Although Ms. Davis agreed that the calculation contained in Table 1 accurately reflects the FCC’s cable rate methodology, she did not agree with some of the inputs used by Ms. Kravtin in her rate calculation. More specifically, Ms. Davis disputed Ms. Kravtin’s use of Consolidated’s 2020 ARMIS data (which was provided by Consolidated in response to Order No. 25,534 in the Pole Transfer Docket), GAAP<sup>56</sup> accounting depreciation (which is taken from Consolidated’s 2020 ARMIS data), and a 39-foot average pole height (which, as explained below, Ms. Kravtin computed using actual pole height data provided by Eversource in the Pole Transfer Docket).

For the reasons discussed more fully below, Ms. Kravtin has properly calculated Consolidated’s pole attachment rates by applying a principled, cost-based formulaic methodology that produces a just and reasonable result. Consolidated has failed to provide any comparable analysis of its rates, choosing instead to improperly make one adjustment to Ms. Kravtin’s formulaic approach by substituting an unsupported “regulatory depreciation” figure for the GAAP-based figure that Consolidated itself provided to the Commission in the Pole Transfer Docket. As explained in Ms. Kravtin’s surrebuttal testimony and below, Ms. Davis’s depreciation adjustment is improper, and therefore cannot be used when calculating Consolidated’s rates.

**B. Consolidated’s 2020 ARMIS Report Data Should Be Used to Calculate Consolidated’s Pole Attachment Rates**

Ms. Kravtin’s rate calculations in this docket use the same cost data, the 2020 ARMIS Report, provided by Consolidated in response to Commission Order No. 26,534 in the Pole

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<sup>55</sup> Transcript, p. 80, lines 13-15.

<sup>56</sup> Generally Accepted Accounting Principles.



Transfer Docket.<sup>57</sup> The 2020 ARMIS Report is intended to show the information Consolidated would have reported to the FCC had Consolidated been required to file such a report.<sup>58</sup>

Ms. Kravtin used this 2020 data to support her calculation of the net book value of Consolidated's poles in the Pole Transfer Docket. The Commission accepted Ms. Kravtin's methodology for calculating the net book value of Consolidated's poles, including her depreciation rate schedule.<sup>59</sup> The 2020 ARMIS Report figures used by Ms. Kravtin for purposes of calculating the net book value of Consolidated's transferred poles in the Pole Transfer Docket are the same as those she used in this docket to calculate Consolidated's total net book value figure for all of Consolidated's poles. Given that the Commission found Ms. Kravtin's methodology for determining the net book value of Consolidated's poles appropriate for use by Eversource in setting its pole attachment rates,<sup>60</sup> the same methodology should be used for calculating the net book value figure that is used in the pole attachment rate calculation in the instant docket.

Utility ratemaking principles and the standards of transparency, uniformity, justness and reasonableness which underly those ratemaking principles, all require that the net book value of Consolidated's poles determined by the Commission in the Pole Transfer Docket for purposes of Eversource's pole attachment rates should also be used for Consolidated's pole attachment rates. Moreover, the 2020 ARMIS Report is the most recent publicly available information concerning Consolidated's costs and is therefore the appropriate data to use. The appropriateness of using that data is underscored by the tables contained in Ms. Kravtin's surrebuttal testimony, Revised

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<sup>57</sup> See Exhibit 3, Bates p. 025, line 18 through p. 026, line 2.

<sup>58</sup> *Id.*, Bates p. 026, lines 3 – 5.

<sup>59</sup> Order No. 26,729 (Nov. 18, 2022), p. 17.

<sup>60</sup> Order No. 26,772 (Feb. 8, 2023), p. 7.

