

1 **STATE OF NEW HAMPSHIRE**2 **PUBLIC UTILITIES COMMISSION**

3 **November 1, 2022** - 1:31 p.m.
4 21 South Fruit Street
5 Suite 10
6 Concord, NH

7 RE: **DT 22-047**
8 **CHARTER COMMUNICATIONS, INC.,**
9 **COGECO US FINANCE, LLC, d/b/a**
10 **BREEZELINE, AND COMCAST CABLE**
11 **COMMUNICATIONS, LLC:** Petition
12 for Resolution of Rate Dispute.
13 **(Prehearing conference)**

14 **PRESENT:** Chairman Daniel C. Goldner, Presiding
15 Commissioner Carleton B. Simpson

16 Lynn H. Fabrizio, Esq.
17 *(PUC Legal Advisor)*

18 Doreen Borden, Clerk

19 **APPEARANCES:** **Reptg. Charter Communications, Inc.,**
20 **Cogeco US Finance, LLC, d/b/a**
21 **Breezeline, and Comcast Cable**
22 **Communications, LLC:**
23 Susan S. Geiger, Esq. *(Orr & Reno)*
24 James White *(Comcast)*
 John Maher *(Charter)*
 Adrianna Michalska, Esq. *(Breezeline)*

Reptg. Consolidated Communications of
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 Patrick C. McHugh, Esq.
 Sarah Davis, Esq.

Reptg. New Hampshire Dept. of Energy:
 David K. Wiesner, Esq.
 Matthew C. Young, Esq.
 (Regulatory Support Division)

 Court Reporter: Steven E. Patnaude, LCR No. 52

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P R O C E E D I N G

CHAIRMAN GOLDNER: Okay. We're here this afternoon in Docket DT 22-047 for a prehearing conference regarding the Charter, Breezeline, and Comcast Petition for resolution of a rate dispute.

Let's take appearances, beginning with the Petitioners.

MS. GEIGER: Yes. Good afternoon, Mr. Chairman and Commissioner Simpson. I'm Susan Geiger, from the law firm of Orr & Reno, and I represent the Petitioners in this case.

And with me today at counsel's table, from each of the petitioning companies is, first, to my immediate left, Mr. James White, from Comcast; to his left, Mr. John Maher, from Charter; and then, to Mr. Maher's left, Attorney Michalska, from Breezeline.

CHAIRMAN GOLDNER: Okay. Thank you very much. And the Respondent, Consolidated.

MR. McHUGH: Good afternoon, Mr. Chairman, Commissioner Simpson. This is Attorney Patrick McHugh, here on behalf of Consolidated Communications. And with me is Sarah Davis, from

1 Consolidated as well.

2 Thank you.

3 CHAIRMAN GOLDNER: Okay. Very good.
4 And the New Hampshire Department of Energy, in a
5 puzzling chair today, but, nevertheless, I
6 recognize you.

7 MR. WIESNER: Good afternoon,
8 Commissioners. David Wiesner, representing the
9 Department of Energy. With me is co-counsel,
10 Matt Young.

11 We are sitting in a different place,
12 but your stars are in the front row.

13 CHAIRMAN GOLDNER: All right. Very
14 good. Thank you.

15 Okay. Very good. So, just as a
16 preliminary matter, I'll just say the goal of
17 today's PHC, from the Commission point of view,
18 is to sort out a procedural schedule, align on
19 any areas of agreement, simplify the issues, if
20 at all possible.

21 I'll direct a question at Mr. Wiesner
22 and the Department of Energy. Under 374:34-a,
23 the DOE has responsibility for the appropriate
24 formula or apportioning costs. Can you share the

1 DOE position, in terms of resolving this dispute
2 under the new statutory and rulemaking regime?

3 MR. WIESNER: I'll say that, to the
4 extent that the -- that it is really
5 Section 1304, dispute resolution and rate
6 setting, which is most at issue in this docket,
7 as we see it, within the context of RSA 374:34-a,
8 and the provisions that provide expressly for the
9 Commission to resolve disputes between attaching
10 entities and pole owners.

11 And, you know, the rules are somewhat
12 in a state of flux, as you know, because we are
13 in the process of separating the rules between
14 the two agencies. But the -- I'll call it the
15 sort of "standard setting" for make-ready and
16 attachment applications in those relevant
17 timelines will be included in the Department of
18 Energy rules. The dispute resolution and rate
19 setting provisions will remain with the
20 Commission, as you're well aware.

21 CHAIRMAN GOLDNER: Okay. All right.
22 That is helpful. Any questions, Commissioner
23 Simpson?

24 *[Cmsr. Simpson indicating in the negative.]*

1 CHAIRMAN GOLDNER: Okay. Okay, very
2 good. So, we can, if there are any
3 other preliminary matters, we can discuss them
4 here, we can go straight to opening statements,
5 if the Parties wish?

6 MS. GEIGER: Just, Mr. Chairman, I just
7 wanted to bring to the Commission's attention
8 that I did file an affidavit of publication in
9 this docket, as directed in the Order of Notice.

