

STATE OF NEW HAMPSHIRE

Before the

PUBLIC UTILITIES COMMISSION

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

Petitioners

v.

**CONSOLIDATED COMMUNICATIONS OF
NORTHERN NEW ENGLAND COMPANY,
LLC**

Respondent

Docket No. DT 22-_____

**PETITION FOR RESOLUTION
OF RATE DISPUTE**

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I. INTRODUCTION/SUMMARY

Charter Communications, Inc. (“Charter”) on behalf of its affiliate, Spectrum Northeast, LLC (jointly, “Charter”),¹ Cogeco US Finance, LLC d/b/a Breezeline (“Breezeline”) on behalf of its affiliate, Cogeco US (NH-ME), LLC d/b/a Breezeline (“Breezeline”),² and Comcast Cable Communications, LLC (“Comcast”)³ (collectively, “the Petitioners”) hereby jointly petition the New Hampshire Public Utilities Commission (“Commission”) to resolve their dispute with Consolidated Communications of Northern New England Company, LLC (“Respondent” or “Consolidated”) regarding unjust, unreasonable, and unlawful⁴ 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. This Petition is submitted pursuant to N.H. RSA 374:34-a, VII. and N.H. Code Admin. R. Puc 1304.03 and Puc 203.

The Petitioners are “attaching entities” within the meaning of N.H. Code Admin. R. Puc 1302.01 because they have statutory and contractual rights to attach their facilities to Consolidated’s poles. Using their attached facilities, the Petitioners provide various

¹ Spectrum Northeast, LLC, an affiliate of Charter Communications, Inc., owns and constructs communications facilities in New Hampshire. For the purpose of this Petition, “Charter” refers to and includes any Charter Communications, Inc. affiliated entity doing business in New Hampshire that may have pole attachment agreements with Consolidated and/or are billed for and pay pole attachment rental fees to Consolidated.

² Cogeco US (NH-ME), LLC d/b/a Breezeline (formerly Atlantic Broadband (NH-ME), LLC), an affiliate of Cogeco US Finance, LLC d/b/a Breezeline (formerly Atlantic Broadband Finance, LLC), owns and constructs communications facilities. For the purpose of this Petition, “Breezeline” refers to and includes any Cogeco US Finance, LLC d/b/a Breezeline affiliated entity doing business in New Hampshire that may have pole attachment agreements with Consolidated and/or are billed for and pay pole attachment rental fees to Consolidated.

³ For the purpose of this Petition, “Comcast” refers to and includes Comcast Cable Communications, LLC and any of its affiliated entities doing business in New Hampshire that may have pole attachment agreements with Consolidated and/or are billed for and pay pole attachment rental fees to Consolidated.

⁴ See N.H. RSA 374:34-a, II and N.H. Code Admin. R. Puc 1301.01 (pole attachment rates, charges, terms, and conditions must be just and reasonable).

communications services over their respective networks in New Hampshire, and compete with Consolidated in providing these services to the state's residential, commercial, non-profit and governmental customers. The Petitioners' facilities are attached to poles owned by Consolidated and include poles that Consolidated solely owns or jointly owns with other utilities, across the state of New Hampshire ("Consolidated Poles"). The Petitioners rely on the ability to access Consolidated Poles at just and reasonable rates in order to deploy their network facilities and provide communications services to their customers in a cost-effective manner.

Collectively, the Petitioners pay Consolidated for over 350,000 attachments.⁵ 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.⁶ In addition, Consolidated imposes a joint use ("JU") charge of \$6.84 for attachments on poles in which Consolidated *has no ownership interest*.⁷ 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. *See Prefiled Direct Testimony of Patricia D. Kravtin*, p. 6.

The Petitioners began examining the justness and reasonableness of Consolidated's rates in Docket DE 21-020 ("the Pole Transfer Docket")⁸ through their membership organization, the New England Cable and Telecommunications Association, Inc. ("NECTA"), which intervened and actively participated in that docket. NECTA conducted discovery in the Pole Transfer

⁵ See *Affidavits of Yann Quere, Nadine Heinen and James G. White, Jr.*, ¶ 10.

⁶ *Id.*, ¶ 8.

⁷ *Id.*

⁸ The Pole Transfer Docket concerns the proposed transfer of Consolidated's interests in over 340,000 poles to Eversource Energy ("Eversource").

Docket in an effort to understand how Consolidated's pole rates are calculated, because Eversource Energy ("Eversource") proposed to "grandfather" Consolidated's rates if the Commission approves the transfer of Consolidated's pole ownership interests to Eversource. Because Consolidated did not respond to NECTA's data requests⁹ for information that would enable the Petitioners to determine how Consolidated calculated its pole attachment rates, the Petitioners, through NECTA, notified Consolidated in writing on October 18, 2021 that they disputed the rates contained in its invoices for the July 1 through December 31, 2021 period, as well as the JU charges, and requested documentation supporting Consolidated's rate calculation.¹⁰ More specifically, the rate dispute letter requested that Consolidated provide all supporting documentation for the rates in the disputed invoices, including Consolidated's calculation of the applicable rate under state and federal rules, and ARMIS reports for New Hampshire for 2018, 2019 and 2020.¹¹

Consolidated did not respond to NECTA's October 18, 2021 letter or its request for information,¹² but did file its "2020 ARMIS Report" (*i.e.*, restated data as shown on the FCC Report 43-01, ARMIS Annual Summary Report for 2020) with the Commission on December 6, 2021 after being ordered to do so by the Commission in response to a Motion to Compel filed by NECTA.¹³ NECTA's expert in the Pole Transfer Docket, Patricia D. Kravtin, then analyzed this data, applied the FCC's cable rate formula¹⁴ (which she found consistent with the Commission's six rate review standards contained in N.H. Code Admin. R. Puc 1304.06 (a) for setting just and

⁹ See Exhibits 1 and 2, Consolidated's Responses to Data Requests NECTA 1-045 and TS 1-005 in DE 21-020.

¹⁰ See Exhibit 3, *Letter from David Soutter to Sarah Davis* (Oct. 18, 2021).

¹¹ *Id.*

¹² NECTA's request to Consolidated for information used to calculate pole rates is customary. Under FCC rules, 47 CFR §1.1404(f), a utility is required to provide such information within 30 days of the request.

¹³ See *Eversource Energy and Consolidated Communications, Joint Petition to Approval Pole Asset Transfer*, DE 21-020, Order No. 26, 534 (Oct. 22, 2021).

¹⁴ See 47 U.S.C. §1.1406(d)(1).

reasonable rates), and determined that Consolidated's rate for attachments on solely owned poles in New Hampshire should be \$6.31 annually, and its jointly owned rate should be \$3.16 annually.¹⁵ See *Prefiled Direct Testimony of Patricia D. Kravtin*, p. 20, lines 15-20.

By letter dated March 15, 2022 to Consolidated, NECTA reiterated the rate dispute for the second half of 2021 and extended the dispute to invoices for any subsequent period,¹⁶ and indicated that NECTA Members wished to resolve the pole attachment rate dispute informally.¹⁷ The March 15th letter also requested that Consolidated accept rates within a range between \$6.31 to \$6.51 for solely owned poles, and between \$3.16 to \$3.26 for jointly owned poles, "for the second half of 2021 and future periods," and asserted that these rates would be even lower if they were calculated using a pole height of greater than 37.5 feet.¹⁸ That letter also requested that Consolidated provide the data requested in the October 18, 2021 letter (*i.e.*, all supporting documentation for Consolidated's pole attachment rates, including ARMIS reports for 2018-2020, and Consolidated's calculation of applicable rates) by March 25, 2022.¹⁹

On March 16, 2022, Consolidated responded to NECTA's March 15, 2022 letter via e-mail from Ms. Sarah Davis, Consolidated's Senior Director of Government Relations and Wholesale Strategies.²⁰ Ms. Davis's e-mail indicated that Consolidated does not have or file ARMIS reports, and that if NECTA Members no longer agree with the terms they agreed to

¹⁵ These rates are based on data provided by Consolidated in its 2020 ARMIS Report.

