

STATE OF NEW HAMPSHIRE
Before the
PUBLIC UTILITIES COMMISSION
DT 22-047

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

Petition for Resolution of Rate Dispute

PETITIONERS' OBJECTION TO CONSOLIDATED'S
MOTION TO DISMISS

NOW COME Charter Communications, Inc., Cogeco US Finance, LLC d/b/a Breezeline, and Comcast Cable Communications, LLC (collectively, “the Petitioners”), and object to the Motion to Dismiss (“the Motion”) filed by Consolidated Communications of Northern New England Company, LLC (“Consolidated”) in the above-captioned docket by stating as follows:

I. Introduction/Procedural History

1. On August 22, 2022, the Petitioners filed a Petition for Resolution of Rate Dispute (“the Petition”) with this Commission for the purpose of resolving the Petitioners’ dispute with Consolidated over the pole rental rates that Consolidated charges the Petitioners for their attachments to Consolidated’s poles, and the Joint Use (“JU”) charge that Consolidated charges Petitioners for their attachments on poles that Consolidated does not own.

2. The Petitioners assert that Consolidated’s pole attachment rates and its JU charges are unlawful, unjust and unreasonable. *Petition*, Count I, ¶¶ 87-90. To support their claims, the Petitioners provided detailed factual information in the Petition, and submitted prefiled testimony

(with supporting documents) of a leading expert on pole attachment rates, Ms. Patricia Kravtin, and an affidavit (with supporting documents) from an employee of each Petitioner (*i.e.*, Yann Quere, Nadine Heinen, and James G. White, Jr.).

3. As explained in the Petition, the Petitioners notified Consolidated by letter on October 18, 2021 that they disputed Consolidated's invoices for the second half of 2021, including Consolidated's JU charges. *Petition*, ¶ 28. That 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. *Id.* Consolidated failed and refused to respond to the above-described request for information. The Petitioners then reiterated their dispute in writing to Consolidated on March 15, 2022, stating that they wished to resolve the pole attachment rate dispute informally, and providing a range of reasonable rates the Petitioners were willing to accept. *Petition*, ¶¶ 31-32.

4. The Petitioners again attempted to resolve their rate and JU charge dispute by meeting with Consolidated on June 7, 2022 to discuss reduced pole attachment rates. *Petition*, ¶¶ 35-36. However, during this meeting, Consolidated refused to negotiate with Petitioners. Instead, Consolidated asserted that if the Petitioners disagreed with the rates set by their Pole Attachment Agreements, the Petitioners should terminate the contracts and renegotiate them. *Petition*, ¶ 34.

5. Because of Consolidated's refusal to negotiate in good faith (or even at all) on the narrow issue of just and reasonable pole attachment rates, and the elimination of the JU charge, the Petitioners filed the Petition seeking relief from the Commission pursuant to RSA 374:34-a, II and VI, and N.H. Code Admin. R. Puc 1304.03.

6. On September 28, 2022, the Commission issued an order commencing an adjudicative proceeding in this docket. In that order, the Commission stated that “in order to be considered by the Commission in this matter,” Consolidated must file its response to the Petition on or before October 14, 2022. *Charter Communications, Inc., Cogeco US Finance, LLC d/b/a Breezeline, and Comcast Cable Communications, LLC*, DT 22-047, Unnumbered Order entitled “Commencement of Adjudicative Proceeding and Notice of Prehearing Conference” (Sept. 28, 2022) at 4.

7. Consolidated filed a Response on October 14, 2022 which summarily concluded, without any supporting legal argument, that the Commission “should dismiss the Petitioners’ Petition.” *Consolidated Communications of Northern New England Company, LLC’s Response to Petition dated August 22, 2022* (Oct. 14, 2022), ¶ 56.

8. On November 8, 2022, the Commission issued a procedural schedule for this docket which makes no provision for the filing of a Motion to Dismiss. However, on November 16, 2022, Consolidated filed the Motion, asserting that the Petition states no claim upon which relief may be granted because: 1) no “dispute” actually exists; 2) the parties’ business relationship regarding pole attachments is embodied each Pole Attachment Agreement which is clear on its face; and 3) the Pole Attachment Agreements must be enforced under New Hampshire law. *Motion*, ¶ 3.

9. Given the express wording of the Commission’s September 28, 2022 order, and the procedural schedule, Consolidated cannot, at this stage of the proceeding, submit for the Commission’s consideration, an additional Response in the form of a Motion to Dismiss. The Motion, therefore, is untimely and cannot properly be considered by the Commission.

