STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DE 21-020

EVERSOURCE ENERGY AND CONSOLIDATED COMMUNICATIONS

Joint Petition to Approve Pole Asset Transfer

Reply Brief of Department of Energy

Pursuant to the Commission's direction at hearing for the parties to submit initial briefs by June 3, 2022 and reply briefs by June 17, 2022, the Department of Energy (DOE) submits this reply brief to address issues raised in the initial brief filed by 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) (collectively, the Joint Petitioners). For the reasons stated in its initial brief and in this reply brief, the DOE continues to believe that the proposed acquisition would not serve the public good and urges the Commission to reject the Joint Petition in order to protect Eversource ratepayers from adverse consequences related to the specific terms of the proposed transaction.

1. Applicable Legal Standard for Approval

The Joint Petitioners' Joint Petition to Approve Pole Asset Transfer (Joint Petition) asserts that the transaction satisfies RSA 374:30, I. That statutory paragraph provides as follows:

> Any public utility may transfer or lease its franchise, works or system, or any part of such franchise, works, or system, exercised or located in this state, or contract for the operation of its works and system located in this state, when the commission shall find that it will be for the public good and shall make an order assenting thereto, but not otherwise, except that commission approval shall not be required for any such transfer, lease, or contract by an excepted local exchange carrier. The commission may, by general order, authorize a public utility to transfer to another public utility a part interest in poles and their appurtenances for the purpose of joint use by such public utilities.

As noted in the initial brief filed by the Office of the Consumer Advocate (OCA), Consolidated is an "excepted local exchange carrier" (ELEC) and therefore the RSA 374:30, I Commission approval requirement technically is inapplicable to its transfer of assets. OCA Initial Brief at 2-4. However, the Joint Petitioners have invoked that standard in their Joint Petition and have also highlighted the necessity for Commission approval of certain rate recovery treatment by Eversource in connection with the proposed transaction. Therefore, the Commission should approve the pole asset transfer only if it is found to be for the public good – in that it would not result in net harm to customers – and is otherwise just and reasonable. The DOE continues to believe that the proposed transaction fails to meet those standards and therefore must be rejected.

The DOE reiterates that it does not oppose electric utility acquisition, ownership, and maintenance of utility poles, which may result in significant benefits in terms of emergency response, service restoration, and regular maintenance, thereby serving to enhance system reliability. The DOE again notes, however, that the Joint Petitioners have not been able to quantify those benefits. *See* Hearing Transcript March 15, 2022 (Tr. Day 1) at 105-109. And the Joint Petitioners expressly concede that point in their initial brief. Joint Petitioners' Initial Brief at 11 (reliability and customer benefits "are difficult to quantify and do not lend themselves to a 'cost-benefit analysis'").

Rather, it is the specific terms of the transaction proposed by the Joint Petitioners that make it inconsistent with the public good, and otherwise not just and reasonable, in particular with respect to the gross and net purchase prices for the poles to be transferred and the parties' settlement of unpaid vegetation management expenses and other claims between them.

2. Purchase Price and Asset Condition Adjustment

With respect to the purchase price, witnesses have testified that the gross purchase price is too high and that the proposed adjustment for failed poles may be too low. In particular, DOE witness Eckberg and NECTA witness Kravtin both testified that the gross purchase price should be based on the net book value to Consolidated, calculated as an "appropriate imputed regulatory value" of the pole assets, referencing the information set forth in Consolidated's restated "ARMIS" report provided in discovery. *See* Exhibit 22 at Bates 6-7 and 19; Exhibit 39 at Bates 12-14; Exhibit 72 at Bates 1-2.

The Joint Petitioners conceded at hearing that the proposed pole asset purchase price was a negotiated amount that did not reflect either utility's net book value. *See* Tr. Day 1 at 58. In their initial brief, they confirm that the gross purchase price "was determined through the course of extended negotiations between the Joint Petitioners . . . and nearly matched Consolidated's net book value at the time negotiations commenced." Joint Petitioners' Initial Brief at 12. They assert that the gross and net purchase price amounts are the product of "a complex, difficult negotiation" intended to "resolve[] extensive differences between them." *Id.* at 11. The Joint Petitioners also compare the proposed gross purchase price to Eversource's net book value for the jointly-owned poles recorded on its financial statements, noting that the gross purchase price is "less than half of the net book value for these same poles as of the date that the Joint Petitioners entered into the agreement." *Id.* at 12.

