

STATE OF NEW HAMPSHIRE

Before the

PUBLIC UTILITIES COMMISSION

Docket No. DT 22-047

**CHARTER COMMUNICATIONS, INC., COGECO US FINANCE, LLC
d/b/a BREEZELINE, AND COMCAST CABLE COMMUNICATIONS, LLC
Petition for Resolution of Rate Dispute**

**Consolidated Communications of Northern New England Company, LLC's
Motion for Rehearing/Reconsideration of the Commission's Order Denying Consolidated's
Motion to Dismiss (Order No. 26,764) and Partial Reconsideration of Order No. 26,775**

NOW COMES, Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications – NNE (“Consolidated”) and hereby respectfully moves the New Hampshire Public Utilities Commission (the “Commission”) to grant a rehearing on and/or reconsider its (i) Order No. 26,764 (issued January 23, 2023) denying Consolidated’s Motion to Dismiss and (ii) Order No. 26,775 (issued February 17, 2023) solely on that portion of the order related to the so-called joint use charges. In support hereof, Consolidated hereby states as follows:

I. Introduction

1. Consolidated respectfully requests that the Commission grant a rehearing on and/or reconsider its order denying Consolidated’s Motion to Dismiss, Order No. 26,764. Consolidated contends that the Commission erred in concluding that it had jurisdiction to resolve this dispute pursuant to RSA 374:34-a, and, in the alternative, in denying Consolidated’s motion to dismiss on the ground that the Petitioners failed to satisfy its contractual obligations necessary

to confer authority on this Commission to resolve this dispute. In support of this Motion for Rehearing/Reconsideration, Consolidated incorporates the arguments presented in its Motion to Dismiss dated November 16, 2022, as if fully set forth in this motion.

2. Consolidated further requests that the Commission grant a rehearing and/or reconsider the portion of its Order No. 26,775 solely pertaining to the so-called joint use charges. As more fully explained below, the Petitioners' pole attachment agreements clearly and unambiguously confer authority on Consolidated to charge the Petitioners for pole attachments on Consolidated's jointly used poles, regardless of Consolidated's lack of ownership in those poles.

II. Procedural History

3. On August 22, 2022, Charter Communications, Inc., Cogeco U.S. Finance, LLC d/b/a Breezeline, and Comcast Cable Communications, LLC, initiated this proceeding by a Petition for Resolution of Rate Dispute. The Petitioners request that the Commission reduce allegedly "unjust, unreasonable, and unlawful annual pole attachment rental rates that Consolidated charges" and allegedly "unjust, unreasonable, and unlawful, 'joint use' charges" that Consolidated collects for "attachments on poles in which Consolidated has no ownership interest." See Petition ¶ 1.

4. On November 16, 2022, Consolidated moved to dismiss the petition. The Petitioners objected on November 28, 2022, and supplemented their objection on December 12, 2022. On January 23, 2023, the Commission denied Consolidated's motion to dismiss. Consolidated now seeks a rehearing on the Commission's denial of its motion to dismiss.

5. On February 17, 2023, the Commission issued Order No. 26,775. See Charter Communications, Inc., Order No. 26,775 (Feb. 17, 2023). In that Order, the Commission

determined that the Petitioners failed to meet their burden of proving the current pole attachment rates charged by Consolidated under pre-existing agreements are unjust or unreasonable.¹ The Commission further held that that the joint use charges billed to the Petitioners on poles in which Consolidated has no ownership interest are not just and reasonable and must be terminated as of the effective date of the Order. Id. at 1, 14.

III. Standard of Review

6. “Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding . . . may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying all grounds for rehearing.” RSA 541:3 (2021). “Such motion shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” RSA 541:4 (2021). “[T]he commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.” RSA 541:3.

7. In ruling on a motion to dismiss, the Commission accepts as true all of the factual assertions contained in the petition, supporting pleadings, and testimony to determine whether those facts, and all reasonable inferences therefrom, could support the relief requested. Eversource Energy, Order No. 26,534 at 7 (Oct. 22, 2021). In addition, the Commission construes all inferences in the light most favorable to the Petitioners. PNE Energy Supply, LLC, Order No. 25,881 (Apr. 8, 2016). The Commission engage “in a threshold inquiry that tests the facts in the [petition] against the applicable law.” Eversource Energy, Order No. 26,534 at 7.

