

STATE OF NEW HAMPSHIRE

Before the

PUBLIC UTILITIES COMMISSION

DT 20-111

COMCAST OF MAINE/NEW HAMPSHIRE, INC.

Petition for Resolution of Dispute and Declaratory Ruling

INITIAL BRIEF OF

COMCAST OF MAINE/NEW HAMPSHIRE, INC.

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I. INTRODUCTION/SUMMARY

Comcast of Maine/New Hampshire, Inc. (“Comcast”) seeks a declaratory ruling against Consolidated Communications of Northern New England Company, LLC (“Consolidated”) regarding Consolidated’s denial of Comcast’s applications to install Comcast risers¹ on poles in Belmont, New Hampshire that Consolidated jointly owns with Eversource. Comcast also seeks a declaratory ruling invalidating the policy Consolidated invoked as the basis for denying the riser request, and preventing Comcast from installing and owning conduit in the public right-of-way between the poles at issue. Comcast’s request to install risers and conduit in Belmont was made to address Comcast’s inability to run an aerial line due to the presence of high voltage electrical wires. Consolidated’s refusal to allow this solution was unlawful, unjust, unreasonable, and discriminatory.

Comcast has the right, under New Hampshire law, rules of the New Hampshire Public Utilities Commission, and the parties’ pole attachment agreement, to attach its own risers to Consolidated’s poles. Consolidated admits there are no capacity, safety, reliability, or engineering issues posed by installing Comcast’s risers on these poles, and Eversource, the joint owner of the poles, has granted Comcast’s riser license application. Comcast also has the right under New Hampshire law to install and own conduit in the Belmont right-of-way, and the Town of Belmont has issued a permit to Comcast for conduit construction in that location.

Consolidated has the duty to provide non-discriminatory access to its poles to its competitors such as Comcast. That duty does not authorize Consolidated to reserve pole and

¹ A “riser” connects an overhead line to an underground line. It includes the cable conduit that runs up the pole and a metallic or plastic encasement material placed vertically on the pole, and other infrastructure to guide and protect wires and cables when transitioning from underground to overhead or overhead to underground. Exh. 20, Stipulation, ¶12.

conduit space for itself so that it can lease risers and conduit to future, unknown attachers, instead of allowing currently eligible attachers, like Comcast, to install their own facilities. Nor may Consolidated use its policy of allowing only one point of access to a Consolidated facility to prevent Comcast from exercising its rights to install its own conduit in the public right-of-way, and to connect that conduit to risers on Consolidated's poles.

In addition to being unlawful, unjust, unreasonable, and discriminatory, Consolidated's actions and policy are anti-competitive. Comcast is currently expanding its New Hampshire network. Because Consolidated's conduct hampers Comcast's ability to deploy needed broadband in New Hampshire, it must be halted. Comcast expects to face situations similar to the one in Belmont. A declaratory ruling invalidating Consolidated's actions and policies as unlawful, unjust, unreasonable and discriminatory is needed to promote broadband deployment, enhance competition in the New Hampshire communications industry, and avoid future litigation.

II. PROCEDURAL HISTORY

On July 13, 2020, Comcast filed a petition ("the Petition") with the New Hampshire Public Utilities Commission ("Commission" or "PUC") pursuant to N.H. RSA 374:34-a, N.H. Admin. R. Puc 1304 (Utility Pole Attachments – Dispute Resolution), and N.H. Admin. R. Puc 207 (Declaratory Rulings). The Petition seeks resolution of a pole attachment dispute² between Comcast and Consolidated, and a declaratory ruling concerning (1) Consolidated's rejection of Comcast's request to install and own its own risers on two poles in Belmont, New Hampshire ("the Belmont Poles") that are owned jointly by Consolidated and Eversource, and (2)

² Paragraphs 24-30 of the Petition, Exh. 1, provide a description of the pole attachment dispute resolution process that preceded the filing of the Petition.

Consolidated's denial of Comcast's proposal to install and own conduit between those poles which are located in the public right-of-way.

The Petition asserts, among other things, that Consolidated's denial of Comcast's application to install its own risers on the Belmont Poles, and Consolidated's insistence that Consolidated own the risers as well as the conduit that Comcast proposed to install between the Belmont Poles, are unlawful, unjust, unreasonable, discriminatory and anti-competitive. The Petition also seeks a declaratory ruling invalidating the policy that Consolidated invoked as the basis for its riser denial.

On July 29, 2020, the Commission issued an Order of Notice stating that the scope of this docket concerns the issues of "whether Consolidated's policies and practices regarding attachers' riser access to poles and conduit installation between poles are consistent with RSA 374:34-a, Puc 1300, and other federal or state laws and rules relevant to utility pole attachments." Order of Notice, DT 20-111 (July 29, 2020), p. 2.

On August 7, 2020, Comcast filed a Supplement to Petition and Notice of Recent FCC Ruling ("Supplement"). Exh. 13. The Supplement describes a post-Petition declaratory ruling issued by the Federal Communications Commission ("FCC"), *i.e.*, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 35 FCC Rcd 7936 (July 29, 2020). Among other things, the FCC ruled that: (1) blanket bans on pole access are prohibited; (2) utilities cannot issue generic denials of pole access; and (3) pole attachment denials must state in detail the specific concerns regarding the particular attachments and the particular poles at issue. *Id.*, at 7938-7942.

On August 10, 2020, Consolidated filed a Response to the Petition.³ The Commission held a duly-noticed, web-enabled remote prehearing conference on August 13, 2020. At the prehearing conference, Comcast requested that the Commission proceed expeditiously with issuing a declaratory ruling, but hold in abeyance the portion of the Petition that seeks riser licenses for the Belmont Poles, as Comcast had found a “workaround” solution to the Belmont problem, but had not yet finalized it. Tr. 8/13/20, p. 16. Immediately following the prehearing conference, representatives of Comcast, Consolidated and Commission Staff (“Staff”) participated in a technical session and agreed upon a procedural schedule establishing deadlines for discovery, a further technical session, and submission of stipulation of facts all of which were memorialized in a secretarial letter issued August 14, 2020.

On October 13, 2020, the parties filed a Stipulation of Facts (“Stipulation”). Exh. 20. Via secretarial letter issued October 20, 2020, the Commission issued a revised procedural schedule. Consolidated submitted the prefiled direct testimony of Glen Fournier on October 26, 2020, and Comcast submitted the prefiled rebuttal testimony of Terrence O’Brien on November 23, 2020. The Commission conducted a web-enabled remote hearing on the merits on December 4, 2020.

