

STATE OF NEW HAMPSIRE

Before the

PUBLIC UTILITIES COMMISSION

DE 21-020

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

d/b/a EVERSOURCE ENERGY and

CONSOLIDATED COMMUNICATIONS OF NORTHERN NEW ENGLAND

COMPANY, LLC d/b/a CONSOLIDATED COMMUNICATIONS

Joint Petition to Approve Pole Asset Transfer

INITIAL POST- HEARING BRIEF OF

NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION, INC.

June 3, 2022

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I. Introduction

The New England Cable and Telecommunications Association, Inc. (“NECTA”)¹ intervened in this docket for the purpose of protecting its interests and those of its Members who provide communications services in New Hampshire. NECTA Members’ interests are substantial, and stem from the fact that they own facilities that are attached to poles owned by Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications (“Consolidated”) and Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource”). As a threshold matter, NECTA does not oppose the transfer of pole assets from Consolidated to Eversource. However, NECTA believes that if the New Hampshire Public Utilities Commission (“the Commission”) approves the transaction that is the subject of this docket (“the transaction”), the Commission should adopt all of NECTA’s billing, operational, financial, and rate recommendations described below in order to ensure that NECTA Members suffer no net harm as result of the transaction.

NECTA Members use their attached facilities to deploy broadband and other advanced communications services to New Hampshire residential and business customers. NECTA Members hold pole attachment licenses from Consolidated and Eversource, have applications for such licenses pending with both companies, and pay pole rental fees to both companies. Generally speaking, NECTA Members’ substantial interests that are directly implicated by the transaction relate to: 1) accurate billing and record keeping relating to pole attachment fees and licenses; 2) fair and efficient pole attachment licensing processes; and 3)

¹ NECTA is a non-profit corporation and regional trade association that represents the interests of most community antenna television (“cable”) and broadband internet providers in New Hampshire, including affiliates of Breezeline, Charter Communications and Comcast, (collectively, the “NECTA Members”) and their competitive local exchange company affiliates. NECTA also represents companies operating in Connecticut, Massachusetts, Rhode Island and Vermont.

nondiscriminatory, just and reasonable pole attachment fees. NECTA wishes to ensure that its members experience no harm if the Commission approves the transaction. Specifically, NECTA wishes to ensure that: the proposed transaction will not result in increased or inaccurate pole attachment bills, or any confusion or delay in processing NECTA Members' pole attachment license applications; that all pole attachment licenses issued by Consolidated for these poles are transferred to Eversource; and that accurate records are maintained for the pole attachments and licenses.

NECTA Members also wish to protect their financial and legal interests in paying pole attachment rates that are nondiscriminatory, just and reasonable. In particular, NECTA submits that if the Commission approves the transaction (including the acquisition premium that Eversource intends to pay for Consolidated's pole assets), it should not permit Eversource to reflect the acquisition premium in its pole attachment rates. In addition, the Consolidated pole attachment rates (that Eversource proposes to charge for the transferred poles for at least two years after the transaction closing) should be calculated using an approved regulatory formula, and reduced to just and reasonable rates. Lastly, NECTA Members assert that post-closing, Eversource should charge Consolidated the same pole attachment rates that it charges other attachers.

II. Standard of Review

The Joint Petition to Approve Pole Asset Transfer ("Joint Petition") asserts that the transaction satisfies RSA 374:30 which requires that the Commission find that the sale of Consolidated's pole assets to Eversource is "for the public good." "The question of public good is not to be answered by looking only to the immediate interests of the public served by these companies, nor by a mere consideration of advantages to those who furnish the service...it is a

question of what is reasonable taking all interests into consideration.” *Grafton County Electric Light and Power Co. & a. v. State*, 77 N.H. 539, 542 (1915). Thus, the Commission must consider NECTA’s interests in deciding this case.

In reviewing the transfers of utility assets made pursuant to RSA 374:30, the Commission has interpreted the “public good” standard to be a “no net harm” test. *See Re Consumers New Hampshire Water Company*, 82 NH PUC 814, 817 (1997). The test requires a finding that a transaction is not legally forbidden, and is reasonably permitted under the totality of the circumstances. *Id.* at 818. The public good standard also includes a determination by the Commission that the proposed transaction will not harm ratepayers. *Re Great Bay Water Company, Inc.*, 83 NH PUC 575, 577 (1998). The public good standard, therefore, requires that the Commission examine whether the transaction will harm ratepayers such as NECTA Members who pay pole attachment rates to Consolidated and Eversource.

III. Summary of the Argument

Under the above-stated standard, the Commission may not approve the transaction unless it finds that NECTA Members will not be harmed. NECTA respectfully requests that, in order to avoid net harm to NECTA Members as a result of the transaction, the Commission should adopt the billing and operational recommendations made by NECTA Witness, James G. White, Jr., and the financial and rate recommendations made by NECTA Witness, Patricia D. Kravtin.

