

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 21-020

EVERSOURCE ENERGY AND CONSOLIDATED COMMUNICATIONS

Joint Petition to Approve Pole Asset Transfer

**Order on Motions for Rehearing and/or Clarification of
Order No. 26,729, and Motion to Strike**

ORDER NO. 26,772

February 8, 2023

In this order, the Commission denies New England Connectivity and Telecommunications Association's motion for rehearing of Order No. 26,729, and clarifies certain aspects of that Order including the applicability and calculation of the net book value that Eversource would impute for the transferred utility poles and assets.

I. PROCEDURAL HISTORY

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) (together, the Joint Petitioners) filed a Joint Petition for Pole Asset Transfer. On November 18, 2022, the Commission issued Order No. 26,729 (Order), the final order on the petition.

Following issuance, an intervenor in this proceeding, New England Connectivity and Telecommunications Association, f/k/a the New England Cable and Telecommunications Association (NECTA), timely filed a "Motion for Rehearing and/or Clarification of Order No. 26,729" (Motion). NECTA's Motion challenges the Order based on five grounds: (1) misapplying the law governing review of the transaction; 2) failing to decide the rates Eversource proposes to charge for attachments to the

transferred poles are just and reasonable; 3) failing to specify the regulatory net book value recommended by NECTA must apply to Eversource's pole attachment rate calculations; 4) failing to decide whether the pole attachment rates charged by Eversource to Consolidated discriminated against other attachers; and 5) failing to adopt NECTA's recommendations for service, billing and application processing requirements.

In response, the Joint Petitioners filed an "Objection to New England Cable and Telecommunications Association, Inc.'s Motion for Rehearing and or Clarification" (Objection). This Objection countered that rehearing was unnecessary and sought "confirmation" of whether the Joint Petitioners applied the appropriate proportion of Consolidated's poles to be transferred in calculating imputed value. The Objection included an attachment – Attachment A – in support of the proportion of Consolidated's poles to be transferred in calculating imputed value.

NECTA subsequently filed a "Motion to Strike Attachment A to Joint Petitioners' Objection and Objection to Joint Petitioners' Request for Approval of Net Book Value Calculation" (Motion to Strike and Objection). The Joint Petitioners again responded, filing an "Objection to New England Cable and Telecommunications Association Motion to Strike."

On January 13, 2023, the Commission issued Order No. 26,759, suspending the final order on the petition pending further consideration of the issues raised in these filings. These filings and the Commission's orders are posted in the docket of this proceeding, which is publicly available at:

<https://www.puc.nh.gov/Regulatory/Docketbk/2021/21-020.html>.

II. STANDARD OF REVIEW

a. Motions for Rehearing

The standard for seeking rehearing of Commission final orders is described in statute, with objection practice addressed in administrative rule. Under RSA 541:3, any party or interested person may seek rehearing of a final order by filing a motion within 30 days of any order or decision. The Commission may grant rehearing or reconsideration for “good reason” if the moving party shows that an order is unlawful or unreasonable. *See* RSA 541:3 and RSA 541:4. A successful motion must establish “good reason” by showing that there are matters that the Commission “overlooked or mistakenly conceived in the original decision,” *Dumais v. State*, 118 N.H. 309, 311 (1978) (quotation and citations omitted), or by presenting new evidence that could not have been presented at the hearing. *See Appeal of Gas Service Inc.*, 121 N.H. 797, 801 (1981).

