STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire and
Consolidated Communications of Northern New England Company, LLC

Joint Petition to Approve Pole Asset Transfer

Docket No. DE 21-020

Brief of the Office of the Consumer Advocate

Pursuant to the briefing schedule adopted by the Commission at hearing on May 10, 2022, the Office of the Consumer Advocate ("OCA"), in its capacity as the RSA 363:28 representative of residential utility customers, submits the following brief in support of its position that the Commission must reject the petition that is the subject of this docket.

I. Introduction

This proceeding seeks Commission approval of a proposed agreement between New Hampshire's two biggest utilities: Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource"), the dominant provider of electric distribution services, and the largely deregulated Consolidated Communications of Northern New England Company, LLC ("Consolidated"), owner of the landline telephone network that was once the property of Verizon Communications and that was later purchased by FairPoint Communications. On

terms the petitioners have persuaded the Commission to keep secret in significant part, *see* Order No. 26,631 (May 24, 2022) (on rehearing of RSA 91-A issues), Eversource proposes to acquire Consolidated's interest in utility poles within the Eversource service territory and resolve an ongoing dispute over Consolidated's obligation to pay for vegetation management associated with those poles. The Commission conducted two days of evidentiary hearings, on March 15, 2022, and May 10, 2022. A review of the evidence adduced during those two days of hearings, including prefiled direct testimony from the joint petitioners as well as the New England Cable and Telecommunications Association ("NECTA") and the Department of Energy ("Department"), leads inexorably to the conclusion that the Commission must reject the petition.

II. Legal Standard

Notably, when the joint petitioners instituted this proceeding with their initial filing on February 10, 2021 (tab 1), they did not directly state which legal standard or requirement they were invoking. The petition merely seeks approval of the proposed transaction, which by its terms requires the present and future costs of the asset transfer to be borne by Eversource customers rather than Eversource shareholders and indicates (but not until paragraph 12 of the petition) that the proposal "satisfies the standards set forth in RSA 374:30."

This is noteworthy because, although RSA 374 applies to the "transfer or lease" of a utility's "franchise, works, or system, or any part of such franchise, works

or system," RSA 374:30 by its express terms does not apply to "any such transfer, lease, or contract by an excepted local exchange carrier." Consolidated meets the definition of "excepted local exchange carrier" enumerated at RSA 362:7, I(c)(1). Therefore, Commission approval is not a legal necessity for Eversource to buy out the pole plant within its New Hampshire territory; the electric distribution company could add these assets to its rate base just as it does every day in the ordinary course of business as it updates and replaces the assets that are used and useful in the provision of service to the public.

What Eversource apparently does consider a necessity is Commission approval of guaranteed shareholder recovery of costs incurred in connection with the agreement. *See* exh. 4 at 4, section 4.4(c) (reciting as a condition precedent to the asset transfer a "final, non-appealable" order of the Commission containing "cost recovery approvals acceptable to Buyer") and petition at 5, paragraph 10 (same); *see also* tr. 5/10/22 (tab 89) at 77, lines 11-14 (Eversource witness Douglas Horton testifying that "the transaction cannot move forward without . . . a regulatory support mechanism to allow us to get reasonable cost recovery"). No provision of New Hampshire law authorizes a public utility to obtain such a guarantee in these circumstances; such an outcome would amount to the sort of "plenary indemnification" of shareholders by customers that is legally anathema in the Granite State. *See Appeal of Public Service Co. of New Hampshire*, 130 N.H. 748, 755 (1988) (Souter, J.) (contrasting "plenary indemnification" and "reasonable

rate of return" and noting that ratepayers should never be required to assume the entire risk associated with a utility investment).[1] This fundamental legal flaw in the petition is, in itself, grounds for rejection.