¹⁶ Notwithstanding that Petitioners are disputing rates and joint use charges contained in Consolidated's invoices for the second half of 2021, first half of 2022, and second half of 2002, the Petitioners have either paid those invoices in full or are in the process of paying them in full. See *Affidavits of Yann Quere and Nadine Heinen*, ¶ 17, and *Affidavit of James G. White, Jr.*, ¶ 19.

¹⁷ See Exhibit 4, *Letter from David Soutter to Sarah Davis* (March 15, 2022).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Exhibit 5, *E-mail from Sarah Davis to David Soutter* (March 16, 2022).

when they entered into their respective pole attachment agreements with Consolidated, they should exercise their rights to terminate the contracts and renegotiate them.²¹

Pursuant to the dispute resolution provisions of their pole attachment agreements,²² the Petitioners, through NECTA, requested a meeting²³ with Consolidated which was held via videoconference on June 7, 2022²⁴ in an attempt to resolve the pole rate dispute informally. During that meeting, Consolidated indicated that it is unwilling to engage in negotiations to voluntarily reduce its pole attachment rates to align them with rates produced by the FCC's cable rate formula (which is the formula used to establish Consolidated's pole attachment rates in Maine of \$3.56 for a solely owned pole and \$1.78 for a jointly owned pole²⁵) or otherwise reduce them to just and reasonable levels.

Ms. Kravtin has recently recalculated Consolidated's New Hampshire pole attachment rates by replacing the FCC cable rate formula's presumed average pole height of 37.5 feet²⁶ with the more accurate average pole height of 39 feet,²⁷ and has determined that Consolidated's rates should be \$5.33 annually for attachments on solely owned poles, and \$2.67 annually for

²¹ *Id.* By letter dated May 6, 2022, in response to receiving additional pole attachment invoices from Consolidated, Comcast notified Consolidated that Comcast disputes the pole rental rates in Consolidated's invoices for the first half of 2022 (January -June), and reasserted the rate dispute initiated in NECTA's October 18, 2021 letter. *See Affidavit of James G. White, Jr.*, Attachment JGW-2, *Letter from Sharon L. Webber to Sarah Davis* (May 6, 2022). Consolidated responded in writing indicating, among other things, that if Comcast wishes to change the effective pole attachment rates, it must follow the termination process in its pole attachment agreement. *See Affidavit of James G. White, Jr.*, Attachment JGW-3, *Letter from Sarah Davis to Sharon Webber* (May 20, 2022).

²² The dispute resolution provisions of the Petitioners' pole attachment agreements with Consolidated are identical. *See* Section 15.10 of Attachment 1 to Affidavits of Yann Quere, Nadine Heinen and James G. White, Jr.

²³ *See* Exhibit 6, *Letter from David Soutter to Sarah Davis* (May 19, 2022).

²⁴ *See Affidavits of Yann Quere and Nadine Heinen*, ¶ 18 and *Affidavit of James G. White, Jr.*, ¶ 20.

²⁵ Effective January 1, 2022, Consolidated reduced its rates in Maine from \$12.60 to \$3.56 for a solely owned pole, and from \$6.30 to \$1.78 for a jointly owned pole. *See* Exhibit 7, *Letter from Harry Loring to Maine Licensee* (Feb. 8, 2022).

²⁶ *See* 47 C.F.R. §1.1410 (the presumed pole height for purposes of the FCC's cable rate formula is 37.5 feet, but this presumption may be rebutted).

²⁷ The 39 foot average pole height figure was derived from pole inspection data compiled by Eversource on poles that it jointly owns with Consolidated, and provided by Eversource in the Pole Transfer Docket.

attachments on jointly owned poles. *See Prefiled Direct Testimony of Patricia D. Kravtin*, p. 21, lines 1-6.

Because Consolidated has failed to demonstrate that its pole attachment rates satisfy the Commission's rate review standards or are otherwise just and reasonable, and refuses to negotiate with the Petitioners to establish agreed-upon pole attachment rates, the Petitioners respectfully request that the Commission resolve the rate dispute pursuant to its authority under RSA 374:34-a, VII and N.H. Code Admin. R. Puc 1304.03.

II. PARTIES

1. Petitioner Charter is a leading broadband connectivity company and cable operator serving more than 32 million customers in 41 states, with more than 77,000 customers in 53 communities across New Hampshire. Over an advanced communications network, Charter offers a full range of state-of-the-art residential and business services including internet, TV, mobile and voice. Charter has a business address of 400 Washington Blvd., Stamford, Connecticut 06902.

2. Petitioner Breezeline is a cable operator that provides various communications services to residential, commercial, non-profit, and governmental customers in New Hampshire, including traditional cable television service, broadband, and state-of-the-art services such as IPTV, video on demand, and interconnected Voice Over Internet Protocol voice service. Breezeline's principal business address is 3 Battery March Park, Suite 200, Quincy, Massachusetts 02169.

3. Petitioner Comcast is a cable operator that provides various communications services to residential, commercial, non-profit, and governmental customers in New Hampshire, including cable television service, broadband, interconnected Voice Over Internet Protocol

service, and other services. Comcast's principal business address is 1701 John F. Kennedy Blvd., One Comcast Center, Philadelphia, Pennsylvania 19103.

4. Respondent Consolidated is a public utility as defined in N.H. RSA 362:2 that owns and controls utility poles throughout New Hampshire that are used by Consolidated to support its wire communications network and to transmit services to its customers. Consolidated is also an incumbent local exchange company ("ILEC") within the meaning of 47 U.S.C. § 251(h) that provides communications and broadband services in New Hampshire in competition with the Petitioners. As a pole owner, Consolidated is required to provide attaching entities with nondiscriminatory access to Consolidated's poles on just and reasonable rates, charges, terms and conditions. See RSAs 374:34-a, II and VI, and N.H. Code Admin. R. Puc 1301.01.

5. The Petitioners are "attaching entities" within the meaning of N.H. Code Admin. R. Puc 1302.01, because they have statutory and contractual rights²⁸ to attach their facilities²⁹ to poles³⁰ owned by Consolidated.

6. The Petitioners are successors in interest to several pole attachment agreements with Consolidated (or its predecessors, FairPoint Communications and Verizon New England Inc.) that include provisions concerning the rates, charges, terms and conditions for the Petitioners' pole attachments, as well as dispute resolution provisions. A representative example of each Petitioner's pole attachment agreements is contained in Attachment 1 to the Affidavits of

²⁸ See RSA 374:34-a, VI. and *Affidavits of Yann Quere, Nadine Heinen and James G. White, Jr.*, Attachments YQ-1, NH-1, and JGW-1 (Pole Attachment Agreements) submitted herewith.

²⁹ N.H. Code Admin. R. Puc 1302.06 defines "facility" as "lines, cables, wireless antennas, and any accompanying appurtenances attached to a utility pole for the transmission of electricity, information, telecommunications, or video programming for the public or for public safety purposes."

³⁰ For pole attachment purposes, "pole" is defined as "any pole, duct, conduit, or right-of-way that is used for wire communications or electricity distribution and is owned in whole or in part by a public utility, including a rural electric cooperative for which a certificate of deregulation is on file with the commission pursuant to RSA 301:57." RSA 374:34-a, I. and N.H. Code Admin. R. Puc 1302.10.

Yann Quere (on behalf of Charter), Nadine Heinen (on behalf of Breezeline) and James G. White, Jr. (on behalf of Comcast), all of which are submitted with this Petition.

7. The Petitioners, through NECTA, have notified Consolidated in writing that they dispute Consolidated's pole attachment rates and JU charges for the second half of 2021, and any subsequent invoice periods.³¹ The Petitioners have attempted to resolve their rate dispute with Consolidated informally, but because Consolidated remains unwilling to negotiate just and reasonable pole attachment rates, the Petitioners are requesting that the Commission resolve the rate dispute.

