Jeremy Katz
PO Box 1325
Lebanon, NH 03766

Via Electronic Mail
Ms. Debra A. Howland, Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03302
Executive.Director@puc.nh.gov

Re: Docket DT 20-111 Comcast Petition

August 31, 2020

Dear Ms. Howland:

I would like to provide the enclosed commentary regarding the matters in DT 20-111 to be placed in the docket and hope that it will be useful to the Commissioners and the parties. If you could please add me to the distribution list as a courtesy notice party with my email address katz95@gmail.com , I would appreciate it.

Sincerely,

/s/

Jeremy Katz

DT 20-111

Background

I am writing this communication in my individual capacity as a New Hampshire resident and telecommunications enthusiast. Besides having Comcast service at my residence in Lebanon, I have no business dealings with either the petitioner or the respondent.

I have been a New Hampshire resident for 29 years. My involvement in telecommunications spans back 25 years, when I founded a telecommunications company that provided service worldwide, in countries as diverse and far ranging as Latvia, Singapore, the Ivory Coast, and Brazil. I worked with the original CLECs, both before and after the Telecommunications Act of 1996, and am eternally grateful for having had the opportunity to play a very tiny part in the birth of the internet and expansion of the information age.

From 2001 to 2011 I was the Chief Executive Officer of segTEL, Inc. segTEL was a New Hampshire based provider of competitive fiber optic services. During portions of the same time period, I was also an investor in, or advisor to, other fiber optic companies operating in New Hampshire. In 2011, segTEL was acquired by Riverside Partners as the fiber-optic core backbone for what would later be known as Firstlight Fiber. I served as the Executive Vice President of Firstlight from 2011 to 2013, and as a board director and investor in the company until 2016, when the company changed ownership. Since 2016 I have had no relationship with Firstlight.

I believe that my experiences, both as an operating executive and as an advisor to other infrastructure companies during the same aforementioned time periods, are directly relevant to the case that you are presently evaluating. I am hopeful that sharing some of these experiences will benefit the Commission and the parties in resolving this dispute.

Summary

The nature of the Comcast dispute is identical in nearly all respects to problems that I encountered with Verizon New England and Fairpoint. Ultimately, each of these matters resolved successfully without intervention from the FCC or the NH Public Utilities Commission, both before and after the PUC's adoption of pole attachment regulations.

The fact that Verizon and Fairpoint voluntarily allowed (after substantial threats of escalation and many unpleasant phone conversations) these activities in a competitive deployment for one

carrier should mandate that other competitive entrants (such as Comcast) receive treatment that is not inferior.

I base my comments upon my understanding of Comcast's complaint in the publicly filed docket, as well as Comcast's inclusion of Consolidated's position statement dated February 24, 2020.

Simply stated, Consolidated facilities were not sufficient to provide a proposed attachment in the manner that Comcast originally requested. Rather than give up on building its network or subject itself to substantial expense and delay in having Consolidated upgrade its facilities, Comcast simply requested riser access to leave the incumbent facilities and circumvent the bottleneck through the independent occupation of the public right of way - an occupation specifically applied for and licensed by the applicable municipality pursuant to state law. This is a standard best practice that is routinely implemented by competitive entrants.

In fiber optic deployments that I supervised, we routinely constructed facilities that, in different ways, left an incumbent facility and then returned to it. The most analogous situation to the Comcast case would be when we reached major highway crossings and the ILEC conduit was exhausted going under a highway. In these cases, we would construct our own conduit within the public right of way and attach to the ILEC poles on either side of the highway, rising or descending via attached risers. We did this at one very important highway crossing in Manchester, and another one up north towards Woodstock. Had we not been allowed to do this many miles of build on either side of that highway would have been for naught. Similar situations were encountered at bridges, where we would deploy our own conduit along a bridge, leaving an pole owner's facilities to transfer to our own, returning to the pole owner's facility at the other side of a water crossing.

In other cases, incumbent conduit and riser was unavailable and we needed to break out of the ILEC manhole system. We did "manhole breakouts" from the ILEC vault and built our own conduits and risers, coming up on a ILEC pole. I recall that we had a major argument about this more than ten years ago in downtown Manchester, but were ultimately allowed to do it. The pole that we rose up on was on the side of the Hanover Street Chophouse parking lot and our privately owned riser was marked with a giant multi-colored company logo sticker.

Other times, the route that we wished to build might have been a shortcut between ILEC pole routes. In Lebanon I recall leaving the ILEC pole line, attaching to a fire department pole, and then returning to the ILEC pole line on the opposite side. In New Hampton, we departed an ILEC pole line and placed nearly a mile of our own poles, returning to an existing pole route on the far side. On several occasions there were telephone-only poles on one side of a street and

electric-only poles on the other side and we built our route crossing from one to the other when we were able to do so to avoid make-ready and speed up our attachments.

