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

REPLY BRIEF OF
NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION, INC.

June 17, 2022

I. Introduction

Pursuant to the post-hearing briefing schedule established by the Commission at the conclusion of the May 10, 2022 hearing in this docket, New England Cable and Telecommunications Association, Inc. ("NECTA") respectfully submits this Reply Brief. In so doing, NECTA incorporates by reference all the information and arguments set forth in its Initial Post-Hearing Brief filed June 3, 2022. In addition, NECTA asserts the arguments below in support of its position that, if the New Hampshire Public Utilities Commission ("the Commission") approves the proposed transaction between Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") and Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications ("Consolidated"), the Commission must adopt NECTA's recommendations in order to ensure that the transaction will be for the public good, and that NECTA Members suffer no net harm.

II. Transfer of Ownership of Consolidated's Pole Assets May Be Approved Subject to NECTA's Recommendations.

The New Hampshire Department of Energy ("DOE") and the Office of Consumer Advocate ("OCA") both assert that the Commission should reject Eversource's and Consolidated's Joint Petition. DOE argues that the transaction is not in the public good because Eversource's recovery of the excessive purchase price it proposes to pay for Consolidated's pole assets, along with the vegetation management settlement that is part of the transaction, will lead to higher future electric rates. Similarly, the OCA argues that rather than attempting to negotiate a new bargain for Eversource by stating the terms it would approve, the Commission should reject the Joint Petition.

NECTA respectfully disagrees with the position that the Commission should reject the proposed transaction outright. NECTA does not oppose a transfer of ownership of the poles

so long as the Commission adopts the recommendations contained in the prefiled testimonies of Mr. White and Ms. Kravtin,[1] and as set forth in NECTA's Initial Post-Hearing Brief. Because those recommendations will ensure that the transaction will be for the public good, they must be adopted by the Commission if it decides to approve the proposed transaction.

III. Legal Standard – Public Good/No Net Harm

The Joint Petitioners assert that the proposed transaction is subject to review under the public good standard set forth in RSA 374:30, I. which includes the "no net harm test" and is the standard the Commission has previously and consistently applied to acquisitions. NECTA agrees with the Joint Petitioners' assertions regarding the applicable standard of review in this case, *i.e.*, that the Commission must review the proposed transaction to determine whether it will be for the public good. In so doing, the Commission must determine that the transaction is not forbidden by law, is reasonably permitted under all of the circumstances of the case, and will create no net harm to the public, based on the totality of the circumstances. *See Re Consumers New Hampshire Water Company*, 82 NH PUC 814, 817 (1997). 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). Because NECTA Members pay pole attachment rates for their attachments to the transferred poles, they are ratepayers who must not be harmed as the result of the proposed transaction.

[1] *See Exh. 28* and *Exh. 39*, Bates p. 21, line 16 through Bates p. 22, line 15.

IV. Because Operational Benefits of the Transaction to Pole Attachers Have Not Been Quantified or Even Articulated, Mr. White's Recommendations Must Be Adopted to Ensure That Pole Attachers Suffer No Billing or Operational Harm from the Transaction.

The Joint Petitioners' Initial Brief at pages 8-11 describes, but fails to quantify, how the proposed transaction will result in certain reliability benefits for Eversource's retail electricity customers. However, it makes no mention of how the transaction will either yield operational benefits for Eversource's pole attachment customers (such as NECTA Members) or will not harm their operations. In the absence of such information or assurances from the Joint Petitioners that the transaction will not result in net harm to NECTA Members, the Commission must affirmatively act to protect NECTA Members' interests if it decides to approve the transaction.

NECTA Witness James G. White, Jr.'s prefiled testimony (*Exh.* 27) explains the billing harm that occurred in Vermont when Consolidated transferred its pole assets to Green Mountain Power, and describes additional operational concerns of NECTA Members whose facilities are attached to the transferred poles. The Joint Petitioners' Brief fails to address any of the recommendations contained in Mr. White's original prefiled testimony (*Exh.* 27) or his updated prefiled testimony (*Exh.* 28). Had the Joint Petitioners found any of those recommendations objectionable, it is reasonable to assume that they would have presented their objections in their Initial Brief, but they did not. Therefore, in the absence of objections from the Joint Petitioners, and to ensure that the transaction does not result in billing or operational harm to NECTA Members, NECTA urges the Commission to adopt Mr. White's recommendations, set forth in Exhibit 28, and in *NECTA's' Initial Post-Hearing Brief* at pages 9 through 11, in the event that the Commission approves the transaction.

