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

Consolidated Communications of Northern New England Company, LLC's Closing Statement and Brief

NOW COMES, Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications – NNE ("Consolidated") and hereby respectfully provides the New Hampshire Public Utilities Commission (the "Commission") with its Closing Statement and Brief following the evidentiary hearing held on January 26, 2023, in connection with the above captioned matter. In support hereof, Consolidated hereby states as follows:

I. Introduction

On August 22, 2022, Charter Communications, Inc. on behalf of its affiliate, Spectrum Northeast, LLC ("Charter"), Cogeco US Finance, LLC d/b/a Breezeline on behalf of its affiliate, Cogeco US (NH-ME), LLC d/b/a Breezeline ("Breezeline"), and Comcast Cable Communications, LLC ("Comcast", and together with Charter and Breezeline, collectively "the Petitioners") filed the instant Petition requesting the Commission to "… resolve their dispute with [Consolidated] regarding unjust, unreasonable, and unlawful annual pole attachment rental rates that Consolidated charges the Petitioners for their attachments on Consolidated's poles, and

regarding the unjust, unreasonable, and unlawful 'joint use' charges imposed by Consolidated for Petitioners' attachments on poles in which Consolidated has no ownership interest." *See* Exh. 1, Petition, bates p. 003. The Petitioners submitted the Petition pursuant to N.H. RSA 374:34-a. *See id.*, p. 003. A summary of the alleged dispute is as follows:

> … the Petitioners pay Consolidated for over 350,000 attachments. Consolidated charges the same annual pole attachment rates to each Petitioner. Consolidated's current annual per attachment rates are $11.67 for attachments on poles solely owned by Consolidated, and $6.84 for attachments on jointly owned poles. In addition, Consolidated imposes a joint use ("JU") charge of $6.84 for attachments on poles in which Consolidated has no ownership interest. The Petitioners assert that all of these rates and charges are unjust and unreasonable because they have not been established in accordance with the six factors required by N.H. Code Admin. R. Puc 1304.06 (a) (which are discussed more fully herein), or by using any specific formula.

Exh. 1, Petition, bates p. 004, citing Exh. 3, Prefiled Direct Testimony of Patricia Kravtin at bates p. 008.

The Petitioners proposed new pole attachment rates solely for Consolidated and no other pole owners, telecommunications or electric utility based pole owners. Through testimony proffered by Ms. Patricia Kravtin, the Petitioners proposed new pole attachment rates at $5.33 for a solely owned pole and $2.67 for a jointly owned pole. Furthermore, despite clear language in each of their respective Pole Attachment Agreements, the Petitioners do not want to pay Consolidated for the space on Consolidated's jointly used poles. *See generally* Exh. 3, bates p. 024.

II. Legal Standard

It is clear and should not be in dispute that the Petitioners bear the burden of proof. At a hearing before the Commission involving a dispute arising under RSA 374:34-a, the burden of proof is on the Petitioners. The Commission's administrative regulations provides that "[a] party filing a petition under this part shall have the burden of proving that an agreement is not just,

unreasonable, and nondiscriminatory." Puc 1303.01. A just and reasonable rate is one that, after consideration of the relevant competing interests, falls within the zone of reasonableness between confiscation of utility property or investment interests and ratepayer exploitation." *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 676 (2001).

III. Argument

III.B The Petitioners' Analysis of Just and Reasonable Attachment Rates is Flawed.

Here the underlying premise to the Petitioners' case is that they should not be paying pole attachment rates that they clearly and unequivocally agreed to pay in multiple contracts. The Petitioners' base their case on a flawed analysis from data taken in an unrelated case before the Commission, DE 21-020, Public Service Company of New Hampshire ("Eversource") and Consolidated's Joint Petition to Approve Pole Asset Transfer. Through calculations and testimony offered by Ms. Patricia Kravtin, the Federal Communications Commission ("FCC") cable rate formula is "…consistent with the Commission's six rate review standards contained in N.H. Code Admin. R. Puc 1304.06 (a)…" (*see generally* Exh. 1, Petition, bates ps. 005-007) and Consolidated's pole attachment rates should be $5.33 for its solely owned poles, and $2.67 for its jointly owned poles (*id*. at bates p. 020, *citing* Exh. 1, Prefiled Testimony of Ms. Kravtin, bates p. 007-8).