There were dozens of use case scenarios where we would need to depart and then re-connect to pole owner facilities. Our motivations for doing so included, but were not limited to: servicing an end-user client, extending our network, minimizing build expense, expediting time to market, maximizing control over our network facility, "owning" rather than "leasing" our network appurtenances, and evading bottlenecks created by exhausted facilities.

The primary point is that I saw plenty of cases where the allegedly objectionable activity in this docket was allowed and licensed.

My secondary point is that I do not believe that the pole owner's defenses of the refusal hold water. I provide my commentary below for the purpose of guiding the Commission as to what questions they may want to ask and analyze during their inquiry.

Positions of Consolidated and Responses

Consolidated presents its position by stating 7 claims, which I list by quoting the February 24, 2020 letter to Comcast and reply to in the order that they were made:

Claim #1: *Consolidated implements policies that allow for structural integrity and efficient use [of its facilities]. Consolidated's Communication denial of the riser access to its poles is an example of such a practice. (First Paragraph)*

Answer: In the ordinary course of business, competitors are allowed to request riser attachment to poles. The attachment file to the Comcast petition, dated July 14th, 2020 starting at page 40 shows an example of a pole attachment request. This document is substantially identical to the pole attachment requests that existed a decade ago. The fourth column specifically allows for attachers to request riser attachments to the poles.

While it is true that any attachment request may be denied on the basis of safety, reliability, generally accepted engineering standards or lack of capacity - none of those are claimed in this case. The claim made is a claim of "policy" relative to "efficient use" of Consolidated facilities. PUC Rules 1303.01(b) does not allow a pole owner to deny an attachment on the basis that the proposed attachment might not (in the pole owner's subjective opinion) be efficient. To the contrary, the request for a riser in this case was made because it

was the most efficient use of an exhausted facility that would minimize the impact on the incumbent pole owner while simultaneously accomplishing the goal of the attacher.

At no point in the Consolidated response did the pole owner allege that the pole, as it stood on the day of the inspection, had (a) insufficient capacity [1303.01(b)(1)] for a riser attachment, would be rendered unsafe/unreliable/in by a riser attachment violation of applicable engineering [1303.01(b)(2)], or lacked authority to rent a riser attachment [1303.01(b)(3)]. The failure to cite a valid reason for denial should end the inquiry.

As this docket continues, I encourage the Commission to ask the question "does Consolidated ever construct an underground facility between two aerial facilities, rising up on either side of the underground." Nuts, bolts, poles and wires don't change their engineering standards based upon the identity of their owners. If the policy is sound for Consolidated to do for itself, it is equally as sound for an attacher to do while book-ended by Consolidated facilities.

Claim 2: Licensing risers that allow privately owned structure from one CCI asset to another greatly accelerates premature exhaustion both in the underground (manhole, pullboxes, etc) and on poles. (paragraph 2)

Answer: There is no place in the pole rules that allows for considering the speculative nature of what may or may not happen in the future with projects that have not been planned or could never be planned. The pole owner's claim, if accepted, essentially provides the right of the pole owner to ask a proposed attacher "to what end and for what purpose do you intend to make this attachment?" It would give a pole owner a veto over an investment-backed capital decision by a prospective attacher to construct their network how they deem best fit to meet their objectives.

Put another way, had Comcast asked to install a riser on the pole in question because it intended to construct an underground feed to an end user, Consolidated would not have refused the request. Had Comcast requested riser access to pole #1 to construct an eastward network expansion, and access to pole #2 to construct a westward network expansion, and the two never met - Consolidated would not have refused the request. The request was denied because Comcast proposed to leave and then re-enter the pole route.

If the attachment of a riser for purpose #1 does not violate "acceptable engineering standards" then the attachment of the identical riser to an identical pole for a different purpose can not possibly violate the identical engineering standards.

It may be true that "too many" risers could theoretically exhaust the facility of a pole. However, a correctly exhausted facility is nothing more than one that has been used to the most efficient level of utilization. Again, that could occur when any party that attaches a riser to the last available space, be it the incumbent or an attacher. If the ILEC could attach for its own purpose, then the basic principles of nondiscrimination mandate that an attacher can place a riser for their own purpose. The exhaustion through the placement of a riser is the same, regardless of the identity of the owner.

Accordingly, I recommend that the pole owner be asked the questions:

1) Would the pole owner be allowed to install a riser on each of the endpoint poles and install conduit between the two? (The answer is presumably yes, as the incumbent offered to do so).

2) Is each of the poles, *regardless of the purpose of the proposed riser*, capable of allowing the attachment of the proposed riser.

