

**STATE OF NEW HAMPSHIRE**

**Before the**

**PUBLIC UTILITIES COMMISSION**

**Docket No. DT 22-047**

**CHARTER COMMUNICATIONS, INC., COGECO US FINANCE, LLC  
d/b/a BREEZELINE, AND COMCAST CABLE COMMUNICATIONS, LLC  
Petition for Resolution of Rate Dispute**

**CONSOLIDATED COMMUNICATIONS OF NORTHERN NEW ENGLAND  
COMPANY, LLC'S  
RESPONSE TO PROCEDURAL ORDER RE: ADDITIONAL BRIEFING**

NOW COMES, Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications – NNE (“Consolidated”) and hereby respectfully responds to the Procedural Order Re: Additional Briefing, dated March 31, 2023 (the “Procedural Order”) issued by the New Hampshire Public Utilities Commission (the “Commission”), and further responds to the claims in the Petitioners’ Response, dated April 11, 2023. In support hereof, Consolidated hereby states as follows:

1. On March 31, 2023, the Commission issued its Procedural Order and ordered the Petitioners to clearly identify the proposed newly discovered evidence they seek to introduce; the relevance and probative value of the proposed evidence; and why the evidence could not have been introduced prior to the Commission’s final order. It ordered Consolidated to submit a reply brief as to (1) the admissibility of the proposed evidence, including relevance and materiality; and (2) whether, if the Commission were to accept the Petitioners’ proposed evidence into the record, an opportunity to submit a document impeaching or rebutting late-filed exhibits without

further hearing would adequately protect Consolidated's right to cross-examination under RSA 541-A:33, IV, or whether an additional hearing must be scheduled.

2. The Commission can "reopen the record" and authorize the filing of exhibits after the close of a hearing only if it finds that late submission of additional evidence will "enhance its ability to resolve the matter in dispute." N.H. Admin. R. Puc 203.30(a). When determining whether to admit a late filed exhibit into the record, the Commission considers two factors: (1) the probative value of the exhibit; and (2) whether the opportunity to submit a document impeaching or rebutting the late filed exhibit without further hearing would adequately protect the parties' right to cross examination. N.H. Admin. R. Puc 203.30(c)(2). Importantly, the Commission's obligation to exclude irrelevant, immaterial, or unduly repetitious evidence applies to late filed exhibits. N.H. Admin. R. Puc 203.23(d).

3. Here, the Petitioners have proposed two exhibits for late entry into the record. The first is an article from Consolidated's website announcing that Consolidated has been awarded \$40 million in American Rescue Plan Act ("ARPA") grant funds to aid in building fiber to 57,000 homes in New Hampshire. The second is the grant contract between Consolidated and the New Hampshire Department of Business and Economic Affairs ("NHBEA"). The Petitioners contend that "[t]he ARPA grant provides Consolidated with a significant competitive advantage over Petitioners who must invest their own funds to deploy broadband;" that the grant "bears directly on the issues of broadband deployment, competition, and ultimately on Consolidated's pole rates;" and that, therefore, the broadband deployment factor supports a reduction in CCI's current rates. *See* Petitioners' Motion for Rehearing/Reconsideration and Request for Oral Hearing ("Motion for Rehearing"), p. 32.

4. The Petitioners argue that the proposed new evidence is relevant to four of the six factors that the Commission considered when determining that Consolidated's pole attachment rates were fair and reasonable: the rates' impact on competitive alternatives; the potential impact on the pole owner and its customers; the potential impact on the deployment of broadband services; and the formulae adopted by the FCC in 47 C.F.R. § 1.1406(d). *See* Petitioners' Response to Procedural Order re: Additional Briefing, pp. 3-4; N.H. Admin. R. Puc 1303.06(a). In its Procedural Order, however, the Commission appears to have stated that the grant could only be potentially relevant to the "potential impact on the deployment of broadband services" factor in N.H. Admin. R. Puc 1303.06(a)(4). *See* Procedural Order, p. 1.

5. The exhibits proposed by the Petitioners are inadmissible because they have no probative value and, therefore, they will not enhance the Commission's ability to resolve the matter in dispute. As stated in the Petitioners' first proposed exhibit, construction on the project is expected to begin at the end of 2023, and expected to be largely completed by the end of 2024.<sup>1</sup> Moreover, the agreement with NHBEA is explicitly conditional and contingent upon "the availability and continued appropriation of funds affected by any state or federal legislative or executive action that reduces, eliminates or otherwise modifies the appropriation or availability of funding for this Agreement." Petitioners' Response, Attachment 2, Section 4, PDF p. 9 of 34. The conditional availability and appropriation of grant funds to help fund fiber-to-the-home service has absolutely no bearing on the fairness and reasonableness of Consolidated's current pole attachment rates. Assuming funding remains available, construction of the project will be completed between 20 months from the present time to potentially over 3.5 years from now. The

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<sup>1</sup> While Consolidated's expectation is that it will complete the project by the end of calendar year 2024, the grant agreement allows Consolidated to complete the project by the end of calendar year 2026. *See* Petitioners' Response, Attachment 2, Scope of Services bullet 4, PDF p. 13 of 34.