10 CHAIRMAN GOLDNER: Thank you. Thank
11 you. Acknowledged. Thank you, Attorney Geiger.

12 Okay. Well, let's go -- let's go to
13 opening statements. And I think we'll start with
14 you, Ms. Geiger, if that's okay?

15 MS. GEIGER: Yes. Thanks very much.
16 Thank you for the opportunity to provide this
17 statement of preliminary position on behalf of
18 the Petitioners.

19 By way of background, as you may know,
20 the Petitioners are cable operators that provide
21 various communication services over their
22 respective networks in New Hampshire. And to do
23 that, they attach their facilities to utility
24 poles that are owned by Consolidated and others,

1 including the provision of broadband, which they
2 provide to their customers, which the Petitioners
3 provide to their New Hampshire customers.

4 The terms, conditions, and rates for
5 the Petitioners' access to Consolidated's poles
6 are contained in pole attachment agreements that
7 each Petitioner has with Consolidated, and, in
8 some cases, in three-party agreements with
9 Consolidated and the local distribution electric
10 utility.

11 Consolidated charges the Petitioners
12 \$11.67 per attachment for poles that Consolidated
13 solely owns, and charges \$6.84 per attachment for
14 poles that Consolidated owns with another
15 utility. Consolidated also bills a joint use
16 charge to the Petitioners in the amount of \$6.84,
17 for attachments on poles that Consolidated
18 doesn't even own.

19 Consolidated has admitted, in
20 Paragraph 22 of its response to the Petition,
21 that these rates were not calculated with respect
22 to any particular formula, and have not changed
23 for several years.

24 During discovery in Docket DT 21-020,

1 this is the docket in which Consolidated proposes
2 to transfer hundreds of thousands of its poles to
3 Eversource, the Petitioners obtained information
4 leading them to conclude that Consolidated rates
5 were unjust and unreasonable, and excessively
6 high.

7 By their terms, the pole attachment
8 agreements, between the Petitioners and
9 Consolidated, are subject to all laws and
10 regulations, which, in any manner, affect the
11 obligations of the parties, and the rights of the
12 parties. These laws and rules are RSA 374:34-a
13 and the PUC's 1300 rules. Those laws and rules
14 authorize the Commission to regulate and enforce
15 pole attachment rates, charges, terms and
16 conditions that are just and reasonable, and
17 permit parties to pole attachment agreements to
18 petition the Commission for resolution of
19 disputes that arise under those agreements.

20 The Petitioner's August 22, 2022
21 submission to this Commission amply demonstrates
22 that Consolidated's pole attachment rates and
23 fees are unjust and unreasonable. As the
24 Petition and Ms. Kravtin's testimony and

1 attachments demonstrate, the most appropriate way
2 to demonstrate or establish Consolidated's pole
3 rates are consistent with the Commission's
4 Six-Criteria Rate Review standards in PUC 1304.06
5 is to apply the FCC's cable rate formula. And,
6 in so doing, Ms. Kravtin has calculated that the
7 solely owned rate of \$11.67 should be reduced to
8 \$5.33. And the jointly-owned rates of the 6.84
9 should be reduced to \$2.67.

10 And just for comparison purposes,
11 Consolidated's rates -- pole attachment rates in
12 Maine, which has adopted the FCC's cable rate
13 formula, are \$3.56 for a solely owned pole, and
14 \$1.78 for a jointly-owned pole.

15 Lastly, with respect to joint use
16 charges for attachments to poles that
17 Consolidated doesn't own, this is inconsistent
18 with Paragraph 3.2.1 of the pole agreement
19 agreements, which states that licensees, such as
20 the Petitioners, are to pay attachment fees "for
21 each attachment made to licensor's utility
22 poles."

23 Now, clearly, since Consolidated
24 doesn't own these poles, Petitioners submit that

1 these joint use charges are not authorized, and
2 that they are unjust and unreasonable.

3 Now, turning to the issues costs raised
4 in the Commission's Notice of Prehearing
5 Conference, the Commission has raised three broad
6 issues. And I'd like to address each of them, if
7 I could.

8 The first issue is "whether
9 Consolidated and any pole owners meet the
10 definition of a "public utility" under RSA 362:2,
11 I, such that they are subject to pole attachment
12 rate regulation by the Commission under New
13 Hampshire law?" It's important to note that
14 Consolidated has admitted, in Paragraph 4 of its
15 response, that it is a "public utility" under RSA
16 362:2, and it is a pole owner.

17 Given that admission, as well as the
18 definition of "pole" in RSA 374:34-a, I, and in
19 the PUC's rules, it is clear that Consolidated is
20 subject to the Commission's pole attachment rate
21 regulation.

22 The second issue raised in the Order of
23 Notice is "whether, assuming that Consolidated is
24 subject to pole attachment rate regulation in New

1 Hampshire" -- or, "under New Hampshire law, the
2 Petitioners' requests are barred by" -- "requests
3 for relief are barred by their agreements with
4 Consolidated." The Petitioners clearly believe
5 that that is not the case.

