

STATE OF NEW HAMPSHIRE

Before the

PUBLIC UTILITIES COMMISSION

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

Petitioner

v.

**CONSOLIDATED COMMUNICATIONS OF
NORTHERN NEW ENGLAND COMPANY,
LLC**

Respondent

Docket No. DT 20-_____

PETITION FOR RESOLUTION OF DISPUTE

AND DECLARATORY RULING

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INTRODUCTION

Comcast of Maine/New Hampshire, Inc. (“Petitioner” or “Comcast”) hereby petitions the New Hampshire Public Utilities Commission (“Commission” or “PUC”) to resolve a pole attachment dispute between Petitioner and Consolidated Communications of Northern New England Company, LLC (“Respondent” or “Consolidated”) and for a declaratory ruling that Consolidated’s denial of riser¹ access in the absence of capacity, safety, reliability, or engineering issues, and Consolidated’s insistence upon ownership and control of conduit between risers attached to Consolidated’s poles, constitute unlawful, unjust, and unreasonable pole attachment terms and conditions in violation of the New Hampshire Pole Attachment Act² and the Commission’s Pole Attachment Rules.³ The Commission should also declare 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. Granting this 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 policy and conduct with respect to Comcast, and to the extent imposed on other New Hampshire communications service providers, are unlawful. This Petition is submitted pursuant to N.H. RSA 374:34-a, and N.H. Admin. R. Puc 1304 (Utility Pole Attachments – Dispute Resolution) and Puc 207 (Declaratory Rulings).

Comcast and its affiliates provide video, voice, and broadband services over its communications network in the state of New Hampshire and compete with Consolidated in the provision of these services to residential, business, and non-profit institutional customers in the

¹ As used herein, the term “riser” refers to cable wire as well as the protective cover placed over the riser cable on a pole.

² N.H. RSA 374:34-a.

³ N.H. Admin. R. Puc 1300.

state. Petitioner's communications facilities are attached to poles owned by Consolidated (and in some cases owned jointly by Consolidated and Eversource) in 60 cities and towns across the state. In the last *three years alone*, Comcast has invested in expanding its network in New Hampshire and has sought access to over 17,000 Consolidated poles, competing with Consolidated for over 26,000 potential customers to provide video, voice, and internet services. Comcast's investment in New Hampshire is ongoing, and Comcast relies on Consolidated poles to deploy additional network facilities.

In August 2019, Comcast submitted an application to Consolidated for pole attachment licenses for poles in the Town of Belmont, New Hampshire, which included three consecutive poles relevant to this dispute. In the course of a joint survey of the three poles, Comcast was informed by Consolidated that there was inadequate space on the second of the three poles (the "Intervening Pole") to accommodate Comcast's proposed attachments. Moreover, the Intervening Pole cannot be replaced with a taller pole to accommodate Comcast's attachment due to overhead high-tension electrical facilities that cross over the pole line.

To resolve the situation, Comcast proposed to install a riser on the first of the three poles to bring Comcast's aerial plant down to an underground conduit that Comcast would install in the public right-of-way. The conduit would bypass the inaccessible Intervening Pole and go directly to the third pole where another Comcast riser would be installed to bring the Comcast plant back up the pole from the conduit to connect aurally for the continuation of the pole line. This is a standard industry practice that Comcast has used regularly to resolve similar circumstances with pole owners across the country, including in New Hampshire.

As explained in more detail herein, by email and other correspondence between October 2019 to February 2020, Consolidated rejected Comcast's efforts and its application to implement

the proposed solution. Consolidated refused to allow Comcast to install its own risers on the two critical Consolidated poles, even though there are no other risers on either pole and the poles could easily accommodate such Comcast risers. Instead, Consolidated insisted that it must own the protective risers (paid for by Comcast) and that Comcast could then lease-back space in the riser covers from Consolidated for Comcast's riser cable. In addition, Consolidated insisted that it must install (at Comcast's expense) and own the conduit between the riser poles, and must lease space in that conduit to Comcast. Alternatively, Consolidated proposed that Comcast could install the conduit itself, convey ownership to Consolidated, and then lease-back conduit space from Consolidated for Comcast's plant. As set forth below, both alternatives are unlawful and are unacceptable to Comcast.

In an effort to resolve the impasse, after informal settlement attempts (including Comcast's offer to install two conduits and provide one to Consolidated for its own use), Comcast invoked the dispute resolution provision of the parties' pole attachment agreement. Settlement efforts proved unsuccessful as Consolidated continued to deny Comcast access to the poles to install risers, and required Comcast to comply with Consolidated's riser and conduit lease-back policy.