III. JURISDICTION/AUTHORITY

8. This Commission's jurisdiction over pole attachment rates was established pursuant to Section 224 (c) of the Communications Act of 1934, as amended (47 U.S.C. § 224(c)), when the Commission certified to the Federal Communications Commission ("FCC") in 2008 that appropriate rules implementing the Commission's regulatory authority over pole attachments were effective. *See New Hampshire Joins States That Have Certified That They Regulate Pole Attachments*, 23 FCC Rcd 2796 (released Feb. 22, 2008); *see also* RSA 374:34-a, II (authorizing Commission to regulate and enforce rates, charges, terms, and conditions for pole attachments in order to ensure that such rates, charges, terms, and conditions are just and reasonable).

9. Under RSA 374:34-a, II., the Commission's regulatory authority includes "the state regulatory authority referenced in 47 U.S.C. section 224(c)." The state's authority, pursuant to Section 224(c), to regulate the terms and conditions for pole attachments does not exist unless the state has adopted rules implementing the state's regulatory authority over pole

³¹ See Exhibits 3, 4 and 6.

attachments, and with respect to an individual matter, unless the state takes final action on a complaint regarding such matter within 180 days after the complaint is filed with the state, and within the applicable period prescribed for such final action in the state's rules, if the prescribed period does not extend beyond 360 days after the filing of the complaint. 47 U.S.C. §224 (c)(3). Because the Commission's pole attachment rules, N.H. Code Admin. R. Ch. Puc 1300, do not contain a deadline for deciding pole rate disputes, the Commission's jurisdiction and authority over the instant action require that the dispute be resolved within 180 days of the date this Petition is filed.

10. The Commission has authority over this action pursuant to RSA 374:34-a, VII (authorizing Commission to hear and resolve complaints concerning rates, charges, terms, conditions, or voluntary agreements relative to pole attachments), and N.H. Code Admin. R. Puc 1304.03 (stating that a party to a pole attachment agreement, or a party subject to an order of the Commission establishing rates, charges, terms, or conditions for pole attachments, may petition the Commission for resolution of a dispute arising under such agreement or order).

IV. FACTS

11. Facts supporting this Petition are set forth below and in the Prefiled Direct Testimony of Patricia D. Kravtin (on behalf of the Petitioners), Affidavits of Yann Quere (on behalf of Charter), Nadine Heinen (on behalf of Breezeline), and James G. White, Jr. (on behalf of Comcast), and Exhibits 1 through 9, all of which are submitted herewith.

12. The Petitioners are cable operators that provide various communications services over their respective networks in New Hampshire using facilities that are attached to utility poles, including Consolidated Poles. These services include cable television service, broadband, interconnected Voice Over Internet Protocol service, and other services.

13. Petitioners compete with Consolidated in providing communications services to residential, commercial, non-profit, and governmental customers in New Hampshire.

14. Collectively, the Petitioners pay Consolidated for more than 350,000 attachments on Consolidated's solely and jointly-owned poles, and poles solely-owned by others pole owners on which Consolidated assesses a JU charge.

15. Petitioners are successors in interest to pole attachment agreements with Consolidated's predecessors, FairPoint Communications and Verizon New England Inc.

16. A representative example of Charter's pole attachment agreements with Consolidated is Attachment 1 to the Affidavit of Yann Quere.

17. A representative example of Breezeline's pole attachment agreements with Consolidated is Attachment 1 to the Affidavit of Nadine Heinen.

18. A representative example of Comcast's pole attachment agreements with Consolidated is Attachment 1 to the Affidavit of James G. White, Jr.

19. The Petitioners' pole attachment agreements with Consolidated all contain provisions regarding the rates, charges, terms and conditions for the Petitioners' pole attachments, including dispute resolution provisions (Section 15.10). *See* Affidavits of Yann Quere, Nadine Heinen, and James G. White, Jr., Attachment 1 (Pole Attachment Agreements). They also contain a "Compliance with Laws" provision, which requires the parties to comply with, and subjects the provisions of the agreements to, "all laws, ordinances, and regulations which in any manner affect the rights and obligations of the parties." *Id.*, Section 15.6. In addition, the pole attachment agreements contain a "Severability" provision, which provides that if any provision of the agreements is invalid or unenforceable, the entire agreement will not be rendered invalid or unenforceable, and if such invalid or unenforceable provision is considered to

be an essential element of the agreement, “the parties shall promptly attempt to negotiate a substitute therefor.” *Id.*, Section 15.4.

20. The Petitioners pay Consolidated annual recurring pole attachment rental fees for their attachments on Consolidated Poles and the “JU “poles owned by others based on invoices issued by Consolidated twice a year (*i.e.* for the periods January through June, and July through December).³²

21. Consolidated’s current annual pole attachment rental fees charged to Petitioners for 2021 and 2022 are: \$11.67 per attachment for poles solely owned by Consolidated; \$6.84 per attachment for poles Consolidated owns jointly with another utility; and Joint Use (“JU”) charges in the amount of \$6.84 annually for each attachment on poles in which Consolidated has no ownership interest.³³

22. Consolidated’s current pole attachment rates were not calculated according to the Commission’s rate review standards for determining just and reasonable rates set forth in N.H. Code Admin. R. Puc 1304.06 (a), or any particular formula. *See Prefiled Direct Testimony of Patricia D. Kravtin*, p. 6, lines 15-16. Consolidated’s current pole attachment rates were inherited as part of its acquisition of FairPoint Communications in 2017, and have not changed since that time. *Id.*, lines 17-18; *see also Attachment PDK-2*.

23. The Petitioners are Members of NECTA, a non-profit corporation and trade association that represents the interests of most communications companies and their affiliates in New England, including New Hampshire. NECTA intervened and participated on behalf of the Petitioners in the Pole Transfer Docket which involves a Joint Petition for Commission approval

³² See *Affidavits of Yann Quere, Nadine Heinen and James G. White, Jr.*, ¶10.

³³*Id.*, ¶8. In addition, the Petitioners pay the JU pole owner a solely-owned pole rate. *Id.*

of the transfer of Consolidated's ownership interests in over 340,000 of its New Hampshire pole ownership interests to Eversource.

24. Through NECTA's involvement in the Pole Transfer Docket, the Petitioners examined the issue of whether Consolidated's pole attachment rates are just and reasonable, because Eversource proposes to charge Consolidated's pole attachment rates if the Commission approves the transfer of Consolidated's Poles to Eversource.

25. In an effort to determine how Consolidated's pole attachment rates are calculated, NECTA submitted data requests to Consolidated in the Pole Transfer Docket in April of 2021 seeking Consolidated's ARMIS reports for years 2018 through 2020.³⁴ Consolidated responded by indicating that Consolidated has not filed ARMIS reports for these years, and is not required to file these reports for its New Hampshire study area.³⁵

26. On May 17, 2021, NECTA propounded a data request to Consolidated seeking information that Consolidated would have provided to the FCC had it been required to file ARMIS reports for 2018, 2019 and 2020.³⁶ Consolidated responded to that data request by stating that Consolidated does not possess the requested information, is an excepted local exchange carrier not subject to rate regulation in New Hampshire, and has no need for such regulatory accounting.³⁷

27. On August 13, 2021, NECTA filed a Motion to Compel in the Pole Transfer docket, requesting that the Commission order Consolidated to provide the same information in

³⁴ See Exhibit 1, Consolidated's Response to Data Request NECTA 1-045 in DE 21-020.

³⁵ *Id.*

³⁶ See Exhibit 2, Consolidated's Response to Data Request NECTA TS 1-005 in DE 21-020.

³⁷ *Id.*

the ARMIS report prepared by FairPoint Communications for New Hampshire 2017, updated to December 31, 2020.³⁸

28. On October 18, 2021, the Petitioners, through NECTA, notified Consolidated in writing that they disputed Consolidated's invoices (covering the period of July 1, 2021 through December 31, 2021) for attachments on Consolidated Poles in New Hampshire, as well as its JU charges for New Hampshire poles in which Consolidated has no ownership interest.³⁹ The dispute letter also requested that Consolidated provide all supporting documentation for the rates in the disputed invoices, including Consolidated's calculation of the applicable rate under state and federal rules, and ARMIS reports for New Hampshire for 2018, 2019 and 2020.⁴⁰

29. On October 22, 2021, the Commission granted NECTA's Motion to Compel,⁴¹ and in response, Consolidated filed the 2020 ARMIS report with the Commission on December 6, 2021.⁴²

30. Using the 2020 ARMIS Report, Ms. Patricia Kravtin, NECTA's expert witness in the Pole Transfer Docket, assessed whether Consolidated's pole attachment rates are just and reasonable. She applied the FCC's cable rate formula (using the formula's presumed, but rebuttable 37.5 foot pole height),⁴³ and determined that Consolidated's rates would be \$6.31 for a solely owned pole, and \$3.16 for a jointly owned pole. *See Prefiled Direct Testimony of Patricia D. Kravtin*, p. 20, lines 15-20. Ms. Kravtin submitted prefiled testimony on January 31, 2022 in the Pole Transfer Docket regarding: her rate calculations; her opinion that the FCC's cable rate formula is the appropriate measure for determining just and reasonable rates under the

³⁸ DE 21-020, Electronic Docket Entry #27.