III. JURISDICTION/AUTHORITY

The Commission has jurisdiction over this action pursuant to N.H. RSA 374:34-a, VII, N.H. Admin. R. Puc 1304.03, Puc 1304.05 and Puc 207.01. The Commission’s jurisdiction over pole attachments was established pursuant to Section 224(c) of the Communications Act of 1934, as amended (47 U.S.C. §224(c)), upon the Commission’s certification to the FCC that appropriate rules implementing the Commission’s regulatory authority over pole attachments

³ The Response is not part of the record of this proceeding as Consolidated did not seek to introduce it as an Exhibit.

were effective.⁴ That certification preempts the FCC from accepting complaints under Section 224(c). *See New Hampshire Joins States That Have Certified That They Regulate Pole Attachments*, 23 FCC Rcd 2796 (rel. February 22, 2008). In addition, the Commission has authority under N.H. Admin. Rule Puc 207.01 to issue declaratory rulings on any matter within the Commission’s jurisdiction.

IV. FACTS

A. The Parties

Comcast is a cable television operator that, along with its affiliates, provides various communications services over its cable systems to residential, commercial, and governmental subscribers in New Hampshire, including cable television service, broadband, interconnected Voice over Internet Protocol, and other services. Exh. 20, Stipulation, ¶ 1.

Consolidated is an incumbent local exchange company (“ILEC”) within the meaning of 47 U.S.C. § 251(h) that provides communications services to its customers within New Hampshire. Consolidated is also a public utility as defined in N.H. RSA 362:2 that owns and controls utility poles throughout the state that are used by Consolidated to support its communications network and to transmit services to its customers. Exh. 20, Stipulation, ¶ 2.

Comcast competes with Consolidated and its affiliates for customers of voice, video, and broadband service in numerous New Hampshire cities and towns. Exh. 20, Stipulation, ¶ 3. Comcast is an “attaching entity” within the meaning of N.H. Admin. Rule Puc 1302.01, and has attachments on multiple poles solely owned by Consolidated or jointly owned by Consolidated and Eversource in several areas in New Hampshire. Exh. 20, Stipulation, ¶ 4. Comcast operates

⁴ The Commission’s authority includes the requirement that the Commission take final action on the Petition within 180 days after the date it was filed, subject to the Commission extending the deadline to no more than 360 days pursuant to its rules and regulations. 47 U.S.C. §224(c)(3)(B).

in 80 New Hampshire communities, and is currently expanding its network in various New Hampshire locations. Exh. 14, p. 2, line 16, and Exh. 1, ¶ 32. As part of its continued network construction, Comcast expects to require riser access to Consolidated's poles and on occasion to lay Comcast-owned conduit in the public right-of-way between such Consolidated's poles. Exh. 1, ¶ 32; Tr. 12/04/20, p. 26, lines 15-20; p. 28, lines 14-21.

B. The Pole Attachment Agreement

Comcast and Consolidated are successors to a pole attachment agreement dated April 15, 2003 between Verizon New England Inc. and Public Service Company of New Hampshire and MediaOne of New England, Inc. ("MediaOne New England"), as amended on June 13, 2003 to change the name from MediaOne New England to Comcast of Maine/New Hampshire, Inc. (hereinafter the "Pole Attachment Agreement"). Exh. 20, Stipulation, ¶ 5; *see also* Exh. 3.

Under Section 2.1 of the Pole Attachment Agreement, Consolidated ("Licensor") has agreed, "subject to the provisions" of the Pole Attachment Agreement, to issue to Comcast ("Licensee") "for any lawful purpose, revocable, non-exclusive licenses" authorizing the attachment of Comcast's facilities to Consolidated's poles. Exh. 20, Stipulation, ¶ 6.

Section 2.6 of the Pole Attachment Agreement provides as follows:

Nothing in the Pole Attachment Agreement requires Consolidated to provide a License where Consolidated believes installation of Licensee facilities would interfere with Consolidated's existing service requirements or the use of Consolidated's facilities by other parties. Exh. 3, Section 2.6, p. 11; *see also* Exh. 20, Stipulation, ¶ 7.

And Section 5.3 of the Pole Attachment Agreement states:

Within forty-five (45) days of receipt of written notification in the form of a complete license application and the correct Survey Fee payment, Licensor shall perform or have performed a Pre-construction Survey and present the Survey results. The Survey results will contain one of the following statements:

If no Make-ready Work is required, a license shall be issued for the attachment.

If Licensor determines that the pole or anchor to which Licensee desires to make attachments is inadequate or otherwise needs rearrangement of the existing facilities thereon to accommodate the Licensee's Facilities, in accordance with the specifications set forth in Article VI, Licensor will provide Licensee with an itemized invoice for such anticipated Make-ready Work. The Make-ready Work will be performed following receipt by Licensor of advance payment. Upon receipt of the advance payment, Licensor will provide the Licensee with the estimated start and estimated construction completion date of the Make-ready Work.

If Licensor determines that the pole may not reasonably be rearranged or replaced to accommodate Licensee's Facilities for reasons of capacity, safety, reliability or engineering, the Licensor may refuse to grant a license for attachment. **Licensor shall provide the specific reason(s) for such denial. Licensor shall not unreasonably exercise the right reserved hereunder.**

(Emphasis added.) Exh. 3, Section 5.3, pp. 15-16; *see also* Exh. 20, Stipulation, ¶ 8.

A "riser" is a facility that Comcast can request to install on Consolidated's poles, pursuant to the Pole Attachment Agreement. Exh. 20, Stipulation, ¶ 11. A "riser" connects an overhead line to an underground line. Exh. 20, Stipulation, ¶ 12. A riser includes the cable conduit that runs up the pole and a metallic or plastic encasement material placed vertically on the pole and other infrastructure to guide and protect wires and cables when transitioning from underground to overhead or overhead to underground. *Id.*

C. Belmont Pole Attachment Application and Field Survey

On or about August 16, 2019, Comcast submitted an application to Consolidated for aerial pole attachment licenses (LAG Application # A-2019-1036) for three consecutive poles in Belmont, New Hampshire owned jointly by Consolidated and Eversource. Exh.20, Stipulation, ¶ 13.

The three consecutive poles referenced above are identified by the following Consolidated and Eversource pole numbers:

- Consolidated pole # 1100/2 (Eversource # 187/2);
- Consolidated pole # 1100/1 (Eversource # 187/1); and
- Consolidated pole # 110/47 (Eversource # 18/49).

Exh. 20, Stipulation, ¶ 14.

Although Comcast applied to attach its overhead facilities to each of these poles in sequence, during a joint field survey conducted with Consolidated on or about October 17, 2019, Comcast learned that Consolidated pole # 1100/1 (“the Intervening Pole”) had insufficient space to accommodate Comcast’s aerial attachment and could not be replaced with a taller pole that would allow Comcast’s attachment because of overhead high-tension electrical facilities that crossed over the pole line. Exh. 20, Stipulation, ¶ 15.