Mr. White’s recommendations are contained in Exhibit 28 (which is a revised version of the recommendations made in Mr. White’s Prefiled Direct Testimony, Exhibit 27 at pp. 11-13), and are also set forth below. These reasonable recommendations are aimed at: ensuring

accurate pole attachment billing after the transaction closes; elimination of the “Joint Use” charge; proper allocation of pole attachment payments to Consolidated and Eversource; maintenance of, and access to information relating to, the pole attachments and licenses issued by Consolidated with respect to the transferred poles; timely processing of pending and future pole attachment license applications, and conducting surveys and make-ready work in accordance with the deadlines established in Commission rules; avoiding payment to Eversource of pole attachment fees or make-ready charges already paid to Consolidated for applications pending at the time the transaction closes; and establishing a process for handling pole attachment license applications pending at the time the pole assets are transferred from Consolidated to Eversource.

Financial harm in the form of unjust, unreasonable and discriminatory pole attachment fees must not result from the transaction. If it approves the transaction, the Commission should ensure that Eversource is not permitted to calculate its pole attachment rates using the full purchase price of the acquired pole assets, given that such price vastly exceeds Consolidated’s regulatory net book value of the transferred assets. The Commission should also expressly preserve and recognize pole attachers’ rights to challenge the recovery of any such acquisition premium in connection with any challenge to Eversource’s pole attachment rates for the transferred poles and all of Eversource’s other poles. In addition, the Commission should not permit Eversource to charge the existing Consolidated rates for the transferred poles, as those rates exceed the just and reasonable rates calculated using either the Federal Communications Commission’s (“FCC”) cable or telecom formula. Lastly, to avoid discriminatory pole attachment rates, Eversource should not be allowed to charge Consolidated lower pole attachment fees than those paid by other pole attachers.

IV. Argument

A. The Commission Should Adopt NECTA's Recommendations Aimed at Avoiding Harm Associated With Improper Billing, Joint Use Charges, and Pole Attachment Recordkeeping and Licensing.

1. NECTA's Billing and Operational Concerns

NECTA has identified several potential billing and operational harms that could befall NECTA Members as a result of the transaction. First, NECTA is concerned about inaccurate post-transaction billing by Eversource based on NECTA member Comcast's experience in Vermont after Consolidated sold its pole interests to Green Mountain Power. *See Exh. 27, Prefiled Direct Testimony of James G. White, Jr.* (Jan. 31, 2022), Bates p. 4, and *Tr. Day 1 (Redacted)*, p. 212. After that pole transfer, Green Mountain Power billed Comcast for more pole attachments than what Consolidated had billed Comcast prior to the transfer. NECTA is concerned that because Eversource and Consolidated do not presently know exactly how many poles will be transferred from Consolidated to Eversource, *see Tr. Day 1 (Redacted)*, p. 36, lines 9-23, the potential exists for a recurrence of the Vermont billing issue described above. NECTA seeks to avoid such a billing problem in the event that the Commission approves this transaction. Recommendations 1, 2 and 3 address this concern.

Another billing issue relates to the imposition of "Joint Use" charges. Discovery in this docket revealed that Eversource fully owns approximately 4,800 poles categorized by Consolidated as "Joint Use", and that Consolidated imposes a "JU" charge (which is the equivalent of a "jointly owned" attachment charge) for these poles even though Consolidated has no ownership interest in them. *See Exh. 27*, p. 5, lines 3-8. This means that in addition to paying Eversource's solely owned pole rate, NECTA Members have been paying Consolidated an additional "JU" charge *despite Consolidated's lack of ownership of the poles. Id.* In other

words, NECTA Members are paying an additional charge on Eversource's solely owned poles, which is the equivalent of the "jointly owned" charge, to Consolidated for no additional benefit. NECTA submits that these charges should be eliminated because they are unfair and unreasonable.² Consolidated has indicated that with the closing of the transaction, it will cease billing for joint use poles in Eversource's territory, and Eversource has confirmed that post transfer it will only charge its solely owned pole rate for attachments on transferred poles for which Consolidated was invoicing a joint use charge. *Exh. 27*, p. 5, lines 9-13; *see also Exh. 31*. Recommendation 4 memorializes these commitments.

Additionally, payments made by NECTA Members for annual pole attachment fee invoices that cover the time period when the transaction closes must be correctly apportioned as between Eversource and Consolidated. While NECTA recognizes that Section 3.2 of the Settlement and Pole Asset Purchase Agreement addresses this apportionment concern, that provision must be updated to replace 2021 dates specified therein to the comparable 2022 dates (assuming that the transaction is approved and closes in 2022). Recommendation 5 addresses this issue.

Joint Petitioners must also maintain proper documentation of and reasonable access to the Joint Petitioner's records relating to the transferred poles, and NECTA Members' pole attachment licenses. Mr. Horton testified at the March 15, 2022 hearing in this docket that Consolidated does not have records of the number of attachments on its poles. *Tr. Day 1 (Redacted)*, p. 48, lines 6-10. In addition, NECTA is troubled by Eversource's statement that its pole inspection reports should not be used to calculate an average pole height (which is critical to the accurate calculation of pole attachment rates, *see Exh. 73*, Bates p. 8), and by Mr.