Comcast's construction schedule necessitated that it continue construction in Belmont during the course of the dispute. On June 13, 2020, because of the impasse, Comcast was forced to move away from the Consolidated pole line and utilize privately-owned poles located across the street in order to avoid the poles at issue, before rejoining aerially with the Consolidated pole line. However, this "workaround" solution does not render the instant controversy moot. As explained herein, the instant situation will recur in other New Hampshire locations as Comcast continues to expand its network.

Consolidated's rejection of Comcast's riser application is a wrongful denial of pole access, discriminates against Comcast, and is a violation of the parties' pole attachment agreement. Unless these anti-competitive and unlawful policies are halted and remedied, Consolidated will effectively undermine key state policy objectives, including the deployment of broadband services in New Hampshire, which are so critical given the Governor's recent announcement of a \$50 million Emergency Broadband Expansion Program to support broadband buildout with CARES Act funding by the end of 2020.⁴ The Commission should act swiftly and firmly to order that Consolidated's policies and actions are unlawful and discriminatory in violation of New Hampshire statutes⁵ and Commission pole attachment rules. The Commission should also declare that Consolidated's policy requiring communications providers to lease conduit capacity from Consolidated when those providers have an independent statutory right⁶ to

⁴ See Attachment 1 [Governor's Office for Emergency Relief & Recovery "CONNECTING NEW HAMPSHIRE-EMERGENCY BROADBAND EXPANSION PROGRAM]. Achieving the objectives of New Hampshire's bold emergency program (as well as facilitating deployment and competition generally) requires effective pole access policies that prohibit tactics by pole owners such as Consolidated's actions in Belmont. The Federal Communications Commission ("FCC") has repeatedly identified pole attachments as crucial in broadband deployment efforts. See, e.g., *Accelerating Wireline Broadband Deployment by Removing Barriers To Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, ¶ 1 (2018) ("Now, more than ever, access to this vital infrastructure must be swift, predictable, safe, and affordable, so that broadband providers can continue to enter new markets and deploy facilities that support high-speed broadband."); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266, ¶ 3 (2017) ("Pole attachments are a key input for many broadband deployment projects. Reforms which reduce pole attachment costs and speed access to utility poles would remove significant barriers to broadband infrastructure deployment and in turn increase broadband availability and competition in the provision of high-speed services.").

⁵ New Hampshire's pole access requirements mirror those in the federal Communications Act. 47 U.S.C. § 224(f). The federal 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 Utilities 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 Utilities Bd.*, 525 U.S. 366 (1999).

⁶ See N.H. RSA 231:160.

install and own their own conduit is anti-competitive, unlawful, and constitutes an unjust and unreasonable term or condition of attachment.

I. PARTIES

1. Petitioner is a cable television operator that provides cable television and broadband service to customers in the state of New Hampshire. Comcast of Maine/New Hampshire, Inc. is a New Hampshire corporation and its principal business address is 1701 John F. Kennedy Blvd, One Comcast Center, Philadelphia, PA 19103. Petitioner is a wholly owned subsidiary of Comcast Cable Communications, LLC (“Comcast Cable”). Comcast Cable, through direct subsidiaries including Petitioner, provides cable television, voice, broadband and other communications services in New Hampshire and 38 states and the District of Columbia. Petitioner has attachments on Consolidated poles in several areas in New Hampshire and is an “attaching entity” within the meaning of N.H. Admin. R. Puc 1302.01.
2. Respondent Consolidated is an incumbent local exchange company (“ILEC”) within the meaning of 47 U.S.C. § 251(h) that provides communications and broadband services to its customers within New Hampshire. Consolidated is 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. Consolidated is also an “excepted local exchange carrier” within the meaning of N.H. RSA 362:7, I(c)(1) and N.H. Admin. R. Puc 1302.04.

II. JURISDICTION

3. This 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
4. 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 were effective. 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 (released February 22, 2008).⁷

III. DISCUSSION

A. Factual Background

1. The Petitioner and The Pole Attachment Agreement

5. Petitioner is a cable television operator, which along with its affiliates, provides various communications services over its cable systems to residential, commercial and governmental subscribers in New Hampshire, including traditional cable television service, broadband, and state-of-the-art services such as high-definition video, video-on-demand, and interconnected Voice over Internet Protocol.

⁷ The federal Communications Act separately imposes upon each local exchange carrier ("LEC") 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).

