

**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**

**REPLY BRIEF OF**

**COMCAST OF MAINE/NEW HAMPSHIRE, INC.**

## **I. INTRODUCTION/SUMMARY**

Comcast of Maine/New Hampshire, Inc. (“Comcast”) submits this Reply Brief in response to the Post Hearing Brief filed by Consolidated Communications of Northern New England Company, LLC (“Consolidated”) in this docket on December 11, 2020. Consolidated argues that it did not deny Comcast access to the poles at issue in Belmont (“the Belmont Poles”), but instead asserts that it merely proposed just and reasonable “make-ready” work (*i.e.* the installation of Consolidated owned conduit) that Comcast did not accept. In the alternative, Consolidated argues that even if Consolidated’s insistence on owning the conduit between the Belmont Poles was a denial of pole access, such denial was permissible as it was based on valid capacity and safety concerns. For the reasons set forth herein, neither argument is valid and must be summarily rejected.

Consolidated’s “make-ready” argument is essentially another version of its “one point of access” policy (“the Policy”). As explained in Comcast’s Initial Brief, the Policy is an unlawful blanket policy that cannot be used to deny pole attachment requests. Accordingly, Consolidated’s “make-ready” claim must fail for the same reason. In addition, Consolidated’s “make-ready” argument is invalid because it is inconsistent with the Commission’s make-ready rules, and ignores Comcast’s legal rights to attach its own risers to Consolidated’s poles and own conduit between poles in the public right-of-way. Comcast’s ownership, attachment and installation rights are at the very heart of the instant controversy, and Consolidated cannot trump those rights by invoking inapplicable make-ready rules, Consolidated’s unlawful Policy, or speculative capacity or safety concerns. Record evidence establishes that there are no actual capacity, safety, reliability, or engineering issues posed by installing Comcast’s risers on the Belmont Poles. As explained below, Comcast requires no make-ready work from Consolidated

for Comcast's riser attachments, and there are no safety or engineering standards requiring Consolidated to own conduit and risers. Nothing in the National Electrical Safety Code or the Telcordia Blue Book precludes Comcast from exercising its rights to own risers on Consolidated's poles, or own conduit between those poles.

Consolidated has the duty to provide non-discriminatory access to its poles to competitors such as Comcast. Consolidated cannot use alleged "make-ready requirements", its obligation to serve unknown, future pole attachers, or alleged safety and capacity concerns as pretexts for depriving a current competitor of its pole access and conduit installation rights. Consolidated's unauthorized conduct and the Policy it invoked to justify such conduct must be declared unlawful, unjust, unreasonable, discriminatory, and anti-competitive.

## **I. ARGUMENT**

### **A. Consolidated Denied Comcast Pole Access; Consolidated's Conduit Ownership Requirement Does Not Constitute Just and Reasonable "Make-Ready".**

Consolidated argues that its requirement that it own the conduit in the public right-of-way between the Belmont Poles did not constitute a denial of pole access to Comcast but was, instead, "make-ready" work authorized by N.H. Admin. R. Puc 1303.01 (c). Under that rule, a pole owner cannot deny a requested attachment "if other make-ready work or another alternative can be identified that would accommodate the additional attachment." Consolidated asserts that it "identified an alternative (Consolidated owned conduit) to accommodate Comcast's access" to the Belmont Poles. Consolidated's Post Hearing Brief, p. 4. Consolidated argues that 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'", and is "**required** as

an alternative to a denial of access.” Consolidated’s Post Hearing Brief, p. 4 (emphasis supplied). This argument fails for several reasons.