However, assuming *arguendo* that RSA 374:30 establishes the legal framework applicable here, the joint petitioners have failed to meet the requisite burden of establishing by a preponderance of the evidence that the proposed transaction is "for the public good . . . and not otherwise." The record here is riddled with "otherwise," as is explained *infra*.[2]

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[1] In his written rebuttal testimony as revised between the two hearing dates, Eversource witness Douglas Horton claims that, assuming approval, transaction costs would be subject to "a complete prudency review" in the Company's next-filed rate case. Exh. 70 at Bates 15, line 10. But Mr. Horton's idea of a "complete prudency review" is odd given that, almost literally in the next pre-filed written breath, he states that Commission approval of the transaction "would indicate a determination of the Commission that the purchase price paid to [Consolidated] and allowed in rate base as part of the Commission's decision in this proceeding would not later be subject to a prudency review." *Id.* at lines 13-17. "Not later be subject to a prudence review" is an effective paraphrase of "plenary indemnification."

At the May 10 hearing, Mr. Horton provided further clarification of what he meant: inclusion of the purchase price in rates would be treated as a done deal for rate recovery purposes but "any investments made thereafter" such as pole replacement, other additions to pole infrastructure, etc. would be subject to prudency review. Tr. 5/10/22 at 17, lines 6-24 and 18, lines 1-4.

[2] There is of course one respect in which the petition is now less onerous from a "public good" then it was when initially filed in 2021. Eversource has amended a key term, as first announced by the electric utility at the March 15, 2022, hearing and as described in the revised edition of Mr. Horton's supplemental direct testimony (exh. 70). At lines 2 through 8 of Bates page 10 of exhibit 70, Mr. Horton explains that to avoid any suggestion that Eversource was seeking to violate the terms of the settlement agreement in its most recent rate case (Docket No. 19-057) the utility is now proposing "to remove the capital costs from the cost recovery sought in this docket" and defer any such recovery to a future rate case. This concession is not sufficient to warrant Commission approval of the petition inasmuch as, for the reasons explained elsewhere in this brief and as fully adduced during the two days of hearing, Eversource is still seeking Commission approval of a transaction that does not meet the "public good" test of RSA 374:30 and is still attempting to insulate itself from any prudence review associated with the excessive price it has agreed to pay Consolidated for the pole plant at issue.

III. Fatal Flaw: Excessive Purchase Price

At the heart of this case – and thus the central reason why the Commission should reject the proposed transaction – is the excessive purchase price to which Eversource has agreed. In this regard, the Commission should adopt as credible the assertions contained in the testimony of NECTA witness Patricia Kravtin and Department witness Stephen Eckberg. Their analyses are largely consistent with each other and are unrebutted in the record.

As Mr. Eckberg explained in the unredacted version of his testimony (exh. 21), if the Commission approves the agreement between Eversource and Consolidated then "Eversource ratepayers would be required to pay for costs that Eversource should instead collect from Consolidated" and certain costs would be included in rate base that do not belong there. Exh. 21 at 3, lines 20-21 and 4 at lines 1-2. Mr. Eckberg explained that the net purchase price to which the two parties agreed is simply a negotiated amount that bears no relationship to what Mr. Eckberg describes as the "book value" of the assets, *see id.* at 5, line 18, which he calculated as $13,382,128, *id.* at 6, line 4.

The basis for Mr. Eckberg's determination of the book value of the pole plant to be transferred from Consolidated to Eversource is the so-called ARMIS report for the year 2020 that is attached to his testimony. *Id.* at 6, lines 8-19. ARMIS is an acronym meaning "Automated Reporting Management Information System," which is the platform used by the Federal Communications Commission to collect data

from local exchange carriers like Consolidated.[3] Although Consolidated's landline telephone service is no longer subject to rate regulation by the Commission in light of RSA 362:8 (exempting utilities that meet the definition of "excepted local exchange carrier"), the ARMIS data attached to Mr. Eckberg's testimony essentially shows what the book value, accumulated depreciation, and depreciation rate for Consolidated's pole plant would be for purposes of allowing the Commission to set such rates.