6. Petitioner's cable television system facilities are attached to poles belonging, in whole or in part, to Consolidated. Specifically, Petitioner is attached to Consolidated poles in New Hampshire pursuant to the following pole attachment agreement described below and submitted herewith as Attachment 2.

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 "Pole Attachment Agreement").

7. Section 2.1 of the Pole Attachment Agreement states in pertinent part that "[s]ubject to the provisions of this Agreement, Licensor agrees to issue to Licensee for any lawful purpose, revocable, non-exclusive licenses authorizing the attachment of Licensee's Facilities to Licensor's poles." Attachment 2, p. 10.
8. Section 1.8 of the Pole Attachment Agreement defines Licensee's Facilities as "[t]he cable and all associated equipment and hardware owned by the Licensee." *Id.*, p. 9.
9. Section 1.3 of the Pole Attachment Agreement defines "Attachments" as "[a]ny of Licensee's facilities in direct contact with or supported by a utility pole, and/or any article of equipment attached to a point on a pole not normally occupied by a strand attachment (*e.g.*, power supplies, equipment, cabinets, terminals, etc.)." *Id.*, p. 8.
10. Form 3 of Consolidated's pole attachment application specifically references "Riser" as a facility that Comcast can request to install on the poles. *See* Attachment 3.

2. Comcast's Pole Attachment Application

11. Comcast is constructing its communications network in a number of areas in New Hampshire, including Belmont. In this process, Comcast has worked closely with Consolidated on the application, survey, and make-ready process throughout the state.
12. On or about August 16, 2019, Comcast submitted an application for pole licenses (LAG Application # A-2019-1036) for the three consecutive poles in Belmont that are relevant to this Petition, all of which Consolidated owns jointly with Eversource. The application is submitted herewith as Attachment 4.
13. The three poles 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).A map identifying the poles is submitted herewith as Attachment 5.
14. Although Comcast applied to attach its facilities to each of these poles in sequence, during a joint field survey conducted with Consolidated on or about October 17, 2019, Comcast was informed that Consolidated pole # 1100/1 (“the Intervening Pole”) had insufficient space to accommodate Comcast’s aerial attachment. In addition, the Intervening Pole 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.

15. During the field survey, the parties discussed other alternatives if replacing the Intervening Pole was not an option. Comcast's representatives stated that Comcast would typically bypass the Intervening Pole by trenching the span between Consolidated poles 1100/2 and 110/47 (the "Poles"), install its own conduit, access the Poles via a riser on both ends of the conduit, and continue to connect to the pole line aerially. Also, during the field survey, Comcast's representatives asked Consolidated if Comcast could add riser requests for the Poles.⁸ Attachment 6, p. 1.
16. In response, Consolidated informed Comcast that its policy prohibits Comcast from installing conduit between two Consolidated pole assets. Consolidated notified 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. Attachment 6, p. 3.
17. 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]", and that "[e]ven if that license were issued, Comcast is not licensed for the risers on each pole." Attachment 6, p. 2.

⁸ A riser application includes the attacher's vertical riser cable itself and the protective cover (*i.e.*, conduit or U-guard) placed over the riser cable on a pole.

18. Mr. Fournier directed Comcast to “submit a conduit request between 1100/2 and 110/47” (*i.e.*, a request to lease conduit space from Consolidated pursuant to a Conduit Agreement). *Id.* Mr. Fournier’s email and Comcast’s subsequent communications with Consolidated employees indicated that the Consolidated “rules” require Comcast to lease conduit from Consolidated, and Comcast could not install its own conduit and connect to the Poles via riser.
19. As explained below, Consolidated is prohibited from requiring Comcast (or other communications service providers) to lease facilities from Consolidated in these circumstances. Further, Comcast does not wish to lease a 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. 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.
20. The path between the Poles where Comcast proposes to install conduit is in the Belmont public right-of-way, and Comcast has obtained independent authority from Belmont to install the conduit. Attachment 7.
21. There is no other conduit or other equipment installed in the right-of-way between the Poles that would be disturbed or impacted if Comcast installed the conduit.
22. Neither of the Poles has another riser installed on it and there is sufficient capacity for the installation of Comcast risers.