First, Consolidated *did* deny Comcast access to the Belmont Poles. Consolidated cannot escape the fact that it did not grant Comcast’s riser licenses. In fact, Consolidated stipulated that “[t]he reasons for **Consolidated’s denial of Comcast’s request for riser access** ...are contained in ...Attachment 9 to Comcast’s Petition...”. Exh. 20, Stipulation, ¶ 27 (emphasis added). Despite Consolidated’s semantic claims to the contrary, Consolidated has clearly denied Comcast riser access to the Belmont Poles, and absolutely no “make-ready” work by Consolidated was “required” for Comcast to make those attachments. The Commission’s rules define “make-ready work” 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 the party requesting attachment to the pole.” N.H. Admin. R. Puc 1302.08 (emphasis added). Consolidated’s conduit requirement does not meet the Commission’s definition of make-ready work given that Comcast did not require a Consolidated conduit to accommodate the attachment of Comcast’s risers on the Belmont Poles. Comcast had already obtained the requisite authority from the Town of Belmont to install Comcast’s own conduit in the public right-of-way, and there was no capacity, safety, reliability, or engineering reason to prevent Comcast from installing its own risers on the Belmont Poles. Thus, Comcast needed no make-ready work from Consolidated to access the Belmont Poles. Contrary to Consolidated’s claims, Comcast was denied pole access, and as explained in Comcast’s Initial Brief, such denial was unlawful, unjust, unreasonable, discriminatory, and anti-competitive.

Second, Consolidated's alleged "make-ready" requirement is simply a new characterization of Consolidated's Policy, which is unlawful. *See* Comcast's Initial Brief, pages 19 through 21. It is noteworthy that *Mr. Fournier's prefiled testimony makes no mention of this "make-ready" requirement.* Instead, Mr. Fournier relies heavily on Consolidated's Policy to justify Consolidated's requirement that it must own the conduit between two Consolidated poles. However, as explained in Comcast's Initial Brief, Consolidated's blanket Policy cannot be invoked to deprive Comcast of its lawful rights to attach its risers to Consolidated's poles and run conduit between them. *Id.* Consolidated cannot legitimize this unlawful policy by recasting it as "required make-ready."

Third, it should be noted that, as authorized by N.H. Admin. R. Puc 1303.01 (c), it was Comcast (not Consolidated) who proposed the riser and conduit alternative to the aerial attachment that could not be installed on the "Intervening Pole." Exh. 20, Stipulation, ¶ 16; Exh. 12, pp. 2 and 4. And it was Consolidated who rejected Comcast's proposed riser and conduit solution to the Intervening Pole issue, Exh. 20, Stipulation, ¶ 17, despite Comcast's legal authority to implement its suggested alternative. As explained above, there was no make-ready required from Consolidated to implement Comcast's conduit and riser proposal, and nothing in N.H. Admin. R. Puc 1303.01(c) allows Consolidated to impose unnecessary "make-ready requirements" to reject Comcast's alternative to aerial attachment on the Intervening Pole, or to justify Consolidated's denial of Comcast's riser access to the Belmont poles.

Fourth, Consolidated falsely asserts that Comcast provided no supporting evidence regarding its claim that the Policy regarding Consolidated's conduit ownership was unjust or unreasonable. This argument completely disregards Comcast's explanation at pages 23 through 28 of its Initial Brief that Comcast has legal rights to install and own risers on Consolidated's

poles, and to own conduit between those poles, and that Consolidated's deprivation of those rights by insisting that Consolidated own and lease riser and conduit space to Comcast (*i.e.*, Consolidated's manufactured "make-ready requirement"), is unlawful, unreasonable, unreasonable, discriminatory and anti-competitive.

Fifth, despite Consolidated's allegations to the contrary, Comcast has demonstrated that Consolidated's ownership of the risers and conduit would harm Comcast. Examples include: (1) operational harm (Comcast-owned conduit insures Comcast immediate, unfettered access to its facilities to address maintenance and service outage issues); (2) physical harm (sharing conduit and riser space with other parties who could potentially damage Comcast's facilities); and (3) Comcast's liability for ongoing lease payments to competitor Consolidated. Exh. 1, ¶ 19. What Consolidated's argument fails to recognize is that Comcast's proposal to install and own risers and conduit is not simply a "preference" - it is Comcast's right, and promotes facilities-based competition which is a central tenet of the 1996 Telecommunications Act.