Exhibit 13, at Bates page 17, which provide a comparison of the values contained in ARMIS Reports actually provided to the FCC in 2017 and 2018,<sup>61</sup> with the 2020 ARMIS Report filed by Consolidated in the Pole Transfer Docket, as well as Ms. Davis's data. Ms. Kravtin reviewed ARMIS data actually reported by FairPoint (Consolidated's predecessor) to the FCC for 2017, as well as the ARMIS data reported to the FCC by Consolidated for 2018.<sup>62</sup> The amounts shown on line 4 of Table 2 are the net pole investments from the 2017 and 2018 ARMIS Reports, which are \$21,007,000 and \$17,279,000, respectively. These amounts are more closely aligned with the net pole investment amount of \$22,900,000 shown in Table 1, which is derived from the 2020 ARMIS report Consolidated provided in the Pole Transfer Docket, than the value of \$48,076,000 that Ms. Davis provided in this docket. Accordingly, it is proper to use the 2020 ARMIS Report data to calculate Consolidated's pole attachment rates in this docket.

Although Ms. Davis argues that Ms. Kravtin should use the most recent Consolidated cost data (currently 2021 data as 2022 data is not yet available), she concedes that a cost analysis for 2021 would not produce a useful result because of the pending pole sale transaction with Eversource.<sup>63</sup> Ms. Davis's argument is also unpersuasive as it fails to consider that it is not unusual for pole attachment rates to be set based upon two years' prior data, as in the case of Eversource.<sup>64</sup> In addition, Ms. Davis has not calculated a just and reasonable rate for Consolidated using 2021 data, nor has she provided any 2021 cost data. As Ms. Kravtin has

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<sup>61</sup> In a letter to Comcast dated May 20, 2022, Ms. Davis asserts that Consolidated has provided the 2017 ARMIS Report, but that "Consolidated does not have any subsequent ARMIS Reports." Exhibit 7, Bates p. 082. This statement was not accurate, as Consolidated filed a 2018 ARMIS Report with the FCC. *See* Exhibit 14, Bates pp. 039-041; Exhibit 20, Bates p. 03.

<sup>62</sup> *See* Exhibit 13, Bates p. 015. Please note that while Ms. Kravtin's surrebuttal testimony refers to 2018 ARMIS data contained in Attachment PDK Surrebuttal-6, the 2018 data was inadvertently omitted from that Attachment which is part of Exhibit 14. However, the 2018 ARMIS data upon which Ms. Kravtin relied was provided in response to a Commission Record Request and has been marked as Exhibit 20.

<sup>63</sup> Petitioners are unaware of whether Consolidated and Eversource intend to consummate the pole asset transfer transaction.

<sup>64</sup> *See* Exhibit 14, Bates p. 036.

indicated, the FCC's rate methodology allows a pole owner to update regulated pole attachment rates annually to reflect current reported cost data, update pole counts, and current pole height, thereby ensuring the proper matching of costs with the utility's current pole population.<sup>65</sup>

Consolidated had the opportunity to provide 2021 data to update the values reflected in

Ms. Kravtin's rate calculation but chose not to. In view of the foregoing, Ms. Kravtin's use of the 2020 ARMIS Report data is appropriate, just and reasonable.

### **C. GAAP Accounting Figures, Applied Consistently, May Properly Be Used for Calculating Consolidated's Pole Attachment Rates**

Without providing any explanation for her position, Ms. Davis asserts that just and reasonable pole attachment rates should be based on "regulatory depreciation and not GAAP accelerated depreciation."<sup>66</sup> In addition, Ms. Davis has provided only a shorthand analysis purporting to show the net cost of a bare pole using "regulatory depreciation" rather than the GAAP depreciation figure used by Ms. Kravtin.<sup>67</sup> In her calculation reflected in Exhibit 17, Ms. Davis asserts that the net cost of a bare pole is \$183.20, which is substantially greater than Ms. Kravtin's figure of \$86.38.<sup>68</sup> Ms. Davis goes further and includes two pole attachment rates in Exhibit 17 without showing the corresponding calculation similar to that provided by Ms. Kravtin in Table 1 of Exhibit 3. Ms. Kravtin's Rebuttal Testimony, on the other hand, explains in detail why using GAAP accounting data for Consolidated, applied consistently, inclusive of accumulated depreciation for pole is appropriate, and why Ms. Davis's revised

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<sup>65</sup> Exhibit 23, Bates p. 008, lines 2-4.

