

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

Docket No. 216-2020-CV-00555

New Hampshire Electric Cooperative, Inc.,  
Plaintiff

v.

Consolidated Communications of Northern New England Company, LLC,  
Defendant

**DEFENDANT’S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE  
AND ARGUMENT ABOUT POLE PARITY AND ANY OTHER OPERATIONAL  
ISSUE UNRELATED TO VEGETATION MANAGEMENT**

Defendant, Consolidated Communications of Northern New England Company, LLC (“Consolidated”), respectfully moves this Court *in limine* to preclude Plaintiff, New Hampshire Electric Cooperative, Inc. (“NHEC”), from presenting any evidence, testimony, or argument about pole parity (meaning the relative number of utility poles owned by the parties) or any other operational issue that is not related to vegetation management. With the Court’s permission, Consolidated voluntarily non-suited its pole parity Counterclaims without prejudice in order “to streamline the case . . . so the current litigation can focus squarely on the vegetation management issue.” *See* Order at 5 (Sept. 14, 2023). NHEC, however, still intends to offer testimony about pole parity, including an unsupported contention that NHEC has incurred nearly \$70 million in capital and operating expenses due to “imbalances in parity.” *See* Ex. A at 5-6 (Arnett Supp. Report). The Court should exclude all such testimony, evidence, and argument because it is irrelevant. Its admission would also waste time and resources, confuse the issues, mislead the jury, and unfairly prejudice Consolidated.

## I. Background

1. On July 31, 2020, NHEC filed this breach of contract action seeking recovery of certain vegetation management costs from Consolidated under the parties' General Agreement Joint Use Wood Poles, as amended ("JUA"), and its Inter-Company Operating Procedure No. 8. NHEC's Complaint includes seven counts. Every count relates to vegetation management obligations. No count refers to, or seeks relief related to, pole parity or any other non-vegetation-related operational issue. *See, e.g.*, Compl. ¶¶ 60-120.

2. Consolidated filed an Answer and Counterclaims on September 21, 2020, and a First Amended Answer and Counterclaims on May 12, 2022. Consolidated included pole parity allegations in its Counterclaims. *See, e.g.*, Am. Counterclaims ¶¶ 75, 85.

3. The Court resolved two of Consolidated's Counterclaims in a May 3, 2021 Order. On June 23, 2023, in response to a request from NHEC to consider streamlining the case, Consolidated filed a voluntarily non-suit of its remaining Counterclaims without prejudice to eliminate the pole parity issues from this case and let "the current litigation . . . focus squarely on the vegetation management issue." *See* Order at 5 (Sept. 14, 2023); *see also* Voluntary Non-Suit (June 23, 2023); Response to NHEC's Partial Objection to Consolidated's Voluntary Non-Suit (July 10, 2023). The Court granted the voluntary non-suit without prejudice in September 2023, recognizing that the issues in Consolidated's remaining Counterclaims were "distinct from the other counts in the case, demonstrating that it makes sense for those claims to be tried separately from the vegetation management issue." Order at 5 (Sept. 12, 2023). As a result, the voluntary nonsuit without prejudice would "create a streamlined case" about the vegetation management issues, which would "benefit both parties." *Id.* at 6.

4. In a Motion for Partial Summary Judgment filed after Consolidated's voluntary nonsuit, NHEC raised the pole parity issue and argued that it should not serve as an affirmative

defense to NHEC’s vegetation management claims. *See, e.g.*, NHEC Br. at 12-16 (June 27, 2023). Consolidated clarified in its Objection that it had not pled pole parity as an affirmative defense to NHEC’s vegetation management claims. *See* Objection at 21 (July 27, 2023).

5. Notwithstanding the law of the case that pole parity was no longer an issue, on February 29, 2024, NHEC served an eight-page report from one of its proposed experts, Wilfred Arnett, that included two sections about pole parity. In one section, Mr. Arnett described “pole-ownership parity” under the JUA and stated that the JUA’s “parity goal is just that, a goal,” and not “an obligation.” Ex. A at 3. In another section, Mr. Arnett purported to calculate the “financial impact to the Cooperative from imbalances in parity.” *Id.* at 5-6. His calculations are based on a series of unclear and unsupported assumptions, which lead him to conclude (1) that NHEC “has incurred additional capital costs of \$16,437,328 . . . by installing additional poles in excess of parity,” (2) that “the Cooperative has also incurred the annual carrying costs of the additional poles . . . calculated . . . to be approximately \$53 million,” and (3) that “NHEC is paying approximately 75% too much for access to CCI’s poles.” Ex. A at 5-6; *see also* Exs. B, C. Mr. Arnett also incorporates by reference a report he co-authored in July 2021, which also includes sections about pole parity and other operational issues unrelated to vegetation management. *See* Ex. D at 20-30, 32-36 (Arnett/Diamond Report).