Sixth, Consolidated's claim that its "make-ready" requirement/Policy is based on concerns for capacity and safety is undermined by: (1) the fact that the Belmont Poles have sufficient capacity for the installation of risers, Exh. 20, Stipulation, ¶ 25; (2) Mr. Fournier's testimony that the Belmont Poles can safely and reasonably accommodate 4 to 5 risers, Tr. 12/04/20, p. 37, lines 16-21; (3) Mr. Fournier's testimony regarding the lack of planned projects in the next year that require riser cable on the Belmont Poles, Tr. 12/04/20, p. 74 line 24 through p. 75, line 3; and (4) Mr. Fournier's speculation that small cell companies **may** seek attachments **within the next 4 to 5 years**. Tr. 12/04/20, p. 72, lines 4-6 (emphasis added).

Lastly, Consolidated's argument that Comcast has failed to meet its burden of producing evidence that Consolidated's proposed "make-ready" was unjust or unreasonable ignores the substantial record evidence which establishes that Consolidated failed to meet the pole access denial criteria set forth N.H. Admin. R. Puc 1303.01 (b), and invoked an unlawful blanket policy to deny Comcast's right to install its own risers on the Belmont Poles and own conduit between them. This evidence includes Mr. Fournier's admission that there is no capacity, safety, reliability or engineering reason why a single riser, as proposed by Comcast, cannot be installed on each of the Belmont Poles, Tr. 12/04/20, pp. 77 through 78, and that Consolidated based its denial of Comcast's riser applications on Consolidated's Policy rather than the physical attributes of the poles in question. Tr. 12/04/20, p. 50, lines 2-7. Consolidated cannot now legitimize its unlawful Policy by claiming that it is simply a "make-ready requirement" that Consolidated can impose as a condition of attachment, especially because the proposed requirement does not even satisfy the Commission's definition of make-ready work, given that no Consolidated "make-ready" is necessary to provide Comcast with immediate access to the Belmont Poles.

**B. The National Electrical Safety ("NESC") Code Does Not Require That Consolidated Own Risers and Conduit, or Prohibit Comcast From Owning Them.**

Consolidated argues that its "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." Consolidated's Post Hearing Brief, p. 6. This assertion is incorrect and, therefore, must be rejected. Simply put, there is nothing in the NESC prohibiting multiple risers, or requiring a pole owner to own risers on its poles, or conduit between them. On the contrary, the NESC expressly recognizes that "risers" (plural) 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. In addition, the Telcordia Blue Book acknowledges that there can be several vertical riser cables on a single pole, and that they can be placed in risers owned by licensees such as Comcast. Telcordia SR 1421, Blue Book - Manual of Construction Procedures, §§26.2, 26.1, Issue 6 (March 2017). Mr. Fournier also admitted that the Belmont Poles could safely and reasonably accommodate 4 to 5 risers. Tr. 12/04/20, p. 37, lines 16-21, and Consolidated has stipulated to the likelihood that Consolidated owns poles in New Hampshire with more than one riser, and it is likely that those risers are owned by different entities. Exh. 20, ¶ 29. Comcast also presented evidence demonstrating the existence of multiple risers owned by multiple attachers on the same Consolidated pole. Exh. 18. In view of the foregoing, Consolidated cannot reasonably claim any capacity, safety, reliability or engineering reason why Comcast cannot own risers on the Belmont Poles, or own conduit between them.

## **II. CONCLUSION**

Consolidated's rights and responsibilities as a utility pole owner are prescribed by N.H. RSA 374:-34-a and N.H. Admin. R. 1300. Comcast clearly established that Consolidated did not meet the criteria set forth in N.H. RSA 374:34-a, VI for denying Comcast access to the Belmont Poles. Consolidated cannot justify its wrongful denial by now invoking the make-ready provisions of N.H. Admin. R. 1303.01(c), or the Consolidated Policy. Neither the Commission's make-ready rule - which does not even apply to Consolidated's unnecessary proposed work - nor Consolidated's Policy can override Comcast's legal rights to attach its own risers to Consolidated's poles, and to connect those risers with Comcast-owned conduit in the public right-of-way, where this can be accomplished consistent with New Hampshire's pole access

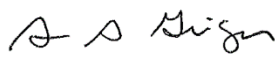


criteria. For the reasons set forth above and in Comcast's Initial Brief, Comcast is entitled to the declaratory relief it has requested.

Respectfully submitted,

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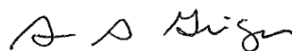
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**Certificate of Service**

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



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Susan S. Geiger