THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

Docket No. DE 21-020

Joint Petition to Approve Pole Asset Transfer

OBJECTION TO CONSUMER ADVOCATE'S MOTION TO DISMISS PETITION

NOW COMES Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications ("Consolidated") and hereby respectfully objects to the New Hampshire Office of Consumer Advocate's Motion to Dismiss Petition filed on Wednesday, August 4, 2021.

I. BACKGROUND AND JOINT PETITION

1. On February 10, 2021, Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource" and together with Consolidated, the "Joint Petitioners") and Consolidated jointly petitioned the New Hampshire Public Utilities Commission (the "Commission") for approval of the transfer of certain utility pole assets from Consolidated to Eversource (the "Joint Petition") pursuant to a Settlement and Pole Asset Purchase Agreement between the Parties dated as of December 30, 2020 (the "Settlement Agreement"). As described in more detail in the Joint Petition, the Parties requested that the Commission find the transfer of assets to be in the public interest because the transfer of Consolidated's utility poles to Eversource (as the sole owner) would result in significant electric grid reliability and operational benefits, with

minimal impacts on customer bills, and is otherwise consistent with New Hampshire law. *See* Joint Petition at p.1.

2. Eversource Witness Lee G. Lajoie's prefiled testimony in this Docket identifies multiple benefits to NH ratepayers. Eversource follows a rigorous inspection and replacement program to ensure poles are safe and reliable; with the Consolidated maintained poles not being part of such a process. Testimony of Lajoie, February 10, 2021 at p. 6., lns. 17-21. Eversource's proactive identification and replacement of poles not meeting minimum strength requirements greatly reduces the probability that a pole will fail in service as the result of adverse weather conditions or the installation of additional equipment by Eversource or third parties. This enhances public safety and reliability while decreasing the need to perform emergency replacements. *Id*. at p. 7, lns. 10-14.

3. Mr. Lajoie also testified to emergency events potentially being of shorter duration with all utility poles being Eversource owned. The transactions contemplated by the Settlement Agreement will reduce delays in emergency response times and avoid Eversource's necessary coordination with a second pole owner, Consolidated. *See id*. at p. 7-8, lns. 15-5. In addition, by becoming the sole pole owner, Eversource will have the ability to avoid these delays and will be able to complete projects requiring pole replacement in a timelier manner, resulting in improvements in system reliability and resiliency for the benefit of Eversource's customers. *See Id*. at p. 8, lns. 15-18. All of these benefits will accrue for Eversource's customers with minimal impacts on customer bills. *See* Joint Petition, para 19, p. 9.

4. While the Joint Petitioners negotiated the Settlement Agreement and resolutions of the financial and operational issues that arose between them, Eversource simultaneously proceeded to negotiate a settlement in Docket DE 19-57, the final agreement being the Settlement Agreement

on Permanent Distribution Rates (the "Distribution Rates Agreement"), dated as of October 9, 2020.[1] According to the introductory paragraph of that document, the Distribution Rates Agreement "… resolves all issues among the Settling Parties regarding the Company's request to establish permanent rates in Docket No. DE 19-057." Distribution Rates Agreement, Exhibit 58, Docket No. DE 19-057, at p. 1 (Exhibit 58 p. 2 of 220). Notably, Section 18.4 of that agreement states: "[u]nder this [Distribution Rates] Agreement, the Settling Parties agree to this joint submission to the Commission as a resolution of the issues *specified herein only*." Section 18.5 of the Distribution Rates Agreement further notes that the Commission's approval of the agreement "… shall not constitute continuing approval of, or precedent for, any particular principle or issue…" *Id*. at p. 34 (Exhibit 58, p. 35 of 220).

II. PROCEDURAL MATTERS

5. The Commission held a Prehearing Conference in this Docket on April 2, 2021. The Consumer Advocate never raised with the parties or the Commission during the Prehearing Conference any issues with or allegations of the proposed transaction being precluded by the Distribution Rates Agreement.