N.H. Code Admin R. Puc 203.07(f) provides that objections to a motion for rehearing pursuant to RSA 541:3 shall be filed within 5 days of the date on which the motion for rehearing is filed; otherwise, pursuant to Puc 203.07(e), objections to motions are due within 10 days of the date on which the motion is filed. No provision for replies to objections is contained in statute or rule.

b. Motions for Clarification

The legal standard for granting a motion seeking clarification of Commission orders is not addressed in statute, rule, or binding precedent apart from rules applicable to declaratory rulings. *See* Puc PART 207. In practice, motions for clarification often seek alternate and concurrent relief in the same pleading as a motion for rehearing and are addressed concurrently with motions for rehearing. The Commission has, however, previously parsed these two forms of relief. *See, e.g.*, Order Nos. 26,149 (June 22, 2018) and 26,156 (July 10, 2022) in Docket No. DG 17-048 (addressing separately but concurrently filed motions for clarification and rehearing as

distinct matters). Historically, the Commission provides clarification when “the Commission’s intent has not been made sufficiently clear and where evidence exists in the record to support the Commission’s intent.” *N.H. Gas Corp.*, Order No. 24,127 at 3 (February 14, 2003)).

III. COMMISSION ANALYSIS

a. Preliminary Matters Related to the Filings

NECTA’s Motion contains requests for rehearing and/or for clarification. The Joint Petitioners’ Objection is an objection to NECTA’s Motion, as well as a new request for “confirmation” to which the newly filed Attachment A relates. The Joint Petitioners do not claim that the new attachment is new information; rather the Joint Petitioners concede in their objection to NECTA’s Motion to Strike and Objection that the attachment is duplicative of record evidence. As suggested by the Joint Petitioners in their objection to NECTA’s Motion to Strike and Objection, we construe this request as a motion for clarification, which is not *per se* barred by RSA 541:3’s 30-day deadline. We decline to consider the new attachment because it is not accompanied by a motion to reopen the record, is not new evidence unavailable at hearing, and its proponents concede that it is cumulative.

b. Legal Standard Applied to the Proposed Transfer

We deny NECTA’s motion for rehearing on the statutory standard that must govern the proposed transfer of utility poles. NECTA asserts that the Commission mistakenly applied RSA 374:30, II to the transaction. NECTA argues that the Commission misapplied the law because such statutory provisions fundamentally cannot apply to the transaction’s transferee (Eversource). Specifically, NECTA asserts that the Commission’s analysis overlooks RSA 374:30, II, which requires a finding that the obligations of RSA 362:8 and RSA 374:22-p can be met by the transferee (here,

Eversource). NECTA further argues that because the transferee in this case cannot meet those obligations, the transaction cannot be reviewed under this statutory provision.

We find this argument unpersuasive. It is uncontested that RSA 374:30, II applies to transfers by incumbent local exchange carriers (ILECs) that are excepted local exchange carriers (ELECs). In this case, Consolidated is such an ILEC-ELEC. The statute does not require the entity that the ILEC-ELEC is transacting with be an ILEC or an ELEC. Rather, it requires that the other side of the transaction be a *utility*. Nor does the statute require the Commission impose the obligations of an ILEC. The statute only requires we find the transferee utility is “technically, managerially, and financially *capable* of maintaining the obligations of an [ILEC] set forth in RSA 362:8 and RSA 374:22-p.” RSA 374:30, II (Emphasis added).

In applying this standard to the transaction at issue, the Commission noted that the proposed transfer would not change Consolidated’s obligations under RSA 362:8 and RSA 374:22-p. Further, the utility transferee (Eversource) would not gain or lease portions of the ILEC-ELEC’s works or system to an extent that the specific telecommunications-related obligations set forth in RSAs 362:8 and 374:22-p would be applicable to the transferee. Upon review, the only specific ILEC obligation this transaction imposes on the transferee is to maintain the utility poles and pole assets in a manner that ensures reasonably safe and adequate utility services. This is an obligation that the Commission found Eversource to be technically, managerially, and financially capable of maintaining.

Assuming, *arguendo*, NECTA is correct regarding the misapplication of RSA 374:30, II, our review under RSA 374:30, I does not yield a different result. If RSA 374:30, I is the appropriate statutory provision under which to review this transaction,

the Commission disagrees that the public good standard applies. The public good standard does not apply because of the exemptions contained in RSA 374:30, I.