23. Because of the communications from Consolidated stating that no license would be granted for the poles, Comcast did not initially submit a formal request for riser access, hoping the situation would be resolved. However, after it was clear no resolution would be forthcoming, on January 23, 2020, Comcast submitted its written application to Consolidated to install risers on the Poles to be used to connect with Comcast-owned conduit. Attachment 8.
24. Via letter dated February 24, 2020, Sarah Davis, Consolidated's Senior Director Government Affairs, reiterated Consolidated's denial of the riser licenses on the Poles. Attachment 9.
25. On May 1, 2020, Consolidated again denied Comcast's riser application, indicating in an email from Consolidated's LAG Representative, Rebecca DeRoche, that "Comcast will not be attaching a riser to the poles. Application has been cancelled." Attachment 10.

3. The Dispute Resolution Request

26. Section 15.10 of the Pole Attachment Agreement includes a Dispute Resolution process to address Comcast's claims that Consolidated is imposing unreasonable terms or conditions regarding pole attachments. Attachment 2, p. 29.
27. In accordance with this process, on February 3, 2020, Comcast transmitted a letter to Mr. John Stevenson of Consolidated's License Administration Group (the "Comcast Dispute Letter"), which explained the background of Comcast's efforts to access the Poles with Comcast risers and to install Comcast-owned conduit in the public right-of-way between the Poles. Attachment 11, pp. 1-3. Comcast requested dispute resolution regarding Consolidated's "denial of Comcast's ability to access [the Poles] via conduit and risers." *Id.*, p. 4. Comcast disputed

“Consolidated’s policy of prohibiting Comcast (and others) from owning conduit that connects to risers on Consolidated poles.” *Id.* Comcast further explained that Consolidated’s refusal to allow Comcast to install risers on the Poles constitutes a denial of access in violation of the Pole Attachment Agreement and the Commission’s rules. *Id.*, pp. 3-4.

28. Comcast’s Dispute Letter noted that, due to Comcast’s ongoing network expansion in New Hampshire, the situation at issue in Belmont would likely repeat itself if Consolidated refused to abide by the “common practice” of allowing Comcast to install its conduit to connect Consolidated poles in similar circumstances. *Id.*, p. 4. Comcast expressed its desire “to seek resolution of this matter through the Dispute Resolution Process and avoid the formal Complaint with the New Hampshire Public Utilities Commission.” *Id.*, pp. 4-5. Finally, Comcast requested that Consolidated respond within 10 business days as required by Section 15.10 of the Pole Attachment Agreement. *Id.*, p. 4.
29. By letter dated and emailed to Comcast on February 24, 2020, Consolidated’s Senior Director of Government Affairs, Sarah Davis, responded to Comcast’s Dispute Letter (“Consolidated Response”). Attachment 9. Consolidated’s Response states that it “denied the riser licenses on each riser pole based on capacity and engineering standards.” *Id.*, p. 1. Consolidated does not contend that there is any existing insufficient capacity or safety issue with the specific Poles at issue, which have no other risers or other equipment installed below Consolidated’s lines in the communications space. Rather, Consolidated argues that “[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.” *Id.*, p. 1.

Consolidated’s position is that in order for it to provide non-discriminatory access to its poles to all that seek to attach, Consolidated must own the risers (*i.e.*, the protective covers within which attachers’ riser cables are placed), which it would then be obligated to lease to other attachers. Further, 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.*

30. Because Comcast was not satisfied with the Consolidated Response, it exercised its right under Section 15.10 of the Pole Attachment Agreement to have a meeting with Consolidated to discuss the disputed issues. The meeting was held May 20, 2020 via conference call during which Comcast representative Stacey Parker reiterated to Sarah Davis that Comcast would be willing to install two conduits and give one to Consolidated for its own use. The parties were unable to resolve their differences during this conference call.
31. Comcast’s construction schedule necessitated that it continue construction in Belmont notwithstanding that the parties’ dispute was unresolved. On June 13, 2020, to avoid the Poles, Comcast utilized poles owned by First Light located across the street before rejoining the Consolidated pole line aurally.

4. The Instant Facts are Likely to Recur as Comcast Continues to Expand its Network in New Hampshire, Where Comcast Competes with Consolidated for Customers.