10. Even assuming that the Motion to Dismiss may be considered at this juncture, it must be denied because, as explained further below, Commission precedent, RSA 374:34-a, the Commission's 1300 rules, and the terms of the Petitioners' Pole Attachment Agreements all permit the Petitioners to maintain this action against Consolidated, and authorize the Commission to resolve it by establishing just and reasonable pole attachment rates, charges, terms and conditions.

II. Legal Standard

11. In ruling on a Motion to Dismiss, the Commission is required to accept as true all of the factual assertions in the Petition, and to determine whether those facts, as well as the supporting documents and testimony, and all reasonable inferences therefrom, could support the relief requested. *Eversource Energy and Consolidated Communications*, DE 21-020, Order No. 26, 534 (Oct. 2021) at 7. In addition, the Commission must construe all inferences in the light most favorable to the Petitioners. *PNE Energy Supply, LLC et al. v. PSNH d/b/a Eversource Energy*, DE 15-491, Order No. 25,881 (Apr. 8, 2016) at 3. The Commission engages "in a threshold inquiry that tests the facts in the complaint against the applicable law." *Eversource Energy, supra*.

12. When viewed in the light most favorable to the Petitioners, the facts alleged in the Petition and all reasonable inferences therefrom demonstrate the existence of a valid dispute with Consolidated over its pole attachment rates, charges, terms, conditions and voluntary agreements. The Petitioners have provided comprehensive, detailed expert testimony demonstrating that Consolidated's pole attachment rates are not just and reasonable, and should be set in accordance with the Commission's rate review standards set forth in Puc 1304.06. Accordingly, the Petitioners have asserted a valid claim that the Commission has the authority

and responsibility to resolve. *See* Puc 1304.03 (“a party to a pole attachment agreement...may petition the commission...for resolution of a dispute arising under such agreement...”), and RSA 374:34-a, VII (“commission shall have the authority to hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements...”). The Commission, therefore, must adjudicate the Petition. *See* Puc 1303.05 (“commission shall conduct an adjudicative proceeding pursuant to Puc 203 to consider and rule on the petition...”).

III. Argument

A. Introduction

13. Consolidated’s Motion asserts that there is no valid dispute or controversy under the existing Pole Attachment Agreements, *Motion*, ¶ 6, and that under RSA 374:34-a, the Commission’s jurisdiction relating to pole attachment issues exists “only when a pole owner and an attacher are unable to reach agreement.” *Motion*, ¶ 7. The Motion goes on to argue that because the Pole Attachment Agreements are clear with respect to the applicable pole attachment and JU rates, the definition of a joint use pole, and how and when the Petitioners may dispute pole attachment rates, there is no valid dispute between the parties and the Commission should dismiss the Petition. *Id.*

14. Consolidated essentially argues that because the Petitioners did not challenge the justness or reasonableness of the last pole attachment rate increase at the time of the last rate increase by Consolidated’s predecessor, FairPoint, several years ago¹ the terms of the Pole Attachment Agreements bar the Petitioners from now seeking rate relief from the Commission,

¹ Information provided in response to a data request in DT 21-020 indicates that Consolidated’s rates were increased to their current levels sometime between 2009 and 2011 by Consolidated’s predecessor, FairPoint Communications. *See* Prefiled Direct Testimony of Patricia D. Kravtin, DT 22-047 (Aug. 22, 2022), Attachment PDK-2.

and that the Petitioners' only recourse is to terminate their Pole Attachment Agreements and renegotiate them in their entireties. Consolidated also argues that the Petitioners cannot challenge the JU charges because those charges are authorized by the terms of the Pole Attachment Agreements. However, these arguments must fail because they ignore Commission precedent, and a plain reading of RSA 374:34-a VII , Commission Rules Puc 1304.03 and 1304.05, and the terms of the parties' Pole Attachment Agreements.