² All "JU" charges should be eliminated – not just those associated with the poles that Consolidated proposes to transfer to Eversource.

Horton's testimony that he was unfamiliar with the data Eversource maintained on its books and records to document the actual height of its poles. *Tr. Day 2 (Redacted)*, p. 21, line 6 through p. 22, line 3. In light of the foregoing, NECTA is concerned that the Joint Petitioners do not maintain accurate records regarding the transferred poles. Therefore, if the transaction is approved, NECTA Members' pole attachment licenses should be properly documented and transferred from Consolidated to Eversource, and both companies must continue to maintain accurate pole attachment licensing records and all records relating to the transferred poles, that NECTA Members may reasonably access. Recommendation 6 addresses this concern.

The final area of concern expressed in Mr. White's testimony relates to the timely processing of pole attachment license applications. *See Exh. 27*, pp. 7-10. Pole attachment license applications that are pending with Consolidated at the time the transaction closes, and Eversource's post-transfer processing of those pending applications must comply with deadlines established in the Commission's pole attachment rules. Although the Joint Petition asserts, at paragraph 15, that the transfer of pole ownership from Consolidated to Eversource will result in operational benefits, neither the Joint Petition nor the prefiled testimony filed February 10, 2021 discusses how the pole transfer will result in operational benefits for pole attachers. To ensure that the transaction does not result in harm to pole attachers in the form of delayed pole attachment licensing processes, NECTA has made three recommendations (*i.e.*, recommendations 7, 8 and 9) discussed below, and Eversource has agreed to them. *See Exh. 11*, Rebuttal Testimony of Douglas P. Horton (Feb. 25, 2022), Bates p. 6, lines 33-34.

While NECTA is hopeful that the transaction will result in expedited surveys and a faster review of pole applications and performance of make-ready work, NECTA is concerned that Eversource may not devote adequate resources to ensure that the timelines contained in the

Commission's pole attachment rules are met. For example, in response to a NECTA data request asking whether Eversource will commit to adhering to the applicable timelines for processing pole attachment license applications, and obtaining necessary resources to ensure such compliance, Eversource responded "[a]s with all aspects of Eversource's business, the Company will evaluate resource needs to ensure all of our customers' expectations and regulatory requirements are met." *Exh. 36*. Although this response did not affirmatively state that Eversource will commit to meeting the applicable licensing deadlines and devote necessary resources for doing so, Eversource has subsequently indicated that it agrees with NECTA recommendation 7. *See Exh. 11, Rebuttal Testimony of Douglas P. Horton* (Feb. 25, 2022), Bates p. 6, lines 33-34.

NECTA is also concerned about delays in processing pole attachment license applications pending with Consolidated at the time the transaction closes, and about being required to pay application fees to Eversource if fees for pending applications have already been paid to Consolidated. To address the latter concern, NECTA has recommended that Eversource not impose new application fees or make ready charges if applicants have already paid those fees and charges to Consolidated for applications associated with attachments to transferred poles that were solely owned by Consolidated. *See Recommendation 8, below*. Eversource has agreed to this recommendation. *See Exh. 11, Bates p. 6, lines 33-34*.

To avoid confusion and delay in processing applications pending with Consolidated at the time the transaction closes, NECTA recommends the adoption of a clear set of principles/protocols for handling these applications, surveys and make-ready work, and associated fees. Recommendation 9, to which Eversource agreed, *id.*, calls for the adoption of a process outlined in Exhibit 38, or one substantially similar thereto. This process is similar to

one followed in Vermont when Consolidated sold its poles to Green Mountain Power. *See Exh. 27*, p. 10, lines 8-12. Therefore, NECTA submits that this recommendation is appropriate and should be adopted if the Commission approves the transaction.

2. NECTA's Recommendations for Addressing Billing and Operational Concerns

NECTA appreciates that Eversource and Consolidated have indicated their agreement with some of the recommendations outlined in Mr. White's Prefiled Direct Testimony, and have provided their response to all of the others. *See Exh. 11*, Bates p. 6, line 33 through Bates p. 12. NECTA considered the Joint Petitioners' responses, and revised its initial list of recommendations relating to the issues raised in Mr. White's Prefiled Direct Testimony. *See Exh. 28*. NECTA submits that to ensure that NECTA Members will suffer no operational harm if the transaction proceeds, the Commission should adopt all of the recommendations contained in Exhibit 28 (set forth below for convenience).