During the October 17, 2019 field survey, representatives of Comcast and Consolidated discussed alternatives to replacing the Intervening Pole with a taller pole. Comcast’s representatives suggested that Comcast could bypass the Intervening Pole by: (1) installing its own conduit in the span between Consolidated poles 1100/2 and 110/47 (*i.e.*, the Belmont Poles); (2) accessing the Belmont Poles via a riser on both ends of the conduit owned and constructed by Comcast; and (3) continuing to connect to the pole line aerially. During the field survey, Comcast’s representatives orally asked Consolidated representatives if Comcast could add riser requests for the Belmont Poles. Exh. 20, Stipulation, ¶ 16.

Consolidated did not accept Comcast’s proposed solution to the problem created by the Intervening Pole. Exh. 20, Stipulation, ¶ 17. Consolidated indicated to Comcast that if Comcast required connection between two Consolidated poles, Consolidated must place a conduit (at

Comcast's expense) and then lease it to Comcast pursuant to a conduit agreement, or Comcast could install the conduit, but must convey it to Consolidated and then lease the conduit directly from Consolidated. *Id.*; *see also* Exh. 7.

By email dated October 30, 2019, Glen Fournier of Consolidated's License Administration Group ("LAG") notified Comcast that if Comcast opted "not to follow the rules, [Consolidated] will not be licensing LBFT-05 [*i.e.*, Comcast's internal number associated with LAG Application # A-2019-1036 for attachments to the Belmont Poles]", and that "[e]ven if that license were issued, Comcast is not licensed for the risers on each pole." Exh. 20, Stipulation, ¶ 18.

D. Consolidated's "One Point of Access" Policy

The "rules" referenced in Mr. Fournier's above-described email refer to a Consolidated policy⁵ that prohibits Comcast from owning conduit between Consolidated poles and connecting that conduit to Consolidated poles via Comcast-owned risers ("Consolidated's One Point of Access Policy" or "the Policy"). The Policy is as follows:

Consolidated will only allow one point of access from its asset to a third party asset. Consolidated will also not allow a second access point to an existing third party asset which already has access to a Consolidated asset. If the third party has a pull box/manhole to which it needs service, then an additional conduit would come from either the pole or the manhole, but not both, and only that additional conduit may be placed by the third party.

Exh. 20, Stipulation, ¶ 19.

The Pole Attachment Agreement does not include the Policy as written above (Exh. 20, Stipulation, ¶ 20; Tr. 12/04/20, p. 47, line 11), and Consolidated could not produce a formal written document stating this policy. *See* Exh. 21, p. 5. Moreover, while Consolidated's

⁵ At hearing, Mr. Fournier also characterized the Policy as an "asset-to-asset rule" and a "very informal guideline" provided to field surveyors. Tr. 12/04/20, p. 45, line 23 through p. 46, line 1.

testimony indicates that the Policy has been in existence for many years, including with Consolidated's predecessor companies, the Belmont riser denial was the first time Comcast had learned of it. Tr. 12/04/20, p. 16, lines 23-24; Exh. 14, p. 5, lines 7-9. In fact, Mr. Fournier conceded at hearing that the only way that prospective attaching entities might learn of the Policy would be when their license application is denied based on the Policy. Tr. 12/03/20, p. 66, lines 14-18.

E. Riser License Denial

After the verbal denial and email referenced above (Exh. 20, Stipulation, ¶ 18), on January 23, 2020, Comcast submitted a formal written application to Consolidated to install risers on the Belmont Poles to be used to connect with Comcast-owned conduit. Exh. 20, Stipulation, ¶ 26. Although neither of the Belmont Poles has another riser installed on it, and there is sufficient capacity on the Belmont Poles for the installation of risers, Consolidated denied the riser licenses on each riser pole based on "capacity and engineering standards." Exh. 20, Stipulation, ¶¶ 25 and 27. However, at hearing, Consolidated's witness, Glen Fournier, admitted that installation of Comcast's risers on the Belmont Poles would not present capacity, safety, reliability or engineering concerns. Tr. 12/04/20, p. 77, line 15 through p. 78, line 8.

In a letter dated February 24, 2020 from Consolidated's attorney to Comcast's attorney, Consolidated provided the following written explanation for its denial of the riser licenses:

Licensing risers that allow privately owned structure from one CCI asset to another greatly accelerates premature exhaustion both in the underground (manholes, pullboxes, etc.) and on poles. If Consolidated were to own this infrastructure it would be made available for any attacher that seeks to place facilities on the pole, therefore no additional risers or conduit would be required in the short term to accommodate the next attacher that has an access issue. Oppositely, Comcast's proposal would require the next attacher to the poles to place its own conduit and place yet another riser on each of the poles. This is not an efficient use of the limited resources and infrastructure. Creating multiple risers on a single

pole unnecessarily causes congestion which makes it difficult for Consolidated Communications personnel to access the poles that it owns. If Consolidated owns the infrastructure, then it is available for any third party which later seeks attachment to Consolidated's poles.⁶

Notwithstanding Consolidated's explanation, the 2017 Edition of the National Electrical Safety Code ("NESC") Section 36, Sub-section 362 acknowledges that multiple risers can be installed on poles, Exh. 20, Stipulation, ¶ 32, and Consolidated has stipulated that "[i]t is likely that there are Consolidated poles in New Hampshire with more than one riser, and it is likely that those risers are owned by different entities." Exh. 20, Stipulation, ¶ 29. In addition, Terrence O'Brien, Director of Construction, Planning and Design for Comcast's Greater Boston Region (which includes New Hampshire) testified that he has seen many Consolidated poles throughout New Hampshire that have more than one riser installed on them, and provided photographs with his prefiled rebuttal testimony showing a Consolidated pole in Nashua, New Hampshire having 7 risers on it. Exh. 14, p. 10, lines 7-13; Exhs. 18-1 through 18-4. Mr. O'Brien also testified that the installation of Comcast's risers on the Belmont Poles would not prevent Consolidated or other attachers from accessing their facilities, and would not present any safety issues to employees who need to work on the poles. Exh. 14, p. 9, lines 6- 20. Mr. O'Brien further stated that, based on his experience and observations of other poles with multiple risers, there would be room for at least 4 to 5 risers on each of the Belmont Poles without violating climbing space standards. Exh. 14, p. 15, lines 10-15.

At the hearing, Mr. Fournier agreed with Mr. O'Brien, and admitted that the Belmont Poles could each safely and reasonably accommodate 4 to 5 risers. Tr. 12/04/20, p. 37, lines 16-21; p. 70, lines 6-9. But Mr. Fournier did not agree that Comcast could own its own risers. Mr. Fournier testified, in effect, that because Consolidated had a duty to provide nondiscriminatory

⁶Exh. 10, p. 1.

access to its poles, Consolidated was required to manage its assets by limiting the number of riser attachments, and by owning the risers on its poles. Tr. 12/04/20, p. 33, lines 15-21; p. 49, lines 5-10.