However, flawed data supporting an analysis leads to flawed outcomes. Putting aside for later the use of the FCC's cable formula, Ms. Kravtin's analysis relied on so-called ARMIS data filed in DE 21-020 based on Generally Accepted Accounting Principles ("GAAP") and she mistook that data for regulatory accounting based information. *Compare* DE 21-020 Hearing Trans., March 15, 2022, at ps. 177-178 (Mr. Michael Shultz explaining ARMIS data based upon GAAP depreciation) versus DE 21-020 Hearing Exh 39, bates p 006, ln. 18 (Ms. Kravtin testifying

that "… As described further below, regulatory accounting data concerning the regulatory net book value of Consolidated's pole assets which Consolidated provided in response to the Commission's order on NECTA's Motion to Compel…) Without further question or investigation, and in the Petitioners' rush to judgement in the present Docket, the Petitioners generated through Ms. Kravtin proposed pole attachment rates based upon GAAP depreciation under the mistaken belief the underlying data was provided using regulatory accounting principles.

This does not end the flawed analysis. As of the closing date of Consolidated's acquisition of FairPoint Communications – July 3, 2017 – FairPoint's assets were revalued for purposes of purchase accounting and the assets and any depreciation essentially started over for the new entity and new cost structure. As Ms. Davis testified during the hearing in this Docket:

> Ms. Kravtin assumes a roll-forward in her attachment of FairPoint numbers. We purchased FairPoint, they no longer exist. We did not continue to roll forward their numbers. We had a revaluation, which would include the depreciation already on those poles, because the revaluation, by its very nature, takes that into account. And, so, you would not -- you would not just keep rolling forward FairPoint numbers, to which we have no visibility and we cannot back up. We would start with the accounting and the revaluation of those pole assets, which, by its very nature, is going to adequately represent the value, minus depreciation, of those poles.

Tr. p. 96, lns. 9-22.

The entire premise of the Petitioners' case-in-chief is based on their flawed analysis from DE 21-020 compounded by utilization of FairPoint data that ceased being maintained and, therefore, that data is not reliable and cannot be updated. The Petitioners used the incorrect data and had Ms. Kravtin generate Table 1 in her Prefiled Direct Testimony leading to the Petitioners' proposed artificially low pole attached rates. Exh. 3, bates p. 024.

Using data that more closely reflected actual data that would appear in an ARMIS report, Ms. Davis demonstrated in her original SD-1 (Exh. 19, bates p. 017) that a just and reasonable solely owned pole attachment rate was in the range of $12.09 - $13.43 depending upon the space factor utilized in the calculation (*id.*)[1] After updating all of the Consolidated pole data in response to the Commission's Record Request #2, Ms. Davis updated her calculations in Exh. 21. Ms. Davis also provided all of Consolidated's pole project data to support the analysis and roll forward from July 2017 through fiscal year 2020. This yields an updated analysis as set forth below leading to a just and reasonable solely owned pole attachment rate was in the range of $11.29 - $12.24 depending upon the space factor utilized in the calculation. Using Ms. Kravtin's logic, the joint use and joint owned pole attachment rates would be one-half of these solely owned pole attachment rates.

Hearing Exh. #21, Consolidated's Excel Spreadsheet Tab "ARMIS Revised"

Attachment SD-1 to the Prefiled Testimony of Sarah Davis - Revised			
		2020 ARMIS Revised	
ARMIS ROW	ROW TITLE (a)	Amount (000) (b)	Revised - Eliminate Accelerated Depreciation Include Regulatory Depreciation
101	Gross Investment - Poles	64,625,338.27	Balance from Asset Re-Valuation + Roll Forward
201	**Less** Accumulated Depreciation - Poles	11,245,554.10	Balance from Depreciation Tab
404	**Less** Net Non-current Deferred Operating Income Taxes - Poles	4,865,000.00	Balance from P. Kravtin Table 1
	Net Pole Investment	$ 48,514,784.17	
	x (1-Appurtenances Factor)	0.95	
	Net Bare Pole Investment	$ 46,089,045	
601		251,845	P. Kravtin Table 1
		$ 183.01	
	P. Kravtin Carrying Charge .9254	$ 169.35	
	Total No. Poles	6.67%	P.Kravtin Space Factor
	Cost of Bare Pole	7.41%	FCC rebuttable presumption space factor
		$ 11.29	Pole Attachment Rate using P. Kravtin space factor/P. Kravtin Carrying Charge
		$ 12.54	Pole Attachment Rate using FCC Rebuttable/P. Kravtin Carrying Charge

[1] This assumes arguendo that Ms. Kravtin was correct in her assertion that the FCC cable rate formula should apply.