- 1) Upon transfer of the poles, Consolidated shall cease billing NECTA Members any amounts for their attachments to the transferred poles;
- 2) Post transfer, Eversource shall bill NECTA Members for the same number of attachments as that for which Consolidated ceased billing for the transferred poles, adjusted for any new attachments made post transfer;
- 3) Until it merges records for currently owned and transferred poles, Eversource shall invoice separately for pole interests it currently owns and for pole interests acquired from Consolidated. Within thirty (30) days of the close of the transaction, Eversource and Consolidated will provide a statement in the form indicated below to each NECTA Member showing the number of the member's attachments on jointly and solely owned transferred poles. If a NECTA member received separate invoices from

Consolidated for different Agreement Numbers, the statement will show the breakdown of transferred joint and solely owned pole interests by Agreement;

**Statement of
Consolidated Pole Interests Transferred to Eversource
Matching of Consolidated and Eversource Billing Determinants**

(for each NECTA member)

Eversource
Pole Interests Acquired from Consolidated

<u>Sole Owned</u>	<u>Joint Owned</u>
X	Y

Consolidated
Pole Interests Transferred to Eversource

	<u>Sole Owned</u>	<u>Joint Owned</u>
Agreement A		
Agreement B		
Agreement C		
Agreement D		
Total	_____ X	_____ Y

Eversource entries X and Y will match the totals X and Y for the Consolidated Agreements.

- 4) Consolidated shall cease billing for joint use poles in Eversource’s territory following the transaction, and Eversource shall not impose a Joint Use charge for any transferred pole or for any pole solely owned by Eversource;
- 5) Per Section 3.2 of the Settlement and Pole Asset Purchase Agreement, NECTA Members’ payments for annual pole attachment fees covering the invoicing time period in which Consolidated’s poles are transferred to Eversource must be apportioned between Eversource and Consolidated based upon the date of the transfer. Eversource and Consolidated shall update Article III, Section 3.2 of their

Settlement and Pole Asset Purchase Agreement to change the 2021 dates specified therein to the comparable 2022 dates;

- 6) All pole attachment licenses issued by Consolidated for the transferred poles must be transferred to Eversource, both companies must maintain all documents relating to the transferred licenses,³ and both companies must provide NECTA Members with access to those documents upon reasonable request;
- 7) Eversource shall adhere to the pole attachment licensing, survey and make-ready work timelines contained in the Commission's pole attachment rules at Puc 1303.04 and 1303.12;
- 8) Eversource shall not impose a new application fee or make-ready charge upon pole attachment license applicants who had made those payments to Consolidated in connection with applications for attachments to transferred poles that were solely owned by Consolidated; and
- 9) Eversource and Consolidated shall follow the process set forth in Attachment JGW-10 (Exhibit 38) or a substantially similar process for pole attachment license applications pending at the time of transfer for the transferred poles.

B. To Avoid Net Economic Harm to NECTA Members, the Commission Must Adopt Ms. Kravtin's Recommendations.

1. Summary of Economic Harm Posed By The Transaction

NECTA Witness Patricia Kravtin provided written and oral testimony regarding the economic harm that NECTA Members would face if the transaction is approved without conditions. Such harm includes increased pole attachment rates resulting from Eversource's

³ "All documents relating to the licenses" includes, but is not limited to, all data relating to the transferred poles and all attachments on them.

recovery of the acquisition premium it proposes to pay for Consolidated's pole assets. Additional economic harm would result if Eversource is allowed to charge Consolidated's existing pole attachment rates for the transferred poles, because such rates are excessive, unjust and unreasonable. Lastly, NECTA Members would suffer economic/competitive harm if Eversource charges them a higher pole attachment rate than the amounts it charges their competitor, Consolidated, for its attachments to Eversource's poles. Because the transaction must not result in net harm, or produce discriminatory, unjust or unreasonable pole attachment rates, *see* RSA 374:34-a, II and VI., the Commission should adopt the recommendations contained in Ms. Kravin's prefiled testimony, Exhibit 39 at Bates pp. 21-22, and as discussed below.

2. Eversource's Pole Attachment Rates Should Not Include the Acquisition Premium Associated With the Transferred Poles, And Pole Attachers Must Retain the Right to Challenge Such Inclusion In Future Pole Attachment Rate Proceedings.

Ms. Kravtin's Prefiled Direct Testimony (Exhibit 39) at Bates page 5, line 20 through Bates page 7, line 9, and the written version of her hearing testimony (Exhibit 72) explain that the net purchase price that Eversource proposes to pay for Consolidated's pole assets vastly exceeds Consolidated's current net book value of those assets (due to Consolidated's accelerated depreciation), and also exceeds the higher imputed "regulatory" net book value as calculated by both Ms. Kravtin, and Department of Energy Witness, Mr. Ekberg. Because Eversource intends to incorporate the full net purchase price of the transferred pole assets into its accounting system as the book value of the transferred poles, *see Exh. 42*, that higher net book value/acquisition premium will cause Eversource's pole attachment rates to increase, all other things being equal, above a just and reasonable level from a regulatory perspective. *Exh. 39*,

Bates p. 7, lines 11-12. Eversource's witness, Mr. Horton, concedes this point. *Tr.* Day 1 (Redacted), p. 64, lines 1-5. In addition, because Eversource's current pole attachment rates are excessive,⁴ *see Exh. 39*, Bates p. 9, lines 10-16, allowing the acquisition premium to be included in future pole attachment rate calculations will create further financial harm to pole attachers.