³⁹ *See Exhibit 3, Letter from David Soutter to Sarah Davis* (Oct. 18, 2021).

⁴⁰ *Id.*

⁴¹ DE 21-020, Order No. 26,534 (Oct. 22, 2021).

⁴² DE 21-020, Electronic Docket Entry # 53.

⁴³ *See* 47 C.F.R. § 1.1410 (the presumed pole height for purposes of the FCC's cable rate formula set forth in 47 C.F.R § 1.1406(d)(1) is 37.5 feet, but this presumption may be rebutted).

Commission's rate review standards contained in N.H. Code Admin. R. Puc 1304.06 (a); and her conclusion that Consolidated's pole attachment rates are not just and reasonable as required by RSA 374:34-a, II.⁴⁴

31. Consolidated did not provide the requested ARMIS reports in response to Mr. Soutter's October 18, 2021 letter,⁴⁵ and has not provided NECTA with the other information specified in that letter (*i.e.*, all supporting documentation for the rates in the disputed invoices, including Consolidated's calculation of the applicable rate under state and federal rules) which would assist the Petitioners in understanding how Consolidated calculated its pole attachment rates.

32. Given the lack of a response to its October 18, 2021 letter, and in light of Ms. Kravtin's testimony in the Pole Transfer Docket, the Petitioners, through NECTA, sent a letter to Consolidated on March 15, 2022 which restated the rate dispute contained in the October 18, 2021 letter and asserted the continued dispute of the same rates and charges for Consolidated invoices issued for any subsequent periods.⁴⁶ The March 15, 2022 letter indicated that NECTA Members wished to resolve the pole attachment rate dispute informally, and were willing to accept rates within the ranges of \$6.31 to \$6.51 for solely owned poles, and between \$3.16 and \$3.26 for jointly owned poles for the second half of 2021 and future periods.⁴⁷ That letter further asserted that the offered rates would be even lower if they were calculated using a pole height greater than 37.5 feet.⁴⁸

⁴⁴ DE 21-020, Exhibit 39, Prefiled Direct Testimony of Patricia D. Kravtin (Jan. 31,2022), Bates pp. 16-20.

⁴⁵ Consolidated did file its 2020 ARMIS report with the Commission in response to Commission Order No. 26,534 (Oct. 22, 2021) in Docket DE 21-0202 granting NECTA's Motion to Compel.

⁴⁶ See Exhibit 4, *Letter from David Soutter to Sarah Davis* (March 15, 2022).

⁴⁷ *Id.*

⁴⁸ *Id.*

33. Applying the FCC's cable rate formula using Consolidated's 2020 ARMIS report data and an average pole height of 39 feet (which the Petitioners maintain is a more accurate reflection of the actual height of Consolidated's poles as that figure was derived from discovery data in the Pole Transfer Docket),⁴⁹ Ms. Kravtin has determined that Consolidated's pole attachment rates should be \$5.33 for its solely owned poles, and \$2.67 for its jointly owned poles. *See Prefiled Testimony of Patricia D. Kravtin*, p. 21. She has also determined that there should be no charge for JU poles that Consolidated does not solely or jointly own. *See Prefiled Testimony of Patricia D. Kravtin*, p. 24.

34. Consolidated's Senior Director of Government Relations and Wholesale Strategies, Ms. Sarah Davis, responded to NECTA's March 15, 2022 rate dispute letter via e-mail on March 16, 2022,⁵⁰ indicating that Consolidated was not required to have or file ARMIS reports, and that if NECTA Members disagreed with the rates set by their contracts with Consolidated, they should exercise their rights to terminate the contracts and renegotiate them.⁵¹

35. The Petitioners did not terminate their pole attachment agreements with Consolidated as directed by Ms. Davis. Instead, the Petitioners followed the dispute resolution provision (Section 15.10) of their pole attachment agreements. That provision authorizes the Petitioners to submit complaints to Consolidated if they claim that a term or condition of the pole attachment agreement is unjust or unreasonable. Because rates and charges are part of the pole

⁴⁹ Pole height data compiled and provided by Eversource in response to Staff Data Request 3-005b.2020 in the Pole Transfer Docket which includes Consolidated pole height data, indicates that the actual height of 39 feet should be used instead of the presumptive pole height of 37.5 feet.

⁵⁰ *See Exhibit 5, E-mail message from Sarah Davis to David Soutter* (March 16, 2022).

⁵¹ Comcast received the same response from Consolidated when Comcast notified Consolidated by letter that Comcast disputes Consolidated's invoices for the first half of 2022, and reasserted the rate dispute initiated in NECTA's October 18, 2021 letter. *See Affidavit of James G. White, Jr.*, Attachment JGW-2, *Letter from Sharon Webber to Sarah Davis* (May 6, 2022) and Attachment JGW-3, *Letter from Sarah Davis to Sharon Webber* (May 20, 2022).

attachment agreements (*i.e.* they are contained in Appendix 1), they are “terms and conditions” which the Petitioners can dispute under Section 15.10.

36. Under Section 15.10 of their pole attachment agreements, the Petitioners, through NECTA, submitted their rate dispute to Consolidated (as noted above), and also requested a meeting with Consolidated to discuss the rate dispute.⁵² This meeting was held via videoconference on June 7, 2022 and attended by representatives of each Petitioner, NECTA, and Consolidated.⁵³ During the meeting, Consolidated indicated that it was not willing to voluntarily reduce its pole attachment rates to what the Petitioners believe are just and reasonable rates.⁵⁴

37. Notwithstanding that the Petitioners have disputed Consolidated’s invoices for the second half of 2021 and any subsequent periods, the Petitioners have all paid the second half 2021 invoices in full, and have either paid the first half of 2022 invoices in full or are in the process of paying them in full, and are all in the process of paying in full the recently received invoices for the second half of 2022.⁵⁵

38. Consolidated’s unwillingness to voluntarily lower its New Hampshire pole attachment rates to a range that approximates the rates produced using the FCC’s cable rate formula not only fails to comply with the Commission’s six factor rate review standard (as discussed below), but also is inconsistent with Consolidated’s recent action in Maine where it reduced its annual pole attachment rates from \$12.60 to \$3.56 for solely owned poles, and from \$6.30 to \$1.78 for jointly owned poles, in accordance with the FCC cable formula.⁵⁶

⁵² See Exhibit 6, *Letter from David Soutter to Sarah Davis* (May 19, 2022).

⁵³ See *Affidavits of Yann Quere and Nadine Heinen*, ¶ 18; and *Affidavit of James G. White, Jr.* ¶ 20.

⁵⁴ *Id.*

⁵⁵ See *Affidavits of Yann Quere, Nadine Heinen*, ¶ 17; and *Affidavit of James G. White, Jr.* ¶ 19.

⁵⁶ See Exhibit 7, *Letter from Harry Loring to Maine Licensee* (Feb. 8, 2022).

39. In 2019, the Maine PUC amended its pole attachment rules to adopt the FCC cable rate formula to set just and reasonable pole attachment rates. *See* Maine PUC Docket No. 2019-00028, Order No. 2019-203 (Nov. 21, 2019), and Maine PUC Rules Ch. 880, Section 4.