A valid attachment should be based upon requested action, as that specific action is defined and without regard to the beneficiary of the attachment or the purported business purpose. In this case, the "action" is the attachment of a riser to the pole for the purpose of feeding an aerial attachment from a point on the pole to a point underground. The identity of the owner or the reason for the riser should be irrelevant to the engineering or capacity concern of the attachment.

Claim 3: 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 on the poles to place its own conduit and place another riser on each of the poles. (paragraph 2)

Answer: This response is speculative. Who knows what Consolidated would do if it attached a riser to the pole. Perhaps it would feed an innerduct for Comcast, an innerduct for its own wire and "reserve" an innerduct for "maintenance," which would be a standard procedure for many incumbent pole owners. If this is the case, then the installation of a Consolidated riser would provide zero additional access to any future attacher. Quite simply, we don't know. Furthermore, why should Consolidated be able to enjoy future revenue on rental income from

other attachers by virtue of Comcast's investment in the makeready? Why should Comcast pay now to produce capacity so that a future competitor could have easier entry later?

Something else that I think should be considered is that the proper reading of the PUC rules regarding pole attachments is as follows: If Comcast installs its own conduit facilities between the two poles, it is then a pole owner as defined in the rules for that new facility. Consolidated's claim that the next attacher would be required to place its own facilities is incorrect. Pursuant to PUC 1303.01(a) Comcast would be required to provide access to its new facility at terms, rates and conditions that are just, reasonable and nondiscriminatory.

I believe that it would be useful to ask Comcast if their placement of facilities is subject to access by third parties under the PUC rules and if they would negotiate in good faith [1303.02] with prospective attachers to its facilities, including Consolidated in the position as a prospective attacher.

I also believe that it would be useful to ask Consolidated if they take into account future needs of all future prospective attachers (even those that do not yet exist) when they construct their own plant.

My personal experience, admittedly nearly a decade old, is as follows:

First, in the promulgation of the pole attachment rules, non-incumbent attachers requested that the definition of "poles" be limited to incumbent poles. Back then, our point was that the obligation to lease space on those poles was based upon the fact that the legacy facilities were built with an implied public subsidy. Competitors did not prevail on that, the clear and unambiguous language of the PUC rules makes it clear that any attacher (including an incumbent) is free to request attachment to any other party's poles, conduits or rights of way.

Second, my experience was also that incumbents did not take into account speculative needs of heretofore unknown entrants into the markets. I recall multiple technical sessions where competitors complained about small poles being replaced by the next higher size, when it was clear that many competitors would be building on a high-value route. I recall multiple times on Londonderry Turnpike in Hooksett where a pole was replaced for a competitive entrant, only to be twice more replaced as the next two competitive entrants requested attachment. Incredulous at the waste of time and expense, the clearly developed record at the time was that the prospective, speculative, future needs that may or may not come down the road were not taken into account when making present day decisions about granting access.

Claim 4: Creating multiple risers on a single pole unnecessarily causes congestion and makes it difficult for Consolidated Communications personnel to access the poles that it owns. (paragraph 2)

Answer: The logical question here is - what are the rules regarding how many risers may be attached to a single pole and how are those universally applied and enforced in a nondiscriminatory manner. I would argue that every attachment increases congestion, necessarily and by definition.

In my experience, congestion is often a good reason to say no to a third party and a perfectly good reason to ignore for your own benefit. I decided to take a drive around my neighborhood in Lebanon earlier this morning. As I drove up Route 120 towards Alteria Business Park I noticed utility poles from a recent network expansion. On these poles there are multiple risers. I have attached photographs, file numbers 5594 and 5596. These poles accommodate more than 5 riser attachments without any apparent problems. As I drove to Hanover on an errand, I noticed a similar pole on Lebanon Street across from Hanover High School, and include it in photographs 5597 and 5598. This pole has multiple large risers, with stub-outs at ground level for additional risers to be installed. Presumably, if the pole owners were impeded from accessing their own poles they would not have allowed these extensive riser placements.

Claim 5: Comcast is forced to incur the expense regardless of the ownership, so it is hard to understand the refusal on Comcast's part. (paragraph 3) Consolidated offered to allow Comcast to place its own conduit and turn it over to Consolidated as a compromise (paragraph 4)

Answer: When I read this I imagined somebody saying "you're going to pay a mortgage every month anyway so we can't understand why you are upset about being forced to rent my apartment rather than building your own home. I guess if you really want to build your own home I will let you build it, hand it over to me, and then pay me rent." That is not the New Hampshire way. As stated above, I do not understand why the business decision, investment backed expectation, deployment objective or ownership of a capital facility is any of the incumbent pole owner's business.