6. According to the Consumer Advocate during the Prehearing Conference:

> The OCA is not taking a specific position at this time on the petition before us. We believe there are real advantages, but also disadvantages that would accrue to residential ratepayers with approval of this transaction. We do very much look forward to exploring those issues further with the parties. We do believe that there could be a productive Settlement Agreement that could further meet the needs of ratepayers than is currently

[1] Consolidated is filing this object independent of Eversource, versus a joint objection, given that Consolidated was not a party to the Distribution Rates Agreement and further did not participate in Docket DE 19-057. The Commission had approved of the Distribution Rates Agreement via Order No. 26,433, dated December 15, 2020 (as revised via Secretarial Letter dated December 17, 2020).

envisioned in the petition, and we look forward to working with the parties toward that end. Thank you.

Prehearing Conference Transcript, Docket DE 21-020, April 2, 2021 at ps. 35-36, lns. 17-5 (Exhibit 1).

7. Since the filing of the Joint Petition and the Prehearing Conference, there have been three rounds of extensive data requests filed on the Joint Petitioners, three technical sessions held all followed by data requests, with two additional technical sessions to follow (one technical session scheduled for Wednesday, August 18, and another proposed by the Department of Energy for a date to be determined). *See generally* Commission Order Approving of Amended Procedural Schedule, July 9, 2021, Docket DE 21-020. Not once during this discovery process has a party to the Docket suggested that the Distribution Rates Agreement actually precludes the transactions contemplated by the Joint Petitioners' Settlement Agreement.

III. LEGAL STANDARD

8. The standard for review of a motion to dismiss in New Hampshire is well settled. In addressing a motion to dismiss, "… the only issue raised is whether the allegations are reasonably susceptible of a construction that would permit recovery." *Royer Foundry & Mach. Co. v. N.H. Grey lron, lnc.*,118 N.H. 649,65I (1978). The [Commission] should assume the truth of the facts alleged in the plaintiff's Complaint and construe all reasonable inferences therefrom in the plaintiffs' favor. *See id*. If the facts as alleged would constitute a basis for legal relief, the motion to dismiss should be denied. *Id*. *See also Liberty Utilities'2017 Least Cost Integrated Resource Plan*, Order No. 26,225 (March 13, 2019) in Docket No. DG 17-152 at 5-6 (denying motion to dismiss and holding in part that "… [t]he existence of elements in Liberty's LCIRP that may conflict with statutory requirements is not a basis for dismissal before relevant facts and

arguments in the proceeding are fully developed…") (citing *Public Service Company of New Hampshire Petition for Approval of Power Purchase Agreement with Laidlaw Berlin BioPower, LLC*, Order No. 25,171 at 9 (November 17, 2010).

9. New Hampshire RSA 374:30(I) specifically exempts excepted local exchange carriers, such as Consolidated, from needing Commission approval to transfer or lease its franchise, works or system, or any part of such franchise, works, or system, exercised or located in New Hampshire. It further states that by general order, the Commission may "… 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."

10. New Hampshire 378:37 contains the statement of New Hampshire Energy Policy (emphasis added):

> The general court declares that it shall be the energy policy of this state to meet the energy needs of the citizens and businesses of the state *at the lowest reasonable cost while providing for the reliability and diversity of energy sources;* to maximize the use of cost effective energy efficiency and other demand side resources; *and to protect the safety and health of the citizens, the physical environment of the state*, and the future supplies of resources, with consideration of the financial stability of the state's utilities.

11. From Eversource's perspective, the Settlement Agreement based transactions are subject to the public good standard. The public good standard "is analogous to the 'public interest' standard . . . applied and interpreted by the Commission and by the New Hampshire Supreme Court." *Consumers New Hampshire Water Company*, 82 N.H. P.U.C. 814, *4 (1997) (applying RSA 374:30 standards to transfer from a prospective municipal water company to a prospective subsidiary of another water company) (citing *Waste Control Systems, Inc. v. State*, 114 N.H. 21 at 22, 23 (1974)). For acquisition cases, the Commission applies a "no net harm" test, rather than a "net benefits" test. *Id*. (citing *In re Eastern Utility Associates, Inc.*, 76 N.H. P.U.C. 236, 252-253

(1991)). "The test requires a finding that a transaction is one not forbidden by law and is reasonably permitted under all the circumstances of the case," and, "based upon the totality of the circumstances, there is no net harm to the public as the result of the transaction." *Id*. (quoting *Pennichuck Water Works, Inc.*, 77 N.H. P.U.C 708, 713 (1992)). Under this standard, the Commission should approve the transaction unless it finds that the transactions will have an adverse impact on the public. *See id*.; *see also Liberty Utilities (Energy North Natural Gas) Corp. d/b/a Liberty Utilities*, DG 16-770, Order No. 25,965 (2016) (finding asset purchase transaction "will do no harm" to buyer or seller's ratepayers, "and in fact will offer significant potential benefits to both").