## **II. The Court Should Exclude Evidence, Testimony and Argument About Pole Parity and Any Other Operational Issue Unrelated to Vegetation Management**

6. As this Court already has held, this case is about the parties’ vegetation management dispute. NHEC did not include pole parity issues in its Complaint. Consolidated voluntarily non-suited without prejudice the Counterclaims concerning pole parity. And Consolidated clarified that it had not included pole parity allegations in its affirmative defenses

to NHEC's vegetation management claims. NHEC should be precluded from reinserting pole parity back into the case.

7. Trial must “focus squarely on the vegetation management issue,” *see* Order at 5 (Sept. 14, 2023), because that is the only issue raised in NHEC's Complaint. “It is well settled that a ‘defendant is entitled to be informed of the theory on which the plaintiffs are proceeding and the redress that they claim as a result of the defendant's actions.’” *Morancy v. Morancy*, 134 N.H. 493, 497 (1991) (quoting *Morency v. Plourde*, 96 N.H. 344, 346 (1950)). In the more than three-and-a-half years that this case has been pending, NHEC has never amended its Complaint to raise a single issue about pole parity, let alone claim a nearly \$70 million “financial impact” from “imbalances in parity.” *See* Ex. A at 5-6 (Arnett Supp. Report). Consolidated is “entitled to have the case decided upon the grounds for relief alleged in the complaint.” *See Lesser v. Wells Fargo Bank, N.A.*, No. 2015–0663, 2016 WL 3748683, at \*3 (N.H. May 31, 2016). Pole parity is never mentioned.

8. NHEC also never included a demand for pole parity damages in its automatic disclosures. In its initial December 20, 2020 Automatic Disclosures, NHEC stated that its damages are “specifically related to unpaid vegetation management invoices.” Ex. E at 4 (Automatic Disclosures, Excerpt). In its January 30, 2024 Supplemental Automatic Disclosures, NHEC again stated that its damages “stem[ ] from CCI's non-payment of the Cooperative's vegetation management invoices.” Ex. F at 5 (Supp. Automatic Disclosures, Excerpt). The absence of pole parity in its damages disclosures also justifies an Order excluding pole parity issues at trial. *See, e.g.*, N.H. Super. Ct. R. 21(d)(2)(C), 22(a)(3), (d).

9. Even if NHEC's pole parity issues had any marginal relevance to the vegetation management issues, which Consolidated disputes, this Court should still exclude any reference to such issues. This case is already highly complex, involving thousands of vegetation

management invoices dating back many years. To allow NHEC to add unrelated pole parity allegations to the case will complicate, confuse, and waste time and resources. It will deny Consolidated the benefit of its voluntary nonsuit without prejudice approved by this Court, which Consolidated relied upon to forego further discovery on its pole parity Counterclaims. And it will significantly prejudice Consolidated if NHEC is permitted to claim a nearly \$70 million “financial impact” when it never asserted such a claim in its Complaint. Thus, any probative value related to the pole parity arguments would be far outweighed by the unfair prejudice to Consolidated, undue delay, confusion of the issues, and the potential to mislead the jury. *See* N.H. R. Evid. 403.

10. The \$16.4 million and \$53 million pole parity calculations (totaling nearly \$70 million) presented by NHEC’s proposed expert, Mr. Arnett, should be excluded on their own terms. *See* Ex. A at 5-6, Exs. B, C. Mr. Arnett lacks the qualifications to support his calculations; he “is not an economist, does not have a college degree, and does not claim any educational background or professional training in dealing with rate issues.” *Blue Ridge Elec. Membership Corp. v. Charter Commc’ns Properties*, No. EC-23, 2018 WL 5258829, at \*23 (N.C. Util. Comm’n Oct. 17, 2018).