<sup>66</sup> Exhibit 19, Bates p. 014, lines 2-3.

<sup>67</sup> Exhibit 19, Bates p.014, lines 16-18; *see also* Exhibit 17.

<sup>68</sup> Exhibit 19, Bates p. 014, lines 18-19.

“regulatory depreciation” figure should not be used in the calculation of Consolidated’s pole attachment rates.<sup>69</sup>

First, citing FCC decision 17-15 (rel. Feb. 24, 2017),<sup>70</sup> Ms. Kravtin notes that the FCC permits the use of GAAP accounting for purposes of calculating just and reasonable pole attachment rates in lieu of USOA<sup>71</sup> regulatory accounting, including for accumulated depreciation reserves, but does not permit mixing and matching figures from each accounting method.<sup>72</sup> Second, Ms. Kravtin notes that the information provided by Consolidated in the 2020 ARMIS Report it filed in the Pole Transfer Docket is based on GAAP accounting as recorded on Consolidated’s books.<sup>73</sup> Therefore, because Ms. Kravtin’s rate calculation is based on the GAAP accounting data recorded on Consolidated’s book of accounts and as provided in the Pole Transfer Docket, there is no validity to Ms. Davis’s argument that Ms. Kravtin should have relied on a different USOA-based depreciation number (derived by Ms. Davis using another unsubstantiated methodology) in isolation from other formula inputs that Ms. Davis herself did not revise for purposes of Attachment SD-1 of her rebuttal testimony.<sup>74</sup>

Third, Ms. Kravtin explains that Ms. Davis’s regulatory depreciation figure should not be used in place of Ms. Kravtin’s GAAP-based depreciation value because Ms. Davis’s figure is unsourced, unverified, and subject to serious calculation errors<sup>75</sup> and oversimplifications

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<sup>69</sup> Exhibit 13, Bates p.08, line 5 – Bates p. 011, line 10; and Bates p. 013, line 1 – p. 018, line 8.

<sup>70</sup> A copy of this FCC decision is contained in Exhibit 14, Bates pp. 01-035.

<sup>71</sup> Uniform System of Accounts.

<sup>72</sup> Exhibit 13, Bates p. 08, lines 7-17.

<sup>73</sup> *Id.*, Bates p. 09, line 18 – Bates p. 09, line 6.

<sup>74</sup> *Id.*, lines 6-10.

<sup>75</sup> As one prime example, in calculating “regulatory depreciation,” Ms. Davis applies the regulatory depreciation rate of 5.8% to an unsourced GAAP *net* book value figure of \$40.5 million, whereas, as Ms. Kravtin testified, the 5.8% regulatory depreciation rate is properly applied to the regulatory *gross* book value as shown in Ms. Kravtin’s Surrebuttal Table 2. Transcript, p. 58, lines 7-20.

regarding retired plant.<sup>76</sup> Fourth, Ms. Kravtin notes that the net book value calculation she and Department of Energy Witness Mr. Eckberg made in the Pole Transfer Docket already “unwound” or adjusted for the extraordinary/accelerated GAAP plant and depreciation-related adjustments that Consolidated made in anticipation of the sale of its poles to Eversource.<sup>77</sup> Accordingly, further selective adjustments to Consolidated’s GAAP accounting-based figures for depreciation beyond those already made by Consolidated in developing the 2020 ARMIS Report are neither appropriate nor warranted.