IV. Argument

¹ Consolidated does not seek reconsideration or rehearing on the portion of Order No. 26,775 related to the Petitioners’ failure to meet their burden of proof in this Docket and the Commission’s denial of the request to mandate a change in Consolidated’s pole attachment rates for its solely owned and jointly owned poles.

- A. The Petitioners have failed to demonstrate, as a matter of law, that the Commission has jurisdiction in this case where they voluntarily entered into a pole attachment agreement with Consolidated.

8. It is well settled in New Hampshire that an agency's authority is limited by its governing statute. See, e.g., Appeal of N.H. Dep't of Env'tl. Servs., 173 N.H. 282, 293 (2020). In this case, there is no dispute that RSA 374:34-a is the relevant statute. When interpreting a statute, the Commission must "first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." Appeal of Algonquin Gas Transmission, LLC, 170 N.H. 763, 770 (2018). It must "construe all parts of the statute as written and [must] not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. The Commission must "not consider words and phrases in isolation, but rather within the context of the statute as a whole." Id.

9. RSA 374:34-a generally acknowledges the Commission's "authority to hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments." RSA 374:34-a, VII (2009). However, other provisions of the statute clarify and limit this grant of authority. The statute provides that, "[w]henever a pole owner is unable to reach agreement with a party seeking pole attachments, the commission shall regulate and enforce rates, charges, terms, and conditions for such pole attachments." RSA 374:43-a, II (Supp. 2022) (emphasis added). It also establishes a broad policy to encourage parties to voluntarily enter into pole attachment agreements. The statute provides that "[n]othing in this subdivision shall prevent parties from entering into pole attachment agreements voluntarily, without department approval." RSA 374:34-a, V (Supp. 2022) (emphasis added).

10. The plain language of RSA 374:34-a, when read as a whole, makes clear that the Commission has jurisdiction to set pole attachment rates only when a pole owner and pole attacher are unable to reach an agreement. See RSA 374:34-a, II. In other words, the Commission lacks the authority to regulate and enforce pole attachment rates, terms, and conditions unless the parties fail to reach an agreement. Otherwise, the Commission would discourage parties from entering into voluntary pole attachment agreements contrary to the plain terms of RSA 374:34-a, V.

11. The Petitioner's theory appears to be that pole attachment agreements impliedly contain rights that spring into action when a pole attacher decides it no longer wants to be held to the contractual provisions to which it voluntarily agreed. Under this theory, any attacher—at any day or any time—could contest the terms of a pole attachment agreement, issue a dispute letter, seek negotiations, and file a complaint with the Commission if and when its demands are not satisfied. This position would render voluntary agreements meaningless and illusory. See Restatement (Second) of Contracts, § 77 (“A promise . . . is not consideration if by its terms the promisor . . . reserves a choice of alternative performance.”). Because the Petitioners proposed framework by which an attacher may unilaterally determine, at any time, that it no longer wants to pay the rates to which it agreed violates RSA 374:34-a, V, the Commission should conclude that it lacks authority to resolve this case.

12. In this case, the Petitioners have multiple valid and enforceable pole attachment agreements with Consolidated. Those agreements are clear with respect to (1) the applicable rates for attachments to Consolidated's solely and jointly owned poles; (2) the applicable rate for attachments to Consolidated's jointly used poles; (3) the definition of a joint use pole; and (4) how and when the Petitioners may dispute the pole attachment rates. The Petitioners are now

unsatisfied with the bargained-for pole attachment rates to which they agreed, subjectively believing that the agreed-to rates are too high. It is beyond the scope of authority that the legislature gave to the Commission to address the Petition filed in this Docket and review the pole attachment rates under these circumstances. See RSA 374:34-a.

B. Even if the Commission has jurisdiction over this case, it should dismiss the petition because the Petitioners failed to comply with the dispute-resolution provisions of their pole attachment agreements.