Eversource argues that because Consolidated is a minimally regulated Excepted Local Exchange Carrier under New Hampshire law, Eversource may ignore Consolidated's net book value of the transferred poles, and instead reflect on Eversource's books (and recover from its ratepayers) the higher net purchase price of the assets. *See Exh. 11*, Bates p. 14, line 6 through Bates p. 15, line 11. While it may be true that under New Hampshire law, Consolidated's rates for communications services are not set by the Commission, its pole attachment rates and those of Eversource, are nonetheless subject to the Commission's regulatory authority. *See RSA 374:34-a*, and N.H. Admin. R. 1301.01 and 1301.02. Thus, because net book value of poles is an important factor in calculating pole attachment rates, it is very important for the Commission to determine the appropriate regulatory net book value of the transferred poles.

To avoid the economic harm associated with increased pole attachments rates, NECTA recommends that if the Commission approves the transaction, it should require that Eversource's pole attachment rates reflect a reasonable regulatory net book value for the transferred pole assets rather than the full net purchase price that Eversource intends to pay for these assets. Both Ms. Kravtin and Mr. Eckberg calculated reasonable regulatory net book value

⁴ Ms. Kravtin has determined that Eversource's 2021 pole attachment rate is overstated by approximately \$2.00 which is approximately 17.5% higher than the just and reasonable rate produced using economically appropriate inputs and correctly applying the Unified Pole Rent Formula in accordance with current FCC rules and regulations. *Exh. 39*, Bates p. 9, lines 12-16. While NECTA is not challenging Eversource's current pole attachment rates in this docket (but has noted the harmful, additive impact that the overstated net book value of the transferred poles will have on an already excessive pole attachment rate), it has separately notified Eversource that NECTA disputes Eversource's 2021 and 2022 pole attachment rates. *See Exhs. 64 and 65*.

figures for the pole assets based on ARMIS data⁵ provided by Consolidated in response to Commission Order No. 26, 534 (Oct. 22, 2021) (granting NECTA's motion to compel the data). These net book value calculations differ only in that Mr. Eckberg included an additional year's worth of depreciation given that the Consolidated ARMIS data was for 2020. *Tr. Day 1* (Redacted), p. 270. These calculations were made in order to impute a book value for the assets that is reflective of regulatory accounting principles, and were necessary because Consolidated is not subject to regulatory accounting. As Ms. Kravtin indicated, the appropriate value of the transferred poles for purposes of calculating a just and reasonable regulated pole attachment rate is one that is a reasonable proxy for a just and reasonable regulatory net book value, *i.e.*, one that reflects the application of capital recovery parameters consistent with regulatory principles. *Exh. 39*, Bates p. 12, lines 18-22.

Ms. Kravtin calculated the regulatory net book value for the transferred poles to be \$15, 927,047. *Exh. 39*, Bates p. 14. She explained how she calculated this figure and provided supporting documentation. *Id.* at Bates p. 13, line 1 through Bates p. 14, line 6; *see also Exhs. 46-49*. She also testified that her net book value calculation is not based on Consolidated's extremely accelerated depreciation (which assumes a useful life of 5 years), but instead applied a depreciation amortization schedule based on the historic regulatory approved depreciation rate, which is roughly three times longer than Consolidated's depreciation rate. *Exh. 72*, p. 1 of 3. From an economic and regulatory perspective, the just and reasonable net book value for the transferred poles is based on the capital recovery of the investment in the transferred assets as carried on the seller's books – not the buyer's. *Exh. 72*, p. 2 of 3.

⁵ This data constitutes a restatement of Consolidated pole assets pursuant to Uniform System of Accounts Part 32 regulatory accounting principles in the format historically reported to the FCC by communications carriers in ARMIS Annual Summary Report, Table III, Pole and Conduit Rental, as of year-end 2020. *Exh. 39*, Bates p. 13; *see also Exh. 46*.

Therefore, the net book value that Eversource asserts (*i.e.*, the net purchase price, or a figure based upon Eversource's net book value of its one-half interest in the jointly owned poles that are being transferred) is not applicable. Moreover, Eversource's own net book value for the jointly owned poles is inappropriate because Eversource uses a much lower regulatory depreciation rate (approximately 3.5%) than the last regulatorily approved rate of 5.8%⁶ for Consolidated which was reflected in the data Ms. Kravtin used in her calculation. *Id.*

NECTA asserts that the Commission should not approve the transaction with the acquisition premium. However, if the Commission does approve the transaction with the acquisition premium, it should order Eversource to calculate its pole attachment rates using Ms. Kravtin's regulatory net book value figure for the pole assets. If the Commission declines to do so, it should expressly indicate that pole attachers are not precluded from disputing Eversource's pole attachment rates on the basis that the value of the pole assets is too high.