40. After the Maine PUC adopted the FCC's cable rate formula, Counsel for the Maine Cable Operators requested several times that Consolidated provide a copy of FCC Report 43-01 (the so-called ARMIS Report) for the purpose of calculating a just and reasonable rate under the FCC's cable rate formula.⁵⁷

41. Upon receipt of Consolidated's 2018 ARMIS report, Counsel for the Maine Cable Operators notified Consolidated that the maximum lawful pole rate that Consolidated could charge under the FCC's cable rate formula was \$3.56 for a solely owned pole.⁵⁸

42. After Counsel for the Maine Cable Operators gave Consolidated notice of the maximum lawful pole attachment rates chargeable in Maine, Consolidated lowered its Maine pole attachment rates to the level requested by Counsel for the Maine Cable Operators.⁵⁹

43. Consolidated acquired its Maine and New Hampshire poles as part of an integrated system from FairPoint Communications in 2017. Given that both sets of poles are owned and operated by the same company in adjoining states, and given that Consolidated has substantially lowered its Maine rates, the Petitioners assert that it is highly unlikely that Consolidated's *legal* New Hampshire pole attachment rates would be much higher than Maine's.

44. Consolidated remains unwilling to engage in negotiations to voluntarily reduce its New Hampshire pole attachment rates consistent with rates produced by the FCC's cable rate

⁵⁷ *See* Exhibit 8, *Letter from David Thomas to Sarah Davis* (Oct. 20, 2020).

⁵⁸ *See* Exhibit 9, *Letter from David Thomas to Sarah Davis* (June 1, 2020).

⁵⁹ *See* Exhibit 7, *Letter from Harry Loring to Maine Licensee* (Feb. 8, 2022).

formula. Instead, Consolidated is demanding that Petitioners terminate their pole attachment agreements in their entirety, and renegotiate them with Consolidated.

45. As explained above, the Petitioners have followed the dispute resolution process outlined in their pole attachment agreements. They have not terminated their pole attachment agreements because there is no requirement to do so in this case (as explained in Section V. C., below), and because termination of the pole attachment agreements exposes the Petitioners to the risk of having to remove their essential facilities from Consolidated's Poles if contract renegotiations are unsuccessful or delayed (also explained in Section V. C., below). In addition, terminating the agreements in their entirety instead of negotiating just and reasonable rates contravenes the severability provision (Section 15.4) of the pole attachment agreements. That Section provides that if any provision of the agreement is invalid or unenforceable, such invalidity or unenforceability shall not invalidate or render unenforceable the entire agreement, and if such invalid or unenforceable provision is considered an essential element of the agreement, the parties shall promptly attempt to negotiate a substitute therefore. Notwithstanding this negotiation provision, Consolidated remains unwilling to negotiate with the Petitioners to arrive at just and reasonable pole attachment rates, or to even provide documentation that supports its rate calculations.

V. DISCUSSION

A. Under the Commission's Six Factor Rate Review Standard, Consolidated's Pole Attachment Rates Should Be Set Using the FCC's Cable Rate Formula.

46. In determining just and reasonable pole attachment rates charged to cable television service providers, wireless providers, and excepted local exchange carriers, the Commission must consider the rate review standards set forth in N.H. Code Admin. R. Puc 1304.06(a). However, the Commission's rules do not require that the Commission weigh or

quantify each of the six rate review standards; they simply require that the factors be “considered.” *Id.*

47. Petitioners respectfully submit that, as demonstrated below, when the Commission considers the six rate standard criteria, it should conclude, as Ms. Kravtin has, that the FCC cable rate formula satisfies each criterion, and produces just and reasonable pole attachment rates for Consolidated.

1. Relevant Federal, State or Local Laws, Rules or Decisions

48. The first standard for establishing just and reasonable pole attachment rates for cable companies requires the Commission to consider relevant federal, state or local law, rules, or decisions.⁶⁰ Consideration of this factor supports adoption of the FCC’s cable rate formula set forth in 47 C.F.R. § 1.1406(d)(1) for all cable operator pole attachments regardless of the services delivered over such attachments. As discussed below, the FCC’s cable rate formula has been utilized by the FCC for several decades, upheld by courts against utility takings and other claims, applied to comingled cable and broadband services, and adopted by several “certified states” (*i.e.* states such as Maine and New York that, like New Hampshire, self-regulate in the area of pole attachments, pursuant to 47 U.S.C. §224 (c)(3)).

49. Within the first decade of its development, the United States Supreme Court held that the cable formula provided just compensation to pole owners.⁶¹ In addition, the Eleventh Circuit has found that the FCC’s cable rate formula provides adequate compensation for utility pole owners.⁶² In so doing, the Court stated “[t]he known fact is that the Cable Rate requires the attaching cable company to pay for any ‘make-ready’ costs and all other marginal costs (such as

⁶⁰ See N.H. Code Admin. R. Puc 1304.06(a)(1).

⁶¹ *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245, 253-54 (1987).

⁶² *Alabama Power Company v. Federal Communications Commission*, 311 F.3d 1357, 1368-69 (11th Cir. 2002).

maintenance costs and the opportunity costs of capital devoted to make-ready and maintenance costs), in addition to some portion of the fully embedded cost.”⁶³

50. In addition to the cable rate formula, the FCC’s rules contain a separate formula that has been applied to attachments classified as “telecommunications.”⁶⁴ However, it is important to note that the FCC, in its seminal April 7, 2011 order, adopted a revised telecom formula that, when properly applied, produces a rate that is an exact or very close equivalent to the cable rate.⁶⁵ See *Filed Direct Testimony of Patricia D. Kravtin*, p. 12, lines 3-7. In making this revision, the FCC sought to minimize the difference in rental rates paid for attachments that are used to provide different services in order to remove market distortions that affect attachers’ deployment decisions.⁶⁶ Moreover, the FCC has long held that cable operators that offer broadband services along with cable service do not lose the protection of the FCC’s cable rate formula.⁶⁷ Accordingly, in light of the FCC’s adjustment of the telecom formula to produce rates in line with those produced by the cable formula (which provides just compensation as discussed above), and because Petitioners are cable system companies, the FCC .rates. Indeed, the FCC has reconfirmed use of its cable formula for decades.⁶⁸

⁶³ *Id.*

⁶⁴ See 47 C.F.R. §1.1406(d)(2).

⁶⁵ *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (“April 2011 FCC Order”).

⁶⁶ *Id.*, ¶ 126.

⁶⁷ See *Texas Utils. Elec. Co. v. Federal Communications Commission*, 997 F.2d 925, 27(D.C. Cir. 1993)(upholding FCC’s determination that cable operator could not be charged above cable formula rate if its attachments also transmit nonvideo communications). Further, in 1998, the FCC found that the public interest would not be served by increasing the cable rate for commingled attachments, and instead found that specifying the cable rate would encourage cable operators to make Internet service available to their customers on a cost-effective basis, and encourage greater competition in the provision of Internet service. *Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 6777, ¶ 32 (1998). In 2002, the United States Supreme Court agreed with the FCC’s conclusion, and declared that the FCC’s position was consistent with Congress’s general instruction to “encourage the deployment” of broadband, Internet capability, and, if necessary, “to accelerate deployment of such capability by removing barriers to infrastructure investment.” *NCTA v. Gulf Power Co.*, 534 U.S. 327, 339 (2002).

⁶⁸ See April 2011 FCC Order”, ¶¶12, 175,180 and decisions cited therein.

51. The vast majority of states that regulate pole attachments have adopted the FCC's cable rate formula or some close variation of it. *See Prefiled Direct Testimony of Patricia D. Kravtin*, p. 12, line 15 through p. 13, line 3. For example, the Maine PUC employs the FCC's cable rate formula to determine just and reasonable pole attachment rates, and, as previously noted, Consolidated recently reduced its Maine pole attachment rates to levels consistent with rates produced using the FCC's cable rate formula.⁶⁹

52. Because Consolidated has owned and operated poles in both Maine and New Hampshire since acquiring the poles from FairPoint Communications in 2017 as part of an integrated system, the Maine PUC's pole rate rules which require the FCC's cable rate formula for setting pole attachment rates, should be considered by the Commission in determining just and reasonable rates for Consolidated.