Lastly, Ms. Kravtin explains that the rate she calculated using Consolidated’s 2020 ARMIS Report data and the FCC’s cable rate formula is higher than it would have been if she had applied the so-called “Implementation Rate Difference” (“IRD”) credit required by the FCC for carriers that switched from regulatory to GAAP accounting.<sup>78</sup> The IRD is a credit offset to the calculated pole attachment rate for a period of 12 years following the switchover to GAAP, which the FCC adopted to minimize any potential rate shock to pole rates resulting from significant revaluations of pole plant and accumulated depreciation reserves under GAAP accounting, the combined effect of which typically increases the net per pole investment component of the rate formula.<sup>79</sup> Ms. Kravtin did not apply the IRD credit figure because Consolidated did not provide it.<sup>80</sup> However, Ms. Kravtin states, based on her experience, that she would expect application of the IRD to reduce her calculated pole attachment rate for Consolidated by as much as \$1 to \$2.<sup>81</sup> Thus, the fact that an IRD credit was not applied by Ms.

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<sup>76</sup> *Id.*, lines 11-17, and footnote 15.

<sup>77</sup> Exhibit 13, Bates p. 010, lines 2-5.

<sup>78</sup> Exhibit 13, Bates p. 010, lines 12-17.

<sup>79</sup> *Id.*, line 16 -Bates p. 011, line 2.

<sup>80</sup> Exhibit 13, Bates p. 011, footnote 20.

<sup>81</sup> *Id.*

Kravtin in her rate calculation further refutes Ms. Davis's claims that Ms. Kravtin's rates are too low.

#### **D. Consolidated's Net Bare Pole Cost Analysis Is Seriously Flawed**

In addition to the inappropriate depreciation adjustment discussed above, Ms. Davis's analysis reflected in Exhibit 17 contain further errors that render that exhibit meaningless for purposes of setting a just and reasonable rate for Consolidated. In particular, the revised net cost of a bare pole presented by Ms. Davis in Exhibit 17 reflects a selective and improper mix of GAAP and purported USOA regulatory accounting figures and lacks sufficient source data. That exhibit also lacks a recalculated carrying charge factor, which is required in a proper calculation of the cable rate, since the carrying charge elements are a function of net investment.<sup>82</sup>

Ms. Davis's net bare pole cost calculation is called into further question when it is compared with Ms. Kravtin's calculations using 2017, 2018 and 2020 ARMIS data.

Ms. Kravtin's pole cost calculations for each of these three years fall within a similar range, *i.e.* between \$64.3 and \$86.38.<sup>83</sup> However, those amounts are less than half the amounts calculated by Ms. Davis, *i.e.*, \$181.35 in her originally filed Attachment SD-1,<sup>84</sup> and \$183.20 in her revised attachment (Exhibit 17). Given the relative consistency among Ms. Kravtin's calculations, and the wide disparity between Ms. Kravtin's net bare pole cost calculations and Ms. Davis's figures (which lack the supporting details and/or explanation similar to that provided by Ms. Kravtin for her calculations), Ms. Davis's figures cannot be used to substantiate Consolidated's current pole

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<sup>82</sup> Exhibit 13, Bates p. 013, lines 13-15.

<sup>83</sup> Revised Exhibit 13, Bates p. 017.

<sup>84</sup> *Id.*

attachment rates, which were inherited from FairPoint and were not set according to any particular formula.<sup>85</sup>

### **E. Petitioners' Expert Properly Used an Average 39-Foot Pole Height Factor In Calculating Consolidated's Rates**

Average pole height is one of the key inputs in the FCC's cable rate formulae, as it is used in the calculation of usable space. In 1979, the FCC found there was a consensus at the time that the most commonly used poles were 35 and 40 feet high, and permitted pole owners to use the arithmetic average pole height of 37.5 feet for the purpose of determining the usable space on a pole.<sup>86</sup> The FCC stated that where there is a large number of poles and a survey or inspection of all poles is impractical or unreasonable, a survey that yields a statistically reliable result would suffice for purposes of rebutting the presumption.<sup>87</sup> The pole owner may then respond with its own properly substantiated survey.<sup>88</sup>

Petitioners initiated their dispute concerning Consolidated's pole attachment rates through their membership organization, NECTA, by letter dated October 18, 2021.<sup>89</sup> In that letter, Consolidated was asked to provide all supporting documentation for its rates.<sup>90</sup> In a follow-up rate dispute letter to Consolidated dated May 6, 2022, Comcast specifically asked Consolidated to provide its plant records showing pole heights for its solely owned and jointly owned poles.<sup>91</sup> Consolidated's response dated May 20, 2022, stated that "[w]ith respect to the

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<sup>85</sup> Exhibit 4, Bates p. 016.