The first exemption is based on the transferor's status as an ELEC. NECTA's assertion that the transaction be subject to the "public good" standard under RSA 374:30, I runs afoul of the clear statutory exemption for transactions by ELECs contained within RSA 374:30, I. Under this provision, Commission approval is not required for any such transfer, lease, or contract by an ELEC. Consolidated is an ELEC as defined in New Hampshire law. Under RSA 362:7, I(c)(1) an "excepted local exchange carrier " means "an incumbent local exchange carrier providing telephone services to 25,000 or more lines."

For the purposes of RSA 374:30, I, Consolidated is an ELEC. To find that the public good standard applies to this transaction would necessitate an analysis that is subject to the same flaw NECTA argues requires rehearing, i.e., "failing to give meaning to all of the words in the statute." Motion for Rehearing at 4. Consolidated is, definitionally, an ILEC operating as an ELEC, which is a specific type of ELEC. So, if RSA 374:30, II does not apply to the transaction and the Commission held RSA 374:30, I to apply, the transaction could be consummated without Commission approval. It would therefore be inappropriate to review under the public good standard.

Further, RSA 374:30, I's second exemption is based on the object of the transfer: utility-to-utility interests in utility poles for the purposes of joint use. NECTA argues that Consolidated's solely owned poles (approximately 3800 poles) do not qualify under this standard. Motion at 5. However, RSA 374:30, I's second exemption and the Commission's general orders implementing it (Order Nos. 4479 and 7676 as

referenced in the Order at page 13), are not limited to *ownership* interests. Rather, the statute and Commission precedent also expressly apply to leases of assets.

As such, we do not agree that NECTA demonstrated that the Commission's legal interpretation in the order is unlawful, unreasonable, or prevented the correct result. We find NECTA raises no matters that the Commission overlooked or that were mistakenly conceived on this issue. NECTA's request for rehearing is denied.

c. Pole Attachment Rate and Service Issues

1) Net Book Value

NECTA and the Joint Petitioners seek clarification related to the net book value of the transferred poles. Both NECTA and the Joint Petitioners recognize the Order specified a methodology for calculating a net book value for the utility poles and pole assets subject to the transaction. NECTA, however, seeks clarification that this formula for calculating the net book value is to be used for purposes of calculating Eversource's pole attachment rates when it ceases charging Consolidated's rates and begins charging a unified rate that reflects inclusion of the transferred poles. The Joint Petitioners expressly disclaim requesting reconsideration of the issue of net book value, but seek "confirmation of *what the net book value is based on under the Order as it stands.*" Objection to NECTA's Motion to Strike and Objection at 3 (emphasis original).

Based on Commission practice and the standard for clarification above, we clarify that the Order determined that the calculated net book value would be used for future ratemaking purposes, including for the calculation of future pole attachment rates. See Order at 15 and 16. We note the Joint Petitioners do not dispute this interpretation. Objection at 9.

In response to Eversource's request for confirmation of the proportion of poles used to calculate the imputed net book value, we clarify that the Order referenced .6964 (69.64 percent) as the correct proportion of utility poles and associated assets to be transferred. In making this determination, the Commission relied on record evidence and determined that 69.64 percent was better substantiated than 75 percent. Specifically, the Commission reviewed Exh. 14 at Bates pages 17–18 and 30, and Exh. 39 at 14. Contrary to the Joint Petitioners' argument, the Commission does not agree that NECTA's witness relied on the 68 percent figure provided in discovery, which Consolidated corrected to 75 percent. 69.64 percent is the result of dividing the equivalent number of sole poles identified in the Joint Petition by Consolidated's total equivalent pole figure provided in the 2020 ARMIS report¹ produced for the Commission in this matter. This 2020 report listed 251,845 equivalent poles, a figure that is consistent with Consolidated's last ARMIS report filed with the FCC for calendar year 2017, which listed 251,720 equivalent poles².