On May 1, 2020, Consolidated formally denied Comcast's riser application, indicating in an email from Consolidated's Representative, Rebecca DeRoche, that "Comcast will not be attaching a riser to the poles. Application has been cancelled." Exh. 11, p. 1. On September 25, 2020, Eversource, the joint owner of the Belmont Poles, granted Comcast's riser license application for the poles. Exh. 15. In so doing, Eversource expressed no safety or engineering concerns regarding the requested risers, nor did Eversource insist on owning the risers or the conduit between them. Exh. 14, p. 7, lines 8-13.

F. Conduit Between the Belmont Poles

In addition to denying Comcast's riser application, Consolidated stated that Comcast needed to abide by Consolidated's policy requirement that Comcast either pay make-ready for Consolidated to install and own the conduit or Comcast could install the conduit itself and convey ownership to Consolidated. Exh. 20, Stipulation, ¶ 28. Both of these options would require that Comcast lease space in the new conduit from Consolidated pursuant to a conduit agreement. Exh. 20, Stipulation, ¶ 17. Consolidated's policy does not allow Comcast to own its own conduit between the Belmont Poles. See Exh. 20, ¶ 19.

The path between the Belmont Poles where Comcast proposes to install conduit is in the public right-of-way, Exh. 20, Stipulation, ¶ 21. Comcast has obtained a permit from the Town of Belmont to install its conduit in the public right-of-way between the Belmont Poles. Exh. 20, Stipulation, ¶ 22. There is no other conduit or other equipment installed in the public right-of-

way between the Belmont Poles that would be disturbed or impacted if Comcast installed the conduit. Exh. 20, Stipulation, ¶ 23.

Comcast does not wish to lease conduit from Consolidated because of concerns about potential damage from third parties to whom Consolidated would be obligated to lease ducts in the same conduit. Exh. 1, ¶ 19. Where at all possible, Comcast prefers to own and control all of its network facilities so that they can be readily accessed (*i.e.*, without reliance on third parties) in order to ensure reliability, and to eliminate the risk of third-party damage that could impact Comcast's service. *Id.*

Comcast is currently engaged in a construction project in Salem, New Hampshire which involves installation of Comcast-owned conduit and risers, with the conduit connecting to Consolidated-owned poles. Exh. 20, Stipulation, ¶ 30. Comcast is also expanding its broadband network in the Lakes Region, and has identified a situation there similar to the one faced in Belmont. Tr. 12/04/20, p. 28, lines 16-21.

V. LEGAL STANDARD

A pole owner must provide nondiscriminatory access to its poles, ducts, conduit and rights-of-way upon just and reasonable rates, terms and conditions. *See* N.H. RSA 374:34-a, I, II and VI. A pole owner may only deny access to its poles on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes with respect to the specific poles at issue. *See* RSA 374:34-a, VI; *see also* N.H. Admin. R. 1303.01(b).⁷ A pole owner's denial of access must be specific and "include all relevant evidence and information supporting its denial, and shall explain how such evidence and information represent grounds for denial as specified in Puc 1303.01". N.H. Admin. R. Puc

⁷ A pole owner may also deny access if it does not possess the authority to allow the attachment, which is not a relevant factor in this case.

1303.04(c). The above-referenced state legal standards for nondiscriminatory pole access and access denial are mirrored in federal law. *See* 47 U.S.C. §224 (f).⁸

The FCC recently held that a denial must state the “‘precise concerns’ regarding the ‘particular attachment(s) and the particular pole(s) at issue.’” *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 35 FCC Rcd 7936, 7939 (July 29, 2020). “[U]tilities may not impose categorical bans on pole access that do not require the utility to provide a reason for denying access specific to the pole or attachment in question.” *Id.* “Denials based on a utility’s construction standard rather than a physical inspection of the pole still must document why the proposed attachment poses a safety, reliability, capacity, or engineering issue. A denial limited to mere reference or citation to a utility construction standard is insufficient.” *Id.* at 7943.

VI. ARGUMENT

A. Summary of the Argument

Because Consolidated failed to provide evidence or information demonstrating any actual capacity, safety, reliability, or engineering concerns specific to the Belmont Poles, Consolidated’s rejection of Comcast’s riser application is an unlawful and discriminatory denial of pole access, and a violation of the Pole Attachment Agreement. Consolidated’s One Point of Access Policy is unlawful, unjust, unreasonable, discriminatory, and anti-competitive as it

⁸ Under the federal Communications Act, a local exchange carrier (“LEC”) has the “duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.” *Local Competition Order*, 11 FCC Rcd 15499 at ¶ 1119; 47 U.S.C §251(b)(4). The federal pole access requirement “seeks to ensure that no party can use its control of the enumerated facilities and property [i.e. poles, conduit and rights-of-way] to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields.” *Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1170 (1996) (“*Local Competition Order*”) *vacated on other grounds, Iowa Utils. Bd. v. F.C.C.*, 120 F.3d 753, 819 (8th Cir. 1997), *as amended on reh'g* (Oct. 14, 1997), *aff'd in part, rev'd in part sub nom. AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

constitutes a “blanket ban” that prohibits a competitor from owning risers on Consolidated poles without examining whether the risers present actual or specific capacity, safety, reliability or engineering issues affecting the particular poles. Consolidated’s duty to provide nondiscriminatory access to its poles does not authorize Consolidated to reserve pole space for unknown, prospective attachers, or that Consolidated own and lease-back risers and conduit to its competitors. Lastly, Consolidated’s requirements that Comcast must lease riser and conduit space from Consolidated when Comcast has the right to attach its own facilities to the pole, and an independent statutory right⁹ to install and own its own conduit in the public right-of-way, are anti-competitive, unlawful, and constitute unjust, unreasonable and discriminatory terms and conditions of attachment.

B. Consolidated’s Denial of Comcast’s Riser Applications Is Unlawful

i. Consolidated Cannot Deny Riser Licenses Absent Evidence of Specific Capacity, Safety, Reliability, or Engineering Issues Associated With Installing Risers on Particular Poles.

Under state and federal law, a utility pole owner must provide nondiscriminatory access to its poles. RSA 374:34-a, VI.; 47 U.S.C. §224(f) (1). Consolidated has agreed, subject to the provisions of the Pole Attachment Agreement, to issue to Comcast “for any lawful purpose, revocable, non-exclusive licenses” authorizing Comcast to attach its facilities¹⁰ to Consolidated’s poles. Exh. 20, Stipulation, ¶ 6. A pole owner may only deny access on a nondiscriminatory basis for the following reasons: “insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.” RSA 374:34-a, VI; 47 U.S.C. §224(f) (2).

⁹ See N.H. RSA 231:160.

¹⁰ Risers are “facilities” that Comcast can request to install on Consolidated’s poles, pursuant to the Pole Attachment Agreement. Exh. 20, Stipulation, ¶ 11.

Because none of those conditions exist here, Consolidated wrongfully denied Comcast's riser application.