It is very clear from reading the Comcast submission that Consolidated offered "in settlement" to allow Comcast to build its own facility and then "turn it over to Consolidated and pay rent on it." The very reasonable question to ask on this is "Comcast's construction of this facility and turning it over to you meets the needs of capacity, reliability, safety and generally accepted engineering standards - so what would make their construction of

this identical facility that they continue to own suddenly unable to meet the exact same standards of capacity, reliability, safety and generally accepted engineering standards?

Additionally, I would like to add that there is a substantial difference in value that the investment world accords to owned facilities than to leased facilities. They are potentially subject to different accounting treatment. Back in my time there was a company that had built custom conduit facilities in two major New Hampshire municipalities with highly strategic customers. The revenue derived from the facilities was minimal, but their existence was unique and differentiated. In each case there was a pole owner route that also served the same destination. I acquired the novel facilities, paying a price many times in excess of what I would have ever paid in rent to be on the incumbent line. "Owning" a novel facility, even at a drastically higher price, may be worth much more than renting. This is why the *subjective* business goals, dreams and motivations of an attacher or an owner should never be taken into account when making an *objective* determination of whether or not an attachment may be made or denied on the basis of capacity, reliability, safety or generally accepted engineering standards.

Claim 6: In fact, the 1300 rules which Comcast cites are borne out of a policy desire that the rights of all attachers are placed above those of any particular property owner. (paragraph 3)

Answer: The Telecommunications Act of 1996 set the FCC as the default regulator of pole attachments and allowed states to assume regulatory oversight through an act known as "reverse preemption." At the time that New Hampshire elected to pursue reverse preemption there was a general consensus between attachers, pole owners and municipalities that the federal regime was inadequate. The PUC promulgated the 1300 rules in compliance with the enabling legislative statute and with substantial testimony from all stakeholders. There is no need to imagine the purpose of the rules as they are stated unambiguously in 1301.01:

> Puc 1301.01 Purpose. The purpose of Puc 1300, pursuant to the mandate of RSA 374:34-a, is to ensure rates, charges, terms, and conditions for pole attachments that are nondiscriminatory, just, and reasonable. Nothing in this rule shall be construed to supersede, overrule, or replace any other law, rule, or regulation, including municipal and state authority over public highways pursuant to RSA 231:159, et seq.

Conclusion

It is important that the PUC act on this controversy. It might be tempting to abstain on the basis that Comcast stated in their complaint that the underlying matter was mooted through the implementation of an alternative solution. The "second choice" solution was presumably second choice for a reason, and that reason would be because the business owner found it inferior to the first choice. By expending time, energy and money the prospective attacher Comcast has already lost its battle.

Absent a resolution, however, these issues will recur with greater frequency and intensity. Time is of the essence when deploying facilities. This is the case in ordinary times, where customers want their network yesterday but can not have it until next year when it is constructed. Time is more essential now, where there are core objectives for State-mandated and/or federally funded broadband expansion, combined with concerns about network stability or reliability. Improper denials of access, even if ultimately overturned, cost attachers time, money and opportunity. Many end user contracts or government grants have absolute deadlines, where the failure to deploy by the "drop dead" date causes one to lose the contract and strand all of their investment.

Competitive providers like Comcast are not guaranteed a return on their investment. The decision to build in a place like Belmont, New Hampshire often results in a decision not to build in some other market in another state. When the investment climate gets stymied and frustrated, capital seeks easier paths to produce viable return. A build in Philadelphia or Miami might become more financially attractive. New Hampshire towns lose the investment, New Hampshire workers do not get the work, and New Hampshire consumers may not get an upgraded choice.

The presumption in New Hampshire's rules is that the answer to an access request is going to be "yes." Rule 1303.01(a) states that, except in the very rare and limited situations identified in 1303.01(b), a pole owner shall provide access to its poles. The language is mandatory. The burden of proving the exception should be on the party denying the access.

Furthermore, I would like to point the Commission to the language of 1303.01(c). Although Consolidated might feel it has satisfied its obligations by offering make-ready, it has ignored the disjunctive "or" in the second part of this rule. Specifically:

"...or another alternative can be identified that would accommodate the additional attachment."

In this case, I would contend that Consolidated has no legal authority to deny the attachment because Comcast has properly proposed "another alternative" that "would accommodate the additional attachment." I would also note that the other alternative is not restricted to an alternative considered optimal to the pole owner.

Attachments should be exclusively evaluated by their objective impact on facilities, not the subjective goals of the owners or their identities.

Thank you very much for considering my thoughts.

Sincerely,

/s/

Jeremy Katz
New Hampshire Resident
Telecommunications Enthusiast