11. Mr. Arnett’s calculations also do not “rise to a threshold level of reliability.” *See Baker Valley Lumber, Inc. v. Ingersoll-Rand Co.*, 148 N.H. 609, 613 (2002) (quoting *State v. Cressey*, 137 N.H. 402, 405 (1993)). Despite his representation otherwise, his calculations do not, in fact, show how much “the Cooperative has incurred.” Ex. A at 6 (Arnett Supp. Report). Instead, Mr. Arnett engaged in a series of high-level and conclusory assumptions, many unexplained and others unexplainable. His \$53 million calculation, for example, uses financial data from 2020 to calculate amounts *back to 1977*. *See, e.g.*, Ex. C. He sources other inputs by simply stating: “provided by NHEC.” *Id.* But an expert witness “cannot [simply] ‘parrot’ or

summarize the out-of-court statements of others.” *Collision Commc’ns, Inc. v. Nokia Sols. & Networks OY*, No. 20-CV-949-LM, 2023 WL 5646096, at \*3 (D.N.H. Aug. 31, 2023) (citation omitted)); *see also State v. Connor*, 156 N.H. 544, 547 (2007) (“Rule 703 does not allow ‘an expert’s testimony to simply parrot the corroborative opinions solicited from nontestifying colleagues.’”) (citation omitted).

12. Mr. Arnett’s deposition began on April 2, 2024, and has not yet been completed. It nonetheless is apparent from the unrealistic assumptions he made, and the conclusory sources he cited, that his calculations are not “based on sufficient facts or data,” or the “product of reliable principles and methods.” *See* N.H. R. Evid. 702; N.H. Rev. Stat. § 516:29-a. His speculative guesses of amounts that may or may not have been “incurred” back to 1977 are irrelevant, unreliable, misleading, and unduly prejudicial to Consolidated. They should be excluded, along with all other irrelevant pole parity evidence, testimony, and argument, which would unduly extend an already lengthy trial, risk juror confusion, and prejudice Consolidated. *See* N.H. R. Evid. 403.

13. New Hampshire Rule of Evidence 702 historically has tracked the Federal Rules of Evidence. *See* N.H. R. Evid. 702 (Reporter Notes). Federal Rule of Evidence 702 was recently amended to correct what the Advisory Committee found was a misapplication by courts of Federal Rule 702 and Federal Rule 104(a). The Advisory Committee stated that the court must determine based on a preponderance of the evidence standard that all of the four factors in Rule 702 had been satisfied *before* qualifying a witness to testify as an expert. The Advisory Committee specifically rejected as erroneous judicial decisions indicating that such issues went to the weight and not the admissibility of the expert’s testimony. *See* Fed. R. Evid. 702 (Advisory Committee Notes). As demonstrated above, Mr. Arnett cannot meet this

preponderance of the evidence standard on any of the four factors identified in both New Hampshire Rule 702 and Federal Rule 702 to qualify to testify as expert witness.

14. This Court should preclude Mr. Arnett from testifying as an expert witness in this case and preclude the introduction of any other testimony, argument, or evidence concerning pole parity issues or damages allegedly relating thereto.

### **III. Conclusion**

15. For the foregoing reasons, Consolidated respectfully moves this Court *in limine* to preclude NHEC from presenting evidence, testimony, or argument about pole parity or any other operational issue that is not related to vegetation management.

16. Alternatively, Consolidated respectfully requests that this Court continue trial and provide Consolidated sufficient time to conduct discovery, reopen depositions, and provide expert analysis regarding pole parity and any other non-vegetation-related operational issue NHEC plans to raise at trial.

17. To the extent the Court believes oral argument will assist in resolving this motion, Consolidated requests a hearing.

18. Due to the nature of the relief requested in this motion, the concurrence of NHEC's counsel was not sought as it "... can be reasonably assumed that the party or counsel will be unable to obtain concurrence." N.H. Super. Ct. R. 11(c).

WHEREFORE, Consolidated respectfully requests that the Court grant this motion; preclude NHEC from presenting evidence, testimony, or argument about pole parity or any other operational issue that is not related to vegetation management; and grant such other and further relief the Court deems just and equitable.

Respectfully Submitted,

Dated: April 19, 2024

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**CERTIFICATE OF SERVICE**

I hereby certify that, as of April 19, 2024, a copy of the foregoing document has been served via the New Hampshire Superior Court's electronic filing system on all parties who have registered through the system.

/s/ Patrick C. McHugh  
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