III.B Pole Attachment Rate Factors Required by Puc 1303.06(a)

Puc 1303.06(a) states in relevant part that: "In determining just and reasonable rates for the pole attachments of cable television service providers, wireless service providers, and excepted local exchange carriers that are not incumbent local exchange carriers to poles owned by electric utilities or incumbent local exchange carriers under this chapter, the commission shall consider…" six factors. In addition to Federal laws and FCC formulae listed in factors 1 and 5, factors 2 – 4 relate to potential impacts on: (A) competitive alternatives (factor2), (B) pole owners (factor 3) and (C) deployment of Broadband services (factor 4). The Commission will find no direct evidence on record from the Petitioners regarding (i) how a reduction in Consolidated's pole attachment rates will impact one or more of the factors or (ii) how Consolidated's current pole attachment rates inhibit the furtherance of the goals behind the factors referenced in Puc 1303.06(a).[2]

The Petitioners offered no direct evidence regarding Consolidated's current pole attachment rates impacting in any way competition for Broadband, data transmission or voice customers. They offered no direct evidence that Consolidated's current pole attachment rates inhibited deployment of Broadband services in the past or currently inhibit each of their respective Broadband deployment efforts. A review of the Petitioners Exhibits 5 through 7, which are affidavits from employees of Charter Communications (Yann Querre), Nadine Heinen

[2] Black's Law Dictionary defines "direct evidence" as "…[t]hat means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact, and is distinguished from circumstantial evidence, which is often called "indirect." Direct evidence means evidence which in the first instance applies directly to the factum probandum, or which immediately points to a question at issue, or is evidence of the precise fact in issue and on trial by witnesses who can testify that they saw the acts done or heard the words spoken which constituted the precise fact to be proved. Evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. *See* https://blacks_law.en-academic.com/7972/direct_evidence

(Breezeline) and James White (Comcast Cable) are devoid of any reference, data or other forms of evidence regarding any of the 6 factors in Puc 1303.06(a).

Instead, the Petitioners only offer second hand, high-level assertions from Ms. Kravtin related to how the FCC's cable rate formula is consistent with the six factors listed in Puc 1303.06(a). Even Ms. Kravtin offers no evidence as to how or whether (for example) her artificially low pole attachments rates would increase Broadband in each Petitioners' service territory. Ms. Kravtin offers no evidence how or whether her artificially low pole attachments rates would increase voice or data transmission competition between Consolidated and the respective Petitioners.

Indeed the Petitioners were unwilling to answer direct questions on these subjects. Consolidated propounded a data request directly on point related to the factors in Puc 1303.06(a) and the Petitioners were unwilling to answer. Consolidated's data request 1-7 and the Petitioners' response is as follows:

> 1-7. See Prefiled Direct Testimony of P. Kravtin, p. 5, lns 2-6. For each of the Petitioners please describe the broadband investments in both Maine and New Hampshire in years 2018-2021 and year to data 2022:
>
> a. provide the total capital investment in new or improved broadband service;
>
> b. describe the municipality where new or improved broadband service occurred; and
>
> c. the number of new homes passed with the broadband service.
>
> **Response: Objection. Please refer to Petitioners' objection to this data request contained in Objections to Set One Data Requests Propounded by Consolidated and the New Hampshire Department of Energy dated November 28, 2022.**

Petitioners' Response to Consolidated Data Request 1-7 (Attachment One) with emphasis in original.[3]

