**STATE OF NEW HAMPSHIRE**

**Before the**

**PUBLIC UTILITIES COMMISSION**

**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**

# PETITIONERS' OBJECTION TO CONSOLIDATED'S MOTION FOR REHEARING/RECONSIDERATION OF THE COMMISSION'S ORDER DENYING CONSOLIDATED'S MOTION TO DISMISS (ORDER NO. 26,764) AND PARTIAL RECONSIDERATION OF ORDER NO. 26,775

NOW COME Charter Communications, Inc. ("Charter"), Cogeco US Finance, LLC d/b/a Breezeline ("Breezeline"), and Comcast Cable Communications, LLC ("Comcast") (collectively, "the Petitioners"), and object to the Motion for Rehearing/Reconsideration of the Commission's Order Denying Consolidated's Motion to Dismiss (Order No. 26,764) and Partial Reconsideration of Order No. 26,775 ("the Motion") filed by Consolidated Communications of Northern New England Company, LLC ("Consolidated") in the above-captioned docket by stating as follows:

## I. PROCEDURAL BACKGROUND

1. Petitioners filed a Petition for Resolution of Rate Dispute ("the Petition") on August 22, 2022 seeking the Commission's resolution of a dispute with Consolidated over the pole attachment rates and joint use fees Consolidated is charging under agreements executed several years ago by the parties' predecessors. Exhibit 1, ¶ 6, Bates pp. 9-10; *see also* Exhibit 5,

Bates p. 06; Exhibit 6, Bates p. 13; and Exhibit 7, Bates p. 07. Those pole attachment rates were not set according to any particular formula. Exhibit 4, Bates p. 16. Consolidated's New Hampshire pole attachment rates are three times the rates it charges in Maine, even though the poles in both states were acquired by Consolidated in 2017 as part of an integrated system. Exhibit 13, Bates pp. 18-19. Consolidated's Joint Use ("JU") charges are imposed on attachments to poles in which Consolidated has no ownership interest. Order No. 26,775 (Feb. 17, 2023) at 13-14.

2. Petitioners provided Consolidated with written notices disputing the pole attachment rates and JU charges, however Consolidated refused to negotiate with Petitioners to resolve the dispute. Order No. 26,764 (Jan. 23, 2023). Because of Consolidated's unwillingness to negotiate with them, Petitioners filed the Petition.

3. Consolidated filed a Motion to Dismiss the Petition on November 16, 2022, and Petitioners filed an Objection to Consolidated's Motion to Dismiss on November 28, 2022, and a Supplemental Objection on December 12, 2022. Petitioners hereby incorporate by reference the provisions of the above-referenced Objection and Supplemental Objection.

4. The Commission issued Order No. 26,764 on January 23, 2023 denying Consolidated's Motion to Dismiss and determining that the Commission had authority under RSA 374:34-a and N.H. Code Admin. 1303.03 to determine whether pole attachment rates contained in Consolidated's pole attachment agreements with Petitioners are unjust or unreasonable. Citing *Time Warner Entm't Co., L.P.*, Order No. 25,387 (July 3, 2012), the Commission found that it had authority under the above-referenced statute and rule to review attachment rates after parties have executed and performed under a pole attachment agreement,

and that the Commission's authority includes ordering revisions to the agreement to the extent any term may be found to be unjust or unreasonable. Order No. 26,764 at 4.

5. The Commission held an evidentiary hearing on the Petition on January 26, 2023, and Petitioners and Consolidated filed post-hearing briefs on February 9, 2023. On February 17, 2023, the Commission issued Order No. 26,775 finding, *inter alia*, that joint use ("JU") charges imposed by Consolidated for attachments on poles in which Consolidated has no ownership interests are unreasonable, and that Consolidated must cease imposing a JU charge on poles it does not own as of the effective date of that order. Order No. 26,775 at 13-14.