32. Comcast expects to face similar situations to those giving rise to the instant petition. 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 where Consolidated's poles are located. If allowed to go unchecked, Consolidated's unlawful, discriminatory, and anti-competitive riser and conduit policies will significantly delay and impair Comcast's and other operators' ability to efficiently build out their networks to meet customers' broadband needs, and potentially to respond to New Hampshire's Emergency Broadband Expansion Program which requires that qualifying projects be completed as early as possible, but no later than December 15, 2020. Attachment 1.
33. Comcast competes with Consolidated throughout the state of New Hampshire for customers of voice, video, and internet service in 60 cities and towns. In the last three years alone, Comcast has sought access to over 17,000 Consolidated poles, competing with Consolidated and other operators for over 26,000 potential customers. In addition, Comcast continues to invest in its New Hampshire communities and is continually building into new territories also served by Consolidated and other competitive providers.
34. In the last 18 months, Comcast has submitted approximately 8100 pole applications for access to Consolidated. Restrictions in Comcast's decades old pole attachment agreement, and the current Commission pole attachment rules,

limit the number of requests for pole attachments by Comcast to only 2,000 poles at any one time, which can delay network expansion timelines.⁹ While these restrictions have slowed down Comcast's construction process considerably and have limited its plans to invest even more robustly in New Hampshire, Comcast has nonetheless worked diligently with Consolidated, gaining minor flexibility in the pole limits, to ensure that Comcast's construction continues. Even with this focus, pole applications and permitting can take several months, as illustrated below.

35. Most recently, Comcast completed a project in Rochester, New Hampshire in which Comcast accessed 7,732 poles and is competing with Consolidated for 13,300 potential customers. This project took almost three years to complete, primarily due to the extensive amount of time to secure pole attachment licenses. Comcast is also in the process of expanding its network in the Lakes Region, passing 13,900 locations in two towns – Laconia and Guilford. This project requires attachment to 9,339 additional Consolidated poles.
36. Comcast is also participating in New Hampshire's "Connecting New Hampshire Emergency Broadband Expansion Program" Request for Proposals ("RFP"). *See* Attachment 1. Funds for this program have been allocated to the state under the CARES Act. The expedited construction timeframe required by the Act, and the onerous pole permitting process, which by its very nature favors pole owners such

⁹ N.H. Admin. R. Puc 1303.12 establishes timeframes for utilities to perform make-ready work based on the number of requested attachments to poles, with requests for over 2,000 poles being subject to "negotiation" with the pole owner.

as Consolidated, have caused Comcast to limit its RFP submission to propose only small line extension projects that do not require make-ready work.

37. The Rochester project and Comcast's limited proposal in response to the RFP demonstrate the critical need that Comcast has for non-discriminatory access to Consolidated-owned poles. And in the instant situation, although Comcast has found a "workaround" solution 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. Comcast anticipates encountering the instant situation in several New Hampshire locations, including a current, large municipal project that is requiring Comcast to install underground facilities. 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 access complaints at the Commission when disputes of this nature arise.

B. Consolidated's Refusal to Approve Comcast's Riser Applications is an Unlawful Denial of Access.

1. Absent Demonstrated Capacity, Safety, Reliability, or Engineering Obstacles, Comcast Has a Right of Access to Install Risers on Consolidated Poles.

38. New Hampshire law requires a pole owner to provide nondiscriminatory access to its poles, ducts, conduits, and rights-of-way upon just and reasonable rates, terms

and conditions.¹⁰ PUC rules provide that these access rules apply to “attaching entities... seeking to attach facilities to such poles.”¹¹

39. 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 specific poles in issue.¹² A pole owner shall not deny a requested attachment for these reasons “if other make-ready work or another alternative can be identified that would accommodate the additional attachment.”¹³
40. 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.”¹⁴
41. By limiting denial of access to poles to the discrete reasons stated in N.H. RSA 374:34-a, VI, the New Hampshire legislature and the Commission implicitly recognized that the attacher is at the mercy of the pole owner, given its “local monopoly ownership or control of poles” and “exclusive control over access to pole lines.”¹⁵ Allowing a denial of access only for specific and limited reasons

¹⁰ See RSA 374:34-a (I), (II), (VI); N.H. Admin. R. Puc 1303.01(a); 1301.01 (“The purpose of PUC 1300, pursuant to the mandate in RSA 374:34-a, is to ensure rates, charges, terms and conditions for pole attachments that are nondiscriminatory, just and reasonable.”); N.H. Admin. R. Puc 1302.10 (“‘Pole’ means ‘pole’ as defined in RSA 374:34-a, I, 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...”).

¹¹ N.H. Admin. R. Puc 1301.02(c).

¹² See RSA 374:34-a (VI), N.H. Admin. R. 1303.01(b) (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.)

¹³ See N.H. Admin. R. Puc 1303.01(c).

¹⁴ N.H. Admin. R. Puc 1303.04(c).