Depreciation emerges as the key metric for purposes of determining whether the purchase price agreed to by Eversource meets the "public good" requirement and is the appropriate amount of rate base to employ in quest of rates that meet the requisite "just and reasonable" standard. As Ms. Kravtin stated in somewhat succinct fashion, "from an economic and public policy perspective, the valuation of the transferred assets is appropriately based on the actual or imputed regulatory depreciation applicable to the pole assets as carried on the telephone company side . . . not the slower regulatory depreciation applied to Eversource." Exh. 72 at 2. In other words, as expert utility analysts Ms. Kravtin and Mr. Eckberg contend that the ARMIS data is probative of how these assets should be valued when inserted into Eversource's books.

The Commission should assume here that if these poles are fully depreciated on the books of Consolidated then Consolidated's customers have already paid in

[3] Information about ARMIS is available on the FCC web site at https://www.fcc.gov/economics-analytics/industry-analysis-division/armis/armis-instructions-data as well as the federal rules and FCC orders cited there. The parties here are not in dispute about what ARMIS is or what its purposes are.

full for them and any additional payment to Consolidated from Eversource's shareholders for the poles is a windfall. "[C]ustomers should not have to pay for the same asset multiple times . . . in contrast to what may be observed in competitive markets." *Id.* at 11. Eversource should not be allowed to evade this principle merely because the entity from which it is purchasing the assets is no longer regulated.

Ms. Kravtin ably explained that the ARMIS data in question essentially recalculates the book value of the pole assets based on how they would have been treated if Consolidated were still a rate-regulated public utility. *See* exh. 39 at Bates 13, lines 4-11. She went on to explain that to be just and reasonable, rates that allow Eversource to recover on the pole plant the electric utility intends to acquire from Consolidated must "reflect an appropriate just and reasonable regulatory net book value consistent with regulatory treatment of depreciation and deferred income taxes applicable to regulatory assets," which must be "determined in accordance with [Uniform System of Accounts] requirements consistent with those reported in the ARMIS reports for communications carriers." *Id.* at Bates 16, lines 18-22. At hearing, Ms. Kravtin clarified that she is therefore calling on the Commission to *impute* a book value of these assets for rate recovery purposes, rather than taking exception to the ultra-accelerated depreciation rates that Consolidated has apparently applied because, as a formerly rate-regulated utility, it apparently can. *See* exh. 72 at 1.

In response to these contentions from Mr. Eckberg and Ms. Kravtin, Eversource attempts to kick up a rhetorical dust cloud. Specifically, Eversource's lead witness attempts to defend the depreciation rate adopted by Consolidated in the hope that the Commission will deem it appropriate for application to the electric utility's request for rate recovery here. Mr. Horton testified that for a regulated utility like Eversource, accumulated depreciation "essentially reflects the amount that our customers have paid for the assets" whereas, because Consolidated is "not rate regulated," depreciation "doesn't stand for that proposition" and simply reflects a management decision "as to what it should record for GAAP accounting purposes." The distinction is obfuscatory in the present context.

Surely there is no dispute here that, in concept, depreciation is precisely as it has been described by the National Association of Regulatory Utility Commissioners ("NARUC") – "the decrease in the value or worth of a fixed asset that occurs throughout its life" that is "usually associated with utilizing the asset for the production of material goods or services." NARUC, "Depreciation Expense: A Primer for Utility Regulators (2021) at 10.[4] While it is true – and the NARUC primer certainly acknowledges – that the process of accounting for depreciation has two distinct purposes (for businesses generally, determining taxable income, and for utilities, to calculate "an expense that a regulated entity is allowed to recover through service tariffs" consisting of "an estimate of the annual costs that is incurred by 'using up' or 'consuming' the value of specific assets for the provision of

[4] The cited document is available at https://pubs.naruc.org/pub.cfm?id=6ADEB9EF-1866-DAAC-99FB-DBB28B7DF4FB.