6 Rule 1304.03 clearly states that "A
7 party to a pole attachment agreement...can
8 petition the commission for resolution of a
9 dispute arising under such agreement." And RSA
10 374:34-a, VII, provides the Commission with
11 express "authority to hear and resolve" such
12 complaints and disputes.

13 Therefore, it's illogical and
14 inconsistent with the above-cited rule and law to
15 argue that the Petitioners' pole attachment
16 agreements themselves could somehow bar the
17 Petitioners from seeking relief from the unjust
18 and unreasonable rates, terms and conditions of
19 those agreements.

20 Consolidated's position appears to be
21 that, because the Petitioners, or their
22 predecessors, voluntarily entered into pole
23 attachment agreements with Consolidated, or its
24 predecessors, that the Petitioners must abide by

1 the rates, terms and conditions of those
2 agreements, despite having recently determined
3 that some of those rates, terms and conditions
4 are unjust and unreasonable. Consolidated's
5 position is totally at odds with RSA 374:34-a,
6 VII, which plainly states that "the commission
7 has authority to hear and resolve complaints
8 concerning...voluntary agreements", as well as
9 "complaints concerning pole attachment rates,
10 charges, terms and conditions."

11 Consolidated has argued that the
12 Petitioners' only recourse for excessive rates
13 that have not changed for several years is to
14 terminate the pole attachment agreements in their
15 entirety, and then renegotiate them in their
16 entirety.

17 Now, in our Petition, in Paragraphs 78
18 through 83, the Petitioners explain why their
19 pole attachment agreements do not prevent them
20 from pursuing their claims at this time and in
21 this docket. More specifically, Section 15.6 of
22 the pole attachment agreements states that
23 "Agreements are subject to all laws, ordinances,
24 and regulations, which, in any manner, affect the

1 rights and obligations of the parties under the
2 agreements." Such a law is RSA 374:34-a, which
3 requires that pole attachment rates be just and
4 reasonable, and which gives this Commission
5 authority to resolve pole attachment rate
6 disputes. Nothing in RSA 374:34-a requires an
7 attaching entity to terminate their pole
8 attachment agreement before seeking redress from
9 this Commission for unjust and unreasonable pole
10 attachment rates.

11 In addition, Section 15.10 of the pole
12 attachment agreement describes the dispute
13 resolution process, in the case where the
14 licensee claims that a term or condition is
15 unjust or unreasonable. These Petitioners have
16 followed that process, with respect to their
17 unjust and unreasonable pole attachment rates,
18 and that process indicates that it culminates
19 with a complaint filed with this Commission.
20 That dispute resolution provision in the pole
21 attachment agreements contains no requirement
22 that the Petitioners must first terminate the
23 agreements in their entirety prior to filing a
24 complaint with this Commission.

1 The only provision in the pole
2 attachment agreement that describes a termination
3 and renegotiation process is Section 3.1.2, and
4 that only applies when Consolidated has given
5 notice of a "change in rates" that licensees find
6 unacceptable. Here, because Consolidated's rates
7 have not changed for several years, that
8 provision does not apply to this dispute.

9 But, even if the pole attachment
10 agreements could somehow be construed as
11 requiring Petitioners to terminate their
12 agreements and renegotiate them, such an
13 interpretation would be unjust and unreasonable,
14 and can't be enforced. Under Section 10.3.1 of
15 the pole attachment agreements, if the
16 Petitioners were to terminate their agreements
17 with Consolidated, and were not able to
18 renegotiate them within 60 days, the Petitioners
19 would be required to remove their facilities from
20 Consolidated's poles, which would prevent the
21 Petitioners from providing services to their
22 customers.

23 Because such a termination and
24 renegotiation provision places the Petitioners at

1 the mercy of Consolidated, and leads to a harsh
2 and unreasonable result, that provision cannot be
3 enforced under New Hampshire law. And the cite I
4 would refer the Commission to is *Gamble versus*
5 *the University of New Hampshire*, at 136 New
6 Hampshire 9, it's a 1992 case.

7 In addition, Consolidated's position
8 that the Petitioners must terminate and
9 renegotiate their entire pole attachment
10 agreements, when only one issue, rates and
11 charges, is disputed, is unjust, unreasonable,
12 and inconsistent with the severability clause of
13 the agreement, Section 15.4. That section
14 provides that "The invalidity or unenforceability
15 of one provision of the agreement does not affect
16 the entirety of the agreement." If an essential
17 element, like rates, is unenforceable, the
18 parties must promptly attempt to renegotiate a
19 substitute for that element. They do not have to
20 go back and renegotiate the entire agreement.

21 Attachment rates are, arguably,
22 probably one of the most material or essential
23 elements of the agreements. And the Petitioners
24 are willing to renegotiate the rates. But

1 Consolidated wants the Petitioners to terminate
2 their entire agreements, thereby exposing the
3 Petitioners to having to remove their facilities
4 from Consolidated's poles, if the agreement can't
5 be renegotiated within 60 days. So,
6 Consolidated's "terminate and renegotiate"
7 provision is unjust, unreasonable, and can't be
8 enforced.