V. Because the Purchase Price of the Pole Assets Exceeds Consolidated's Regulatory Net Book Value, Such Excess Amount Must Not Be Included in Eversource's Future Pole Attachment Rate Calculations.

NECTA agrees with the position advanced by DOE and the OCA that the purchase price of the pole assets is excessive. Underscoring the point that the purchase price of the pole assets factors prominently into the question of whether the transaction is for the public good, DOE notes that the Commission has recognized that "gross and net purchase prices are key terms in evaluating the value (and thereby the cost) of this transaction to Eversource's ratepayers" and in "determining whether the transaction meets the public good standard under RSA 374:30." Order No. 26, 631 (May 24, 2022), p. 8. The amount of the purchase price is critically important because Eversource proposes to use the full purchase price to calculate future electricity and pole attachment rates. As explained in NECTA's Initial Post-Hearing Brief and below, NECTA opposes Eversource's proposal for full purchase price recovery, and asserts that the portion of the purchase price that exceeds the regulatory net book value of the poles should not be included in pole attachment rates.

DOE and NECTA have put forth compelling testimony by their respective experts, Stephen Eckberg and Patricia Kravtin, supporting the fact that the gross purchase price of the pole assets greatly exceeds the net book value that Consolidated would have carried on its books had it remained a fully regulated utility. Although Consolidated is an excepted local exchange carrier ("ELEC") that is exempt from many of the regulations that apply to other public utilities, *see* RSAs 362:7 and :8, it is not exempt from the Commission's authority to set pole attachment rates pursuant to RSA 374:34-a, II and VII. *See* RSA 362:8, I. (ELECs are not exempt from the Commission's authority under the Communications Act of 1934, as amended); *see also New Hampshire Joins States That Have Certified That They Regulate Pole Attachments,* 23 FCC Rcd

2796 (released February 22, 2008). Therefore, it is entirely appropriate to determine Consolidated's regulatory net book value of the pole assets because Consolidated's pole attachment rates are regulated by the Commission.

As OCA has argued, "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." *Brief of the Office of the Consumer Advocate ("OCA Brief"),* p. 5. OCA makes several additional noteworthy observations with which NECTA agrees:

- Mr. Eckberg and Ms. Kravtin are "expert utility analysts" who have contended that Consolidated's ARMIS data is probative of how the pole assets should be valued when included in Eversources' books. *OCA Brief,* p. 6.
- "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." *OCA Brief,* p. 7.
- Ms. Kravtin is asking the Commission "to *impute* a book value of these assets for rate recovery purposes" - she is not "taking exception to Consolidated's "ultra-accelerated depreciation rates…" *Id.*[2]
- The Commission should assume that Consolidated's accelerated depreciation for the poles reflects the fact that Consolidated's customers have paid those depreciation costs, and any amount paid by Eversource above Consolidated's net book value of the depreciated

[2] NECTA is not arguing that Eversource must pay Consolidated a lesser amount than the negotiated purchase price for these pole assets. NECTA is simply arguing that for pole attachment ratemaking purposes, Eversource cannot use a value for the transferred poles that exceeds the net book value that would have been reflected on Consolidated's books had it remained a fully regulated utility.

assets is a windfall to Consolidated. *OCA Brief*, p. 9. "[N]othing 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." *OCA*, p. 10.

DOE correctly notes that the purchase price will affect future pole attachment rates, and that the Joint Petitioners have failed to meet their burden to demonstrate that their negotiated purchase price is correct or even reasonable. *Initial Brief of Department of Energy ("DOE Brief")*, p. 3-4. The Joint Petitioners, on the other hand, contend that the purchase price is appropriate, and ask the Commission to note that it took the Joint Petitioners 19 months to negotiate their settlement agreement." *Joint Brief of Eversource and Consolidated ("Joint Petitioners' Brief")*, p. 11. NECTA respectfully submits that the duration of the Joint Petitioners' negotiations should be of no consequence in determining whether the product of those negotiations, *i.e.*, the Joint Petitioners' settlement agreement (*Exhs.* 3 and 4), should be approved by the Commission. Because the price paid by Eversource for the pole assets will affect Eversource's future electricity and pole attachment rates, the Commission must examine the reasonableness of that purchase price in making its public good determination, irrespective of the complexity or duration of the Joint Petitioners' negotiations.