the regulated service," *id.*), a business not subject to rate regulation (or at least, such a business that plans to remain solvent) must take depreciation expenses into account as it decides what prices to charge for its goods and services. No record evidence in this case suggests, and there is no basis for the Commission to infer, that an assumed five-year useful life for poles reflects a judgment by the company that its revenue over those five years fully compensated shareholders for their investment in those poles.[5]

In other words, the Commission should assume here that if these poles are fully depreciated on the books of Consolidated then Consolidated's customers have already paid in full for them and any additional payment to Consolidated from Eversource's shareholders for the poles is a windfall. "[C]ustomers should not have to pay for the same asset multiple times . . . in contrast to what may be observed in competitive markets." *Id.* at 11. Eversource should not be allowed to evade this principle merely because the entity from which it is purchasing the assets is no longer regulated.

Mr. Horton claimed at hearing that, for Consolidated, the "net book value doesn't stand for an amount that's not yet been paid for by customers," tr. 5/10/22 at 55, lines 15-17, but he has no way of knowing that because he does not have access to Consolidated's internal financial documents and thus, as Mr. Horton conceded, the purchase price was simply a "negotiated term," *id.* at 58, line 13. Asked directly

[5] [5] Ms. Kravtin made essentially the same point at the May 10 hearing. *See* tr. 5/10/22 at 91, lines 16-22 ("Whatever price is charged includes the recovery of costs" and "because . . . the rates charged by Consolidated were far in excess of even a regulatory capital recovery . . . by definition they were sufficient to recover more than that regulatory amount of depreciation").

whether he knew the extent Consolidated had already recovered its pole investment from its own customers, Mr. Horton had to admit that "I can't speak to the Consolidated side of that question." Tr. 3/15/22 at 87, lines 6-7.

Both Mr. Horton and one of the Consolidated witnesses, Sarah Davis, made much of the fact that, as to jointly owned poles, the value on the books of Eversource vastly exceeds the corresponding value on Consolidated's books. *See id.* at 18-21 (Horton) and 197 at lines 11-17 (Davis, asking "Why is this half worth less than that half?"). The answer is that nothing in this record gives the Commission a reason to assume that customers have not already paid for the assets Consolidated is proposing to sell to Eversource, and the burden here is with the joint petitioners. In other words, from the ratepayer perspective – and here, as usual, the ratepayers have the only wallet in the room – the Consolidated half of the poles are only "worth" buying to the extent they have not already been paid for.

IV. Improvident Compromise: Vegetation Management Expenses

Even if the Commission could somehow determine that the gross purchase price agreed to by Eversource and Consolidated is just and reasonable, the proposed adjustment of that price to reflect the two companies' proposed resolution of their ongoing dispute does not merit the Commission's imprimatur. The dispute concerns the sums Consolidated owes Eversource for the telephone company's share of vegetation management costs. "[W]e are resolving the issue that is the subject of dispute as to Consolidated's vegetation management responsibility, up through 2020, the date that we signed the agreement," testified Mr. Horton. Tr. 3/15/22 at

96, lines 23-24 and 97 lines 1-4. Eversource wants "a mechanism to recover the incremental vegetation management expenses from that point forward," reconciled via the PPAM in the following year. *Id.* at lines 7-9 and 19-21; *see also* tr. 5/10/22 at 29, lines 15-16 and 23 24, and 30, lines 1-4 (noting that the requested cost recovery approval includes approximately $8.3 million for 2021, plus "additional accrued but unpaid amounts for the current year, through the date of the closing of the proposed transaction" if approved).