9 The last issue that the Commission
10 raised in its Order of Notice is "whether,
11 assuming that Consolidated is subject to pole
12 attachment rate regulation under New Hampshire
13 law, and the Petitioners' request for relief are
14 not contractually barred, the Petitioners are
15 entitled to the relief requested in the Petition,
16 including mediation under New Hampshire law,
17 including RSA 374:34-a and PUC Rules 1304.06."

18 With respect to the request for
19 mediation, the Petitioners respectfully withdraw
20 that request. In our Petition and cover letter,
21 we asked that the Commission schedule -- or,
22 excuse me, appoint a member of its Staff as a
23 mediator to provide an expedited mediation
24 session within 45 days of the filing of the

1 Petition. The Petition was filed on August 22nd.
2 We are almost at that point now. And, so, we
3 don't want to delay this matter any further, and
4 are withdrawing that request. So, that issue is
5 moot.

6 As for the merits of the complaint, the
7 Petitioners believe that they have filed
8 sufficient information in this docket to prove by
9 a preponderance of the evidence that
10 Consolidated's pole attachment rates and its JU
11 fees are unjust and unreasonable.

12 And, more specifically, I would direct
13 the Commission to the prefiled Testimony of
14 Patricia Kravtin, which discusses in great deal
15 why the FCC's cable rate formula satisfies this
16 Commission's pole attachment rate-setting
17 criteria and which calculates a just and
18 reasonable rate. And I would note that the
19 response that Consolidated filed to the Petition
20 contains no rebuttal to that formula or to the
21 rates that Ms. Kravtin has calculated.

22 Now, I'd like to turn to a response
23 briefly to some of the issues raised in
24 Consolidated's response.

1 Consolidated responded to the
2 Petitioners' request for relief concluding, in
3 very summary fashion, that the Petitioners have
4 failed to state claims upon which relief may be
5 granted; that the Commission lacks jurisdiction
6 over the request for refunds; and that the
7 Commission should dismiss the Petition.

8 However, other than citing to the Time
9 Warner order, which I'll discuss in a minute, the
10 response contains no substantive legal arguments
11 to support Consolidated's position, and is devoid
12 of any facts demonstrating that Consolidated's
13 pole attachment rates are lawful, just, and
14 reasonable.

15 Second, as for the Commission's
16 authority to resolve this dispute and grant
17 retroactive rate relief or for refunds, I would
18 not that RSA 374-a [*sic*] and the Commission's
19 rules clearly give the Commission authority to
20 resolve disputes arising under existing pole
21 attachment agreements, and the Commission also
22 has the authority to order Consolidated to pay
23 refunds, with interest, for the amounts the
24 Petitioners' paid to Consolidated for the second

1 half of 2021 and subsequent billing periods that
2 exceed the just and reasonable rates that are
3 established in this docket.

4 Now, in support of its argument that
5 the Commission doesn't have authority to do that,
6 Consolidated cites the Time Warner order that I
7 just mentioned, Order Number 24,387, and that was
8 issued back in 2012. But the facts of the Time
9 Warner case are easily distinguishable from this
10 case.

11 In that case, in Time Warner, PSNH had
12 increased its pole attachment rates, but Time
13 Warner didn't pay the increase, they paid the
14 lower rates, for several years. PSNH brought a
15 breach of contract claim against Time Warner in
16 court seeking to recover unpaid amounts. Time
17 Warner came to this Commission, arguing that the
18 Commission should decide whether Time Warner's
19 rates, the rates that they paid were just and
20 reasonable, and should decide the issue of unpaid
21 pole attachment fees. However, the Commission
22 decided that it did not have jurisdiction over
23 the contractual dispute, the unpaid balance,
24 which it left to the court to decide. But this

1 Commission did assert jurisdiction over the issue
2 of whether PSNH's rates were just and reasonable.

3 In the instant docket, we do not have a
4 dispute over unpaid invoices. Here, the
5 Petitioners have continued to pay unreasonably
6 high rates, and are simply seeking a refund in
7 accordance with PUC Rule 1304.07. That rule
8 states "When the Commission determines just and
9 reasonable rates that differ from the rates paid
10 by the petitioner, the Commission shall order a
11 payment or a refund as appropriate. Such refund
12 or payment shall be the difference between the
13 amount actually paid and the amount that would
14 have been paid under the rates established by the
15 Commission, plus interest, as of the date of the
16 Petition."

17 These Petitioners began disputing their
18 pole attachment rates as a result of information
19 that they obtained in the pole transfer docket,
20 DT 21-020. And they formally disputed their pole
21 attachment rates starting with the bills issued
22 for second half of 2021, and all bills submitted
23 thereafter. Therefore, if the Commission decides
24 to reduce Consolidated's rates, the Petitioners

1 are entitled to refunds, with interest, from the
2 date of the Petition, and for all payments
3 actually made as of the date of the Petition.