B. Commission Precedent Properly Articulates the Commission's Authority Over the Instant Rate Dispute

15. The Commission has previously asserted jurisdiction over a rate complaint filed by an attaching entity that had a pole attachment agreement with a utility pole owner. *See Time Warner Entertainment Company L.P. d/b/a Time Warner Cable*, Petition for Resolution of Dispute with Public Service of New Hampshire, DT 12-084, Order No. 25, 387 (July 3, 2012) ("Time Warner Order"). In the Time Warner case, the Commission found that it had jurisdiction under RSA 374:34-a over rate setting issues, and that like the Federal Communications Commission ("FCC"), "the Commission has primary jurisdiction over issues about the reasonableness of rates, terms and conditions concerning pole attachments." *Time Warner Order* at 14 quoting *In the Matter of Mile Hi Cable Partners, LP*, 17 F.C.C.R. 6268, 6271 (2002). The Commission has also recently held that "pole attachment rates are subject to Commission jurisdiction pursuant to RSA 374:34-a and N.H. Code Admin. R. Puc Ch. 1300", recognizing that pole attachment rates "must be just and reasonable." *Eversource Energy and Consolidated Communications*, DT 21-020, Order No. 26,729 (Nov. 18, 2022) at 19.

16. The Commission has recognized that "pole attachments are and have been subject to regulatory oversight and that to the extent a party to an agreement attempts to impose or enforce an unreasonable or unjust condition, a regulatory body may correct that action." *Time Warner*

Order at 7. The scope of the Commission’s authority in such cases includes a review of “the terms of the parties’ agreement, with particular emphasis on the rate setting provisions to determine if they are just and reasonable in light of the relevant and applicable state and federal law. To the extent that any terms may be found to be unjust or unreasonable, the Commission will...order revisions to the agreement.” *Time Warner Order* at 15.

17. Thus, the Time Warner Order clearly establishes that the Commission has the authority to review the pole attachment rates, JU charges, and other terms and conditions of the parties’ Pole Attachment Agreements to determine if they are just and reasonable. This fundamental principle is also reflected in RSA 374:34-a, VII which specifically authorizes the Commission to resolve complaints concerning pole attachment “rates”, “charges” and “voluntary agreements”.

18. Moreover, if the Commission determines that rates, terms and conditions of Pole Attachment Agreements are unjust or unreasonable, the Commission has the authority to order revisions to the Agreements. *Time Warner Order, supra*. This principle is consistent with the FCC’s authority to review voluntary pole attachment agreements and to reform them upon a finding that rates charged thereunder are unjust and unreasonable. *See, e.g., Southern Company Service, Inc. v. Federal Communications Commission*, 313 F.3d 582-584 (D.C. Cir. 2002) (upholding FCC’s authority to resolve pole attachment rate disputes between parties to pole attachment agreements; party to a pole attachment agreement is not estopped from filing complaint about terms of the agreement after it is executed).

19. The above-cited Commission precedent completely undermines Consolidated’s claims that the Petitioners may not seek a review of the JU charges, or obtain rate relief from the Commission at this time because the Petitioners did not challenge the rates several years ago

when they were increased. A plain reading of RSA 374:34-a, VII and the Commission's rules, set forth below, does the same.

C. RSA 374:34-a, VII Authorizes the Commission to Resolve the Petitioners' Complaint Notwithstanding the Existence of "Voluntary" Pole Attachment Agreements

20. Consolidated reads RSA 374:34-a as conferring authority upon the Commission to regulate and enforce pole attachment rates, charges, terms and conditions "only when a pole owner and attacher are unable to reach agreement." *Motion*, ¶ 7. Consolidated appears to argue that the Commission's authority to establish just and reasonable rates under RSA 374:34-a, II is restricted to cases where the pole owner and an attaching entity do not have a pole attachment agreement in place. However, this interpretation is improper as it reads RSA 374:34-a, II in isolation, and without regard to other provisions of the statute, namely RSA 374:34-a, VII, which gives the Commission "authority to hear and resolve complaints concerning rates, charges, terms, conditions" and "voluntary agreements...relative to pole attachments." When interpreting a statute, the New Hampshire Supreme Court construes "all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." *Appeal of Algonquin Gas Transmission*, 170 N.H. 763, 770 (2018). The Court does "not consider words and phrases in isolation, but rather within the context of the statute as a whole...to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." *Id.*

21. When reading all of the provisions of RSA 374:34-a together as a whole, it is clear that an overarching policy goal of the statute is to ensure that pole attachment rates, charges, terms, and conditions are "just and reasonable." RSA 374:34-a, II. The statutory scheme plainly reveals that the Commission has the authority to "regulate and enforce" such rates, charges, terms and conditions even if they are contained in a "voluntary agreement." RSAs 374:34-a, II.

and VII. RSA 374:34-a, VII also makes clear that the Commission’s regulatory and enforcement authority over pole attachments includes the authority to “hear and resolve complaints” concerning pole attachment rates, charges, terms, and conditions, as well as those involving “voluntary agreements.” Given that the instant action concerns a complaint that Consolidated’s pole attachment rates, fees, and other terms and conditions of the parties’ “voluntary agreements” (*i.e.*, the Pole Attachment Agreements) are unjust and unreasonable, it is clear that the Commission has the authority to hear and resolve the complaint.