Consolidated witness Michael Shultz testified that in 2018, Consolidated paid Eversource $6.3 million in vegetation management costs but only $3.9 million in 2019. Tr. 3/15/22 at 173, lines 21-24. The Commission should keep in mind that this was not the culmination of years of cooperative and successful joint pole ownership. Rather, as Mr. Schultz testified, Consolidated acquired its New Hampshire assets in 2017, paid $5.2 million in 2018, disputed any and all further amounts, and in May of 2019 unilaterally announced that it would be paying nothing further to Eversource. Tr. 3/15/22 at 188, lines 1-12. Instead, Eversource and Consolidated commenced negotiations and entered into their agreement in late 2020 including liquidated amount to cover all remaining vegetation management obligations for Eversource to be applied as a credit to the agreed upon purchase price. As the Commission is aware, Consolidated has thus far successfully claimed that this amount should not be publicly disclosed, despite its centrality to the highly controversial agreement now pending in this docket, although it appears *inter alia* at line 16 of page 188 of the transcript of the March 15, 2022 hearing.

Eversource is asking to be relieved of an obligation to pursue reimbursement for vegetation management costs payable by Consolidated so that Eversource can collect the money from ratepayers instead. Mr. Horton admitted that the ownership transfer will not reduce vegetation management expenses, conceding: "the vegetation management on the system is going to need to be performed at the [requisite] level, regardless of whether or not we own the poles jointly with Consolidated or not. The issue is a matter of 'will Consolidated pay or not?'" *Id.* at 149, lines 8-16.

What a stark contrast this presents to the way a similar dispute has played out between Consolidated and the state's only customer-owned electric utility, the New Hampshire Electric Cooperative ("NHEC"). Where Eversource chose to cut a deal with Consolidated, NHEC sought relief via civil litigation in Superior Court. *See* tr. 3/15/22 at 181, lines 21-24, 182, and 183 lines 1-3; *see also* exh. 26 (order of Superior Court denying Consolidated summary judgment motion). Mr. Shultz characterized the agreement his company reached with Eversource as a "win/win for both . . . parties," tr. 3/15/22 at 191, line 3 – a true statement. But the "win" achieved by these two investor-owned companies would come at the unfair and unreasonable expense of Eversource's captive customers. Thus, it is not surprising, and the Commission should duly take note, of how the same dispute plays out differently when the electric utility at the negotiating table has no shareholders to enrich and only its customer-owners' interests to consider.

V. "Trust Me" Reliability Benefits

Eversource witness Jason Yergeau testified at the March 15 hearing that he and his employer "firmly believe that our exclusive ownership of the utility poles [in the Eversource service territory" is in the long-term best interest of our electric customers." Tr. 3/15/22 at 27, lines 16-18. He referenced Eversource's "rigorous, proactive pole inspection replacement program," *id.* at 28, lines 14-15, and pointed out that Eversource is "more successful" than Consolidated at "avoiding broken poles in bad weather," *id.* at 29, lines 8-9. Mr. Yergeau predicted that once Eversource owns all of the poles in his service territory, "delays in pole replacement will be eliminated" because there will no longer be a need to coordinate such work with the other pole owner. *Id.* at lines 12-21.

The OCA does not disagree with Eversource that as the beneficial electrification of New Hampshire proceeds while landline telephone service continues its inexorable slide toward complete obsolescence, it is optimal for the state's electric distribution companies to assume full ownership of the utility poles within their service territories. But that general proposition does not relieve Eversource of its burden of proving here that the proposed transaction is for the public good pursuant to RSA 374:30.

Nevertheless, Eversource is asking the Commission to assume that reliability benefits will materialize in the wake of the transaction. When asked at hearing whether Eversource had any "quantifiable evidence" of "additional units of

reliability," however measured, that would result from the transaction, Mr. Horton confirmed that his employer has nothing. Tr. 5/10/22 at 88, lines 3-7. "[D]ifficult to quantify" was his explanation. *Id.* at line 12; *see also id.* at 106, line 13 ("[T]o my knowledge, they have not been quantified," said Eversource witness Yergeau). Eversource is asking the Commission buy into Mr. Horton's perspective – which he himself characterized as "biased" – that customers simply "be more comfortable knowing" that total pole ownership by their electric distribution utility as opposed to a telephone company "is the paradigm for service" in light of Eversource's approach to pole safety and pole maintenance. *Id.* at 59, lines 12-15.