4 Although there may be a potential
5 disagreement over the exact dollar amount of each
6 refund, there can be no disagreement that the
7 Commission's rules require the Commission to
8 order refunds, if the Commission reduces
9 Consolidated's pole attachment rates in this
10 docket.

11 Now, the last thing that I'd like to
12 respond to in Consolidated's response is at
13 Page 2, where they state that "none of the
14 Petitioners have provided this Commission with
15 the entirety of their contractual relationships
16 with Consolidated for purposes of adjudicating
17 the present dispute." Consolidated's response
18 belies this assertion. Paragraph 6 of
19 Consolidated's response admits Paragraph 6 of the
20 Petition, which states that "A representative
21 example of Petitioner's pole attachment
22 agreements is contained in Attachment 1 to the
23 Affidavits" that we filed with the Petition.

24 So, inasmuch as Consolidated has

1 admitted that the pole attachment agreements
2 submitted with the Petition are representative of
3 the agreements that the Petitioners' have with
4 Consolidated, they are sufficient for purposes of
5 adjudicating this dispute. Moreover, if
6 Consolidated believes that these submitted pole
7 attachment agreements do not represent the
8 totality of the parties' agreements, then
9 Consolidated is free to submit its copies of the
10 same agreements.

11 The last issue that the Chairman noted
12 that we would be discussing today is the
13 procedural schedule. And the Order of Notice did
14 encourage the parties to confer to see if there
15 could be any areas of agreement over that
16 schedule. I have -- I emailed Attorney McHugh,
17 and he kindly responded, and I also emailed
18 Attorney Wiesner and Attorney Kreis, regarding a
19 procedural schedule. We have not reached an
20 agreement on that schedule.

21 One thing that's very important for the
22 Commission to note with regard to a schedule, as
23 explained in Paragraphs 8 and 9 of the Petition,
24 is that, by operation of law, under federal law,

1 the Commission's authority to adjudicate pole
2 attachment disputes requires that it take final
3 action on the Petitioners' complaint within 180
4 days after the complaint is filed, because there
5 are no state rules or regulations that extend
6 that deadline beyond 180 days. By my
7 calculation, the 180th day is Saturday,
8 February 18th. Therefore, a final order must be
9 issued no later than Friday, February 17th, 2023.

10 Thank you very much for the opportunity
11 to provide these comments. I realize they were
12 quite lengthy. But the issues in this docket are
13 very, very important to the Petitioners. Thank
14 you.

15 CHAIRMAN GOLDNER: Okay. Thank you,
16 Attorney Geiger.

17 Let's turn to the Department of Energy,
18 and Attorney Wiesner.

19 MR. WIESNER: Thank you, Mr. Chairman.

20 The Department wants to see this
21 dispute resolved between the Petitioners and
22 Consolidated in a timely and effective manner.
23 We will collaborate with the Parties to develop a
24 procedural schedule for adjudication of this

1 dispute, keeping in mind the relevant 180 day
2 timeline under federal law. And we agree with
3 the Petitioners that that timeline is important.
4 It's compliance with that timeline that permits
5 the state to effectively reverse preempt what
6 would otherwise be FCC jurisdiction over pole
7 attachment disputes, and I believe the state
8 statute even has a strong policy to keep those
9 disputes in New Hampshire, and not send them off
10 to Washington and the FCC.

11 As this may be viewed essentially as a
12 rate and contractual dispute between
13 telecommunications carries and the utility pole
14 owner, the Commission should expect to look
15 primarily to those parties to develop the record
16 to support its ultimate decision in this docket.

17 With that said, we are happy to
18 participate in an appropriate manner in this
19 proceeding.

20 CHAIRMAN GOLDNER: Okay. Thank you,
21 Attorney Wiesner.

22 And we'll turn now to Attorney McHugh.

23 MR. MCHUGH: Thank you, Mr. Chairman.
24 I'll be, I think, relatively brief.

1 I think, first and foremost, the
2 Commission needs to determine whether or not a
3 "dispute" exists. There's been a lot of words
4 thrown around in paper and pleadings, and
5 prefiled testimony, simply stating that a
6 "dispute exists". But, really, the question is
7 "is there a dispute?" And, when you look back
8 through everything, I submit there really is no
9 evidence of an actual dispute.

10 What we have here is a contract, a
11 contract governed by New Hampshire law. And it
12 contains various elements of what it relates to
13 in terms of pole attachments, including a lot of
14 elements, including the rates. The rates are
15 straightforward. There's no dispute what the
16 rates are. There's no dispute how the rates have
17 been applied to pole attachments. There's
18 certainly no dispute in terms of anything related
19 to how attachments are made to the poles, at
20 least so far as I've read the pleadings. There's
21 no complaint about timeframes, in terms of
22 allowing or disallowing pole attachments by
23 Consolidated on either its jointly-owned poles or
24 on its solely-owned poles.