¹⁵ *Implementation of Section 224 of the Act: A National Broadband Plan for our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240, ¶ 4 (2011) (“2011 Pole Attachment Order”) *appeal denied*, *Am. Electric Power Service Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013). New Hampshire’s narrow exceptions to a pole

helps ensure the Commission can promote the state's goal of accelerating the deployment of broadband infrastructure.¹⁶

42. Comcast's risers (including their protective covers) are "facilities" entitled to pole access under New Hampshire law. "Facility" is defined in Puc 1302.06 as "the lines, cables, wireless antennas, and any accompanying appurtenances attached to a utility pole for the transmission of electricity, information, telecommunications, or video programming....". Similarly, as explained in paragraph 9, above, Section 1.3 of the Pole Attachment Agreement provides Comcast a right of access for "Attachments," which is defined broadly and would include risers. Moreover, Consolidated's Form 3 ("Itemized Pole Make-Ready Work Charges"), expressly lists risers among the facilities for which make-ready work may be conducted and charged. Attachment 3; *see also* Attachment 4, Form 3-1, Column F.
43. 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.¹⁷ Thus, the inclusion of risers within the facilities entitled to pole access rights is consistent with both New Hampshire and federal law.

owner's duty to provide access substantially track the exceptions under the federal Pole Attachment Act to advance the deployment of broadband and communications service competition.

¹⁶*See State of New Hampshire Broadband Action Plan* (June 30, 2008) at iii-iv ("Improve utility pole access" is listed as one of the seven "critical" action items "to move the State forward to ensure that New Hampshire maintains and expands its leadership position" on broadband deployment. <http://www.trafford.org/cmsAdmin/uploads/Final-Report-082808.pdf>).

¹⁷ *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]").)

44. Consolidated has provided no legitimate justification to deny Comcast's application to install its risers at these specific Poles. Factually, it is indisputable that there is sufficient capacity on the Poles to install the risers because there are no other risers or other equipment that would prevent Comcast from installing its risers consistent with applicable safety codes. Consolidated's purported reason for denying access based on some hypothetical future scenario in which there might be more limited access if multiple risers were installed amounts to an unlawful "reservation of space" on the Poles as explained in paragraph 49 below. In addition, Consolidated's rationale for invoking the "insufficient capacity exception" conflicts with the policies for requiring pole access and the uniform understanding regarding the meaning of "insufficient" capacity, which does not include situations like this one, where the installation can be readily accommodated.¹⁸
45. Nor is there any legitimate safety, reliability, or engineering purpose that would justify Consolidated's access denial. As noted, Consolidated argues that "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." Attachment 9. This response is hypothetical and speculative as there are no other risers on the poles and it is unknown whether there will be more in the foreseeable future. Moreover, Consolidated's position is inconsistent with the

¹⁸ *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).

Telcordia Blue Book-Manual of Construction Procedures (“Blue Book”), which establishes attachment specifications under the Pole Attachment Agreement, Section 6.1. The Blue Book states that “[w]hen locating other pole-mounted equipment [other than power supplies], consult with the local telephone company for the best location.”¹⁹ In addition, the Blue Book specifically contemplates the installation of multiple risers on a pole by attachers, and it is not unusual for Consolidated poles to have more than a single riser. “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 several of these vertical riser cables on a single pole, the cables can be consolidated under a U-Guard....”²⁰ The Blue Book specifically contemplates that the protective conduit that houses a riser cable can be owned by attachers such as Comcast.²¹

46. Under the Blue Book and the Pole Attachment Agreement, Consolidated was obligated to provide a suitable location for Comcast’s risers and not compel a lease-back arrangement.
47. Sufficient capacity exists on the Poles to install Comcast’s risers and there is no specified safety or engineering concern with Comcast’s proposed installations justifying access denial under N.H. Admin. R. Puc 1303.01. In considering denial of access issues involving ILECs like Consolidated, the FCC explained “with respect to non-electrical utilities’ denials of access, the issues will be very

¹⁹ Telcordia SR 1421, Blue Book – Manual of Construction Procedures, §3.2, Issue 6 (March 2017).

²⁰ *Id.* § 26.2.

²¹ *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)).

carefully scrutinized, particularly when the parties concerned have a competitive relationship.”²² Consolidated’s denial of access is without legal basis and prejudices its competitors, including Comcast and other similarly situated communications service providers which must seek permission from Consolidated in order to attach broadband infrastructure to Consolidated poles.