IV. ARGUMENT

A. The Commission should deny the Motion to Dismiss and allow Eversource to seek recovery under the Joint Petition as specified in Paragraphs 7 through 10 thereof.

12. First and foremost, the Distribution Rates Agreement does not preclude the closing of the transactions contemplated by the Settlement Agreement. That agreement is specific in that it settled only those issues that arose in Docket DE 19-057. It did not purport to settle issues outside of that docket. *See* Distribution Rates Agreement, Section 18.4, Exhibit 58, Docket No. DE 19-057, at p. 34 (Exhibit 58 p. 35 of 220) ("… the Settling Parties agree to this joint submission to the Commission as a *resolution of the issues specified herein only*") (emphasis added). The phrase "specified herein only" is clear – any issues not raised in the Distribution Rates Agreement are not covered by the terms of the agreement. Moreover, the Distribution Rates Agreement does not "constitute continuing approval of, or precedent for, any particular principle or issue". *See* Distribution Rates Agreement, Section 18.5, Exhibit 58, Docket No. DE 19-057, at p. 34 (Exhibit

58 p. 35 of 220). The issues in the Joint Petitioners' Settlement Agreement clearly fall outside the scope of the Distribution Rates Agreement and are not specified therein.

13. In addition, in reviewing the facts and the Joint Petition most favorable to the Joint Petitioners, it is clear that the Settlement Agreement transactions present considerable benefits to Eversource electric ratepayers and are consistent with New Hampshire Energy Policy. The Prefiled Testimony of Mr. Lajoie establishes several operational and reliability benefits that will arise from Eversource's ownership of Consolidated's utility pole assets. The benefits include the utility poles being subjected to inspection on a scheduled basis and subjected to replacement when poles fail to meet minimum strength requirements. Eversource's responses to emergent situations and storm events also will be improved by the proposed transactions. Projects requiring pole replacement will be completed in a timelier manner, resulting in improvements in system reliability and resiliency for the benefit of Eversource's customers. All of these factors support the conclusion that the closing of the transactions contemplated by the Settlement Agreement will greatly reduce the probability that poles will fail in service as the result of adverse weather conditions or the installation of additional equipment on the poles, and that customers benefit.

14. New Hampshire's formal Energy Policy is to meet the needs of citizens and businesses of the state at the lowest reasonable cost while providing for the reliability and diversity of energy sources and to protect the safety and health of the citizens of the state. *See* RSA 378:37. The phrase "lowest reasonable cost" must be considered in the context of reliability in meeting the requirements to protect the safety and health of New Hampshire citizens. Low costs are not the end of the analysis. Lowest possible costs are not what the New Hampshire Legislature could have intended when it used the term "reasonable" in the Energy Possible. Costs must be weighed against reliability and safety issues. Here, the Settlement Agreement presents just such an

opportunity to benefit New Hampshire residents – there are low, but reasonable, costs attributable to Eversource's purchase of Consolidated's ownership interests in utility poles. These costs must be measured against the operational, reliability and overall safety benefits that are presented by the Joint Petitioners' proposed settlement. Cost recovery should be permitted and is consistent with RSA 378:37's requirement that "the financial stability of the state's utilities" is a factor to be considered when assessing impacts on the State's Energy Policy.

15. For the above reasons, the Joint Petitioners have demonstrated via their pleadings and prefiled testimony that the transactions proposed in the Settlement Agreement should be found to be just and reasonable and for the public good. The Consumer Advocate's Motion to Dismiss Petition should be denied. As with the *Liberty Utilities'2017 Least Cost Integrated Resource Plan* Docket, the Commission should deny the motion to dismiss as the existence of potential conflicts between the Settlement Agreement and the Distribution Rates Agreement is not a basis for dismissal. *See Liberty Utilities, infa* (holding in part that "… [t]he existence of elements in Liberty's LCIRP that may conflict with statutory requirements is not a basis for dismissal before relevant facts and arguments in the proceeding are fully developed…)

B. The Commission should deny the Motion to Dismiss as Section 10.6 of the Distribution Rates Agreement does not specifically preclude the transactions contemplated by the Joint Petitioners' Settlement Agreement.