The Joint Petitioners also attempt to defend their negotiated gross purchase price by noting the "mismatch in depreciation periods" between the 30-year depreciation schedule used by Eversource, as a fully-regulated electric distribution utility, and the "extraordinarily short five-year amortization period" used by Consolidated with respect to those same poles. *Id.* at 13-

14. They claim that "by accelerating the depreciation, Consolidated has "broken" the nexus between the financial book value and the actual value of these assets." *Id.* at 14. They conclude that the negotiated net purchase price represents the "actual value" of the poles to be transferred and therefore "Eversource should be permitted to record the net purchase price as the net book value on its financial records for the Transferred Poles." *Id.* at 14-15.

In essence, the Joint Petitioners' negotiated gross purchase price does not correspond to either company's net book value based on a depreciation schedule that is appropriate for a regulated utility; nor is it based on any other valuation method that is reasonable and appropriate for regulated utility assets. Instead, the two companies cut a deal that both could live with and the purchase price is merely one element of their negotiated settlement terms. The DOE does not believe those factual circumstances support a finding that the negotiated gross purchase price represents the actual value of the pole assets for purposes of Eversource's future rate base and related cost recovery from its customers.

The Joint Petitioners also negotiated an adjustment to the gross purchase price in a specified amount to account for poles that failed inspection and require replacement. *See* Exhibit 3 at Bates 2 (Settlement and Pole Asset Purchase Agreement Section 2.1). In their initial brief, the Joint Petitioners assert that an extensive and thorough pole inspection effort preceded their negotiation of that purchase price adjustment amount. Joint Petitioners' Initial Brief at 16-17.

However, witness testimony at hearing called into question whether the amount of that purchase price adjustment is adequate. For example, Eversource witnesses conceded that the actual cost of replacing failed poles likely would exceed the adjustment amount included in the purchase agreement. *See* Tr. Day 1 at 109-114. More specifically, Eversource's pole replacement cost per pole is assumed to be $5,400 and, with a total number of 2,310 poles

planned to be replaced, the total cost of that pole replacement would be $12,474,000, an amount that is greater than the negotiated purchase price adjustment amount. *Id.* at 112-114. Eversource witness Horton maintained that the negotiated adjustment amount "reflects an amount that Consolidated has agreed to credit against the purchase price, reflecting Consolidated's cost and cost structure." *Id.* at 113-114. And he acknowledged that Eversource effectively would seek to recover from its customers through its next rate case the difference between pole replacement costs it actually incurs and the stipulated purchase price adjustment amount. *Id.* at 114. Once again, the Joint Petitioners have negotiated a transaction term that is favorable to Consolidated while exposing Eversource customers to excessive costs and risks.

Based on that factual record, the DOE believes that the Joint Petitioners have not demonstrated the justness and reasonableness of either the gross or the net pole asset purchase price. And the net purchase price will have a direct impact on Eversource's customers as it will establish the capital asset value of the poles for rate recovery purposes, as well as potentially affecting future third party attachment fees. Accordingly, the Joint Petitioners have not carried their burden to establish that the negotiated gross purchase price and purchase price adjustment are correct – or even reasonable – and therefore the proposed transaction cannot be found to be in the public good or otherwise just and reasonable, based on the evidentiary record adduced in this proceeding.

3. Vegetation Management Expense Settlement

The Joint Petitioners also negotiated a provision in the Settlement and Pole Asset Purchase Agreement pursuant to which Consolidated would be released from millions of dollars in vegetation management expenses for which it has been billed or could have been billed by Eversource, in exchange for a specified amount of money that is effectively treated as an offset

to the net purchase price payment. Exhibit 3 at Bates 2. That provision is characterized in the Joint Petitioners' agreement as a "full and complete settlement and satisfaction" of any and all disputes between them, including those related to vegetation management expense amounts payable under their Joint Ownership/Use Agreement and related Intercompany Operating Procedures. *Id.*

In their initial brief, the Joint Petitioners attempt to explain and defend that settlement term as a negotiated "reasonable settlement amount that recognizes the different objectives of each entity regarding vegetation management." Joint Petitioners' Initial Brief at 19. They further assert that such "a comprehensive resolution mitigates the risks of future litigation and ensures recovery of vegetation management costs" – presumably from Eversource customers only. *Id.* at 20. And they challenge "the notion that the Joint Petitioners should be equally responsible for vegetation management costs [as] not reflected in current operational realities," citing regulatory and technological changes affecting the telecommunications industry over the past decades. *Id.* at 20-21. According to the Joint Petitioners, that "mismatch of need creates a disincentive for telecommunications companies to agree to share equally in the costs of pole maintenance, including vegetation management costs because there is no material benefit." *Id.* at 21.