In light of the above, we grant both NECTA's and the Joint Petitioners' requests for clarification regarding net book value and its application. But we find no reason to hold the Order unlawful or unreasonable. As a result, any request in the alternative for rehearing of this issue is denied.

2) Just and Reasonable Pole Attachment Rates Based on
Consolidated's Existing Pole Attachment Agreements

We deny NECTA's motion for rehearing of the determination not to address questions related to Consolidated's existing pole attachment agreements in this proceeding.

¹ Exh. 46 at Bates page 1, line 601.

² Exh. 47 at Bates page 10, line 601.

While the Order does not address whether Consolidated's existing pole attachment rates would be unjust and unreasonable for Eversource to charge, the Order states we understand the purchase and sale agreement to "transfer, assign and set over" to Eversource Consolidated's interests in attachment fees. Order at 20–21. The Order holds Consolidated can only transfer to Eversource its actual interests in its pole attachment fees, which may be impacted by a separate regulatory proceeding.

Addressing NECTA's request for rehearing, we are not convinced that NECTA made a showing that the Order was unlawful, unreasonable, or that evidence was overlooked or misconstrued. As a matter of procedure, NECTA argues rehearing is warranted because the Commission must issue a final order on all matters presented to it and such an order must include a decision on each issue. NECTA asserts it has made the justness and reasonableness of Consolidated's pole attachment rates an issue in this proceeding and therefore the Commission must rule on this issue. Further, NECTA asserts that Commission's RSA 541-A:31, III notices were sufficient to provide the Joint Petitioners notices that Consolidated's pole attachment rates would be litigated in this proceeding. NECTA states that even if the Commission's notice lacked specificity, the Joint Petitioners were provided sufficient actual notice to render due process concerns meaningless. Taken together, NECTA argues the Commission's refusal to opine on the justness and reasonableness of Consolidated's rates is unreasonable and unlawful.

The New Hampshire Administrative Procedure Act, RSA Ch. 541-A, provides that all parties in a contested case are entitled to notice that includes "reference to the *particular sections* of the statutes and rules involved." RSA 541-A:31, III(c) (emphasis added). At no point did the Commission issue notice to the parties that a pole attachment rate dispute would be adjudicated in this proceeding. We note NECTA's

members are seeking alternative relief from the Commission for excessive pole attachment rates in a separate Commission proceeding, Docket No. DT 22-047. These proceedings were not consolidated under N.H. Admin. R. Puc 203.19 and have remained separate throughout. Despite NECTA's assertions to the contrary, it cannot supplant the Commission and control the scope of a particular adjudicative proceeding.

Moreover, we did not leave this issue unaddressed in violation of our obligation to issue a comprehensive final order. The Order found the issue of Consolidated's rates to be beyond the scope of this proceeding and provided the reasoning for this determination. Last, we find the argument that it is unreasonable or unlawful to adhere to RSA 541-A:31, III(c)'s notice requirements unpersuasive, and that a pole attachment rate dispute must be specifically noticed.

Substantively, NECTA asks the Commission to answer the question whether it would be just and reasonable for Eversource to charge Consolidated's existing pole attachment rates if the transaction is consummated. NECTA argues that if the Commission were to apply the Federal Communication Commission's Cable Rate Formula to Consolidated based on Consolidated's books and records pursuant to Puc 1303.06(a)(5), that Consolidated's existing rate agreements would be unjust and unreasonable.

Assuming, *arguendo*, that Consolidated's existing pole attachment rates are unjust and unreasonable for Consolidated to charge, it does not necessarily follow that Eversource's total rate recovery from pole attachment fees would also be unjust and unreasonable. Eversource, the transferee, is to become the pole owner. If the transaction occurs, Eversource's total rate recovery will be based on the combined revenues of Eversource's pole attachment agreements and the transferred pole

attachment agreements, i.e., the agreements previously negotiated by Consolidated. Therefore, to examine the appropriateness of the rates requires evaluation of Eversource's capital structure and expenses. NECTA's argument relies on the evaluation of the wrong utility's capital structure and expenses.