16. According to the Consumer Advocate, Section 10.6 of the Distribution Rates Agreement precludes the transactions contemplated by the Joint Petitioners' Settlement Agreement and the "… very act of filing the [Joint Petition] places Eversource of in violation of the settlement agreement it signed in DE 19-057." Motion to Dismiss at p. 3. While appearing to

acknowledge the befits of the Settlement Agreement (*See id*. at p. 4), the Consumer Advocate argues (at ps. 4-5) that:

> … Eversource is obliged to pursue these things in any event, in quest of meeting the energy needs of its customers 'at the lowest reasonable cost while providing for the reliability and diversity of energy sources.' RSA 378:37. The applicable regulatory paradigm calls for Eversource to make such investments, along with appropriate adaptations and improvements to operations, within existing rates unless and until those charges are updated in a subsequent rate case.

17. Interestingly, the Consumer Advocate provides no alternative to the Settlement Agreement in terms of how Eversource could "pursue these things" in the quest to meet the terms of New Hampshire's Energy policy. Consolidated owns jointly with Eversource legal title to over three hundred thousand utility poles, plus Consolidated owns solely (as in 100% ownership) of over thirty-five hundred utility poles to which Eversource has attached its electric facilities. From a legal standpoint, Eversource cannot unilaterally take actions concerning the Consolidated owned assets without Consolidated's consent. Similarly, Eversource cannot force Consolidated to undertake measures Eversource or the Consumer Advocate deem desirable for the electric grid. The "way to pursue these things" is to negotiate an agreement with the entity that co-owns the assets. The Joint Petitioners have done just that – hence Docket DE 21-020.

18. When interpreting a contract, such as the Distribution Rates Agreement, "[a]bsent ambiguity, the parties' intent will be determined from the plain meaning of the language used in the agreement." *Behrens v. S.P. Constr. Co.*, 143 N.H. 498, 503 (2006). Ambiguity, the existence of which is a question of law for the court, is found when the parties "reasonably differ" as to the meaning of the contract term. *Id*. Where possible, the court will "… avoid construing the contract in a manner that leads to harsh and unreasonable results or places one party at the mercy of the other." Gamble, 136 N.H. at 14-15 (quoting *Thiem v. Thomas*, 119 N.H. 598, 604 (1979)).

19. The Consumer Advocate's position appears to be that Eversource cannot undertake any actions whatsoever unless those actions fit within the confines of the Distribution Rates Agreement. Such an interpretation means that Eversource cannot undertake any work that might be necessary to maintain its electric distribution system unless if first verifies that such work is permitted with the terms of the agreement. That can only lead to harsh and unreasonable results, and cannot possibly be what the parties intended in Docket DE 19-057. It also could lead to results that completely diverge from the requirements of RSA 378:37.

20. Section 10.6 of the Distribution Rates Agreement needs to be read in the context of the entire agreement. That agreement is clear that it resolved matters contested in Docket DE 19-057. Nowhere is it stated in the agreement that Eversource is barred from undertaking activities it believes to be in the best interests of the electric distribution grid and/or ratepayers simply because such actions are not specifically listed in the agreement. That would lead to unreasonable results.

21. While Consolidated respectfully believes the consumer Advocate's motion should be denied in all respects, in the event the Commission agrees with the Consumer Advocate's interpretation of Section 10.6 of the Distribution Rates Agreement, then the Commission also should determine that said agreement permits the transactions contemplated by the Settlement Agreement with only the timing of those transactions being at issue. Capital costs associated with plant placed in service outside of certain specified "step adjustments" "… shall be based on a test year ending no sooner than December 31, 2022, and which shall be filed no earlier than the first quarter of 2023." This language allows the capital costs of the Settlement Agreement to be worked into test year ending no earlier than December 2022 to be filed in Eversource's related rate case.

V. CONCLUSION

22. For the foregoing reasons, Consolidated respectfully requests that the Commission deny the Consumer Advocates' Motion to Dismiss Petition.