The Joint Petitioners assert that as a non-rate regulated utility, Consolidated has the right to use an accelerated, five-year depreciation period (20% depreciation rate) which is quite shorter than the 30-year period (3.33% depreciation rate) that Eversource is required to use due to its regulated status. They further claim that because Consolidated has accelerated its depreciation of the pole assets, it has "broken" the nexus between the financial book value and the actual value of the assets, and therefore the net book value recorded on Consolidated's

financial records is not appropriate for determining the value of the transferred poles. *Joint Petitioners' Brief,* p. 14. While it may be true that Consolidated's accelerated depreciation of these assets is different from what a regulated depreciation rate would be, that fact alone does not support the position that the negotiated purchase price that Eversource has agreed to pay for the poles is the correct book value for these assets. In fact, NECTA agrees that because Consolidated's depreciation period/rate is extremely accelerated, it would be inappropriate to use the net book value resulting from that period/rate to calculate a proper net book value of these assets that remain regulated for purposes of pole attachment rates. Therefore, Ms. Kravtin has used Consolidated's last regulatorily approved depreciation rate of 5.8% as reflected in its 2020 ARMIS data, along with other ARMIS data for the same year, and has calculated a reasonable net book value of the pole assets, reflecting their worth as of year-end 2020,[3] had Consolidated remained fully regulated. In so doing, she has repaired the Joint Petitioners' claimed "broken nexus" between Consolidated's financial value and the actual value of its pole assets.

Although the Joint Petitioners argue that the purchase price is reasonable based upon Eversource's confirmation that, as of the date of the settlement agreement, the gross purchase price was less than half the net book value that Eversource reflected on its books for the jointly owned poles, this argument is flawed as it overlooks the fact that Eversource's depreciation rate is lower than Consolidated's last regulatorily approved depreciation rate, thereby yielding an Eversource net book value that is higher than Consolidated's. Given the mismatch in the Joint Petitioners' regulatory depreciation rates for these assets, comparing Eversource's net book value with Consolidated's to assess the reasonableness of the purchase price is improper. Nor is it proper, as Eversource argues, to allow Eversource to reflect the purchase price of these assets on

[3] Note that Mr. Eckberg applied another year's worth of depreciation for 2021 which results in a lower net book value for the pole assets than that calculated by Ms. Kravtin.

its books just as it would if Eversource were to purchase new poles. The flaw in this argument is obvious. These poles are not new; they have been devalued through usage. Many of these poles will require replacement by Eversource, the costs of which will be borne by pole attachers and electric ratepayers in future rates paid to Eversource. In these circumstances, it is the seller's net book value (as recalculated by Ms. Kravtin for regulatory purposes) – not the inflated, negotiated purchase price that Eversource is willing to pay – that is the proper measure of the assets' value.

Lastly, the Joint Petitioners' argument that there is no acquisition premium in this case because that term only applies in cases involving the sale of a business- as opposed to the sale of physical assets like utility poles- is largely one of form over substance. Whether a payment above an asset's net book value is called an "acquisition premium" or an "excess purchase price" the rate recovery principles should be the same for both situations; ratepayers should not pay for such excess amount.

For all of the above-stated reasons, and to avoid net harm to ratepayers, the Commission, if it approves the transaction, should explicitly find that Eversource may not use an amount above Ms. Kravtin's net book value for the transferred poles when calculating pole attachment rates. If the Commission approves the transaction without making the above-described finding, the Commission should expressly note and preserve pole attachers' right to challenge the net book value of the transferred poles in any future pole attachment rate dispute.

VI. The Consolidated Rates That Eversource Proposes to Charge Third Party Pole Attachers for Their Attachments to the Transferred Poles Are Relevant in this Proceeding.

At page 21 of their Initial Brief, the Joint Petitioners assert that NECTA is advocating for a reduction in Consolidated's pole attachment rates in the event that the Commission approves the transfer of pole ownership from Consolidated to Eversource. They also assert that

the Commission should not entertain any proposed changes to pole attachment rates as part of this docket, arguing that pole attachment rates are beyond the scope of this acquisition proceeding, and that the Joint Petitioners are not requesting modification of their current rates. These arguments are without merit for the following reasons:

First, to the extent that the Joint Petitioners assert that NECTA is requesting a reduction to the rates that Consolidated charges for attachments to all of its poles, irrespective of whether the poles are being transferred to Eversource, the Joint Petitioners are mistaken. While NECTA, on behalf of NECTA Members, has separately initiated the process for disputing Consolidated's rates in accordance with processes outlined in relevant pole attachment agreements and Commission rules, *see* Exh. 65, in the instant docket NECTA is only challenging the justness and reasonableness of the rates that Eversource proposes to adopt and charge for third party attachments to the transferred poles. That these rates happen to be the rates charged by Consolidated does not mean that NECTA must challenge those rates through the process outlined in Consolidated's pole attachment agreements or Commission rules. Because the Joint Petitioners have raised in this docket the issue of the pole attachment rates that Eversource proposes to charge for attachments to the transferred poles, NECTA is entitled to challenge, in this docket, the justness and reasonableness of those rates.