Petitioners are attempting to manufacture a prospective, speculative impact on competitive offerings. However, the grant's impact on current competitive alternatives is nonexistent. *See New Hampshire Telephone Association; Petition for an Investigation into the Regulatory Status of IP Enabled Voice Telecommunications Services*, 2011 N.H. PUC LEXIS 86, \*6; Order No. 25,288, at p. 4 (Nov. 10, 2011) (accepting NHTA's argument that "because the information provided by Comcast concerned prospective offerings, the information by definition cannot be the record of any proceeding related to the current nature of its service offering" and noting that there is "nothing in the submissions that alters [the PUC's] opinion about the nature of Comcast's service or the prospective nature of its offerings.").

6. The Commission also should not consider exhibits related to the grant funds received by Consolidated because they are wholly irrelevant and immaterial to the issues raised in the Parties' pleadings and reviewed during the hearing. The Commission issued a reasoned decision based on its evaluation of the Parties' evidentiary submissions and witness testimony. It evaluated, as it was required to, the impact of Consolidated's rates on competitive alternatives at the time of the hearing. The grant's potential impact on market penetration for Broadband and other competitive offerings is merely hypothetical at this point. It will only be subject to reasonable evaluation several years after construction is completed, whenever that may be. Therefore, the grant has no bearing on any of the issues that were before the Commission during the hearing. *See Kearsarge Telephone Co., Wilton Telephone Co., Hollis Telephone Co. and Merrimack County Telephone Co.; Petitions for Approval of Alternative Form of Regulation; Order Regarding Joint Settlement Agreement*, 2008 N.H. PUC LEXIS 35, \*49, Order No. 24,852 (Apr. 23, 2008), at p. 30 ("[a]s for Staff's motion to reopen the record and to take administrative notice of the Comcast CLEC application, our findings in this order are based upon the evidence

presented at hearing and the availability of competitive alternatives at that time.”) (emphasis added).

7. The Petitioners argue that the “grant award, coupled with excessive pole attachment rates, impacts competition, Consolidated and its customers, and broadband deployment in New Hampshire.” Petitioners’ Response, p. 4. The Petitioners’ statement claims that the subject pole attachment rates are “excessive,” even though the Commission specifically ruled that they are not. Perhaps more importantly, the Petitioners repeat the conclusory statement that the grant “impacts competition” without any explanation of why or how competition is presently impacted by Consolidated’s being awarded grant funds to construct Broadband capable facilities that (i) presently do not exist and (ii) will not be completed any time soon. *Lakes Region Water Company, Inc.; Petition for Emergency Rates*, 2013 N.H. PUC LEXIS 123, \*7-8, Order No. 25,557 (Aug. 2, 2013), at p. 5 (“A successful motion for rehearing does not merely repeat prior arguments and request a different outcome.”).

8. Consolidated also notes that when it attempted to conduct discovery on the very issue placed in dispute by the Petitioners’ request to reopen the record, the Petitioners refused to provide any evidence on the matter. *See Consolidated’s Motion to Reopen the Evidentiary Record on a Limited Basis*, February 9, 2023. Consolidated sought discovery on the Petitioners’ investment in Broadband in communities currently served by the Petitioners. Yet the Petitioners refused to provide such information. The Commission should not now allow the Petitioners to reopen the record to conduct discovery against Consolidated related to future Broadband penetration scenarios (several years into the future) when they refused to provide any such information on the state of their respective Broadband networks or other information which specifically addressed how a reduction in Consolidated’s pole attachment rates would affect “the

impact on competitive alternatives” or “the potential impact on the deployment of broadband services” N.H. Admin. R. Puc 1303.06(a)(2) and (4). In other words, the Petitioners prevented Consolidated from developing a factual record on the same issue which they now claim warrants re-opening the record. Consolidated submits that the Petitioners have waived, or should be estopped from asserting, such an argument.<sup>2</sup> *U.S. Fidelity & Guaranty Corp. v. Kancer*, 108 N.H. 450, 452 (1968) (“Waiver is the voluntary relinquishment of a known right, and may be found from action, inaction, or statements[.]”); *In re Perkins*, 147 N.H. 652, 655 (2002) (“Estoppel precludes one party from asserting a position contrary to one previously taken when it would be unfair to allow the party to do so.”)