<sup>86</sup> In the Matter of Adoption of Rules for the Regulation of CATV Pole Attachments, FCC Docket 78-144, Release No. FCC 79-308, 72 F.C.C.2d 59 \*; 1979 FCC LEXIS 374 \*\*; (rel. May 23, 1979), ¶ 21. For the Commission's convenience, paragraph 21 of the Report and Order is attached.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Exhibit 2, Bates p. 03.

<sup>90</sup> *Id.*

<sup>91</sup> Exhibit 7, Bates pp. 078-079.

information that Comcast requests in its letter, Consolidated has provided all of the information that it has in its possession.”<sup>92</sup> However, this clearly is not the case because, as acknowledged at hearing by Consolidated’s witness, Ms. Davis, Consolidated possesses pole height information, but according to Ms. Davis, it may not be easy to “get at.”<sup>93</sup> Moreover, Consolidated’s response to Commission Record Request #2 (Exhibit 21 in this docket) contains height data for Consolidated poles installed during the years 2017 through 2020.

In the absence of the requested pole height information from Consolidated, Petitioner’s expert, Ms. Kravtin, used actual pole height data from Eversource, and determined that it would be proper to use a 39-foot average pole height in calculating the just and reasonable annual rate under the FCC cable formula for an attachment to Consolidated’s poles. As explained in her prefiled direct testimony and surrebuttal testimony, Ms. Kravtin derived the 39-foot average pole height using actual pole data produced in an Excel spreadsheet provided by Eversource in response to a data request by the Department of Energy in the Pole Transfer Docket.<sup>94</sup> The spreadsheet, Exhibit 15 in this docket, contains a pole-by-pole listing of the poles inspected by Eversource in 2020, and includes actual pole height information for a majority of those poles. Ms. Kravtin performed a straightforward calculation of summing the individual pole heights, and then dividing that total sum by the total number of poles with pole height information (30,219) to arrive at an average pole height of 39 feet.<sup>95</sup> Ms. Kravtin’s calculation is statistically reliable as

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<sup>92</sup> Exhibit 7, Bates p. 082.

<sup>93</sup> Transcript, p. 087, lines 14-17.

<sup>94</sup> Exhibit 3, Bates p. 025; Exhibit 13, Bates pp. 011-012.

<sup>95</sup> Exhibit 13, Bates p. 012, lines 1-2. Note that Exhibit 13, Bates p. 012, footnote 21 references Ms. Kravtin’s worksheet and cell # showing the derivation of her pole height figure. Because that worksheet, which otherwise is an exact copy of the excel spreadsheet (“Staff 3-005b.2020”) provided by Joint Petitioners to the Department of Energy in DE 21-020, was inadvertently omitted from Exhibit 15, a Revised Exhibit 15 containing Ms. Kravtin’s worksheet (i.e. “2020 Pole Inspections (2)”) as well as the original tab (“2020 Pole Inspections”), is submitted herewith. Note also that Ms. Kravtin referenced this worksheet in her testimony at hearing. Transcript, p. 44, lines 14-16.



it uses actual utility data for a very large number of poles, and is more than sufficient to rebut the presumed average 37.5-foot pole height established by the FCC over 40 years ago. The Eversource spreadsheet includes poles from across New Hampshire, including poles owned by Consolidated as well as Eversource and others denoted as jointly used.<sup>96</sup> Ms. Kravtin's 39-foot figure is further supported by Consolidated's own workpaper provided in response to Commission Record Request #2 (Exhibit 21) containing pole height information for poles Consolidated added in the years 2017 to 2020. That data shows that the majority of poles installed are 40 feet or higher consistent with now common pole construction guidelines.<sup>97</sup>