1 So, really, what it is is you have, you
2 know, very large, sophisticated corporations, who
3 have signed agreements, voluntarily signed
4 agreements with a very clear rate. And now, all
5 of a sudden, they decide "Well, we don't like the
6 rates. So, we're going to claim it's a dispute."
7 But there's really no dispute when you pull it
8 back. And, if there's no dispute -- first of
9 all, I don't know that I agree that the 180-day
10 shot clock even applies when you get to the
11 procedural schedule.

12 And I would urge the Commission, in
13 part, to look at the FCC -- it's an FCC docket
14 labeled "EB Docket Number 17-245", and the
15 decision was released on July 18 of 2018. And it
16 talks about different disputes, and the FCC, when
17 they applied the 180-day shot clock. And it's
18 really to pole attachments and procedures for
19 attaching. And it talks about extending a
20 different shot clock to really things that have
21 to do with rates, and not delaying attachments or
22 the procedures for attaching, and that's a
23 270-day shot clock.

24 But, really, the Commission's order, in

1 terms of the commencement of the adjudicative
2 proceeding, I think hit so many issues that need
3 to be decided first. And that is, are the
4 agreements, do they preclude everything here? Do
5 we even really have a dispute? And that is --
6 that is not uncontested on our side. We don't
7 really agree that there's a dispute.

8 We certainly agree that, all of a
9 sudden, they decided, for whatever reason, over a
10 year's time, that they were going to raise issues
11 about what they pay. But that doesn't mean
12 there's a dispute under a legally valid and
13 binding New Hampshire contract. So that, I
14 think, is really, from our perspective, one of
15 the foremost issues that need to be decided.

16 You know, in terms of the fact that we
17 didn't file prefiled testimony or anything in our
18 response. First of all, we weren't required to,
19 at least as I read the Commission's Commencement
20 of the Adjudicative Proceeding. That's number
21 one. And, number two, from the various timing of
22 when it was -- when the Petition was filed by the
23 cable companies, then delivered to Consolidated,
24 it certainly wasn't in any way reasonable or

1 practical to think that, after they have been
2 working on this Petition for probably over a
3 year, given the timing, that all of a sudden, in
4 the manner of a couple of weeks, that CCI was
5 going to turn around and file some wholesome
6 defense, with prefiled testimony and everything
7 else, I don't even think that's realistic, nor
8 was it required, at least by -- certainly, by my
9 reading of the Commission's order.

10 So, we'll see if we can get in a
11 technical session an agreed-upon schedule;
12 doesn't sound like it. But I think there are
13 other matters of law that need to be decided in
14 the first instance. Because, if you decide there
15 really is no dispute, then there's no shot clock,
16 and, in fact, there may even be no case. But
17 that, perhaps, is a second matter to discuss
18 during the technical session.

19 Anyway, that's, in my attempt to be
20 brief, that's all I'll say for now. And,
21 certainly, I'm happy to answer your questions as
22 well.

23 CHAIRMAN GOLDNER: Thank you. I'll
24 just maybe start with one, and then I'll turn it

1 over to Commissioner Simpson. It's a question, I
2 think, for Mr. Wiesner.

3 Do you -- this question of "is there a
4 dispute?" that Attorney McHugh highlighted, and
5 the contract law piece of it, do you have any
6 thoughts on that topic?

7 MR. WIESNER: I mean, when you look at
8 the statute, RSA 374:34-a, there is a reference
9 to the "inability of pole owners to reach
10 agreement with a party seeking a pole
11 attachment." But the exact interrelation between
12 contractual rights and regulatory rate-setting is
13 not perfectly clear.

14 I would suggest that, if Consolidated
15 believes that the Petition should be dismissed,
16 that perhaps they should file a motion to
17 dismiss, based on the Petitioners' filing and
18 their interpretation of the law.

19 CHAIRMAN GOLDNER: Thank you, Attorney
20 Wiesner.

21 Perhaps, I can give Attorney Geiger an
22 opportunity to comment?

23 MS. GEIGER: Yes. Mr. Chairman, given
24 where we are procedurally in the 180 day deadline

1 that we believe does apply, I don't think giving
2 Consolidated time to file a motion to dismiss
3 really is appropriate. If Consolidated thought
4 that the Petition should be dismissed they could
5 have filed a motion to dismiss with their
6 response.

7 I realize that the Commission's Order
8 of Notice said "file a response". But there
9 would be nothing there that would bar -- would
10 bar Consolidated from filing a motion to dismiss.

11 So, I would argue that the time for
12 filing a motion to dismiss is passed. They
13 should have filed it by October 14th, which is
14 the deadline that you gave them for filing a
15 response. I think we need to move to an
16 adjudicative schedule.

17 And I believe that there clearly is a
18 dispute. The term "dispute" is not contained or
19 defined in the Commission's rules. But I think
20 commonsense would tell you that we have a dispute
21 here. And, if it isn't clear from the
22 Commission's -- from the Petitioners' Petition in
23 this docket, most certainly it has to be made
24 clear from the information that NECTA put into

1 the record in the pole transfer docket, 21-020.