Eversource clearly expects to recover in its rates (both retail electricity rates and pole attachment rates) the full net purchase price that it pays for Consolidated's assets even if that price is above the appropriate imputed regulatory value of those assets. *Tr. Day 2* (Redacted) p. 16, line 23 through p. 18. Line 21. Mr. Horton underscored this point by testifying that Eversource would not purchase assets at a price exceeding the amount the company would be allowed to recover from customers. *See Tr. Day 2* (Redacted), p. 53, lines 7-11 (“[w]e would never engage in a transaction that we’re going to pay more to the vendor selling us the poles than we’re going to be allowed to get recovery of from our customers and through the PUC process.”). This position, however, is completely contrary to the position taken by Eversource's water company subsidiary, Aquarion Company, when it recently acquired Abenaki Water

⁶ *See Exh. 46, ROW 301.*

Company, Inc. In that case, Aquarion agreed not to seek recovery of any acquisition premium associated with the transaction. *Abenaki Water Company, Inc. and Aquarion Company*, DW 21-090, Order No. 26,549 (Nov. 12, 2021), p. 7. There is no reason why Eversource cannot take the same position in the instant matter, especially given the direct harm (*i.e.*, increased pole attachment rates) that will result from full recovery of the net purchase price. Even if the Aquarion case is distinguishable in some respect from the instant proceeding because it involved the acquisition of a utility company as opposed to utility assets, the same principle applies to both – *i.e.*, recovery of an acquisition premium should be prohibited in order to avoid net harm to utility ratepayers. *See Exh. 39*, Bates p. 8, lines 7-14. At a minimum, and consistent with prior Commission decisions, the question of whether an acquisition premium may be recovered is appropriately considered in the context of a rate case, not in the acquisition approval proceeding. *See, e.g., Re: New England Electric System*, 84 N.H. PUC 502, 513, DE 99-035, Order No. 23, 308 (Oct. 4, 1999).

3. Eversource Should Not Charge the Existing Consolidated Pole Attachment Rates for the Transferred Poles, As Those Rates Are Not Just and Reasonable.

If the transaction is approved and consummated, Eversource proposes to charge pole attachers (other than Consolidated) for attachments to the transferred poles at the Consolidated pole attachment rates in effect at the time the transaction closes. *See Exh. 51; see also Tr. Day 1 (Redacted)*, p. 43, lines 9-19. Those rates would remain in effect until Eversource calculates a single unified rate for all of Eversource's poles. *Id.* However, the rates that Consolidated charges for its poles may be changed before Eversource's rates change, in accordance with the process outlined in Consolidated's pole attachment agreements, and Commission rules. *See Exhs. 51 and 63; see also N.H. Admin. R. Puc 1304.03 and 1304.05.*

Paragraph 6 of the Joint Petition describes the pole attachment fees that Eversource will receive from Consolidated (*i.e.*, a negotiated amount of \$5 million per year for the first two years after the transaction closes) and states that Eversource will receive third-party revenues from other pole attachers pursuant to contracts that are currently in place with Consolidated. *Exh. 67*, Bates p. 3. The Joint Petition then states “[i]n compliance with N.H. Code Admin. Rules Puc 1301.01 and RSA 374:34-a, the foregoing pole attachment fees are nondiscriminatory, just, and reasonable.” *Id.*

As demonstrated in Section B.4., below, the negotiated fees that Eversource proposes to charge Consolidated for its pole attachments are not nondiscriminatory, because those fees are lower than the rates Eversource will charge other pole attachers. In addition, as explained in Ms. Kravtin’s Prefiled Direct Testimony and her oral testimony at hearing, the current Consolidated pole attachment rates are not just and reasonable because they exceed the rates produced using accepted, regulatory cost-based pole attachment rate formulae and standards. *See Exh. 39*, Bates pp. 16-20. Therefore, in order to avoid financial harm to NECTA members, the Consolidated rates that Eversource proposes to charge NECTA members for attachments to the transferred poles must be reduced to the levels described below, and the reduced rates should be charged by Eversource until such time as Eversource unifies its pole attachment rates to reflect inclusion of the transferred poles.

The current Consolidated rates are \$11.67 per attachment for a solely owned pole, and \$6.84 per attachment for a pole that Consolidated jointly owns with another pole owner. *Exh. 39*, Bates p. 15, Table 3. Although Consolidated’s pole attachment rates are subject to the

Commission's regulatory authority,⁷ the above-stated rates have not been calculated using a specific formula, *Exh. 53*, or any approved pole rate formula. *Tr. Day 1 (Redacted)*, p. 231, lines 13-14. Eversource estimates that the total pole attachment revenues it will receive from pole attachers other than Consolidated for the first two years after the transaction closes will be \$2.7 million each year. *Exh. 70*, Bates p. 3, line 26. NECTA believes these amounts are unjust and unreasonable. Based on Consolidated's response to the Commission's order granting NECTA's motion to compel in the instant proceeding, *see Order No. 2, 534 (Oct. 22, 2021)*, NECTA discovered that Consolidated's pole attachment rates far exceed those produced using accepted regulatory formulae that would substantiate that the rates meet the regulatory just and reasonable standard under RSA 374:34-a, II. *See Exh. 39*, Bates pp. 16-19.