In response to Ms. Kravtin's pole height figure, Consolidated belatedly attempts to rely on the 37.5-foot presumption, and simply asserts, without further explanation, that Ms. Kravtin's calculation is deficient because it is not derived from all of Consolidated's poles throughout New Hampshire.<sup>98</sup> In the first instance, Consolidated's premise that a complete inventory of its poles is required to rebut the presumption is incorrect as explained above. Moreover, for Consolidated to take this position is extremely concerning, given that Ms. Davis acknowledged that Consolidated possesses pole height information,<sup>99</sup> but has not provided that information to the Petitioners despite having been first asked for that information in October 2021 and several times thereafter.<sup>100</sup> Importantly, Consolidated has not disputed the accuracy of the information in the spreadsheet relied on by Ms. Kravtin. Ms. Kravtin's calculation is based on actual utility data. It

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<sup>96</sup> The Petitioners note that the data set used by Ms. Kravtin includes poles in many New Hampshire towns: Hudson, Manchester, Ossipee, Hebron, Sanbornton, North Hampton, Rumney, Canterbury, Hill, Plymouth, Stark, Green's Grant, Unity, Allenstown, Columbia, Bath, Hancock, Peterborough, Roxbury, Marlboro, New Market, Sullivan, Windsor, Lyme, Wentworth's Location, Charlestown, Landaff, and perhaps a few others. The data set includes over 3,000 poles with FairPoint listed as the owner, and over 14,000 with Telephone listed at the owner. The spreadsheet categorizes many of the poles as jointly used.

<sup>97</sup> Exhibit 21.

<sup>98</sup> Exhibit 19, Bates p. 015, lines 6-9.

<sup>99</sup> Transcript, p. 087, lines 14-16.

<sup>100</sup> Exhibit 2, Bates p. 03-08; Exhibit 7, Bates pp. 078- 079.

provides a statistically reliable result, which Consolidated has failed to refute mathematically or by producing countervailing pole height information. In view of the foregoing, the Commission should not sanction Consolidated's refusal to provide key information it possesses and that is necessary to the calculation of the pole rate,<sup>101</sup> either because it was not willing to make the effort to produce it, or because the data might justify a lower rate. Accordingly, and in light of the statistical reliability of the data used by Ms. Kravtin, and the absence of any countervailing information from Consolidated, the Commission must accept the 39-foot pole height as the proper input for the pole rate calculation.

#### **F. The Rates Calculated by Ms. Kravtin Are Just and Reasonable**

Using the FCC's cable rate formula, which Ms. Kravtin has explained is consistent with this Commission's six factor rate review standards, and using a 39 foot pole height based on data actual pole height data described above, Ms. Kravtin has determined that a just and reasonable pole attachment rate for Consolidated's solely owned poles is \$5.33, and a just and reasonable rate for Consolidated's jointly owned poles is \$2.67.<sup>102</sup>

Ms. Kravtin's prefiled direct testimony and surrebuttal testimony provide detailed narrative explanations of the FCC's cable rate formula, her rate calculations, the inputs she used, and why they are all appropriate for calculating Consolidated's pole attachment rates. She has also shown her calculations in numerical form,<sup>103</sup> and provided work papers to support her calculations.<sup>104</sup> Consolidated, on the other hand, has provided no cost-based support of the type provided by Ms. Kravtin, as required for effective pole rate regulation, for its current excessive

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<sup>101</sup> In a complaint proceeding at the FCC, a pole owner must provide the information requested by a cable operator or telecommunications carrier necessary to calculate the pole rate within 30 days of the request. 47 CFR §1.1404(f).

<sup>102</sup> Exhibit 3, Bates p. 024.

<sup>103</sup> *Id.*

<sup>104</sup> Exhibit 20.

rates of \$11.67 and \$6.84, for solely owned and jointly owned poles, respectively. Consolidated has merely argued that it can charge those rates, without regard to their justness or reasonableness, simply because they appear in Petitioners' pole attachment agreements that Consolidated inherited from its predecessor, FairPoint. The Commission correctly rejected this argument because the argument ignores the Commission's statutory and regulatory authority to adjudicate pole rate disputes, and to review the parties' pole attachment agreements to ensure that the rates, terms and conditions of those agreements are just and reasonable.