Consolidated does not dispute that "there is sufficient capacity on the [Belmont] Poles for the installation of risers." Exh. 20, Stipulation, ¶ 25. In addition, Mr. O'Brien's testimony establishes that there are no safety, reliability, or engineering reasons to support a denial of Comcast's riser license application. Ex. 14, p. 8, line 16 through p. 9, line 5. Moreover, in response to questions from Commissioner Bailey at the hearing in this matter, Consolidated's own witness, Glen Fournier, admitted that installation of Comcast's risers on the Belmont Poles would not present capacity, safety, reliability, or engineering concerns. Tr. 12/04/20, p. 77, line 15 through p. 78, line 8. Based on this evidence alone, the Commission must find in Comcast's favor regarding the unlawfulness of Consolidated's riser license denial.

In addition, Consolidated's denial as set forth in its February 24, 2020 letter (Exh. 10) is unlawful as it does not specify relevant evidence or information supporting its denial, or explain how such evidence or information constitutes grounds for denial on the basis of capacity, safety, reliability or engineering concerns relative to the Belmont Poles, as required by N.H. Admin. R. 1303.04 (c).

Instead of meeting the specificity requirements of the above-referenced rule, Consolidated asserted a generic, theoretical argument in support of its riser denial. Consolidated's denial letter states "[l]icensing risers that allow privately owned structure from one [Consolidated] asset to another greatly accelerates premature exhaustion both in the underground (manholes, pullboxes, etc.) and on poles." Exh. 10, p. 1. Consolidated's position appears to be that in order for it to provide non-discriminatory access to its poles to all potential attachers, Consolidated must own the risers, which it would then lease to other attachers. In

addition, Consolidated states that “[c]reating multiple risers on a single pole unnecessarily causes congestion which makes it difficult for Consolidated Communications personnel to access the poles that it owns.” *Id.*

The reasons expressed by Consolidated in support of its denial of Comcast’s riser application are invalid as they fail to specify reasons why the Belmont Poles cannot presently accommodate the risers from a capacity, safety, reliability, or engineering standpoint. Instead of specifying information on those four items, Consolidated posits a hypothetical future scenario in which there might be more limited access for prospective attachers if Comcast’s risers were installed, and some possible congestion that might make it difficult to access the poles. At hearing, Mr. Fournier testified that Consolidated denied the riser licenses based on its “rule” which is “based on the capacity and general engineering principles for the efficient use of plant.” Tr. 12/04/20, p. 33, lines 12-16. He also testified that a pole owner’s duty to provide non-discriminatory access to its plant, both conduit and poles, carries with it the authority to ensure that the pole owner makes the most efficient use of its plant, Tr. 12/04/20, p. 49, lines 4-10, such that Consolidated can deny a pole attachment license in order to reserve space for future attachers. However, nothing in RSA 374:34-a or the Commission’s rules supports that position.

Consolidated’s desire to manage its assets in the way it deems most efficient does not override its duty to provide non-discriminatory pole access, and therefore cannot legitimately serve as the basis for denying a pole attachment request that meets the licensing criteria set forth in RSA 374:34-a, VI and N.H. Admin. R. Puc 1303.01(b). To the contrary, Consolidated’s reliance on a general policy of efficient network management for some future, unspecified use, amounts to discriminatory treatment of attachers, like Comcast, whose riser applications meet the above-cited statutory and regulatory licensing criteria.

The question of whether pole capacity is sufficient to accommodate a riser must be focused on the present situation and the particular poles at issue. As Mr. O'Brien explained at hearing, pole attachment field surveys assess the individual poles for such things as safety, clearance, decay, age, and any sort of violation. Tr. 12/04/20, p. 24. The question of whether a pole has sufficient capacity must be resolved by examining whether a particular request can be accommodated using traditional methods of attachment.¹¹ It does not entail speculation about the potential for future pole use or efficient network administration. Simply put, Consolidated's concern about the possibility of future multiple risers on its poles is an invalid basis upon which to deny a current request for riser attachments.

Consolidated's alleged safety and space concerns about multiple risers are misplaced. At hearing, Mr. Fournier agreed with Mr. O'Brien that the Belmont Poles could each accommodate 4 to 5 risers. Tr. 12/04/20, p. 70, lines 6-9. Multiple risers are common in the communications industry¹² and do not, in and of themselves, pose capacity, safety, reliability or engineering issues constituting legitimate bases for denying riser licenses. Indeed, the Blue Book and the NESC, both of which are referenced in Section 6.1 of the Pole Attachment Agreement, Exh. 3, p. 11, and in N.H. Admin. Rule Puc 1303.07(a) (regarding installation and maintenance of pole attachments), specifically contemplate the installation of multiple risers on a pole.

The Blue Book states: "Transition cables between aerial plant and underground/direct-buried plant can be attached directly to the pole or be protected inside conduits. **If there are**

¹¹ *2011 Pole Attachment Order*, 26 FCC Rcd 5240 at ¶ 232 ("... we recognize that a utility may deny access where a pole's capacity is insufficient to accommodate a proposed attachment, but find that capacity is not insufficient where a request can be accommodated using traditional methods of attachment."). See also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 18049, ¶ 52 (1999) ("*Local Competition Order Reconsideration*") ("...a utility that denies access to, for example, a 40 foot pole due to lack of capacity should be able to demonstrate why there is no capacity...") *aff'd in part, rev'd in part, Southern Co. v. FCC*, 293 F. 3d 1338 (11th Cir. 2002).

¹² In fact, Consolidated acknowledges the likelihood that "there are Consolidated poles in New Hampshire with more than one riser, and it is likely that those risers are owned by different entities." Exh. 20, Stipulation, ¶ 29.

several of these vertical riser cables on a single pole, the cables can be consolidated under a U-Guard....”¹³ (Emphasis added.) Similarly, the NESC specifically recognizes that risers may be located on poles, and recommends that they be located in the safest available position with respect to climbing space and exposure to traffic damage. Exh. 20, Stipulation, ¶ 32. The NESC further states that the number, size and location of riser ducts or guards should be limited to allow for adequate access for climbing. *Id.* However, neither the Blue Book nor the NESC prohibit the installation of multiple risers on a pole. Nor do they require that the pole owner own the risers. To the contrary, the Blue Book specifically contemplates that the protective conduit that houses a riser cable can be owned by attachers such as Comcast.¹⁴ Thus, under the Blue Book, the Commission’s attachment installation rules, and the Pole Attachment Agreement, Consolidated was obligated to provide a suitable location on the Belmont Poles for Comcast’s risers. Consolidated’s failure to do so constitutes a wrongful denial of pole access in violation of RSA 374:34-a, VI.

ii. Consolidated’s One Point of Access Policy Is Unlawful

Consolidated’s letter denying Comcast’s riser request states that Consolidated “implements policies that will allow for structural integrity and efficient use” of its pole, and that the denial of riser access to Consolidated’s poles “is an example of just such a practice.” Exh. 10, p. 1. Consolidated has indicated that it will allow Comcast access to the Belmont Poles on the conditions that Consolidated owns the risers and the conduit running between them. Exh. 10. As justification for this position, Consolidated asserts its Policy, which states that “Consolidated

¹³ Telcordia SR 1421, Blue Book-Manual of Construction Procedures §26.2, Issue 6 (March 2017).