Applying the pole attachment rate review standards set forth in N.H. Admin. Rule Puc 1304.06(a), Ms. Kravtin opines that the formula for calculating Consolidated's rates that is most consistent with the purpose of effective pole regulation (*i.e.*, to prevent pole owners from leveraging their market power over the essential pole facilities needed by broadband providers to provide their services to customers), is the widely accepted and most commonly used FCC cable formula, or in the alternative, the equivalent current formulation of the FCC telecom rate formula (as modified in 2015), which is effectively identical to the FCC cable formula and was adopted in recognition of the critical role that pole attachment rates play in promoting broadband services and the greater public good. *Exh. 39*, Bates p. 18, line 5 through Bates p. 19, line 9. At a minimum, Ms. Kravtin opines that the pole attachment rates applicable to the transferred poles must be no greater than those produced using the formula that applies to Eversource's rates, *i.e.*,

⁷ Consolidated's pole attachment rates are subject to the Commission's regulatory because Consolidated is a public utility owning poles, ducts, conduit or rights-of-way used for wire communications. *See* RSAs 374:34-a, I, II and 362:2; *see also* N.H. Admin. R. Puc 1301.01 and 1301.02.

the “Unified Pole Rent Formula”, which is contained in a settlement agreement⁸ approved by the Commission in *Time Warner Entertainment Company L.P. d/b/a Time Warner Cable*, DT 12-084, Order No. 25,453 (Jan. 17, 2013). *Exh. 39*, Bates p. 18, lines 9-12. The Unified Pole Rent Formula follows the FCC’s telecom formula in effect prior to the FCC’s 2015 revisions. *Exh. 39*, Bates p. 6, lines 11-14; *see also In the Matter of 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 (2011). An overview of the Unified Pole Rent Formula, and explanation of the FCC pole rate formula methodology, is contained in Exhibit 41. Significantly, all of Ms. Kravtin’s rate calculations demonstrate that Consolidated’s pole attachment rates are excessive.

Ms. Kravtin has calculated appropriate, regulatory just and reasonable pole attachment rates for Consolidated using the regulatory net book value for the pole assets (as discussed in section B.2, above), applying the formula under the FCC’s 2015 rules. *Exh. 39*, Bates p. 19. In so doing, Ms. Kravtin’s calculations produce rates that approximate the rates that would be produced using the FCC’s cable formula, and that are significantly lower than those currently charged by Consolidated. Specifically, under the FCC’s 2015 rules, Ms. Kravtin calculated that Consolidated’s rates for solely owned poles would be \$6.31, and for jointly owned poles the rate would be \$3.16.⁹ *Exh. 39*, Bates p. 19, Table 4, line 12. This compares with Consolidated’s current solely owned pole rate of \$11.67, and its jointly owned pole rate of

⁸ Consolidated is not a party to the settlement agreement that adopted the Unified Pole Rent Formula for calculating Eversource’s pole attachment rates. Ms. Kravtin has calculated rates applying the Unified Pole Rent Formula for the purpose of demonstrating how those rates compare with the rates produced using the FCC’s cable formula, which is the most appropriate formula under “[r]elevant federal ... laws, rules and decisions.” *See* N.H. Admin. R. 1304.06(a)(1).

⁹ These rates assume a pole height of 37.5 feet and would be even lower using a taller pole height figure (as indicated in Eversource’s pole data), *see Tr. Day 2 (Redacted)*, p. 84, line 20 through p. 85. Line 2.

\$6.84 (which is more than double the just and reasonable rate calculated by Ms. Kravtin). *Exh. 39, Bates p. 15; see also Exh. 51.*

For comparison purposes, Ms. Kravtin calculated Consolidated's pole rates using the formula under the pre-2015 FCC rules (which closely approximates the Unified Pole Rate formula that applies to Eversource's pole attachment rates). *Exh. 39, Bates pp. 19-20.* Those calculations show that Consolidated's solely owned pole rate would be \$6.51, and its jointly owned pole rate would be \$3.26. *Exh. 39, Bates p. 19.*

No party presented evidence to rebut Ms. Kravtin's rate calculations or to adequately justify the justness or reasonableness of Consolidated's current rates. Given that Ms. Kravtin's pole attachment rate calculations were made pursuant to accepted regulatory methodologies, and given that such rates are markedly lower than Consolidated's current pole attachment rates (which, as indicated in Exhibit 53, are not the product of any particular formula), the public good requires that Eversource not be permitted to impose Consolidated's excessive pole rates if the transaction is approved. Instead, for attachments to the transferred poles, Eversource should be required to charge the lower rates calculated by Ms. Kravtin using either the FCC's cable formula, the comparable rate produced using the FCC's 2015 rules, or at a minimum, the rates resulting from applying the FCC's pre-2015 rules.

Lastly, NECTA wishes to note that, on behalf of NECTA Members, NECTA has initiated the process for disputing Consolidated's pole attachment rates.¹⁰ *See Exh. 64.* If NECTA and NECTA Members are unable to resolve the rate dispute with Consolidated,

¹⁰ Even though Consolidated opted to charge pole attachment rates not based on any approved regulatory formula when it raised its rates to the current levels several years ago, it was not until the Commission granted NECTA's motion to compel and ordered Consolidated to provide the ARMIS data in this docket, that NECTA learned the extent to which Consolidated was overcharging for pole attachment fees.