2. Impact on Competitive Alternatives

53. Petitioners compete with Consolidated, and also rely on Consolidated for a vital component of their business – access to Consolidated's poles. Sound regulatory policy favoring competitive neutrality or a level playing field dictates that all competitors be treated fairly and similarly. This is best achieved by applying the FCC's cable rate formula, which is not inherently biased in favor of any one industry or one competitor, and can be readily applied in uniform fashion across broadband providers using a pole owner's actual financial data. *See Prefiled Direct Testimony of Patricia D. Kravtin*, p. 14, lines 12-17.

54. In order to promote competitive services, pole attachments – through which competitive service offerings are provided – must be priced at an efficient and cost-based level rather than excessive monopoly rate levels sought by pole owners, and in a manner that does not

⁶⁹ *See* ¶ 38, *supra*.

discriminate against competitive alternatives depending on the provider's choice as to technology, business plan, or mix of service offerings. *See Prefiled Direct Testimony of Patricia D. Kravtin*, p. 14, lines 7-11.

55. The FCC's cable rate formula is fully compensatory and produces rates well above the pole owner's marginal cost. *Id.*, lines 17-19. Rates set above those produced by the cable formula introduce market distortions via-a-vis the competitive benchmark of marginal cost pricing, and have a decidedly negative effect on competitive alternatives and competition generally. *Id.*, lines 19-22.

56. Using the FCC's cable rate formula to set Consolidated's pole attachment rates would have a positive impact on competitive alternatives. While providing adequate compensation to Consolidated for the use of its poles, the cable formula rates will also level the competitive playing field and promote competitive service offerings by enabling Consolidated's competitors to redirect the excess pole rent fees they currently pay Consolidated to investments in broadband and competitive service offerings.

3. Potential Impact on the Pole Owner and its Customers

57. Adoption of the FCC's cable rate formula would not negatively impact Consolidated or its customers. A pole attachment rate is considered "just and reasonable" if it allows the pole owner to recover at least its incremental costs but no more than the fully allocated costs of the attachment.⁷⁰ The FCC's cable rate formula produces rates at the high end of this statutory range as it attributes the fully allocated cost of the construction and operation of the pole.⁷¹

⁷⁰ See 47 U.S.C. § 224(d)(1).

⁷¹ *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245, 253 (1987). It is important to understand that under the FCC's cable rate formula, the attacher pays an appropriate share of the costs of the *entire*

58. In addition to the fully compensatory pole rental rate produced by the FCC's cable rate formula, pole owners also recover "make-ready" costs that the attacher pays to the pole owner that would not be incurred by the pole owner "but for" the pole attachment.⁷² These make-ready charges cover all work relating to "rearrangement or transfer of existing facilities, replacement of a pole, complete removal of any pole replaced, or any other changes required to accommodate" third party pole attachments.⁷³

59. Given that the pole owners recover fully allocated costs (*i.e.* the high end of the range produced by the FCC's cable rate formula) for pole rent, and incremental costs (*i.e.*, the low end of the range produced by the FCC's cable rent formula) for make-ready work associated with accommodating additional third party attachments, the cable rate formula has no adverse impact on the pole owner. In that respect, the FCC's "cable rate formula, together with the payment of make-ready expenses, provides compensation that exceeds just compensation."⁷⁴

60. As noted herein, the courts have found that the rates produced by the FCC cable rate formula fully compensate the pole owner for the use of its poles. In addition, the FCC has concluded that the cable formula rate is compensatory to pole owners "because these rates meet or exceed incremental cost, and satisfy all constitutional compensation requirements."⁷⁵

Thus, there can be no subsidization of pole attachers by the pole owner's customers.

pole – usable and unusable pole space -for each pole it occupies. A common misunderstanding, and one often repeated by pole owners, is that the attacher is only paying a share of the costs of the *usable* space (which is presumed to be 13.5 feet under 47 C.F.R. §1.1410 for a typical pole). However, this fallacy has been recognized and firmly repudiated: "[Such misstatements are] a complete mischaracterization of the Pole Attachment Act and the Commission's rules." *Alabama Cable Telecoms. Ass'n v. Alabama Power Co.*, 16 FCC Rcd 12209, ¶ 60 (2001). The FCC observed that "under the Cable Formula, the costs of unusable space are allocated based on the portion of usable space an attachment occupies, the space factor." *Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703 (e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 53 (2001).

⁷² April 2011 FCC Order, ¶¶ 185-187.

⁷³ N.H. Code Admin. R. Puc 1302.08.

⁷⁴ *Alabama Cable Telecom. Ass'n v. Alabama Power Co.*, 16 FCC Rcd 12209, ¶ 58 (FCC May 25, 2001).

⁷⁵ April 2011 FCC Order, ¶ 183.

61. Because the FCC’s cable rate formula complies with federal law and produces rates that are fully compensatory and not confiscatory, neither Consolidated nor its customers are harmed by these rates. Moreover, because Petitioners must pay make-ready charges (one-time incremental costs incurred by Consolidated to accommodate third party pole attachments, including costs of facility rearrangements and pole modifications and/or replacements as necessary), pole owners – in addition to receiving pole rental rates at the higher end of the range produced by the FCC’s cable formula- also recover their incremental costs (*i.e.* the low end of the rates produced by the cable formula). In that respect there can be no financial harm to Consolidated or its customers from application of the FCC cable rate formula because all of its costs associated with pole attachments are recovered - and then some. *See Prefiled Testimony of Patricia D. Kravtin*, p. 16, lines 8-15.

4. Potential Impact on the Deployment of Broadband Services

62. The FCC has recognized that “pole rental rates play a significant role in the deployment and availability of voice, video and data networks.”⁷⁶ Lower and more uniform pole attachment rates serve to “eliminate barriers to broadband deployment, provide regulatory certainty,” and promote deployment and competition.⁷⁷

63. Like the FCC, New Hampshire’s Broadband Action Plan recognizes the impact that pole attachment fees have on broadband deployment, and states that “[a]ttachment fees for pole access should be consistent and competitive so that they do not hinder the further deployment of broadband services.”⁷⁸

⁷⁶ April 2011 FCC Order, ¶ 172.

⁷⁷ *Id.*

⁷⁸ *State of New Hampshire Broadband Action Plan* (June 30, 2008), p. 39.

64. New Hampshire's Broadband Action Plan also states that public sector initiatives should not impede private investment that would expand broadband services in unserved and underserved regions of the state.⁷⁹ Allowing a monopoly pole owner like Consolidated to charge its competitors, *i.e.*, cable operators and other broadband services providers, attachment fees exceeding the economically efficient level produced by the FCC's cable rate formula is directly contrary to this stated goal, and therefore must be avoided.

65. Absorbing excessively high pole rents directly and negatively impacts the cable industry's ability to meet financial and investment obligations including those related to the build out of infrastructure needed to support the widespread deployment of advanced broadband services, including in rural areas. Accordingly, reducing Consolidated's current pole attachment rates to those produced by the FCC's cable rate formula will positively impact the deployment of broadband infrastructure investment and the deployment of high-speed internet service in New Hampshire, as unreasonable pole rental fees that would otherwise be paid to Consolidated can be used by Petitioners for infrastructure investments to deploy and support advanced broadband services.

5. Formulae Adopted by the FCC in 47 C.F.R. §1.1409(b) through (g) in effect on October 1, 2017

66. The FCC pole attachment rate formulae in effect on October 1, 2017 include the FCC's cable rate formula used by Ms. Kravtin to calculate the rates the Petitioners are proposing in this docket. As discussed above, that formula produces rates that the courts, other certified states and the FCC have found to be constitutional, just and reasonable.

⁷⁹ *Id.*

67. In addition to the cable rate formula, the federal rules contain a formula for attachments providing “telecommunications” services.⁸⁰ This is because the federal rules’ bifurcated formulae reflect federal law provisions which reference both cable and telecommunications attachments. *See* 47 U.S.C. §224 (d) (3). However, because RSA 374:34-a contains no such distinction, and for the reasons discussed herein, the FCC’s cable rate formula is the more appropriate formula for determining just and reasonable pole attachment rates.

