

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**

Post Hearing Brief

I. INTRODUCTION

The question before the New Hampshire Public Utilities Commission (the “Commission”) is straight forward in this Docket. That is – Does a public utility pole owner, such as Consolidated Communications of Northern New England Company, LLC (“Consolidated”), in New Hampshire have the right to prescribe the method of access to its poles that it believes is necessary to prevent the potential of additional climbing hazards by virtue of additional apparatus on its pole or is it required to allow an attacher to attach in any manner the attacher prefers, regardless of safety issues or the consequences to future attachers?¹

In the instant case, Comcast seeks a declaratory ruling that “Consolidated’s effort to compel Comcast to lease-back conduit space from Consolidated in locations where Comcast is authorized to install its own conduit in the public right-of-way is unlawful.” As support for this ruling, Comcast claims that Consolidated’s application of its policy that third parties cannot run conduit between two Consolidated assets, amounts to a denial of access and that the denial is

¹ The Commission’s determination has State wide implications in that other pole owners may have the same or similar policies that will be impacted (or abrogated) by any ruling in favor of Comcast in the instant Docket.

unlawful because it was not based on capacity, safety, reliability, or engineering issues. As Consolidated will demonstrate in more detail below, Comcast claims are without merit. Consolidated's conduit requirements in Belmont (i.e. that Consolidated own the conduit), was not a denial of access but rather proposed make-ready. Furthermore, Consolidated will demonstrate that the make-ready Consolidated required was both just and reasonable and therefore consistent with New Hampshire Law and the Commission's Administrative Rules. Lastly, Consolidated will demonstrate that even if the Commission could construe the requirement to place Consolidated owned conduit as a denial, that denial was based on both safety and generally applicable engineering standards.

II. FACTS

The relevant facts are simple and largely undisputed. In Belmont, New Hampshire Consolidated is a pole owner and Comcast is a cable and telecommunications provider. (Ex. 20 at para. 1 and 2). Consolidated and Comcast are parties to a pole attachment agreement. (Ex. 20 at para. 5). Comcast sought to attach to certain poles owned jointly by Consolidated. (Ex. 20 at para. 13) and Eversource. Comcast has a contractual right to attach to Consolidated's poles. (Ex. 20 at para. 4 and 13). Upon survey of the poles in Belmont, it was discovered that there was inadequate space on a single pole (the "Inaccessible Pole"). (Ex. 20 at para. 15). Due to high tension lines above the pole, there was no ability to replace the pole with a taller pole to create space. (Ex. 20 at para. 15). As a result, the parties agreed that there was no way to attach to the Inaccessible Pole. (Ex. 20 at para 16).

In order to accomplish its objectives, Comcast proposed to place underground conduit between the two poles on either side of the Inaccessible Pole (the "Access Poles") in order to bypass the Inaccessible Pole. (Ex. 20 at para. 16). Comcast proposed the conduit would lead to risers that would be placed on the Access Poles. (Ex. 20 at para. 16). Consolidated responded to Comcast that pursuant to its policy to not allow parties to run facilities between two

Consolidated assets, Comcast would need to pay make ready for Consolidated to run the conduit and lease space². (Ex. 20 at para. 17 and 19). Consolidated's Response was consistent with the pole attachment agreement between the Parties.

Section 2.6 of The Pole Attachment Agreement between the parties provides:

Nothing in the Pole Attachment Agreement requires Consolidated to provide a License where Consolidated believes installation of Licensee facilities would interfere with Consolidated's service requirements or the use of Consolidated's facilities by other parties. (Ex. 20 at para. 7).

Comcast did not accept Consolidated's proposed alternatives. (Ex. 20 at para. 21). Instead, Comcast attached to a pole in the vicinity of the Inaccessible Pole which was owned by another telecommunications provider. (Ex. 1 at pg. 3). Despite achieving the access Comcast required, Comcast brought the instant case.

III. ARGUMENT

A. Consolidated Did Not Deny Access to its Poles

In its Complaint, Comcast claims that Consolidated violated New Hampshire law when it "denied access" to its poles. The facts on the record demonstrate, however, that Consolidated did not deny access but rather it proposed make-ready as required by the New Hampshire Public Utilities Commission Rules. The applicable rule states:

The owner or owners of the pole shall not deny a requested attachment under subparagraph (b)(1) or (b)(2) above if other make-ready work or another alternative can be identified that would accommodate the additional attachment. See N.H. Admin. R. Puc. 1303.01(c).

The Pole Attachment Rules define make-ready as "all work, including, but not limited to, rearrangement or transfer of existing facilities, replacement of a pole, complete removal of any pole replaced, or any other changes required to accommodate the attachment of the facilities of

² Consolidated also offered as an alternative that Comcast could place the cable and convey ownership to Consolidated.

the party requesting attachment to the pole.” See N.H. Admin. R. Puc. 1302.08 (emphasis added). The definition is intentionally broad and inclusive. Conduit placement, or placement of a “pole³” as it is defined under New Hampshire law is a routine form of make-ready. In Belmont, there was insufficient capacity on the Inaccessible Pole and Consolidated identified an alternative (Consolidated owned conduit) to accommodate access on the Access Poles. This alternative fits squarely in the category of “... any other changes required to accommodate the attachment of the facilities of the party requesting attachment to the pole.” This is not only expressly permitted by the Pole Attachment Rules, it is **required** as an alternative to a denial of access.