Fantasy cannot become the basis of findings, at least not in a contested administrative proceeding conducted pursuant to RSA 541-A. As Mr. Eckberg pointed out, Eversource has recourse via the intercompany operating procedures agreed to by Consolidated when Eversource believes the telephone company is not meeting its obligations as a vigilant steward of utility poles. Exh. 21 at 7-8. Eversource chose to negotiate away its rights as Consolidated's co-owner, but the terms are unfair to Eversource customers. This reality, well supported by record evidence, cannot be superseded by Eversource testimony about its executives' inchoate belief that its customers will simply sleep better at night knowing that Eversource and not Consolidated is completely in charge of the utility poles that provide them with service.

VI. The Obvious Answer: Eminent Domain

"I would love to take the poles for free, and I would love for [Consolidated] to pay us for it," confessed Eversource witness Horton toward the end of the first day of the hearing. Tr. 3/15/22 at 160, lines 11-13. "That just is not a business transaction that [Consolidated] would enter into." *Id.* at 4.5.

The question here is not whether "free" is the right price for Eversource to incur, and pass along to customers, for assuming sole ownership of the poles. Rather, the question is what price is just and reasonable – and whether, on the present record, the Commission can find that the agreed-to-price meets the standard. The answer, as already noted, is "no."

Thus, given that it is impossible for Eversource to reach an agreement with Consolidated providing for a reasonable purchase price for the pole assets in the Eversource territory, and given the undisputed evidence that such a transaction would be in the public interest, the obvious answer is for Eversource to invoke RSA 371 to acquire the assets via eminent domain. In the absence of any reasonable dispute over whether such an acquisition would meet the requisite public benefit test, *see, e.g., Petition of Bianco*, 143 N.H. 83, 86 (1998) (defining the test as one of "reasonable" rather than "absolute" necessity) (citation omitted), the focus of such a proceeding would be to determine precisely what the evidence adduced in this docket lacks: a fair market value for the assets in question, the determination of which is objectively determined via a public (or at least somewhat public) process.

In the process of rejecting the instant petition, the Commission should therefore suggest that Eversource consider instituting eminent domain proceedings. Eversource is correct that, ultimately, it should emerge as the sole owner of the utility poles in its service territory.

VII. Conclusion

The transaction for which Eversource and Consolidated seek approval here does not meet the "public good" standard set forth in RSA 374:30. Eversource has agreed to pay an unreasonable price for Consolidated's share of the utility pole assets in the Eversource service territory in New Hampshire. The purchase price is then offset by an amount that reflects an agreement to which Eversource should not have entered, in connection with disputed vegetation management costs that should be resolved by a judicial or quasi-judicial decisionmaker based on a full evidentiary record. Ultimately, Eversource seeks guaranteed rate recovery – plenary indemnification – based on the notion that its customers assume, and thus that the Commission should assume, – everyone is better off if Consolidated is relieved of any obligation to maintain utility poles in the Eversource territory. For the reasons stated above, the Commission should not repeat past mistakes by allowing a telephone company to flee its obligations in such fashion. *See* Order No. 24,824 (2008) in Docket DT 07-011 (approving transfer of Verizon landline telephone network to Fairpoint Communications) and subsequent docket entries in that proceeding.[6] Rather than attempt to negotiate a new bargain for Eversource

[6] Those subsequent docket entries are available at https://www.puc.nh.gov/Regulatory/Docketbk/2007/07-011-3.htm.

publicly by stating what terms it would approve, the Commission should simply reject the joint petition and suggest Eversource institute eminent domain proceedings.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Deny the joint petition of Public Service Company of New Hampshire and Consolidated Communications of Northern New England Company, LLC for approval of the transfer of certain utility pole assets, and

B. Grant such further relief as shall be necessary and proper in the circumstances.

Sincerely,

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Certificate of Service

I hereby certify that a copy of this pleading was provided via electronic mail to the individuals included on the Commission's service list for this docket.

Donald M. Kreis