6. Consolidated's Motion seeks rehearing/reconsideration of Order No. 26,764 ("the Order") in which the Commission denied Consolidated's Motion to Dismiss, and partial reconsideration of Order No. 26,775, *i.e.*, only as it pertains to the JU charges. For the reasons discussed below, Petitioners respectfully submit that the Motion should be denied, and note that they will be filing a Motion for Rehearing of the portion of Order No. 26,775 addressing pole attachment rates within the deadline prescribed by RSA 541:3.

## II. DEADLINES FOR REHEARING MOTIONS AND OBJECTIONS

7. A party may move for rehearing of a Commission order within 30 days of the order by specifying every ground upon which it is claimed that the order is unlawful or unreasonable. RSAs 541:3 and 541:4.

8. 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. However, because the aforementioned deadline is less than 6 days, intermediate Saturdays and Sundays are not included in the computation of the time period for filing this objection. *See* N.H. Code Admin. R. Puc 202.03(c). Although the Motion is dated

February 22, 2023, it was filed on Tuesday, February 21, 2022. Therefore, pursuant to the above-cited rules, the objection deadline is February 28, 2023, and the instant objection is timely.

## III. REHEARING STANDARD

9. The purpose of a rehearing motion is to direct the Commission's "attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invites reconsideration upon the record upon which that decision rested." *Dumais v. State of New Hampshire Personnel Commission*, 118 N.H. 309, 311 (1978) (citation omitted). "A successful motion must do more than merely restate prior arguments and ask for a different outcome." *Public Service Company of New Hampshire d/b/a Eversource Energy*, DE 16-241, Order No. 25,970 (Dec. 7, 2016) at 4-5.

10. A rehearing may be granted if the Commission finds "good reason" which must be established by showing that the Commission either overlooked or mistakenly conceived matters in its original decision, or "by presenting new evidence that could not have been presented at the hearing." *Eversource Energy and Consolidated Communications*, DE 21-020, Order No. 26,772 (Feb. 8, 2023) at 3 (citations omitted).

11. A motion for rehearing must be denied where no "good reason" or "good cause" has been demonstrated. *See O'Loughlin v. New Hampshire Personnel Commission*, 117 N.H. 999, 1004 (1977); *see also In re Gas Service, Inc.*, 121 N.H. 797, 801 (1981).

## IV. ARGUMENT

12. Consolidated's Motion fails to meet the standards for rehearing. The Motion fails to meet the good cause standard as it does not demonstrate that the Commission overlooked or mistakenly conceived any matter decided in the Order denying Consolidated's Motion to

Dismiss. Nor does the Motion present new evidence that could not have been presented at the hearing. Instead, as set forth below, the Motion restates the same arguments contained in Consolidated's Motion to Dismiss, which were already considered and rejected by the Commission, and asks for a different result.

13. Paragraphs 9 and 10 of the Motion contain the same statutory construction and jurisdictional arguments as those presented in paragraphs 6 and 7 of the Motion to Dismiss; paragraph 11 of the Motion contains the same characterization of Petitioners' position on the Commission's dispute resolution authority as that found in paragraph 8 of the Motion to Dismiss; paragraphs 13 and 14 of the Motion contain allegations that Petitioners failed to comply with their pole attachment agreements, which are the same allegations contained in paragraph 15 of the Motion to Dismiss; paragraphs 15 through 17 of the Motion essentially make the same the argument contained in paragraphs 16 through 18 of the Motion to Dismiss (*i.e.*, that because Consolidated's joint use charges appear in the Petitioners' pole attachment agreements, the Commission cannot eliminate them); paragraph 18 of the Motion contains the same argument and language as paragraph 26 of the Motion to Dismiss (*i.e.*, that "Petitioners come before this Commission seeking extraordinary and unprecedented relief"); and paragraph 19 of the Motion contains the same argument as paragraph 27 of the Motion to Dismiss (*i.e.*, the parties have voluntary agreements which would be rendered meaningless and illusory if the Commission were to allow the petition to go forward).