Furthermore, the Petitioners failed to rebut Consolidated's testimony regarding its Broadband expansion and how the inequitable sharing of pole costs would disproportionately impact Consolidated's fiber based Broadband expansion and, therefore, not only have a negative impact of Consolidated's customers, but on all New Hampshire residents as it would impact the competitive Broadband marketplace. *See* Exh. 19, bates p. 0011-12; Tr. p. 73, lns. 1-15. Consolidated was clear that a reasonable pole attachment rate would allow both the cable company and Consolidated to share equally in the costs of a pole since they are direct competitors engaged in the same business, achieving the same benefit for affixing their voice and broadband attachments to pole infrastructure. *Id.* Consolidated demonstrated that Consolidated's current rates had the cable companies bearing less than 15% of the cost of bare pole in New Hampshire, while Consolidated, and in some cases a joint owner, bore the rest of said cost. The Petitioner's on the other hand think it reasonable that they pay less than 7% of a cost of bare pole. Exh. 13, bates p. 012. Although Ms. Kravtin incorrectly assumed that Consolidated did not take other attachers into consideration, she was incorrect. Consolidated testified that:

> Consolidated's rates are just and reasonable because Consolidated's pole attachment rates represent only 15% of the cost of a bare pole after the carrying charge used by the cable company expert Patricia Kravtin. Since Consolidated averages one third party attacher per pole plus the assumption that both the power company and Consolidated are on the pole, this means the joint owners (or the sole owner in the case of solely owned poles) are absorbing 85% of the pole costs while the attacher is absorbing 15%, a more than fair allocation. Consolidated believes the most reasonable result treats both Consolidated and the attachers equitably with respect to the amount of pole costs they bear. All attachers in the telecom space of a pole are largely unregulated, and they aggressively compete for residential and

[3] Consolidated has filed this day in this Docket its Motion to Reopen the Record on a Limited Basis seeking to admit the Petitioners' response to Consolidated Data Request 1-7 as hearing exhibit 23.

> business customers. Consolidated, like other attachers, is actively engaged in the deployment of broadband and its subscribers will equally benefit from a more equitable sharing of pole costs.

Exh. 19, bates p. 013.

Finally, the Petitioners' have failed to address why, if the only measure of reasonableness is the FCC cable rate formula, the Commission did not simply adopt the FCC cable rate formula as the sole means for determining a just and reasonable pole attachment rate. The Petitioners' argue that federal jurisprudence has made such a determination (*see ex.* Exh. 3, bates p. 021), but that was true at the time of adoption of the New Hampshire administrative rule Puc 1303.06. The Commission made the affirmative decision to not adopt the FCC's formula as the sole measure of reasonableness and it should not change course for the present Docket (versus undertaking another rate making docket to so adopt the FCC cable rate formula for ***all pole owners*** on an equitable basis).

III.C Pole Attachment Rates in Maine are Not Relevant to this Docket

The Petitioners also rely on Consolidated's pole attachment rates in Maine as support for their arguments in the present Docket. *See* Petition, ps. 16 – 17. Those rates are not relevant to the present Docket. In Maine, the Public Utilities Commission (the "MEPUC") adopted administrative rules significantly different that the rules adopted in New Hampshire. Chapter 880, Section 4, of the MEPUC's administrative rules clearly and unequivocally states:

> **CALCULATION OF RATES FOR JOINT-USE UTILITY POLES**
>
> In determining a just and reasonable rate for attachments to joint-use utility poles, the Commission will employ the FCC Cable Rate Formula, presuming an average joint-use utility pole with a space factor of 7.4% per foot used by an attachment. Pole top attachments are presumed to occupy one foot of usable space for the purposes of Cable Rate calculations. The use of an average joint-use utility pole, and the one-foot space for pole-top attachments are rebuttable presumptions.

In Maine, there are no factors to consider. There is no analysis other than calculating the pole attachment rates within the confines of the administrative rule. In other words, the MEPUC made an affirmative determination to undertake no analysis regarding pole attachment rates other than that set forth in the formula. This has no relevance to the New Hampshire administrative rules nor does it have relevance to the present claims. *See* Puc 203.23(d) "[t]he commission shall exclude irrelevant, immaterial or unduly repetitious evidence."

III.D In the event the Commission Changes Consolidated's Current Pole Attachment Rates, the Commission should not award Retroactive Relief.