D. The Commission’s Pole Attachment Rules Authorize the Filing and Adjudication of the Petition

22. In addition to the plain language of the above-cited statutes, the plain language of the Commission’s rules clearly authorizes the Petitioners to pursue claims for unjust and unreasonable pole attachment fees and charges under a “voluntary agreement”, and requires that the Commission adjudicate those claims. Specifically, N.H. Code Admin. R. Puc 1304.03 (entitled “**Dispute Following Agreement** or Order”) (emphasis added) states that a “party to a pole attachment agreement, or a party to an order of the commission establishing rates, charges, terms, or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order”, and Puc 1304.05 requires that the Commission conduct an adjudicative proceeding “to consider and rule on the petition.”

23. As its title makes clear, Puc 1304.03 permits an attaching entity to file a rate dispute petition with the Commission *after* the attaching entity and a pole owner enter into a “voluntary agreement” for pole attachment rates, charges, terms and conditions. The same is true for a party subject to a Commission order establishing pole attachment rates, charges, terms, and conditions. The rule contains no time limitation on when a pole attachment dispute petition may be filed. Therefore, a party to a Commission order is not barred from filing a pole attachment rate

complaint even though it did not file a motion for reconsideration of the order within 30 days as required by RSA 541:3. Similarly, a party to a voluntary agreement containing a time period within which a licensee is to challenge a rate increase, is not barred from filing a rate dispute petition after that period has expired.

24. Strong public policy considerations favor allowing pole attachment rate complaints to be filed with the Commission after the execution of a voluntary agreement concerning such rates. Underscoring this point are cases where attaching entities have been initially satisfied with the pole attachment rates and charges established in their pole attachment agreements many years ago, but then discover that the rates they initially accepted years ago are no longer just and reasonable. Just because pole attachers do not object to pole rate increases at one point in time does not mean that the rates must be grandfathered forever. If that were the case, pole attachment rates could never decline, despite the fact that poles are regulatory assets that depreciate over time which should result in lower pole attachment rates. Such is the case here, where Consolidated's pole attachment rates were last raised several years ago by its predecessor. Until the Commission compelled Consolidated to provide information in docket DT 21-020 that allowed the Petitioners to assess the regulatory value of Consolidated's pole assets, and to test the justness and reasonableness of Consolidated's pole attachment rates, the Petitioners were not in a position to challenge the rates. *Petition*, ¶¶22, and 24-30.

E. The Pole Attachment Agreements Permit the Filing and an Adjudication of the Petition

25. The terms of the parties' Pole Attachment Agreements discussed below specifically permit the Licensees/Petitioners to file a rate complaint with the Commission without first terminating and attempting to renegotiate the Agreements.

26. Section 15.6 of the 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 times, observe and comply with those laws, ordinances and regulations. Those laws and regulations include RSA 374:34-a, II (requiring that pole attachment rates be just and reasonable), RSA 374:34-a, VII and Puc 1304.03 (authorizing Petitioners to seek Commission resolution of pole attachment rate disputes), and Puc 1304.05 (requiring the Commission to adjudicate a petition filed under PART Puc 1304). Consolidated must observe these statutory and regulatory provisions, and cannot prevent the Petitioners from pursuing their rights and remedies under the provisions. Further, because none of the statutes and rules affecting the rights and obligations of the parties to the Pole Attachment Agreements require the Petitioners to terminate and renegotiate their pole attachment agreements before seeking rate relief from the Commission, Consolidated’s attempt to impose that obligation on the Petitioners is improper.

27. Consolidated’s reliance on Sections 3.1.2 and 3.1.3 of the Pole Attachment Agreements to support its position that the Petition is time-barred is misplaced. Those sections describe the process for challenging a rate *change*, which is not the case here – where the Petitioners are challenging rates they have paid for approximately a decade, and were only recently provided the information allowing them to discover the rates are excessive. Moreover, Sections 3.1.2 and 3.1.3 of the Pole Attachment Agreements cannot be construed as establishing pole attachment rates in perpetuity, or as insulating unjust and unreasonable rates from regulatory scrutiny authorized by RSA 374:34-a. At best, Section 3.1.3 merely creates a “presumption” that the rates are “acceptable” if not challenged within a specified time period.