14. In light of the fact that the Motion for Rehearing/Reconsideration of the Commission's Order Denying Consolidated's Motion to Dismiss (Order No. 26,764) merely restates the arguments contained in the Motion to Dismiss, the Motion must be denied.

15. Consolidated has also failed to meet the standard for rehearing or reconsidering the portion of Order No. 26,775 (Feb. 17, 2023) finding that Consolidated's joint use ("JU") charges assessed on attachments to poles in which Consolidated has no ownership interest to be unreasonable and ordering those charges to be terminated. In that order, the Commission correctly noted that the Petitioners provided testimony showing that the JU charge is unreasonable and that Consolidated did not rebut that evidence. Order No. 26,775 (Feb. 17, 2023) at 13. The Commission correctly found that Consolidated has not provided any support for the $6.84 annual charge for attachments on JU poles, and that there was no testimony concerning any Consolidated costs that the JU charge is offsetting. *Id.* The record evidence also shows that, in addition to paying Consolidated a JU charge, third-party attachers also pay the JU pole owner its solely-owned pole rate. Exhibits 5, 6, and 7, Bates p. 2, ¶8. Accordingly, it is unjust and unreasonable for attaching entities, who compete with Consolidated, to pay an additional charge to Consolidated for their attachments to poles that Consolidated does not own. In these circumstances, there is no good cause to rehear or reconsider the portion of Order No. 26,775 relating to JU charges.

16. Notwithstanding the Commission's JU findings noted above, paragraph 16 of the Motion simply reiterates the argument contained in paragraph 17 of the Motion to Dismiss, *i.e.*, that Section 3.2.1 of the parties' pole attachment agreements require Licensees to "pay an Attachment Fee for each attachment made to **Licensor's** Utility Poles" (emphasis added). Consolidated further argues that because the definition of the term "Utility Pole" includes poles Consolidated jointly uses (but does not own) to support to support its facilities, that Consolidated can impose joint use charges for attachments to those poles. However, this argument is flawed because it fails to recognize that the term "Utility Poles" appearing in

Section 3.2.1 is modified by the word "Licensor's," which must be given meaning. Thus, contrary to the claim in paragraph 17 of the Motion that Consolidated's lack of ownership of the JU poles is of no relevance, a plain reading of Section 3.2.1 is that a licensee must pay for attachments to poles that are owned by the licensor of those poles. Because Consolidated is not the licensor-owner of the poles on which it assesses a JU charge, those charges are not authorized by Section 3.2.1 of the pole attachment agreements. Moreover, Section 1.7 of the Petitioners' pole attachment agreement excludes licensees from the definition of "Joint User." Exhibit 5, Bates p. 9; Exhibit 6, Bates p. 16; and Exhibit 7, Bates p. 9. Accordingly, a fair reading of the agreements is that licensees such as the Petitioners are not subject to JU charges because they are not Joint Users. The Commission, therefore, properly concluded that Consolidated's JU charges are unreasonable and should be terminated.

17. Even if the pole attachment agreements could somehow be construed to require payment of a JU fee to Consolidated for poles it does not own, the Commission nonetheless has the authority to review those charges and can reform the contract to eliminate them if the Commission finds the charges to be unjust or unreasonable. *See Time Warner Entm't Co., L.P.*, Order No. 25,387 (July 3, 2012) at 15. Consolidated argues that "Petitioners cannot solicit the Commission to alter their private contractual relationship with Consolidated simply because they are dissatisfied with the terms of their agreements." Motion, ¶ 7. However, this argument is unpersuasive as it fails to recognize that Petitioners are not seeking to alter the entirety of their agreements; they are simply seeking a determination of the justness and reasonableness of the rates and JU charges. Moreover, this argument fails to recognize that Consolidated is a public utility and its pole attachment rates are subject to the Commission's regulatory authority. *Eversource Energy and Consolidated Communications*, Order No. 26,729 (Nov. 18, 2022) at