¹⁴ *Id.* § 26.1. (“U-type cable guards...are used to provide mechanical protection for the cable that is placed in a communications company-owned conduit *or a licensee-owned* conduit installed vertically on poles...” (Emphasis added)).

will only allow one point of access from its asset to a third party asset.” Exh. 20, Stipulation, ¶

19. The Policy further states that

Consolidated will also not allow a second access point to an existing third party asset which already has access to a Consolidated asset. If the third party has a pull box/manhole to which it needs service, then an additional conduit would come from either the pull box/manhole, but not both, and only that additional conduit may be placed by the third party.

Id.

Consolidated’s Policy, by itself, cannot be invoked to deny Comcast’s riser request or prohibit Comcast from owning conduit between the Belmont Poles. The FCC has declared that a utility’s “blanket ban”... on attachments to any portion of a utility pole is inconsistent with the federal requirement that a ‘denial of access...be specific’ to a particular request...”

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Investment, 35 FCC Rcd at 7936. The FCC held that “utilities may not impose categorical bans on pole access that do not require the utility to provide a reason for denying access specific to the pole or attachment in question.” *Id.*, at 7939. Denials “must state the ‘precise concerns’ regarding the ‘particular attachment(s) and the particular pole(s) at issue.’” (Citation omitted) *Id.* The FCC further held that although utilities may rely on construction standards, and state and national standards, **pole attachment denials must be “based on actual (not theoretical) safety, reliability, capacity, or engineering grounds.”** (Emphasis added.) *Id.* at 7942. A “mere citation or reference to a construction standard to justify a denial of access is insufficient to comply with [47 CFR] section 1.1403(b).” *Id.* at 7943.

Notwithstanding that New Hampshire pole attachment requests and disputes are subject to this Commission’s jurisdiction,¹⁵ the FCC’s declaratory ruling is instructive given the

¹⁵ The NH PUC’s jurisdiction over pole attachments was established pursuant to 47 U.S.C. §224(c) upon this Commission’s certification to the FCC that appropriate rules implementing the NH PUC’s regulatory authority over

similarity between the FCC’s rules regarding pole attachment denials and the Commission’s rules on the same topic. More specifically, the FCC’s rules state that “a utility’s denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.” 47 CFR §1.1403 (b). The Commission’s nearly identical denial rule states that a “pole owner’s denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information represent grounds for denial as specified in Puc 1303.01.” N.H. Admin. R. Puc 1303.04(c). The “grounds for denial” specified in Puc 1303.01(b) are: (1) insufficient capacity on the pole; (2) for reasons of safety, reliability, or generally applicable engineering purposes; and (3) the pole owner does not have the authority to allow the proposed attachment.

Consolidated cannot invoke a blanket policy or issue a generic denial of pole access for any part of the pole. *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 35 FCC Rcd at 7936-7937. Unless Consolidated demonstrates that Comcast’s riser and conduit proposal poses a specific (as opposed to hypothetical) capacity, safety, reliability or engineering issue with respect to the particular poles at issue, Consolidated’s Policy cannot lawfully be invoked to prevent Comcast from owning its own risers on Consolidated’s poles and owning conduit in the public right-of-way that connects those risers.

iii. Consolidated May Not Reserve Pole Space For Speculative Future Attachments

pole attachments were effective. See *New Hampshire Joins States That Have Certified That They Regulate Pole Attachments*, 23 FCC Rcd 2796 (rel. February 22, 2008).

Although there is sufficient space on the Belmont Poles for Comcast's risers consistent with applicable safety and engineering standards, Consolidated has denied access in order to reserve space for some future hypothetical purpose by prospective, unknown attachers. This position is inconsistent with the parties' Pole Attachment Agreement. As Mr. Fournier acknowledged in his prefiled testimony, Section 2.6 of the parties' Pole Attachment Agreement contains "language related to not allowing attachments that would interfere with [Consolidated's] **existing** service requirements." (Emphasis added.) Exh. 22, p. 8, lines 16-18. Thus, it is the current, existing pole conditions and service requirements that Consolidated must consider when deciding whether to grant pole licenses. At the hearing, Mr. Fournier, admitted that there are no existing risers on the Belmont Poles, Tr. 12/04/20, p. 45, lines 5-10, and agreed with Comcast's witness, Mr. O'Brien, that each of the Belmont poles could safely and reasonably accommodate 4 to 5 risers. Tr. 12/0/4/20, p. 37, lines 16-21; p. 70, lines 6-9. Furthermore, Mr. Fournier displayed a lack of knowledge of the current circumstances of the Belmont Poles; he could not identify any of the Poles' existing attachers, nor identify any would-be, future attachers, other than to speculate that small cell companies may seek attachment within the next 4 to 5 years. Tr. 12/04/20, p. 72, line 2 through^{2977722_1} page 73, line 3. Mr. Fournier also conceded that there is nothing in the Commission's pole attachment rules that requires a pole owner to conserve space on its poles for future attachers. Tr. 12/04/20, p. 57, lines 14-18. In view of the foregoing, Consolidated's argument about reserving pole space for future use is specious and, therefore, must be rejected.

Likewise, Consolidated's proposed reservation of available pole space for its own facilities (*i.e.* Consolidated-owned risers that it can lease to potential attachers in the future) to prevent the attachment of a competitor's facilities is unlawful, unjust, unreasonable,

discriminatory, and anti-competitive. Following the passage of the 1996 Telecommunications Act, which was enacted to facilitate the emergence of competitive communications facilities and services, the FCC addressed the problem of utilities reserving pole space for purported future needs. The FCC determined that given the anti-competitive incentives for ILECs to disadvantage competitive providers, ILEC pole owners were prohibited from reserving space on their poles.¹⁶ Although electric company pole owners are allowed to reserve space for their future use for core electric uses (but not for competing communications facilities) if such space is reserved pursuant to a “bona fide development plan”, they are nonetheless required to make the space available to attachers in the interim period before the space is needed by the electric company.¹⁷ In this case, Consolidated (an ILEC) is denying Comcast access to available space premised on a hypothetical future need for the space, and insisting that Consolidated own key infrastructure (*i.e.*, risers) necessary to provide Comcast’s communications services. Such a reservation of space is anti-competitive and discriminatory and constitutes an unjust and unreasonable term or condition of attachment in violation of N.H. RSA 374:34-a, II.