2 I think it's abundantly clear that
3 there is a disagreement between these Petitioners
4 and Consolidated about what the appropriate rate
5 for pole attachments should be. And, granted,
6 there are voluntary agreements. But the law
7 talks about "voluntary agreements", and it talks
8 about the Commission's ability to look at
9 voluntary agreements when there's a dispute.

10 CHAIRMAN GOLDNER: And, Attorney
11 Geiger, I'm hoping you can help me out with this,
12 because it's been 30 years since Contract Law
13 class, and I don't --

14 MS. GEIGER: Forty-two for me.

15 CHAIRMAN GOLDNER: I think I might have
16 been -- it might be well over 30.

17 So, you know, it seems like there was a
18 contract that was signed. And, to Attorney
19 McHugh's point, that, you know, that was the
20 contract. And I just would like to give you an
21 opportunity to maybe educate the Commission a
22 little bit on how you see the signed contract and
23 this -- and the fact that there is a signed
24 contract in place. I'm not sure I'm able to

1 follow, to Attorney McHugh's point, that if only
2 one party disputes it, is that a "dispute"?

3 So, I'm just -- I hope you can just
4 educate me on how that works?

5 MS. GEIGER: Right. I think you have
6 to focus in on the "unjust and unreasonable rate"
7 language that the Commission is bound to follow.

8 If Consolidated's logic were to
9 prevail, pole attachers would never have the
10 ability to argue for a reduction in their rates,
11 even if they were exorbitantly high, which they
12 are in this case. Just because, you know, two
13 parties reached agreement 20 years ago about a
14 rate that would enable my clients to get on
15 Consolidated's predecessor's poles, doesn't mean
16 sitting here, 20 years later, that those rates
17 are still just and reasonable. And that's the
18 dispute.

19 CHAIRMAN GOLDNER: Okay. That's
20 helpful.

21 Attorney McHugh, would you like to --
22 any comments? You don't have to, I just want to
23 give you the opportunity.

24 MR. McHUGH: Well, sorry. I don't have

1 the ability to predict the existence of a
2 procedural schedule when none exists, nor do I
3 make it a habit of trying to play judge or
4 commissioner. So, the attempt here to now say
5 "CCI didn't file a motion to dismiss, you know,
6 it should now be barred", because we didn't file
7 a motion, we weren't required to file a motion to
8 dismiss, pursuant to the -- again, that's my
9 reading of the Commencement of Adjudicative
10 Proceeding. We clearly asked, I think, for the
11 case to be dismissed as part of the relief. And
12 we certainly can file a motion to dismiss. I
13 don't think there's anything barring me from
14 doing it. Certainly, what the Commission does
15 with it, in terms of timing, that might be
16 another matter.

17 But the one thing I guess I didn't
18 comment on, that I just don't want to leave alone
19 in the record, is what I believe to be nonsense
20 about "removing all of these pole attachments",
21 if somehow these agreements were somewhat
22 terminated. I mean, you know, I don't recall the
23 exact numbers from whatever came out in the
24 Eversource pole sale, other than I know we're

1 talking about, in that docket, about 355, 356,000
2 poles.

3 Clearly, Consolidated has more utility
4 poles in the State of New Hampshire than what it
5 just proposes to sell to Eversource. So, the
6 fact that -- the fact that an agreement
7 terminates, like, that we're going to magically,
8 in some amount of time, either take down hundreds
9 and thousands of attachments for all of these
10 companies, it's just nonsense. I mean, no one
11 was talking about taking down attachments.

12 And my reading of what Attorney Davis
13 wrote in response to the various letter-writing
14 campaigns by the cable companies, nowhere did I
15 find, you know, nowhere do I think I found any
16 reference to "take down your attachments, if
17 these agreements terminate." I mean, that's just
18 not going to happen, and nor is it our position
19 that they have to come down.

20 There is a separate process, for
21 example, for companies that don't have
22 agreements, how they get negotiated. We have a
23 statutory requirement to negotiate in good faith,
24 to not discriminate. And, as those negotiations

1 going on, I believe there's a timeframe. And, if
2 they don't work out, then final disputes would
3 come to you, to the Commission.

4 But, to somehow turn around and say
5 "Oh, my God, we're going to be, you know, held
6 hostage by Consolidated, because we're going to
7 have to take down all of these hundreds of
8 thousands of attachments", that's just not even
9 realistic.

10 So, I didn't want to let that one go in
11 the record. I know that's not a direct response
12 to Attorney Geiger's response to me. But I think
13 I've said enough.

14 Thank you.

15 CHAIRMAN GOLDNER: Thank you, Attorney
16 McHugh. No problem.

17 Commissioner Simpson, is there anything
18 you'd like to ask?

19 CMSR. SIMPSON: Not at this time.

20 Thanks.

21 CHAIRMAN GOLDNER: Okay. All right.

22 So, I guess my next question would be
23 relative to how you would like or how you would
24 suggest to the Commission that the Commission

1 proceed with respect to the procedural schedule?
2 The working assumption is the 180-day
3 requirement, Attorney McHugh, to your point,
4 maybe it is, maybe it isn't. But that's my
5 working assumption at the moment. Which would
6 mean that we would need a hearing, if there was
7 no agreement or settlement, you know, certainly
8 by mid-January, to give us enough time to be
9 responsive before the February 17th deadline.