Second, the issue of whether the Consolidated rates that Eversource proposes to charge for the transferred poles are just and reasonable is relevant to the question of whether the proposed transaction is in the public good, and is squarely within the scope of this proceeding because the Joint Petitioners, themselves, have put this issue before the Commission. Paragraph 6 of the Joint Petition (*Exhs.* 66 and 67) states, in part, that Eversource will receive third-party pole attachment revenues directly under the terms of the contracts in place between the attachers

and Consolidated. This means that, for attachments to the transferred poles, Eversource will be charging pole attachers (other than Consolidated which will be paying a negotiated fee) the rates that the attachers are currently paying Consolidated. The Joint Petition then goes on to state that these fees are in compliance with Commission Rules (at N.H. Admin. R. Puc 1301.10) and RSA 374:34-a, and characterizes the fees as "nondiscriminatory, just, and reasonable." *Exhs.* 66 and 67, Bates p. 3, ¶6.

Given that the Joint Petition asserts that the fees that Eversource proposes to charge for attachments to the transferred poles are "nondiscriminatory, just and reasonable", the question of whether that assertion is true is clearly within the scope of this proceeding. Moreover, the Joint Petitioners bear the burden of proving their rate assertions by a preponderance of the evidence, *see* N.H. Admin. R. Puc 203.25, and NECTA has the right to introduce evidence to rebut that assertion. *See* RSA 541-A:31, IV. ("[o]pportunity shall be afforded all parties to respond and present evidence and argument on all issues involved"). As discussed below, the Joint Petitioners have failed to meet their burden of proof, and NECTA has clearly demonstrated through unrebutted expert testimony that the Consolidated rates that Eversource proposes to charge are unjust and unreasonable as they exceed accepted regulatory formulae.

Third, even if the Joint Petition did not include the assertion that the rates that Eversource proposes to charge for attachments to the transferred poles are nondiscriminatory, just and reasonable, that issue would nonetheless be relevant to the Commission's determination of whether the pole transfer is in the public good. The public good standard requires that in determining whether a proposed transaction will create net harm to the public or ratepayers, the Commission must examine the totality of the circumstances. *See* Section III, *supra.* Here, the

totality of the circumstances necessarily includes an examination of the rates that Eversource proposes to charge for attachments to the poles that are the subject of this docket. And to the extent that those rates are found to be excessive, unjust or unreasonable, the Commission may reduce them as part of its public good determination in this docket.

VII. Because Consolidated's Pole Attachment Rates are Excessive, Eversource Should Not Be Permitted to Charge Them for Attachments to the Transferred Poles.

Consolidated's current annual rate for an attachment on a solely owned pole is $11.67, and its jointly owned pole rate is $6.84. *See Exh.* 39, Bates p. 15. Ms. Kravtin has provided unrebutted expert testimony that these rates (that Eversource proposes to charge third parties for their attachments to the transferred poles) are unjust and unreasonable as they vastly exceed rates produced using accepted regulatory formulae and data provided by Consolidated in response to the Commission's Order No. 26,534 (Oct. 22, 2021) granting NECTA's Motion to Compel. More specifically, using ARMIS data for 2020 that the Commission ordered Consolidated to produce, Ms. Kravtin applied the widely accepted and most commonly used Federal Communications Commission ("FCC") cable formula, and determined that Consolidated's solely owned pole rate would be $6.31 and its jointly owned pole rate would be $3.16. *See Exh. 39,* Bates p. 17-19. For comparison purposes, Ms. Kravtin calculated rates using the FCC's 2011 telecom rate formula, produced rates similar to those resulting from the FCC's cable formula and that are also much lower than Consolidated's existing rates. *Id.,* Bate p. 19.

There is no evidence in the record disputing the fairness or correctness of Ms. Kravtin's rate calculations, nor have the Joint Petitioners provided any evidence supporting their claim that the excessive Consolidated rates are just and reasonable. In short, the Joint Petitioners

have failed to meet their burden of proving that the pole attachment rates Eversource proposes to charge for attachments to the transferred poles are just and reasonable. In the absence of such evidence, and as part of its public good determination in this docket, the Commission should order that if the transaction proceeds, Eversource must charge the lower rates calculated by Ms. Kravtin, using the FCC's cable formula, for attachments to the transferred poles.