But even assuming *arguendo* that those assertions are valid, the key facts remain uncontested. Prior to 2019, Consolidated paid to Eversource its share of vegetation management expenses for each year; for 2019 it paid only a small fraction of the over $8 million it was billed; and from 2020 on it has paid nothing for such expenses. Exhibit 68 at Bates 1-2; Tr. Day 1 at 98-99. At hearing, Eversource witness testimony confirmed there was no change in the underlying agreements between the Joint Petitioners that would provide a basis for Consolidated

not to pay the full amounts it was invoiced for vegetation management expenses. Tr. Day 1 at 99-100. And that testimony also indicated that Eversource had not pursued litigation or any other formal dispute resolution process against Consolidated in connection with any disputes related to its vegetation management expense payment obligations. *Id.* at 81, 100-101. Moreover, the nature and validity of the disputes to be resolved by the Joint Petitioners' settlement have not been substantiated in a manner that would permit the Commission to determine that the proposed settlement amount is just and reasonable. *Id.* at 91, 99-101.

The amount of resulting costs that would be shouldered by Eversource customers is material. Total vegetation management expenses that would have been paid by Consolidated, in the absence of the settlement, from 2021 through the transfer of pole asset ownership are estimated to be approximately $8.3 million for 2021 plus additional accrued but unpaid amounts for 2022 through the date of closing of the transaction, if it occurs. *See* Exhibit 68 (showing total actual expenses for 2019 through 2021); Hearing Transcript May 10, 2022 (Tr. Day 2) at 28-30. And Eversource has made clear it will seek to recover from its ratepayers the full amount of any expenditures it has made for vegetation management from January 2021 through the date of closing, if it occurs, including the share of those expenses that Consolidated will not pay for as a result of the settlement provision. Tr. Day 2 at 28-30.

Eversource customers effectively would be required to pay a substantial amount for expenses that Consolidated was obligated to pay but did not pay – and will not have to pay – as a direct result of the proposed settlement provision. The settlement term included with the proposed transaction agreement therefore would have a significant adverse impact on Eversource's customers. That impact represents another basis for the Commission to find that

the proposed transaction does not meet the public good standard and is not otherwise just and reasonable.

4. Conclusion

The Joint Petitioners assert that "[o]n balance, the record evidence in this docket demonstrates that the Agreement is in the public interest because, under the no net harm standard, there are real benefits to Eversource's customers and minimal bill impacts." Joint Petitioners Initial Brief at 22. The DOE maintains that, to the contrary, the Joint Petitioners have failed to produce record evidence on which the Commission can find that the proposed pole asset purchase transaction and related settlement terms would be in the public good and otherwise just and reasonable. The Joint Petitioners effectively have negotiated a transaction that is beneficial for Consolidated, as a largely unregulated ELEC, while exposing Eversource's customers to significant future negative rate impacts. Eversource's customers would bear the adverse consequences of gross and net purchase prices that are too high and a vegetation management expense settlement that shifts to Eversource an unreasonable share of costs that should have been paid for by Consolidated, in each case leading to higher future electric rates for Eversource customers.

The Commission therefore should find that the Joint Petitioners' proposed transfer of poles from Consolidated to Eversource is not for the public good, nor is it otherwise just and reasonable, and therefore the Joint Petition for approval of that proposed transaction should be denied.

Date: June 17, 2022

Respectfully submitted,

N.H. DEPARTMENT OF ENERGY

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically served a copy of this filing upon each party on the official Service List maintained by the Commission for this proceeding.

Dated at Concord, New Hampshire, this 17th day of June, 2022.

/s/ David K. Wiesner

David K. Wiesner, Esq.