NECTA expects to file a petition with the Commission for resolution of the dispute in accordance with N.H. Admin. R. Puc 1304.03. Therefore, if the Commission does not order Eversource to apply reduced Consolidated rates as part of the Commission's public good determination in this docket, and if Consolidated's rates are subsequently reduced (either as the result of a settlement, or through a Commission order) prior to the time Eversource develops new pole attachment rates that reflect the inclusion of the transferred poles, the new Consolidated rate should be billed by Eversource for the transferred poles retroactively to the date of such a settlement, or the date of the petition(s) requesting such rate reduction. *See* N.H. Admin. Rule Puc 1304.07.

4. Eversource Must Not Discriminate Against NECTA Members By Charging Pole Attachment Rates That Are Higher Than The Pole Attachment Fees Eversource Proposes To Charge Consolidated For Its Pole Attachments.

For Consolidated's attachments to Eversource's poles, Consolidated will pay Eversource \$5 million per year for the first 2 years after the transaction closes. *Exh.* 6, Bates p. 8, lines 14-16. Thereafter, Consolidated will be subject to Eversource's pole attachment rates in effect for solely owned poles. *Exh.* 6, Bates p. 8, lines 16-18. The \$5 million dollar figure is not derived by multiplying Eversource's existing pole attachment rates by the number of Consolidated's pole attachments; it is a negotiated amount that is part of the settlement agreement between Eversource and Consolidated that is part of the transaction. *Tr.* Day 2 (Redacted), p. 14, line 23 through p. 15, line 2; *Tr.* Day 1 (Redacted), p. 48, lines 2-3, and lines 23-24. The \$5 million pole attachment fee that Consolidated will pay Eversource for Consolidated's pole attachments to Eversource's poles is equivalent to a rate of approximately \$12.38. *Exh.* 57. This is lower than the rate of \$14.17 that other pole attachers will pay for their attachments to an Eversource solely owned pole, and with \$13.93, which is the combined

rate for a pole that had formerly been jointly owned by Eversource and Consolidated. *Exh. 39*, Bates p. 20, lines 5-9; Bates p. 15, Table 3. Because Consolidated will pay Eversource fees for Consolidated's pole attachments that are less than those paid to Eversource by other pole attachers, the \$5 million fee is discriminatory, in that it provides Consolidated with a financial advantage over its competitors such as NECTA Members. *See Tr. Day 2 (Redacted)*, p. 195, lines 6-8 ("We [*i.e.*, Consolidated] face steep competition from our cable competitors, from the NECTA parties specifically.")

Such discrimination is further manifested by Eversource's failure to renegotiate the \$5 million Consolidated pole attachment fee despite the fact that, since the time of the settlement agreement, Eversource has raised its pole attachment rates charged to other pole attachers. Although Eversource updated its original filing to reflect increased third party pole attachment revenues (other than Consolidated's) attributable to the fact that Eversource had increased its pole attachment rates since the time the Joint Petition was filed (*compare Exh. 8*, line 16 with *Exh. 70*, line 13), Eversource did not renegotiate the \$5 million dollar pole rental fee agreement with Consolidated. *Tr. Day 2 (Redacted)*, p. 13, line 14 to p. 15.

The above-described discriminatory treatment is inconsistent with the requirement that all pole attachment rates be just and reasonable, and that pole access must be nondiscriminatory. *See RSA 374:34-a*, II and VI. Accordingly, the above-cited statutes and the public good/no net harm standard require that Eversource charge Consolidated the same rates for its pole attachments as the rates Eversource charges all of its other pole attachment customers.

V. Conclusion

NECTA appreciates the opportunity to participate in this docket to raise and discuss issues of concern to NECTA and NECTA Members that bear on the question of whether the proposed transaction between Eversource and Consolidated is in the public good. As discussed above and in the written prefiled testimony, exhibits, and oral hearing testimony of Mr. White and Ms. Kravtin, NECTA has presented several billing, operational, financial and rate issues that must be addressed in order to ensure that the transaction, if approved, does not result in net harm to NECTA Members. If the Commission decides to approve the transaction, NECTA respectfully requests that the Commission adopt NECTA's recommendations discussed in sections IV. A. and B, above, Exhibit 28, and in Ms. Kravtin's Prefiled Direct Testimony, Exhibit 39, Bates p. 20, line 16 through Bates p. 21, line 15.

Respectfully submitted,

**NEW ENGLAND CABLE AND
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INC.**

By its attorneys,
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Dated: June 3, 2022

Certificate of Service

I hereby certify that on the date set forth above a copy of the within Initial Brief was sent by electronic mail to persons listed on the Service List in this docket.

A handwritten signature in blue ink that reads "Susan S. Geiger". The signature is written in a cursive style with a horizontal line underneath it.

Susan S. Geiger

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