NECTA and NECTA Members were not aware of the extent to which Consolidated's pole attachment rates exceeded the just and reasonable rates produced using the FCC's cable formula until after the Commission ordered Consolidated to produce its 2020 ARMIS data. The Commission should not "grandfather" Consolidated's excessive rates for the transferred poles, or otherwise permit Eversource to perpetuate the financial harm to NECTA Members caused by Consolidated's unjust and unreasonable pole attachment rates. The Commission must prevent this financial harm by ordering Eversource to charge the lower FCC cable rates for the transferred poles if the transaction is approved. If the Commission fails to reduce the rates that Eversource proposes to charge for Consolidated's transferred poles, and if Consolidated's rates are reduced (through settlement or a Commission order) before Eversource develops new pole attachment rates reflecting the inclusion of the transferred poles, the Commission should order Eversource to bill the new Consolidated rates (for the transferred poles) retroactively to the date of such settlement, or the date of the petition(s) filed with the Commission seeking a reduction of Consolidated's rates. *See* N.H. Admin. R. Puc 1304.07.

VIII. Eversource Cannot Discriminate Against Third Party Pole Attachers by Charging them Higher Pole Attachment Fees than Those Charged by Eversource to Consolidated for its Pole Attachments.

The Joint Petitioners also are asking the Commission to approve the fees that Consolidated will pay to Eversource for Consolidated's attachments to the transferred poles. *See Exhs.* 65 and 66, Bate p. 3, ¶ 6. "For Consolidated's pole attachments, Consolidated will pay Eversource $5.0 million per year in pole attachment fees for the first two years following the closing date of the Agreement. Thereafter, the revenues for Consolidated's pole attachments will be subject to Eversource's pole attachment rates in effect for solely owned poles." *Id.* The Joint Petitioners have asserted that these attachment fees are "nondiscriminatory, just, and reasonable." *Id.* However, not only have the Joint Petitioners failed to support that claim, they have failed to even address it in their Initial Brief.

NECTA, on the other hand, has demonstrated that the $5 million fee that Consolidated will pay to Eversource in lieu of paying Eversource's current pole attachment rates is discriminatory because it is lower on a per-attachment basis than the rate others will pay for their attachments to an Eversource solely owned pole. The $5 million fee is equivalent to a rate of approximately $12.38. *Ex.* 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 lower than the $13.93 rate which is the combined rate for a transferred pole formerly owned jointly by Eversource and Consolidated. *Ex.* 39, Bates p. 20, lines 5-9; Bates p. 15, Table 3.

This preferential rate treatment is clearly discriminatory as it provides Consolidated with an economic advantage over other pole attachers, such as NECTA Members, with whom Consolidated competes. *See Tr.* Day 2 (Redacted), p. 195, line 6-8 (Consolidated faces "steep

competition from our cable competitors, from the NECTA parties specifically.") Moreover, such discrimination is exacerbated by the fact that after it negotiated the $5 million fee with Consolidated, Eversource raised its pole attachment fees charged to other attachers (such as NECTA Members) but did not go back to Consolidated to renegotiate a higher fee. *Tr.* Day 2 (Redacted), p. 14, lines 2-15. This clearly demonstrates that the $5 million fee that the Joint Petitioners negotiated for Consolidated's pole attachment payments to Eversource is discriminatory.

In view of the foregoing, the Joint Petitioners have failed to satisfy their burden of proving that the rates they propose to charge Consolidated for its attachments to Eversource's poles are nondiscriminatory, just and reasonable. To remedy this infirmity, if the Commission approves the transaction, it should order that Consolidated pay Eversource the same pole attachment rates that apply to other pole attachers.

IX. Conclusion

NECTA respectfully submits that, as part of its public good determination in this docket, the Commission must address NECTA's billing, operational, financial and rate issues raised in the prefiled and oral testimonies of Mr. White and Ms. Kravtin, and their supporting exhibits. To ensure that the proposed transaction between Eversource and Consolidated will not harm NECTA Members operationally or financially, the Commission must adopt NECTA's recommendations[4] in their entirety.

[4] *See Exh.* 28, *Exh.* 39, Bates p. 21, line 16 through Bates p. 22, line 15, and NECTA's Initial Post-Hearing Brief.

Respectfully submitted,

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Dated: June 17, 2022

Certificate of Service

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

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