68. The FCC’s current telecom rate formula was adopted in 2011 to revise the former telecom formula in order to produce rates that approximate the rates using the FCC’s cable rate formula.⁸¹ In making this revision, the FCC sought to “minimize the difference in rental rates paid for attachments that are used to provide voice, data, and video services, and thus...remove market distortions that affect attachers’ deployment decisions.”⁸² In support of its decision, the FCC found that under the FCC’s former telecom rate formula “cable operators have been arbitrarily deterred from offering new, advanced services” because of the “financial impact” that could result from application of a higher telecom rate.⁸³ Thus, the FCC determined that “implementing a low and more uniform rate” would “eliminate competitive disadvantages.”⁸⁴ The FCC also sought to “reduce disputes and costly litigation about the applicability of ‘cable’ or ‘telecommunications’ rates to broadband, voice over Internet protocol, and wireless services that distort attachers’ deployment decisions.”⁸⁵

⁸⁰ *See* 47 C.F.R. §1.1406(d) (2).

⁸¹ April 2011 FCC Order, ¶ 126.

⁸² *Id.*

⁸³ *Id.* ¶ 174.

⁸⁴ *Id.* ¶ 176.

⁸⁵ *Id.* ¶ 174.

69. At the same time, the FCC ensured that its revised telecom rate formula adequately compensated pole owners,⁸⁶ preserved “appropriate incentives” for them to “invest in poles,”⁸⁷ and did not impose an undue burden on utility rate payers.⁸⁸

70. The FCC’s cable rate formula, which allocates costs exclusively in proportion to relative pole usage offers many advantages over the FCC’s telecom rate formula, which allocates costs using a hybrid proportional and per capita approach. *See Prefiled Direct Testimony of Patricia D. Kravtin*, p. 19, lines 1-3. These advantages include that the cable rate formula is: designed in a manner that is fully consistent and transparent with respect to the principles of cost causation and economically efficient marginal cost pricing; fully compensatory to the pole owner; and applied in a simple, expeditious and unified manner that is less administratively burdensome than the telecom rate formula. *Id.*, lines 5-9.

71. In view of the foregoing, when considering the formulae under the FCC’s rules, the FCC’s cable rate formula should be applied in this case.

6. Other Interests of Subscribers and Users of Services Offered Via Such Attachments, or Consumers of Any Pole Owners Providing Such Attachments

72. This factor essentially equates to the regulatory “public interest standard” which dictates that the appropriate methodology for determining just and reasonable rates take into consideration not only the interests of utility pole owners, third party attachers, and both groups’ customers, but also the greater “public good.” Consideration of whether the FCC’s cable rate formula produces rates that are for the public good includes analysis of the public benefits of that formula in addition to the private costs and benefits of the parties directly involved.

⁸⁶ *Id.* ¶¶ 182-198.

⁸⁷ *Id.* ¶ 151.

⁸⁸ *Id.* ¶149.

73. As discussed above, the FCC’s cable rate formula produces rates that fully compensate the pole owner and do not result in subsidization by pole owners’ customers. Those rates are just and reasonable to third party attachers, and benefit their customers as well as the public generally by promoting broadband deployment.

74. When considering these various interests comprising “the public interest,” the benefits associated with the FCC’s cable rate formula outweigh any short term gain to the pole owner from the imposition of pole rental rates that exceed the costs incurred in direct relation to third party attachments, such as the rates currently charged by Consolidated, or rates produced by other formulae that are more complicated and/or which may exceed those produced by the FCC’s cable rate formula.

75. The National Association of State Utility Consumer Advocates (“NASUCA”), a national organization of consumer advocates who represent the interests of utility consumers has consistently supported the FCC cable rate, finding that, when balancing the interests of pole attachers, pole owners and customers, “the cable rate [formula] ‘should be used for all pole attachments.’”⁸⁹

B. Consolidated’s Joint Use Charges Should Be Eliminated

76. Section 3.2.1 of the Petitioners’ pole attachment agreements with Consolidated require payment of an attachment fee for each attachment made to Licensor’s (*i.e.*, Consolidated’s) poles. However, because Consolidated is charging Petitioners a joint use (“JU”) fee (referenced in Appendix 1 of the pole attachment agreements) for their attachments on poles that Consolidated *does not own*, the JU fee is inconsistent with Section 3.2.1 or any standard of

⁸⁹ *Id.*, ¶147.

reasonableness, and is therefore an unjust and unreasonable charge. Consolidated should therefore be prohibited from charging a fee for attachments to property that it does not own.

77. Consolidated is required by RSA 374:34-a to provide nondiscriminatory access to its poles at just and reasonable rates. Therefore, Consolidated's imposition of charges for pole attachments on poles it does not own is unjust, unreasonable and unlawful. As noted above, the FCC cable rate formula is fully compensatory and captures a fair allocation of pole-related capital expense and carrying charges from Consolidated's own financial data. Consolidated performs no services for attaching entities for which a JU charge is justified. Accordingly, Consolidated must be prohibited from charging pole attachment fees for poles it does not own.

C. The Petitioners Should Not Be Required to Terminate Their Pole Attachment Agreements With Consolidated In Order To Contest Only the Justness and Reasonableness of Consolidated's Pole Attachment Rates.

78. Consolidated asserts that the only process available to Petitioners if they believe that Consolidated's pole attachment rates are unjust and unreasonable is for Petitioners to terminate their pole attachment agreements and renegotiate them. Consolidated's position is unlawful as it conflicts with RSA 347:34-a, VII and N.H. Code Admin. R. Puc 1304.03, and is inconsistent with the pole attachment agreement provisions regarding Compliance With Laws (Section 15.6), Dispute Resolution (Section 15.10) and Severability (Section 16.4), as discussed below.

79. Section 15.6 of the Petitioners' pole attachment agreements states that the provisions of the agreements "are subject to, all laws, ordinances, and regulations which in any manner affect the rights and obligations of the parties hereto under this Agreement" and requires the parties to those agreements to at all time observe and comply with those laws, ordinances and regulations. That includes RSA 374:34-a, II (requiring that pole attachment rates be just and

reasonable), and RSA 374:34-a, VII and N.H. Code Admin. R. Puc 1304.03 (authorizing Petitioners to seek Commission resolution of pole attachment rate disputes). Consolidated must observe those provisions, none of which require Petitioners to terminate their pole attachment agreements before seeking relief from the Commission. Accordingly, inasmuch as Consolidated's "terminate and renegotiate" demand is inconsistent with the above-cited statutes and rule, which Consolidated must observe as required by Section 15.6 of its pole attachment agreements, Consolidated's position is unlawful, unjust and unreasonable.

80. Consolidated's "terminate and renegotiate" position also conflicts with Section 15.10 of the Petitioners' pole attachment agreements, which outlines the dispute process in cases, such as the instant one, where Petitioners claim that a term or condition of the agreement (*i.e.* rates and charges⁹⁰) is "unjust or unreasonable." Because the Petitioners assert that the pole attachment rates and JU fees charged by Consolidated under their agreements are "unjust and unreasonable," the dispute resolution provisions of Section 15.10 clearly apply. The dispute resolution process outlined in the Petitioners' pole attachment agreements does not require that the Petitioners terminate and renegotiate the agreements prior to filing a complaint with the Commission about Consolidated's unjust and unreasonable pole attachment rates, and other unjust and unreasonable terms and conditions of the pole attachment agreement. Consolidated's "terminate and renegotiate" position, therefore, is unlawful, unjust and unreasonable.

81. To the extent that Consolidated relies on Section 3.1.2 of the pole attachment agreements to support its position, that reliance is misplaced. The termination provision of Section 3.1.2 of the pole attachment agreements applies only when Consolidated has given notice of a **change** in its rates ("Licensee may terminate this Agreement at the end of such sixty

⁹⁰ See *Affidavits of Yann Quere, Nadine Heinen, and James G. White, Jr.*, Attachments CS-1, NH-1 and JGW- 1 (Pole Attachment Agreement), Section 3.1.1.

(60) day notice period if the change in Fees and Charges is not acceptable to Licensee.”).

Because Consolidated’s excessive rates have not changed since it acquired its pole interests from FairPoint in 2017, the termination provisions of Section 3.1.2 do not apply to this rate dispute.