2. Consolidated’s Refusal to Grant Access for Comcast’s Risers is an Unjust and Unreasonable Term or Condition.

48. Although there is sufficient space on the 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. Consolidated’s proposal is that Comcast pay Consolidated to install riser covers owned by Consolidated and for Comcast to lease-back space in the risers from Consolidated. Attachment 9, p. 1. This reservation of available pole space for Consolidated’s own facilities to the exclusion of a competitor’s facilities is unjust and unreasonable.
49. 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.²³ By contrast, electric company pole owners

²² *Local Competition Order Reconsideration*, 14 FCC Rcd 18049 at ¶¶ 9, 11.

²³ The 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. *See, e.g., Local Competition Order*, 11 FCC Rcd 15499 at ¶ 1170; *Local Competition Order Reconsideration*, 14 FCC Rcd 18049 at ¶¶ 67-72.

are allowed to reserve space for their future use for core electric uses (but not for competing communications facilities) pursuant to a “bona fide development plan” but are required to make the space available to attachers in the interim period before the space is needed by the electric company.²⁴ In this case, Consolidated is denying Comcast access to available space premised on a hypothetical future need for the space, and insisting that Consolidated own key infrastructure necessary to provide Comcast’s communications services. Such a reservation of space is anti-competitive and constitutes an unjust and unreasonable term or condition of attachment in violation of N.H. RSA 374:34-a, II.

C. Requiring Comcast to Lease Riser Space is Anti-Competitive and Constitutes an Unjust and Unreasonable Term or Condition.

50. Consolidated’s proposal that Comcast forgo installing its own risers on readily available pole space and instead pay Consolidated to build and then lease-back riser space is anti-competitive and an unjust and unreasonable term or condition of attachment. 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.
51. 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

²⁴See *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.”)

itself.²⁵ Consolidated is utilizing the same methodology with regards to its riser leasing requirement. Consolidated's denial of access and unjust and unreasonable requirements for installation and lease-back of risers has already substantially delayed Comcast's deployment of communications services that will compete with Consolidated's offerings and has driven up deployment costs. Comcast and others have a right of access for their own facilities on Consolidated's poles, including for risers, to the extent that pole capacity is available and there are no legitimate safety, reliability, or engineering issues, as in this case.

52. Comcast should not be required to forego its preferred facility construction and ownership approach for the Belmont project and pay unnecessary rent to its competitor based solely on Consolidated's purported concerns regarding hypothetical future demand for risers. Consolidated's position conflicts with standard industry practices (including with regard to other Comcast risers on

²⁵ 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 Telephone 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.").

Consolidated poles) and with the Blue Book technical standards that recognize third party attachers may install risers on ILEC poles.

D. Consolidated's Effort to Require Comcast to Use Consolidated Conduit is Unlawful.

1. Comcast has Express Authority to Install Conduit in the Public Right-of-Way.

53. Consolidated's claim that it must own the conduit between the 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. Under N.H. RSA 231:160, Comcast has the right to install conduit in the Belmont public right-of-way upon receipt of Belmont's approval.²⁶ Comcast was granted a Permit for Work in a Public Way or Place by Belmont on December 5, 2019 for the purpose of installing conduit between the Poles. Attachment 7. 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, Consolidated has no legal authority to prevent Comcast from installing its conduit. Consolidated's anti-competitive policy denying Comcast that right is an abuse of Consolidated's leverage over the poles (*i.e.* wrongful denial of riser access) to accomplish this result.

2. Consolidated's Actions are Anti-Competitive and Constitute an Unjust and Unreasonable Term or Condition of Attachment.

54. As described above, Consolidated is using its control over the Poles as leverage to compel Comcast to comply with Consolidated's "compromise" whereby Comcast

²⁶ See N.H. RSA 231:161.

would pay to install the conduit, turn ownership over to Consolidated, and then lease-back conduit space from Consolidated. Attachment 9, p. 2. Comcast has the right to own its own conduit where it has secured the necessary local government permits to install it in the public right-of-way, as it has in Belmont. Consolidated's interference with Comcast's ability to exercise that right by denying Comcast's riser application is anti-competitive. Moreover, Consolidated's insistence that Comcast pay to install the conduit, convey it to Consolidated, and then lease-back conduit space is not only anti-competitive, as explained above, but constitutes an unjust and unreasonable term or condition of attachment.

IV. COUNTS

Count I:

Denial of Access

55. Comcast incorporates by reference as if fully set forth herein paragraphs 1 through 54 of this Petition.
56. Consolidated's refusal to grant Comcast a license to install its own risers on the Poles is a violation of Consolidated's duty to provide access to any pole it owns or controls, except in narrowly defined circumstances, which do not apply here.
57. Consolidated's denial of access to the Poles is not legitimately based on capacity, safety, reliability, or engineering concerns.