B. The Make-Ready Work Required Was Not Unjust and Unreasonable

Under the Pole Attachment Act, Consolidated is required to provide access to its poles on rates, terms and conditions that are just and reasonable. “Whenever a pole owner is unable to reach agreement with a party seeking pole attachments, the commission shall regulate and enforce rates, charges, terms, and conditions for such pole attachments...to provide that such rates, charges, terms, and conditions are just and reasonable...” See RSA 374:34(a) (Pole Attachment Act). Comcast, argues that Consolidated’s ownership of the conduit was not just or reasonable, but provides no supporting evidence as what makes it unjust or unreasonable. Consolidated believes the reason for this lack of evidence is that no such evidence exists.

Comcast has not identified either any harm to Comcast or any significant benefit to Consolidated stemming from the requirement that Consolidated own the conduit. In fact, the required make-ready work (placement of conduit), was substantially similar work to what would have been required absent the high tension lines (i.e. a pole placement), and would have created

³ “Pole” means “pole” as defined in RSA 374:34-a(l), namely “any pole, duct, conduit, or right-of-way that is used for wire communications or electricity distribution and is owned in whole or in part by a public utility, including a rural electric cooperative for which a certificate of deregulation is on file with the commission pursuant to RSA 301:57.” N.H. Admin. R. Puc. 1302.10

a situation that exists all over New Hampshire. “Comcast has facilities in Consolidated’s conduit in New Hampshire in numerous locations.” (Ex. 20 at para. 10).

Furthermore, since Consolidated offered to allow Comcast to build the conduit, the make-ready costs were the same whether or not Consolidated owned the conduit. Pursuant to both the Pole Attachment Rules and the parties Conduit Agreement, Comcast would have had full access to the conduits for its attachments and any future attachments. As an owner of the conduit, Consolidated would have been responsible for any maintenance or repair of the conduits and if the State or City demanded relocations, those costs would have been Consolidated’s to bear. Consolidated already had cables on the poles in question, including the inaccessible pole, so it did not need the conduit for its own use.

The only articulated reason that Comcast objected to Consolidated’s proposed make-ready was a “preference” to avoid sharing. “Comcast prefers to own and control all of its network facilities. For these reasons, Comcast does not wish to lease conduit from Consolidated given that Consolidated would be obligated to lease ducts in the same conduit to third parties.” (Ex. 20 at para. 21). The Commission is only empowered under the Pole Attachment Act to determine if the terms and conditions of attachment are just and reasonable, they cannot or should not order something because it is an attacher’s preference. Consolidated’s requirement is based on concern for capacity and safety, the underpinnings for the policy are articulated in industry codes and it has no substantive adverse impact on the attaching entity or an unwarranted benefit to the utility, therefore; it is impractical to find that it is unjust or unreasonable.

Furthermore, it is illogical to read into a body of law, the entire purpose for which is to mandate infrastructure sharing, a requirement that a utility allow a less safe method of access because a party does not wish to share infrastructure. Comcast has the burden of proving that Consolidated’s proposed make-ready was unjust or unreasonable, and based on the record in this case, it has failed to do so.

C. In the event the Commission Were to Find That Consolidated's Conduit Requirement was a Denial of Access, Consolidated Based its Decision on Valid Capacity and Safety Concerns.

The New Hampshire Rules, as well as the Pole Attachment Agreement, require that the attachment practices follow the NESC.⁴ Consolidated's desire to limit riser attachments by owning the conduit so it could be used by any future attachers, followed to the letter, the recommendations of the NESC. "The number, size and location of riser ducts or guards should be limited to allow adequate access for climbing." See Section 362 of the 2017 version of the NESC. It is undisputed that applicable codes are there to ensure safety and capacity on poles. The codes are the basis for all "generally applicable engineer standards." Consolidated's make-ready requirement, even if viewed as a denial, was based on the NESC and was applied to conserve space on the poles to avoid unwarranted hazards for employees that may need to access the poles. Therefore, the Commission should uphold Consolidated's requirement that its ownership of the conduit would have been consistent with applicable law.

IV. Conclusion

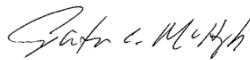
Consolidated is a pole owning utility. As the owner of the property in question, Consolidated has a right to enjoy full use and benefits that all property owners enjoy, in this case, the right of control of the property it owns. Consolidated's right to enjoy control over its property is trumped when that right conflicts with applicable law requiring the sharing of the property for all competitive carriers on an equal, non-discriminatory basis. The relevant law in question in this case is the Pole Attachment Act and the associated Pole Attachment Rules. As set forth above, the requirement that Comcast utilize Consolidated conduit between two Consolidated assets was neither unjust or unreasonable. It was based in a valid industry code and did place any unreasonable burdens on the Comcast. It was a valid exercise of Consolidated's right to require

⁴ All attachments shall be installed in accordance with the National Electrical Safety Code, 2017 edition. NH Admin. R. Puc. 1303.07.

make-ready to allow for access. As a result, the Commission should deny Comcast's Request for a Declaratory Ruling and uphold Consolidated's valid make-ready requirement in Belmont.

Dated as of this 11th day of December, 2020

CONSOLIDATED COMMUNICATIONS OF
NORTHERN NEW ENGLAND COMPANY, LLC
D/B/A/ CONSOLIDATED COMMUNICATIONS –
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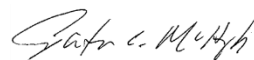
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Certificate of Service

I hereby certify that on the date set forth above a copy of this Post Hearing Brief was sent by electronic mail to the service list in this docket on the day and year hereinbefore written.



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