C. Consolidated’s Requirement that Comcast Lease Risers from Consolidated is Unlawful, an Unreasonable Term and Condition, and Anti-Competitive

i. Comcast Has a Right to Install and Own its Own Risers

A riser is a facility that Comcast can request to install on Consolidated’s poles pursuant to the Pole Attachment Agreement. Exh. 20, Stipulation, ¶ 11. Section 2.1 of the Pole

¹⁶The FCC’s policies restricting reservations of pole space by pole owners advance facilities-based competition and the same objectives as New Hampshire’s pole attachment law that ensures nondiscriminatory pole access to competitors, subject to narrow exceptions for electric utilities *but not ILECs*. See, e.g., *Local Competition Order*, 11 FCC Rcd 15499 at ¶ 1170; *Local Competition Order Reconsideration*, 14 FCC Rcd 18049 at ¶¶ 67-72.

¹⁷See *Local Competition Order*, 11 FCC Rcd 15499 at ¶ 1169 (“We will permit an electric utility to reserve space if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service.”)

Attachment Agreement expressly authorizes the attachment of Comcast's own facilities to Consolidated's poles. Exh. 20, Stipulation, ¶ 6. Risers are also "facilities" within the meaning of N.H. Admin. R. 1302.06 ("lines, cables, ...and any accompanying appurtenances attached to a utility pole for the transmission of ...information, telecommunications, or video programming..."). The types of attachments regulated by the Commission under RSA 374:34-a are those that are also regulated by the FCC under 47 U.S.C. §224. *See* RSA 374:34-a, II. The FCC has long recognized that cable operator equipment such as risers and power supplies are facilities "normally required" by the presence of a cable television attachment.¹⁸ Thus, the Pole Attachment Agreement, New Hampshire law and federal law entitle Comcast to install and own risers on Consolidated's poles. There is simply no legal basis for Consolidated to compel Comcast to lease risers from Consolidated.

ii. Requiring Comcast to Lease Risers from Consolidated as a Condition of Pole Access is Anti-Competitive and an Unreasonable Term or Condition of Pole Access

Consolidated's insistence that Comcast forgo its right to install its own risers on readily available pole space and access those poles by renting risers from Consolidated is anti-competitive and an unjust and unreasonable term or condition of attachment. Moreover, this lease-back tactic is a variant of early anti-competitive practices by ILECs that led to the regulation of pole attachments in the first place.

¹⁸ *See Texas Cablevision v. SWEPCO*, Memorandum Opinion and Order, 1985 FCC Lexis 3818, ¶ 6 (1985); *Capital Cities Cable, Inc. v. Mountain States Telephone and Telegraph Co.*, Memorandum Opinion and Order, 1984 FCC Lexis 2443, ¶ 23 (1984) ("[I]n adopting a standard of one foot for space deemed occupied by CATV, the Commission not only included that space occupied by the cable itself, but also the space associated with any equipment normally required by the presence of the cable television attachment [such as risers and power supplies].")

In considering access issues involving ILECs like Consolidated, the FCC explained “with respect to non-electrical utilities’ denials of access, the issues will be very carefully scrutinized, particularly when the parties concerned have a competitive relationship.”¹⁹ Historically, “lease-back” arrangements provided for telephone company ownership and control of all aerial plant with the cable operator paying for “channel service” for delivering cable television programming to its subscribers over that plant as opposed to owning and deploying the coaxial cable plant itself.²⁰ Consolidated is utilizing the same anti-competitive tactics with regards to its riser leasing requirement.

Consolidated’s wrongful denial of pole access, and its requirements for installation and lease-back of risers are without legal basis and prejudice Consolidated’s competitors, including Comcast and other similarly situated communications service providers that must seek permission from Consolidated in order to attach broadband infrastructure to Consolidated poles. Consolidated cannot use its duty to provide nondiscriminatory access as a basis to prevent a competitor such as Comcast from exercising its lawful right to access Consolidated’s poles. The

¹⁹ *Local Competition Order Reconsideration*, 14 FCC Rcd 18049 at ¶¶ 9, 11.

²⁰ As ILECs began to regard broadband cable services as a competitive threat, they caused cable operators seeking to attach their facilities to ILEC poles to face delays in installation, overcharges, restrictive tariffs forbidding competitive telecommunications, and attempted to force the cable operators into “lease-back” arrangements in which the pole owner would have sole control over the installation, maintenance, and operation of the cable attachments. See, e.g., S. Rep. No. 95-580 at 13 (1977), reprinted in 1978 U.S.C.C.A.N. 109, 121; *Applications of Telephone Companies for Section 214 Certificates*, 21 F.C.C.2d 307, 323-29 (1970) (cable systems “have to rely on the telephone companies for either construction and lease of channel facilities or for the use of poles for the construction of their own facilities.”); *Better T.V., Inc. of Dutchess County, N.Y.*, 31 F.C.C.2d 939, ¶¶ 44, 68 (1971) (“[Telephone] company may not utilize its monopoly control over the utility poles in a community to force a CATV operator to take channel service.... Since the telephone company owns or controls the utility poles so essential to the construction of a cable system, it was in a position to use a variety of pressures in pursuit of its goal of forcing the acceptance of channel service or eliminating the requesting CATV operator as a competitor to the channel service customer in the community...”); *General Tel. Co. of California*, 13 FCC 2d 448, 463 *aff’d*, 413 F. 2d 390 (D.C. Cir. 1969) *cert denied*, 396 US 888 (1969) (“By reason of its control over utility poles...the telephone company is in a position to preclude or to substantially delay an unaffiliated CATV system from commencing service and thereby eliminate competition. Furthermore, construction by a telephone company for an affiliated CATV operator calls for careful scrutiny on the part of the Commission in order to insure against wasteful duplication or unnecessary construction.”); *General Tel. of California v. U.S.*, 449 F. 2d 846, 851 (5th Cir. 1971) (“...the telephone companies were in a position to preclude or substantially delay an unaffiliated CATV system from commencing service and thereby eliminate competition.”).

duty to provide nondiscriminatory treatment of all providers of telecommunications or video services “does not contain an exception for the benefit of such a provider on account of its ownership or control of the facility or right-of-way.”²¹

Consolidated is unlawfully creating unnecessary obstacles for Comcast and other competitors in the deployment of communications services to customers. As stated previously, Comcast and others have a right to attach **their own facilities**, including risers, to Consolidated’s poles, to the extent that pole capacity is available and there are no legitimate safety, reliability, or engineering issues, as in this case. This is consistent with the goals of facilities-based competition and the rapid deployment of advanced services set forth in the Telecommunications Act of 1996.²²

Comcast should not be required to forego its preferred facility construction and ownership approach to risers and conduit, and pay unnecessary rent to its competitor based solely on Consolidated’s purported concerns regarding hypothetical future demand for riser space. Consolidated’s position in this case ignores the industry reality that multiple risers exist on Consolidated’s poles, *see, e.g.*, Exhs. 18-1, 18-3 and 18-4, as well as the Blue Book technical standards that recognize third party attachers may install risers on ILEC poles. Consolidated’s unjust, unreasonable, discriminatory, and anti-competitive leasing requirements must be halted.