Count II:

Unjust and Unreasonable Terms or Conditions of Attachment

58. Comcast incorporates by reference as if fully set forth herein paragraphs 1 through 54 of this Petition.

- 59. Consolidated's requirement that Comcast pay Consolidated to install riser covers to be owned by Consolidated and then to pay Consolidated rent to lease-back space in those facilities is an unjust and unreasonable term or condition of attachment.
- 60. Consolidated's refusal to allow Comcast to install its own conduit in the public right-of-way between the Poles is unlawful, anti-competitive, and an unjust and unreasonable term or condition of attachment.
- 61. Consolidated's alternative requirement that Comcast install conduit in the public right-of-way between the Poles, convey title to Consolidated, and then pay Consolidated rent to lease conduit space is unlawful, anti-competitive, and an unjust and unreasonable term or condition of attachment.

I HEREBY DECLARE THAT THE ABOVE STATEMENTS ARE TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

/s/Terrence O'Brien
 Terrence O'Brien
 Comcast Cable
 Director 1, Construction
 GBR Network

STATE OF _____

COUNTY OF _____

Subscribed and sworn to before me this _____ day of July, 2020.

 Notary Public/Justice of the Peace
 My Commission Expires _____

V. RELIEF REQUESTED

For the foregoing reasons, Petitioner respectfully requests that the Commission issue an order:

- A. Finding that Consolidated's refusal to license Comcast's risers on the Poles is a violation of Consolidated's duty to provide access under New Hampshire law;
- B. Finding that Consolidated's requirement that Comcast pay Consolidated to install risers and then lease-back riser space from Consolidated is anti-competitive and an unjust and unreasonable term or condition of attachment;
- C. Finding that Consolidated's requirement that Comcast pay to install conduit between the Poles, convey title to Consolidated, and then lease-back conduit space from Consolidated is anti-competitive and an unjust and unreasonable term or condition of attachment;
- D. Prohibiting Consolidated from interfering with the installation of Comcast-owned conduit in the public right-of-way between the Poles;
- E. Allowing Comcast to install its facilities in Comcast-owned risers on the Poles via the Comcast owned conduit between the Poles;
- F. Declaring that Consolidated's riser lease-back policies constitute a denial of access where sufficient capacity exists for attachers to install their own risers, consistent with applicable safety and engineering standards;
- G. Declaring that it is an unjust and unreasonable term or condition of attachment for Consolidated to require an attacher to pay Consolidated to install risers to be owned by Consolidated and then to pay Consolidated rent to lease-back riser

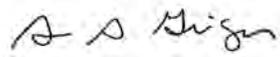
space where sufficient capacity exists for an attacher to install its own riser, consistent with applicable safety and engineering standards;

- H. Declaring that Consolidated cannot prohibit an attacher from installing conduit in the public right-of-way between Consolidated poles where the attacher is authorized by the relevant local government to install such facilities, consistent with applicable safety and engineering requirements;
- I. Declaring that it is an unjust and unreasonable term or condition of attachment for Consolidated to refuse to allow an attacher to install its facilities in attacher-owned risers on Consolidated poles from attacher-owned conduit, to the extent otherwise consistent with applicable safety and engineering standards and applicable law; and
- J. Awarding such other relief the Commission deems just, reasonable and proper.

Respectfully submitted,

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

By its Attorneys,
ORR & RENO, P.A.

By: 

Susan S. Geiger, N.H. Bar No. 925
45 South Main Street, P.O. Box 3550
Concord, NH 03302-3550
Telephone: 603-223-9154
Email: sgeiger@orr-reno.com

DAVIS WRIGHT TREMAINE LLP

By: /s/ James F. Ireland

James F. Ireland, DC Bar No. 336248

Davis Wright Tremaine LLP

1919 Pennsylvania Avenue NW

Suite 800

Washington, DC 20006-3401

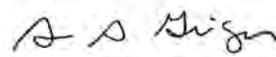
Telephone: (202) 973-4246

Email: jayireland@dwt.com

Dated: July 13, 2020

Certificate of Service

I hereby certify that on the date set forth above a copy of this Petition was sent by electronic mail to the Office of Consumer Advocate and to Sarah A. Davis, Senior Director Government Affairs, Consolidated Communications.



Susan S. Geiger