10 So, I'll just put that out there, in
11 terms of something that the Commission would need
12 is, if there is no agreement or settlement, a
13 hearing by mid-January timeframe. And then,
14 inside of that, I think the parties can operate
15 as they see fit.

16 Any thoughts or comments on how to get
17 to a procedural schedule? Because, Attorney
18 McHugh, I think you were indicating some concern,
19 in terms of sitting down and sorting through
20 that. And, obviously, that's something we, the
21 Commission, need to move forward.

22 MR. McHUGH: Understood. And, yes, we
23 can see if we can work something out in the
24 technical session. If not, I'm happy to file,

1 say, by, well, Thursday, so, Thursday, or Friday
2 at the latest, our preferred procedural
3 schedules, so that you can make a very efficient
4 decision on what it needs to be.

5 But I will also point out that there's
6 nothing from preventing the cable companies, who,
7 again, have been working on this complaint, I'm
8 sure, for over a year, to agree to extend the
9 180 days for some reasonable period of time, so
10 that not everybody is jammed up, including, you
11 know, Thanksgiving, Christmas, and everything
12 else, to get to a rush to this judgment to a
13 further timeframe.

14 So, you know, there's no mad rush, from
15 Consolidated's perspective, to say "Oh, no, no,
16 no. We get to go to the FCC." That's not what
17 anybody is looking to do here at Consolidated.
18 So, if the cable companies can be reasonable, and
19 the Department agrees, we can certainly
20 voluntarily extend that deadline, is the way I
21 see it.

22 CHAIRMAN GOLDNER: Is there the
23 possibility, Attorney Geiger, Attorney Wiesner,
24 in your mind, of extending that schedule, or is

1 that a statutory requirement that can't move, in
2 your opinion?

3 MS. GEIGER: Our initial reaction is
4 that the federal law is very clear, and that is
5 that this Commission has jurisdiction over pole
6 attachment complaints, dispute resolution, so
7 long as it issues a final order within 180 days
8 of the complaint, unless, by the Commission's
9 rules or regulations, a different time period is
10 established, up to 365 days.

11 In New Hampshire, rules and regulations
12 have a specific meaning, as the Commission is
13 aware. Rules are promulgated under the
14 Administrative Procedures Act under RSA 541-A.
15 I'm not aware of any Commission rule or any other
16 rule that has a deadline beyond 180 days, or any
17 deadline, for that matter. I think the rules are
18 silent about a time period for resolution of pole
19 attachment disputes.

20 Therefore, I would argue that the
21 federal law is very clear on this Commission's
22 jurisdiction. And, as this Commission is aware,
23 jurisdiction is an issue that can be raised at
24 any time. So, if, for some reason, things

1 don't -- if parties aggrieved by this
2 Commission's final determination and there is an
3 appeal, there is a possibility that, in an
4 appellate review, a review in court may decide
5 that the Commission didn't have jurisdiction if
6 it issued an order beyond 180 days, and the
7 parties don't have the authority to agree to
8 extend the statutory deadline.

9 So, we would argue that the 180 days
10 should apply here.

11 CHAIRMAN GOLDNER: Okay. Attorney
12 Wiesner, any thoughts?

13 MR. WIESNER: We have not researched
14 the issue. So, I'm not really in a position to
15 say whether the parties can waive the 180-day
16 statutory requirement. Under federal law, if
17 there is an opportunity for a waiver, I don't
18 think we'd be adverse to it.

19 But I think it's probably best for us
20 to proceed on the assumption that the 180 days is
21 binding.

22 CHAIRMAN GOLDNER: Okay. Very good.

23 Okay. I'll just maybe repeat the
24 earlier comment where, if the -- the working

1 assumption is the February 17th deadline, so, the
2 Commission would need a hearing mid-January. And
3 then, the deadlines inside of that period would
4 be up to the parties.

5 If you can't agree on a schedule, is it
6 customary for everyone to submit their own
7 concept of the schedule?

8 MS. GEIGER: Correct.

9 CHAIRMAN GOLDNER: Okay. Can we get
10 that, can everybody commit to get that by Friday,
11 if either aligned or unaligned?

12 MS. GEIGER: Yes.

13 MR. MCHUGH: Yes.

14 CHAIRMAN GOLDNER: Okay. Okay, thank
15 you. Is there anything else we need to cover
16 today?

17 MS. GEIGER: I don't think so.

18 CHAIRMAN GOLDNER: Okay. Thank you.
19 I'll get you out of here in time for supper. So,
20 thank you for your time today. And we are
21 adjourned.

22 ***(Whereupon the prehearing conference***
23 ***was adjourned at 2:15 p.m., and a***
24 ***technical session was held thereafter.)***