9. Nor can Consolidated meaningfully cross-examine a witness who can speak with any expertise or authority on how the Petitioners’ proposed exhibits would impact the deployment of Broadband services. The pole attachment rate administrative rule applies to determining just and reasonable rates for the pole attachments of cable television service providers, wireless service providers, and excepted local exchange carriers that are not incumbent local exchange carriers. N.H. Admin. R. Puc 1303.06(a). No fact witness from any of the Petitioners addressed, in discovery or during the hearing, how lower pole attachment rates could lead or potentially would lead to expanded Broadband services or otherwise impact the competitive landscape in their respective service territories. And the Petitioners do not attempt to explain the issue in their Response to the Procedural Order. Any testimony on the state of Broadband penetration 2 to 3 (or 4) years from now directly tied to the award of grant funds would be speculative and would be based on nothing of substance. Certainly no witnesses from

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<sup>2</sup> To the extent that the Commission construes the Petitioners’ Motion for Rehearing as a request to conduct additional discovery on the impact of Consolidated’s rates on competitive alternatives or Broadband deployment, Consolidated objects on the same basis.

the Petitioners could be cross-examined when (i) there is no evidence in the record related to any of the Petitioners' deployment of Broadband or other competitive services and (ii) the Petitioners refused to provide such information during discovery.

10. NH RSA 541-A:33(IV) requires a party to be able to conduct cross-examination "... required for a full and true disclosure of the facts." In their Motion for Rehearing, the Petitioners' claim that "... the ARPA grant provides Consolidated with a significant competitive advantage over Petitioners who must invest their own funds to deploy broadband ..." Motion at p. 32. But there is no evidence in the record from any of the Petitioners in any way related to the Petitioners' funding of Broadband deployment, or even if the Petitioners' in fact are currently expanding or intend to expand Broadband deployment in the future, or in what New Hampshire communities the Petitioners provide Broadband services. There is no evidence in the record in any way related to whether lower pole attachment fees will have a potential impact on competitive alternatives available from each of the Petitioners. Therefore, Consolidated cannot cross-examine any witness from the Petitioners<sup>3</sup> in a manner which might allow for a full and true disclosure of the facts regarding these issues. Consolidated submits that such cross-examination is an impossible task based on this record and the two documents submitted by the Petitioners do not change anything in this regard. *State v. Stanin*, 169 N.H. 209, 215 (2016) (noting that "without any record of what [the defendant] would have said, [the court] cannot review the relevance and appropriateness of a hypothetical cross-examination on a particular subject.")

11. Finally, Petitioners' submission in response to the Commission's Procedural Order attempts to re-litigate issues that have already been decided, and to which the proposed

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<sup>3</sup> Indeed the Petitioners offered no such witnesses; therefore, it stands to reason that there is no witness to cross-examine.

new evidence has no logical link. For example, Petitioners claim that Consolidated's receipt of the grant "highlights the need for using the FCC's cable rate formula" because it is "cost-based, fully compensatory, and does not involve examination of external factors such as grant awards." Petitioners' Response, p. 5. This claim ignores all but one of the requirements of N.H. Admin. R. Puc 1303.06, an administrative rule expressly requiring the review of multiple factors as listed therein. Moreover, the Commission already has found that Petitioners failed to meet their burden of proving by a preponderance of the evidence that Consolidated's pole attachment rates are unjust and unreasonable. There has already been a decision on the merits on that issue. The receipt of grant funds simply does not allow Petitioners to re-argue this issue beyond the narrow question of how the grant award impacts Consolidated's current pole attachment rates vis-a-vi the deployment of Broadband services. *See Electric and Gas Utilities; 2021-2023 Triennial Energy Efficiency Plan*, 2021 N.H. PUC LEXIS 77, \*2, Order No. 26,513 (Sept. 1, 2021), at p. 2 (noting that the purpose of N.H. Admin. R. Puc 203.30 is to "allow for the re-opening of a record prior to the issuance of a decision on the merits to receive relevant, material, and non-duplicative evidence necessary for a full and fair consideration of the issues.")

WHEREFORE, Consolidated respectfully request that this honorable Commission:

- A. Deny the Petitioners' Motion for Rehearing in its entirety; and
- B. Grant any other such relief as it deems appropriate.



Respectfully Submitted by

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

By its Attorneys,

April 18, 2023

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**Certificate of Service**

I hereby certify that on April 18, 2023, this response to the Commission's Procedural Order has been electronically provided to the service list in this docket.

/s/ Patrick C. McHugh  
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