Moreover, under the Commission's rules, pole attachment rates are set in the first instance through private negotiation, and only subject to Commission rate setting upon complaint. Puc 1303.01 places the burden of proving that an existing agreement is not just, reasonable, and nondiscriminatory on the party making the complaint. Puc 1303.06(a) contains five factors other than the formulae incorporated by Puc 1303.06(a)(5) that the Commission would need to consider in setting just and reasonable rates. Puc 1303.06(a)(3), for example, would require the Commission to consider the potential impact on the pole owner and its customers.

The Order approved operation of the Pole Plant Adjustment Mechanism (PPAM) to collect increased expenses related to pole ownership as a result of this transaction, a determination that is not challenged on rehearing. *See* Order at 17–19. The PPAM, *see generally* Exh. 70, anticipates significant spending, operations, and maintenance expenses in the transitional years following the proposed transaction. The PPAM allows Eversource to recover these incremental expenses from Eversource's ratepayers, offset by incremental pole attachment revenues that Eversource will collect based on Consolidated's current agreements. *Id.* Therefore, any reduction to the rates Eversource would collect from NECTA's members based on Consolidated's existing agreements would necessarily have a direct adverse impact on Eversource's ratepayers.

In light of the above, we maintain that NECTA's rate dispute with Consolidated is not properly before the Commission in this asset transfer docket. NECTA's Motion

fails to show our determination not to address this issue was in error. We deny NECTA's request for rehearing.

3) Transitional Rates for Consolidated

With respect to the negotiated \$5 million flat fee that Consolidated will pay Eversource for pole attachments during the first two years following the transaction, we do not agree that NECTA stated good reason to grant rehearing. This flat negotiated fee is a negotiated term for a transitional period, akin to a joint use lease. As stated in the Order at page 20, Consolidated's actual number of pole attachments on the utility poles identified in this transaction are not known by either of the Joint Petitioners. We further note Exh. 57 (stating that if rates were calculated based on Eversource's 2020 solely owned pole rate and an estimated number of Consolidated attachments, that an annual bill would be approximately \$5,047,374).

4) NECTA's Proposed Conditions

Finally, we decline to grant rehearing related to NECTA's request that the Commission impose service, billing, and pole attachment operational conditions that were assented-to, as well as NECTA's service, billing, and pole attachment operational conditions that were not assented-to. NECTA's arguments are expressly linked to the public good standard. As the Commission did not grant rehearing on this standard, NECTA's requests for rehearing or clarification of this issue are denied.

Notwithstanding, we note the Joint Petitioners ongoing pledge to work cooperatively with NECTA members if the transaction is finally consummated, with due consideration to any commitments made by the Joint Petitioners during the course of this proceeding.

Based upon the foregoing, it is hereby

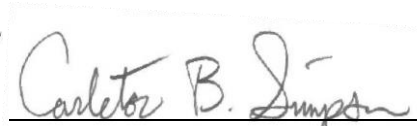
ORDERED, that New England Connectivity and Telecommunications Association's requests for rehearing are DENIED; and New England Connectivity and Telecommunications Association's requests for clarification are GRANTED IN PART as discussed above; and it is

FURTHER ORDERED, that 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 request for clarification is GRANTED as discussed above; it is clarified that the proportion of poles to be used in calculating an imputed net book values is 69.64 percent; and it is

FURTHER ORDERED, that New England Connectivity and Telecommunications Association's Motion to Strike Attachment A to Joint Petitioners' Objection is DENIED as MOOT.

By order of the Public Utilities Commission of New Hampshire this eighth day of February 2023.


Daniel C. Goldner
Chairman


Carleton B. Simpson
Commissioner

Service List - Docket Related

Docket#: 21-020

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