82. Even if Section 3.1.2 of the pole attachment agreements does apply to this rate dispute, that contract provision is unjust and unreasonable and should not be enforced.

Consolidated’s “terminate and renegotiate” interpretation is unjust and unreasonable as it puts Petitioners at risk of having to remove their essential facilities from Consolidated’s poles. More specifically, if Petitioners are required to terminate their pole attachment agreements when they disagree with Consolidated’s rates, and if they are unable to reach agreement with Consolidated on new pole attachment agreements within 60 days of the effective date of the termination, Sections 3.1.2 and 10.3.1 require that the Petitioners remove their facilities from Consolidated’s poles, which would prevent the Petitioners from providing services to their customers. Because “terminate and renegotiate” places the Petitioners at the mercy of Consolidated and leads to a harsh and unreasonable result, Consolidated’s position cannot be enforced. *See Gamble v. University of New Hampshire*, 136 N.H. 9, 15 (1992) (New Hampshire Supreme Court “will, where possible, avoid construing the contract in a manner that leads to harsh and unreasonable results or places one party at the mercy of the other’[citation omitted]).”

83. Consolidated’s demand that the Petitioners terminate and renegotiate their entire pole attachment agreements when only one issue (*i.e.*, the rates and charges in Appendix 1 of the agreements) is disputed, is unjust and unreasonable, and is inconsistent with the severability provisions (Section 15.4) of the pole attachment agreements. The severability section provides that the invalidity or unenforceability of one provision of the agreement does not affect the validity or enforceability of the entire agreement. It further provides that if the invalid or

unenforceable provision is considered an “essential element” of the agreement, the parties must “promptly attempt to negotiate a substitute therefor.” That is exactly what the Petitioners attempted to do, *i.e.*, negotiate with Consolidated to determine just and reasonable pole attachment rates. Consolidated, however, refuses to negotiate.

84. Consolidated’s failure to provide pole rate-related information sought in NECTA’s data requests in the Pole Transfer Docket, and NECTA’s knowledge that Consolidated’s rates in Maine were to be reduced to levels produced using the FCC’s cable rate formula led the Petitioners to question the justness and reasonableness of Consolidated’s pole attachment rates in New Hampshire, and to initially dispute those rates (and to ask for data substantiating them) in October of 2021. After Ms. Kravtin used Consolidated’s 2020 ARMIS report to calculate rates under the FCC’s cable rate formula, and filed testimony in the Pole Transfer Docket that Consolidated’s rates were unjust and unreasonable, the Petitioners renewed their rate dispute with Consolidated in writing in March of 2022, and met with Consolidated in June of 2022 to attempt to resolve their dispute through negotiation. The Petitioners have pursued their rate claims in accordance with their pole attachment agreements, and applicable statutes and rules. In these circumstances, the Petitioners should not be barred from pursuing their rate claims at this juncture or in this forum.⁹¹ Nor should the Petitioners be forced to terminate and renegotiate their pole attachment agreements when only one issue (rates and charges) is disputed and can be severed and reset without affecting the remaining provisions of their pole attachment agreements.

⁹¹ In fact, Consolidated conceded in the Pole Transfer Docket that the governing law provisions and dispute resolution provisions of the Petitioners’ pole attachment agreements “represent the appropriate forums and processes for resolving any disagreements regarding pole attachment rates...[and] each attaching entity has the right to follow the process outlined in the Commission rules to file a rate dispute.” DE 21-020, *Joint Brief of Public Service Company of New Hampshire d/b/a Eversource Energy and Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications* (June 3, 2022), pp. 21-22.

85. Given Consolidated's unwillingness to engage in negotiations to arrive at a mutually agreed-upon reduction in Consolidated's pole attachment rates to levels that the Petitioners believe are just and reasonable, Petitioners believe that further attempts to resolve their dispute with Consolidated without the Commission's involvement would be unproductive.

86. Petitioners believe that the rate dispute should be resolved with the assistance of a Commission-appointed mediator. However, they reserve their rights to fully litigate the issues raised in this Petition before the Commission in the event that mediation is unsuccessful.

VI. COUNTS

Count I:

Unlawful Pole Attachment Rates and Charges

87. Petitioners incorporate by reference as if fully set forth herein paragraphs 1 through 86 of this Petition.

88. Because Consolidated's current pole attachment rates, which were in effect during the second half of 2021, first half of 2022 and second half of 2022 charged to Petitioners, have not been established according to any particular methodology, formula or according to the rate review standards in N.H. Code Admin. R. Puc 1304.06(a), they are unjust and unreasonable in violation of 47 U.S.C. §224 and RSA 374:34-a, II.

89. Because Consolidated's pole attachment rates charged to Petitioners exceed the rates produced under the FCC's cable rate formula prescribed in 47 C.F.R. §1.1406(d), the rates are unjust and unreasonable in violation of 47 U.S.C. §224 and RSA 374:34-a, II.

90. Because Consolidated is imposing joint use charges for poles that it does not own, those charges are unjust and unreasonable in violation of 47 U.S.C. §224 and RSA 374:34-a, II.

Count II:

Unlawful Terms and Conditions of Pole Attachment Agreement

91. Petitioners incorporate by reference as if fully set forth herein paragraphs 1 through 86 of this Petition.

92. To the extent that Section 3.1.2 or any other provision of the Petitioners' pole attachment agreements may be interpreted as requiring that Petitioners must terminate and attempt to renegotiate the agreements prior disputing rates charged by Consolidated under the agreements, such provision is an unreasonable term and condition in violation of 47 U.S.C. §224 and RSA 374:34-a, II.

93. To the extent that Section 3.1.2 or any other provision of the Petitioners' pole attachment agreements may be interpreted as requiring that Petitioners must terminate and attempt to renegotiate the agreements prior to disputing rates charged by Consolidated under the agreements, such provision violates RSA 374:34-a, VII and N.H. Code Admin. R. Puc 1304.03.

VII. RELIEF REQUESTED

Based on the foregoing, Petitioners respectfully request that the Commission:

- A. Exercise its authority under RSA 541-A:31, V (b) in order to facilitate an informal disposition of this matter without the need for a fully litigated proceeding and expeditiously appoint a member of the Commission's staff to conduct one or more mediation sessions to resolve this dispute within 45 days of the date of this Petition;
- B. In the event that mediation is unsuccessful in resolving this dispute within 45 days of the date of this Petition, establish a procedural schedule that will permit the Commission to issue an order that resolves this dispute within 180 days of the date of this Petition as required by 47 U.S.C. §224 (c)(3);

- C. Pursuant to N.H. Code Admin. R. Puc 1304.06 (a), 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) using an average pole height of 39 feet;
- D. Order that the pole attachment rates calculated by Ms. Kravtin using the FCC's cable rate formula (with an average pole height of 39 feet) are just and reasonable;
- E. Order that Consolidated charge the pole attachment rates of \$5.33 for a solely owned pole, and \$2.67 for a jointly owned pole until such rates are lawfully changed;
- F. Order that Consolidated eliminate pole attachment charges or fees (such as joint use charges) for attachments to poles that Consolidated does not own;
- G. Order Consolidated to pay refunds with interest to Petitioners for the amounts they paid to Consolidated for invoices covering the second half of 2021 and subsequent billing periods that exceed the just and reasonable rates established in this docket;
- H. Order that Consolidated cannot require attachers to terminate and attempt to renegotiate their pole attachment agreements before disputing Consolidated's pole attachment rates or any other term or condition that the attaching entities allege are unlawful;
- I. Order Consolidated to cease and desist the imposition of its unlawful, unjust and unreasonable rates, terms and conditions of attachment in a manner consistent with this Petition;
- J. Order Consolidated to cease and desist from employing such unreasonable rates, terms and conditions of attachment in the future; and
- K. Award Petitioners such additional 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.

By:



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Dated: August 22, 2022

Certificate of Service

I hereby certify that on the date set forth above, a copy of this Petition was sent by electronic mail to the Office of Consumer Advocate, Attorney David Wiesner, Attorney Patrick McHugh, Ms. Sarah Davis, Senior Director of Government Affairs, Consolidated Communications.



Susan S. Geiger

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