D. Consolidated’s Requirement that Comcast Lease Conduit from Consolidated is Unlawful, an Unreasonable Term or Condition of Attachment, and Anti-Competitive

i. Comcast Has a Right to Install and Own its Own Conduit In the Public Right-of-Way

²¹ *Local Competition Order*, 11 FCC Rcd 15499 at ¶ 1170.

²² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 18049, ¶ 22 (1999).

Consolidated's claim that it must own the conduit between its poles ignores the fact that publicly-owned rights-of-way, such as the one at issue in Belmont, are owned and controlled by municipalities, not the owners of the poles located in such rights-of-way. Comcast has the right to install conduit in the public right-of-way upon receipt of approval from the Town of Belmont. *See* RSAs 231:160 and 231:161. Comcast was granted a Permit for Work in a Public Way or Place by the Town of Belmont on December 5, 2019 for the purpose of installing conduit between the Belmont Poles. *See* Exh. 20, Stipulation, ¶ 23; *see also* Exhibit 8. Consolidated has no legal authority to prevent Comcast from installing its conduit in those locations where Comcast obtains the express right to construct, own, and control its conduit in the public right-of-way (such as between the two Poles at issue in Belmont), or in other analogous circumstances.

ii. Requiring Comcast to Lease Conduit from Consolidated is Unlawful, An Unreasonable Term or Condition of Attachment, and Anti-Competitive

As indicated above, Comcast has the right to own its own conduit where it has secured the necessary local government permits to install conduit in the public right-of-way, as Comcast has in Belmont. Consolidated cannot compel Comcast to convey its conduit in the public right-of-way between two Consolidated poles to Consolidated, nor can Consolidated compel such conveyance as a condition for allowing Comcast access to Consolidated's poles. Nothing in the Pole Attachment Agreement or RSA 374:34-a authorizes this anti-competitive behavior.

Consolidated is using its control over the Belmont Poles as leverage to compel Comcast to comply with Consolidated's policy which would require Comcast to pay to install the conduit, turn ownership over to Consolidated, and then lease-back conduit space from Consolidated. Exh. 10, p. 2. By denying Comcast's right to install and own risers on Consolidated's poles, Consolidated has effectively negated Comcast's ability to utilize the conduit that Comcast has

secured the right to install in the public right-of-way. Consolidated may not leverage its pole attachment access authority to prevent a competitor from utilizing conduit that it has the legal right to install and own, or to convert a competitor's conduit for Consolidated's own use. Such behavior is clearly unlawful, an unreasonable condition of pole access, and is anti-competitive.

VII. CONCLUSION

A preponderance of the evidence in this proceeding conclusively establishes that Consolidated's Policy, which resulted in a denial of Comcast's riser application is unlawful, unjust, unreasonable, discriminatory, and anti-competitive. Granting the Petition will advance policies promoting broadband deployment and enhancing competition in the communications industry, and will reduce future litigation by confirming through a declaratory ruling that Consolidated's policies and conduct with respect to Comcast as described herein, and to the extent imposed on other New Hampshire communications service providers, are unlawful, unjust, unreasonable, discriminatory and anti-competitive.

Comcast expects to face similar situations to those giving rise to the Petition. Tr. 12/04/20, p. 28, lines 14-21. Comcast is currently expanding its network in various New Hampshire locations and expects to require riser access to Consolidated's poles and to lay conduit in the public rights-of-way between two Consolidated owned poles. *Id.*; Exh. 1, ¶ 37. In addition to the Lakes Region project Mr. O'Brien described at the hearing, Tr. 12/04/20, p. 28, lines 14-21. Comcast is also currently engaged in a construction project in Salem, New Hampshire which involves installation of Comcast-owned conduit and risers, with the conduit connecting to Consolidated-owned poles. Exh. 20, Stipulation, ¶ 30. If allowed to go unchecked, Consolidated's unlawful, discriminatory, and anti-competitive riser and conduit policies has the potential to significantly delay and impair Comcast's ability to efficiently build out its network to meet customers' broadband needs.

Although Comcast has found a “workaround” solution²³ to the construction obstacles created by Consolidated in Belmont, declaratory relief is nonetheless warranted given that the specific, concrete facts at issue here are likely to recur in other New Hampshire locations where Comcast requires riser access from Consolidated and seeks to install Comcast conduit in the public rights-of-way. New competitive service opportunities often emerge unexpectedly and will require timely access to poles, risers, and conduits for associated network expansion. Deployment depends upon predictable and effective access to Consolidated’s (and other pole owners’) facilities without the need to pursue separate complaints at the Commission when disputes of this nature arise.

VIII. REQUESTS FOR RELIEF

For the reasons discussed above, Comcast respectfully requests that the Commission issue a declaratory ruling that:

- A. Consolidated’s refusal to license Comcast’s risers on the Belmont Poles in the absence of evidence showing capacity, safety, reliability or engineering issues with respect to those specific poles is a violation of Consolidated’s duty to provide access under RSA 374:34-a, N.H. Admin. R. 1300 and the Pole Attachment Agreement;
- B. Consolidated’s One Point of Access Policy which denies pole access without consideration of actual capacity, safety, reliability, or engineering concerns

²³ Comcast utilized FirstLight’s poles located across the street from the Belmont Poles. Exh. 1, ¶ 31.

regarding the specific poles in questions, is unjust, unreasonable, discriminatory, anti-competitive, and violates New Hampshire law.

- C. Consolidated's requirement that Comcast pay Consolidated to install risers and then lease-back riser space from Consolidated is a violation of Comcast's right to install and own its own facilities on Consolidated's poles, is anti-competitive, and an unjust, unreasonable, and discriminatory term or condition of attachment;
- D. Consolidated's riser lease-back requirement constitutes a wrongful denial of access and an unjust, unreasonable, and discriminatory term or condition of attachment, where sufficient capacity exists for attachers to install their own risers, consistent with applicable safety, reliability and engineering standards;
- E. Consolidated cannot prohibit another party from installing conduit in the public right-of-way between Consolidated poles where the attacher is authorized by the relevant governmental entity to install such facilities;
- F. Consolidated's requirement that Comcast pay to install conduit between poles to which Comcast is seeking riser access, convey title to the conduit to Consolidated, and then lease-back conduit space from Consolidated is anti-competitive and an unjust, unreasonable, and discriminatory term or condition of attachment;
- G. It is an unjust, unreasonable, and discriminatory term or condition of attachment and a wrongful denial of pole access for Consolidated to refuse to allow an attacher to install its facilities in attacher-owned risers on Consolidated poles where such risers connect to attacher-owned conduit, absent a showing of specific capacity, safety, reliability or engineering issues; and
- H. Awards such other relief the Commission deems just, reasonable and appropriate.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the date set forth above a copy of this Initial Brief was sent by electronic mail to the service list in this docket.

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