While the rates Ms. Kravtin calculated are considerably lower than Consolidated's current rates (which are not based on a formula), they are nonetheless just and reasonable because they have been computed in a principled manner using a widely accepted FCC formula which has been upheld by the courts, and using the most recent publicly available cost data for Consolidated which this Commission found acceptable in the Pole Transfer Docket for purposes of establishing a net book value for Consolidated's poles.

In addition, Ms. Kravtin's rates are fair to Consolidated, as they are higher than they would have been had she applied an IRD credit pursuant to FCC rules, which she was unable to do because she lacked that information. Moreover, Ms. Kravtin's rates are higher than those charged by Consolidated in Maine, *i.e.*, \$3.56 for solely owned poles, and \$1.78 for jointly owned poles. Notwithstanding Consolidated's claims to the contrary, its Maine rates are very relevant to the instant proceeding given that the Maine Public Utilities Commission ("PUC") uses the FCC's cable rate formula,<sup>105</sup> and that Consolidated acquired its Maine and New Hampshire poles from FairPoint in 2017 as part of an integrated system that Consolidated

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<sup>105</sup> See Maine PUC Docket No. 2019-00028, Order No. 2019-203 (Nov. 21, 2019) and Maine PUC Rules Ch. 880, Section 4.

operates in Northern New England.<sup>106</sup> In these circumstances, it is entirely appropriate to compare Consolidated's Maine pole attachment rates with its current New Hampshire rates, to determine whether the latter rates are just and reasonable. The comparison reveals that Consolidated's current New Hampshire pole attachment rates are over three times higher than its Maine rates, which is unjust and unreasonable, and leaves New Hampshire with a significant infrastructure cost disadvantage compared to its neighboring state.

It is important to note that in February 2022, Consolidated lowered its Maine solely owned pole rate from \$12.60 to \$3.56, and lowered its jointly owned rate from \$6.30 to \$1.78.<sup>107</sup> Although the Maine PUC adopted the FCC's cable rate formula in 2019,<sup>108</sup> Consolidated did not lower its rates until after counsel for the Maine cable operators gave Consolidated notice of the maximum lawful pole attachment rates chargeable in Maine.<sup>109</sup> Because they are calculated using the FCC's cable rate formula, and are charged by Consolidated for poles it acquired as part of an integrated system that includes its New Hampshire poles, the Maine rates provide a very useful and relevant benchmark against which to assess the justness and reasonableness of Ms. Kravtin's rates.

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<sup>106</sup> *See*

[https://www.consolidated.com/Portals/0/Support/Business%20Support/Network%20Maps/Data%20Sheet\\_NNE%20Fiber%20Network.pdf](https://www.consolidated.com/Portals/0/Support/Business%20Support/Network%20Maps/Data%20Sheet_NNE%20Fiber%20Network.pdf).

<sup>107</sup> Exhibit 7, Bates p. 09.

<sup>108</sup> Exhibit 1, Bates p. 019, ¶ 39.

<sup>109</sup> *Id.*, ¶ 42.

## **V. CONSOLIDATED'S JOINT USE CHARGES SHOULD BE ELIMINATED**

Consolidated imposes Joint Use (“JU”) charges equal to its jointly owned pole rate for poles in which Consolidated holds no ownership interest.<sup>110</sup> In addition to paying Consolidated a JU charge, Petitioners also pay the actual pole owner a solely-owned pole rate.<sup>111</sup> Ms. Davis argues that the JU charges are just and reasonable simply because they appear in Petitioners’ pole attachment agreements and in their pole attachment bills. However, she has provided no substantive justification for these charges. She has not described any services that Consolidated provides, or costs Consolidated incurs with respect to the JU charges, that would justify them. Further, pursuant to the terms of the Petitioners’ pole attachment agreements, the Petitioners are “licensees” and therefore do not meet the definition of “joint user” contained in their agreements, as that definition specifically excludes licensees.<sup>112</sup> Given that: Petitioners are licensees; Consolidated does not own the poles for which it collects JU charges from Petitioners, and does not provide any services to the Petitioners in exchange for the JU charges; and Petitioners already pay a solely owned pole attachment fees to the JU pole owner, the JU charges imposed by Consolidated are unjust and unreasonable and should be eliminated.