13. Section 3.1.3 of the pole attachment agreements between Consolidated and the Petitioners require the Petitioners to notify Consolidated of a rate dispute within thirty days of receiving notice of a rate increase. See JGW-1, at 12; see also NH-1, at 19; YQ-1, at 12. There is no dispute that the rates increased on some unknown date in the past, and none of the Petitioners notified Consolidated of their objection to the rate increase within the contractually agreed-to timeframe. The Petitioners failed to avail themselves of the relief Section 3.1.3 afforded them. The pole attachment agreements make clear that the Petitioners' failure to object to the rate increase results in a presumption that the rates are acceptable. See JGW-1, at 12; see also NH-1, at 19; YQ-1, at 12. Where, as here, the language of the contract is unambiguous, the Commission must enforce the plain language of the contract as it is written. See In the Matter of Liquidation of the Home Ins. Co., 166 N.H. 84, 88 (2014).

14. The Commission should not now permit the Petitioners to bring this claim. They long ago forfeited their rights under the pole attachment agreements by failing to challenge the rates and invoke this Commission's authority. Their claims are barred by the plain language of the pole attachment agreements.

C. Even if the Commission has jurisdiction over this case, it should reconsider its Order No. 26,775 because the Petitioners' claim with respect to joint use fees is unsupported by the plain language of the pole attachment agreements.

15. The Petitioners contend that the joint use fees are inconsistent with Section 3.2.1 of the pole attachment agreements or any standard of reasonableness. See Petition ¶ 77. This claim is solely a matter of contract interpretation. The Petitioners cannot solicit the Commission to alter their private contractual relationship with Consolidated simply because they are dissatisfied with the terms of their agreements. See Appeal of Public Service Company of New Hampshire, 122 N.H. 1062, 1066-67 (1982) (“[T]he owners of a utility do not surrender to the PUC their rights to manage their own affairs merely by devoting their private business to a public use.”).

16. Section 3.2.1 of the pole attachment agreements state, in relevant part, that “[l]icensees shall pay an Attachment Fee for each attachment made to Licensor’s Utility Poles.” JGW-1, at 12. The term “Utility Pole” is defined as “[a] pole solely owned, jointly owned, or jointly used by the Licensor and used to support its facilities and the facilities of an authorized Licensee.” Id. at 10 (emphasis added); see also NH-1, at 17; YQ-1, at 10.

17. The commission must give the language of the parties pole attachment agreements their plain and ordinary meaning. See Penacook Lower Falls, Order No. 25,184 at 11 (Dec. 22, 2022); see also Liquidation of the Home Ins. Co., 166 N.H. at 88; Crowley v. Town of Loudon, 162 N.H. 768, 772-73 (2011) (explaining that terms defined in a contract are given the meaning agreed-to by the parties). The plain language of the pole attachment agreements expressly authorize Consolidated to bill the Petitioners for their attachments to poles jointly used by Consolidated that support Consolidated’s facilities. That Consolidated has no ownership interests in such poles is of no relevance to the analysis.

V. Conclusion

18. The Petitioners come before this Commission seeking extraordinary and unprecedented relief. The Petitioners have filed a petition over which this Commission lacks authority pursuant to RSA 374:34-a because the parties have a valid, voluntary, and binding agreements. The Petitioners are sophisticated actors that have negotiated more than twenty such agreements. The Petitioners have not exercised their rights under their pole attachment agreements to objected to the pole attachment rates. Despite not exercising these rights, they now ask the Commission to ignore RSA 374:34-a, ignore the terms of the pole attachment agreements to which they voluntarily entered.

19. To allow this petition to proceed in the face of a voluntary agreement would create unjustified and unlawful precedent. See RSA 374:34-a. It would render voluntary pole attachment agreements in New Hampshire meaningless and illusory. The Petitioners cite no law that permits the Commission to order such an extraordinary remedy. Accordingly, this Motion for Rehearing/Reconsideration should be granted, and the Petitioner's petition should be dismissed.

WHEREFORE, Consolidated respectfully request that this honorable Commission:

- A. Grant this Motion for Rehearing/Reconsideration;
- B. Dismiss the Petition filed in this docket, and
- C. Grant any other such relief as it deems appropriate.

Respectfully Submitted by

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

February 22, 2023

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Certificate of Service

I hereby certify that on February 22, 2023, this Motion for Rehearing/Reconsideration has been electronically provided to the service list in this docket.

/s/ Patrick C. McHugh
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