Dated: August 16, 2021

Respectfully submitted,

CONSOLIDATED COMMUNCIATIONS OF NORTHERN NEW ENGLAND COMPANY, LLC D/B/A CONSOLIDATED COMMUNICATIONS

By its Attorneys,

/s/ Patrick C. McHugh
Patrick C. McHugh
Consolidated Communications
770 Elm Street
Manchester, NH 02101
(603) 591-5465
Patrick.mchugh@consolidated.com

/s/ Sarah Davis
Sarah Davis
Consolidated Communications
5 Davis Farm Rd.
Portland, ME 04103
(207) 535-4188
Sarah.davis@consolidated.com

CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached to be served on the parties to Docket DE 21-020 via the Service List on file with the Commission.

August 16, 2021
Date

/s/ Patrick C. McHugh
Patrick C. McHugh

EXHIBIT ONE

PREHEARING CONFERENCE TRANSCRIPT PAGES

In Re:

DE 21-020 EVERSOURCE ENERGY AND CONSOLIDATED COMMUNICATIONS JOINT PETITION TO APPROVE POLE TRANSFER

PREHEARING CONFERENCE

April 2, 2021

SUSAN J. ROBIDAS, N.H. LCR

30 James Pollock Drive

Manchester, New Hampshire 03102

(603) 540-2083

shortrptr@comcast.net

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been made to Consolidated must be properly accounted for. In addition, both Eversource and Consolidated should commit to maintaining adequate resources to support application, survey and make-ready work on a timely basis for all attachers: Eversource for the poles they are acquiring and Consolidated for the poles they will continue to own after the transfer.

Lastly, regarding competitive issues. NECTA has concerns about how this transaction impacts competitive issues. After the transfer, Consolidated must be treated like any other third-party attacher with respect to pole rates and attachment applications. NECTA should be allowed to fully investigate this issue and would urge the Commission to ensure that the rates that Consolidated will pay Eversource for Consolidated's pole attachments on these poles are just, reasonable and non-discriminatory. Consolidated should receive no preferential treatment as a result of this pole transfer that would result in

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competitive harm to NECTA's members. For example, because the filing indicates that the pole fees paid by Consolidated to Eversource for the next two years will remain the same, NECTA submits that all pole attachers' rates should remain the same as they currently are for the next two years.

NECTA appreciates the opportunity to provide these comments and looks forward to exploring its issues with the parties in the upcoming technical session. Thank you.

CHAIRWOMAN MARTIN: Thank you, Ms. Geiger.

And Ms. Shute.

MS. SHUTE: Thank you, Chairwoman Martin.

The OCA is not taking a specific position at this time on the petition before us. We believe there are real advantages, but also disadvantages that would accrue to residential ratepayers with approval of this transaction. We do very much look forward to exploring those issues further with the parties. We do believe that there could be a

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productive Settlement Agreement that could further meet the needs of ratepayers than is currently envisioned in the petition, and we look forward to working with the parties toward that end. Thank you.

CHAIRWOMAN MARTIN: Thank you, Ms. Shute.

Mr. Buckley.

MR. BUCKLEY: Thank you, Madam Chair.

Staff is still evaluating the issues presented in the joint petition and therefore withholds judgment on those issues at this prehearing conference. Nonetheless, we take this opportunity to highlight for the Commission some of the issues we intend to examine for the duration of the proceeding.

While Staff sees truth in the companies' assertions that there may be reliability, maintenance and operational efficiency savings that could result from the transfer and accrue to Eversource's ratepayers, it is unclear to Staff whether those benefits, almost all of which are

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described only qualitatively in the petition, justify the increase in revenue requirements that would result from the Commission's approval of this transfer. We look forward to reviewing the values of those benefits with the petitioners.

Similarly, we look forward to reviewing the purchase price and other terms negotiated by the companies, the pole inspection and replacement schedules proposed, the CCI vegetation management settlement terms, the CCI attachment rates for the first two years, the basis for attachment rates paid pay CCI during the first two years following the transfer, and potential impacts to attachment rates paid by others, the status of CCI's solely-owned poles, and the exclusion of the so-called "dual poles" from the proposed transfer.

Also, it is unclear to Staff whether the Company's proposal to recover costs through the recently approved regulatory reconciliation adjustment, the RRA mechanism, is appropriate in light of the