## **VI. RELIEF REQUESTED**

Petitioners respectfully request that the Commission establish just and reasonable pole attachment rates for Consolidated and order that Consolidated cease imposing Joint Use Charges or charges by any other name for poles that Consolidated does not own. More specifically, Petitioners respectfully request that the Commission:

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<sup>110</sup> Exhibit 5, Bates p. 02, ¶ 8; Exhibit 6, Bates pp. 02-03, ¶ 8; Exhibit 7, Bates p. 02, ¶ 8.

<sup>111</sup> *Id.*

<sup>112</sup> Exhibit 5, Bates p. 09; Exhibit 6, Bates p. 016; and Exhibit 7, Bates p. 09 (“§1.7 Joint User. A party to whom use of the pole or anchor has been extended by the owner of the facility. The term “Joint User” shall not include Licensees.”)

- A. **Order** Consolidated to cease and desist from imposing unlawful, unjust and unreasonable pole attachment rates and charges;
- B. **Order** Consolidated to cease and desist from charging Joint Use charges or any similar charges for poles in which it has no ownership interests;
- C. **Order** that Consolidated's pole attachment rates must be calculated using the FCC's cable rate formula set forth in 47 C.F.R. §1.1406(d)(1) in effect on October 1, 2022 using an average pole height of 39 feet;
- D. **Use** in this docket the same methodology the Commission accepted in DE 21-020, which relies on recorded GAAP depreciation values provided by Consolidated in that docket for valuing Consolidated's poles, and **order** that the pole attachment rates for Consolidated as calculated by Ms. Kravtin in this docket, *i.e.*, \$5.33 for a solely owned pole, and \$2.67 for a jointly owned pole, are just and reasonable, and that these rates apply to Petitioners' pole attachments until such time as these rates are changed through negotiation, Commission order, or operation of the parties' pole attachment agreements;
- E. **Order** that the rates approved in this docket will apply to all Consolidated poles transferred to Eversource if such transfer occurs as pursuant to Docket DE 21-020;
- F. In accordance with N.H. Admin. R. Puc 1303.07 and 1303.08, **order** Consolidated to refund to Petitioners amounts representing the difference between the amounts actually paid by the Petitioners and amounts they would have paid under the rates established by the Commission in this docket, plus interest, as of the date of the Petition, *i.e.*, August 22, 2022, and adjust any unpaid invoices issued on or after that date to reflect the rates established in this docket;

- G. **Confirm** its holding in Order No. 26,764 that Consolidated cannot require attachers to terminate and attempt to renegotiate their entire pole attachment agreements before disputing as unlawful, unjust or unreasonable, Consolidated's pole attachment rates, charges, terms and conditions;
- H. **Order** that in future pole attachment rate disputes, Consolidated must provide pole attachers with information in its possession that is needed for the calculation of pole attachment rates within 30 days of the pole attacher's request; and
- I. **Order** such further relief as the Commission deems just, reasonable and appropriate.

Respectfully submitted,

**Charter Communications, Inc.,  
Cogeco US Finance, LLC d/b/a  
Breezeline, and Comcast Cable  
Communications, LLC**

By their Attorneys,  
Orr & Reno, P.A.



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Dated: February 9, 2023

Certificate of Service

I hereby certify that on the date set forth above a copy of the foregoing Post-Hearing Brief was sent electronically to the Service List for this docket.

A handwritten signature in blue ink that reads "Susan S. Geiger". The signature is written in a cursive style with a large initial 'S' and a distinct 'G'.

Susan S. Geiger