The Petitioners in this case seek retroactive application of their pole attachment rates. Consolidated submits this is not warranted. At all times since the dispute first arose, the Petitioners had a mechanism to renegotiate their rates. They chose not to exercise it. *See* Exh. 2, bates p. 006 (Email communication from Ms. Davis, dated in March 2022, advising NECTA to have its members exercise their rights under the respective Pole Attachment Agreements). Instead, each of these very sophisticated parties sat on their rights. The Petitioners were well aware that Consolidated was involved in a large transaction to sell a substantial portion of their pole assets in the state (*see* Docket DE 21-020) and that as part of that sale Consolidated would be transferring pole attachment agreements with each of these Petitioners. Despite knowing this, the Petitioner's thought it reasonable that they did not need to follow the contractual provisions that allow them to terminate and renegotiate those rates. Instead, the Petitioners' insisted that Consolidated lower the rates it charged under those contracts simply because they wanted lower rates. Consolidated advised the Petitioners of the path to renegotiate and explained that changing contracts, without following the terms thereof, was not reasonable. As a result, Consolidated believes it is unreasonable for these same parties to now claim they should receive retroactive application of

rates when at all times they could have exercised their rights to renegotiate them well over a year ago. It follows that since the Petitioners did not exercise their rights pursuant to existing contract terms, they should not benefit from that inaction.

III.E Joint Use Rates

According to the Petitioners, Consolidated's joint use fees are inconsistent with Section 3.2.1 of the Pole Attachment Agreements or any standard of reasonableness. Exh. 1 (Petition), para 76-77, bates ps. 030-31. This ignores the plain language within the Petitioners' Pole Attachment Agreements.

The Pole Attachment Agreements, by their terms are governed by New Hampshire law, the state where Licensor's poles are located per Section 15.5 of the agreements. *See ex.* Exh. 7 (JGW-1, bates p. 028 (Section 15.5, Choice of Law, of the Comcast Pole Attachment Agreement)). Section 3.2.1 of the Pole Attachment Agreements state in relevant part that "Licensees shall pay an Attachment Fee for each attachment made to Licensor's Utility Poles." *Id.*, at bates p. 012. The term "Utility Pole" is a defined term per section 1.20 of the agreement and is defined therein as "[a] pole solely owned, jointly owned, or jointly used by the Licensor and used to support its facilities and the facilities of an authorized Licensee." *Id.*, at bates p. 010 (emphasis added); see also Exh. 6 (NH-1, bates p. 017) and Exh. 5 (YQ-1, bates p. 010) (defining "Utility Pole" in the Breezeline and Charter Communications' Pole Attachment Agreements (respectively) in the same manner as in the Comcast Pole Attachment Agreement)).

The language used by the parties in the Pole Attachment Agreement should be given its reasonable meaning. *See* 2010 N.H. P.U.C LEXIS 120, DE 09-174, Order No. 25,184, *18 ("[w]hen interpreting a written agreement [the Commission], like the New Hampshire Supreme

Court, give[s] the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated.") The plain language of the Pole Attachment Agreement expressly allows Consolidated to bill an "authorized Licensee" (here, the Petitioners) for their attachments on poles jointly used by Consolidated that support Consolidated's facilities. Consolidated adheres to the terms of the Pole Attachment Agreements in this regard. Petitioners make no claim to the contrary and, therefore, the Commission should fine it within Consolidated's rights to bill for third-party attachments on such poles.

IV. Conclusion

The Petitioners' requested relief should be denied and the petition for resolution of pole attachment rate dispute should be dismissed. The Petitioners have failed to satisfy their burden of proving via a preponderance of evidence that their proposed pole attachment rates satisfy Puc 1303.06(a) and further failed to prove that Consolidated's current pole attachment rates violate said administrative rule. The Petitioner's proposed rates further are based on faulty data, and data that is not based upon Consolidated's accounting books and records.

WHEREFORE, Consolidated respectfully request that this honorable Commission:

A. Deny the Petition filed in this docket;

B. In the alternative, in the event the Commission establishes new pole attachment rates to be charged by Consolidated, order the new charges to be prospective only and not retroactive; and

C. Grant any other such relief as it deems appropriate.

Respectfully Submitted by

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

By its Attorneys,

February 9, 2023

/s/ Patrick C. McHugh
Patrick C. McHugh
Consolidated Communications
770 Elm Street
Manchester, NH 02101
(603) 591-5465
Patrick.mchugh@consolidated.com

Certificate of Service

I hereby certify that on February 9, 2023, this Closing Statement and Brief has been electronically provided to the service list in this docket.

/s/ Patrick C. McHugh
Patrick C. McHugh