The Agreements cannot be construed in the manner suggested by Consolidated – *i.e.*, that only Consolidated can lower pole rates, and the Petitioners cannot seek rate relief from the Commission - as such an interpretation produces a harsh and unreasonable result, and places the Petitioners at the mercy of Consolidated. *Thiem v. Thomas*, 119 N.H. 598, 604 (1979). The Pole Attachment Agreements, therefore, cannot be interpreted to prevent the Petitioners from challenging Consolidated’s unjust and unreasonable pole attachment rates and charges at this juncture.

28. Section 15.10 of the Pole Attachment Agreement outlines the dispute process in cases, such as the instant one, where Petitioners claim that terms or conditions of the agreement (*i.e.* existing rates and charges) are “unjust or unreasonable.” There is no limitation on the type of dispute that can be instituted under this section, nor on the period within which it must be instituted. The plain language of Section 15.10 reveals the parties’ intent to provide another process for resolving disputes that arise outside of the narrow time period that applies to the announcement of a rate increase. The Petitioners are challenging longstanding rates and JU charges that the Petitioners only recently learned were excessive and unreasonable. The rate increase dispute sections of the Pole Attachment Agreements (which require that rate increase disputes are to be filed within 30 days of the increase notice) are inapplicable here where the rates increased many years ago. The Petitioners proceeded properly under Section 15.10, the “Dispute Resolution” section. The Petitioners notified Consolidated in writing that they dispute as “unjust and unreasonable” the pole attachment rates and JU fees imposed by Consolidated under the Pole Attachment Agreements, and have otherwise followed the dispute resolution process in Section 15.10. That process specifically allows a Licensee to file “a complaint with the regulatory body of competent jurisdiction” if the Licensee is not satisfied with the results of a

meeting with Consolidated to discuss the dispute. Section 15.10 is not limited to any particular type of dispute, and does not require that the Licensee terminate and renegotiate the Pole Attachment Agreement prior to filing a complaint with the Commission. Therefore, under a plain reading of the language contained in Section 15.10, the Petition may proceed to adjudication.

29. To the extent that any provision of the Pole Attachment Agreements may be construed as barring the Petition because the Petitioners did not notify Consolidated's predecessor in writing within 60 days of the last rate increase (which occurred several years ago), such provision(s) are unenforceable in light of the statutes and rules discussed above, and because such provisions are unconscionable and oppressive.

30. New Hampshire law recognizes that contracts, or portions of them, may be declared void and unenforceable because they are unconscionable or oppressive. *Pittsfield Weaving Co., Inc. v. Grove Textiles, Inc.* 121 N.H. 344, 346 (1981). "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.* quoting *Williams v. Walker-Thomas Furniture Company*, 350 F. 2d 445, 449 (D.C. Cir. 1965). "Gross inequality of bargaining power is also a factor to be considered" in examining whether a contract or contract term is unconscionable. *Pittsfield Weaving Co., supra.* (citations omitted).

31. Cable operators such as the Petitioners have no meaningful choice when it comes to leasing pole space for their facilities. As the United States Supreme Court recognized, "[u]tility company poles provide...virtually the only physical medium for the installation of television cables." *Federal Communications Commission et al. v. Florida Power Corp.*, 480 U.S. 245, 247 (1987). The courts have also recognized that pole owning utilities "often exploited their market

position to charge excessively high attachment rates.” *Southern Company Services, Inc. v. FCC*, 313 F. 3d 574, 577 (D.C. Cir. 2002). In these circumstances, provisions of the Pole Attachment Agreements that could potentially be construed as preventing attaching entities from exercising their statutory and regulatory rights to challenge excessively high pole attachment rates and unreasonable charges cannot be enforced under New Hampshire law because they are unconscionable.

IV. Conclusion

32. For the reasons stated above, Consolidated’s Motion to Dismiss provides no lawful basis upon which the Petition can be dismissed. Furthermore, RSA 374:34-a, VII, Puc 1304.03, and Section 15.10 of the Pole Attachment Agreements, clearly permit the Petitioners to pursue, in this forum and at this time, their complaint that Consolidated’s pole attachment rates and JU charges are unjust and unreasonable, and RSA 374:34-a, VII and Puc 1304.05 require that the Commission hear and resolve the complaint.

WHEREFORE, the Petitioners respectfully requests that the Commission:

- A. Deny Consolidated’s Motion to Dismiss; and
- B. Grant such additional relief as is just and appropriate.

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

By their Attorneys,
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Dated: November 28, 2022

Certificate of Service

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

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

Susan S. Geiger