19. That authority includes the ability to review pole attachment agreements and revise any contract provisions, including rates and charges, that the Commission determines are unjust or unreasonable. *Time Warner Entm't Co., L.P.*, Order No. 25,387 (July 3, 2012) at 15. The Commission validly exercised this authority. In doing so, the Commission properly found that Consolidated did not rebut the Petitioners' testimony that the JU charge is unreasonable and that Consolidated provided no cost support or other justification for JU charges relating to attachments on poles that Consolidated does not own. In these circumstances, the Commission's decision is lawful and reasonable, and therefore, no good cause exists for the Commission to rehear or reconsider the portion of Order No. 26,775 concerning Consolidated's JU charges.

18. Consolidated's argument that the Commission has no authority to review and reset pole attachment rates contained in an agreement between a pole owner and a pole attacher ignores the plain language of RSA 374:34-a, VII, which specifically authorizes the Commission to resolve complaints concerning pole attachment rates, charges and "voluntary agreements." Consolidated's argument also ignores N.H. Code Admin. R. Puc 1304.03 (entitled "Dispute Following Agreement or Order") which states that a "party to a pole attachment agreement…may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement." As explained in Petitioners' Supplemental Objection to Consolidated's Motion to Dismiss, when the Commission initially adopted the above-referenced rule, it eliminated language from its interim rules that prohibited the Commission from altering the terms of voluntary agreements. The Commission also rejected language suggested by Consolidated's predecessor, FairPoint Communications, that would have limited the applicability of the Commission's pole attachment rules to situations where a pole owner and

pole attacher did not have an agreement in place. In addition, Consolidated's position ignores long-standing precedent recognizing the Commission's authority to take corrective action if a party to a pole attachment agreement attempts to impose or enforce an unreasonable or unjust condition, and to order revisions to the agreement if rates contained therein are found to be unjust or unreasonable. *Time Warner supra*, at 7 and 15. Lastly, Consolidated's argument ignores that Section 15.10 of the parties' pole attachment agreements expressly permits Petitioners to file a complaint with the Commission if they cannot reach agreement with Consolidated on a claim that a term or condition of their pole attachment agreements is unjust and unreasonable. *See* Exhibit 5, Bates p. 16, Exhibit 6, Bates p. 36, and Exhibit 7, Bates p. 29.

19. The Motion avers that the Petitioners' theory is that pole attachers can seek Commission action against a licensor "when a pole attacher decides it no longer wants to be held to the contractual provisions to which it voluntarily agreed," and also asserts that "Petitioners are now unsatisfied with the bargained-for pole attachment rates to which they agreed." Motion, ¶ 11 at 5, and ¶ 12 at 5-6. These claims are incorrect. Petitioners did not voluntarily agree to or bargain for Consolidated's pole attachment rates. Rather, Petitioners inherited their pole attachment agreements from their predecessors in interest. *See* Exhibit 5, Bates p. 06; Exhibit 6, Bates p. 13; and Exhibit 7, Bates p. 07. Moreover, Petitioners are not seeking to be relieved of their contractual obligations; they are merely exercising their rights under the above-referenced statute, rule and precedent to obtain a review of their unjust, unreasonable and excessive pole attachment rates and charges.

20. Consolidated argues that Petitioners forfeited the right to challenge their pole attachment rates because, under Section 3.1.3 of Petitioners' pole attachment agreements, such a challenge should have been made within 30 days of the last rate increase, and the Commission

must enforce the plain language of the contract. Motion, ¶¶ 13-14. However, these arguments ignore that Petitioners did not forfeit any rights. As explained above, the Petitioners properly invoked rights under applicable statute, rules and precedent. In addition, the Petitioners' availed themselves of the dispute resolution provisions of Section 15.10 of the pole attachment agreements, a provision that the Motion fails to address or even mention. Further, as the Commission determined in *Time Warner, supra*, the Commission is not required to enforce a pole attachment agreement's rates, terms and conditions that the Commission finds to be unjust or unreasonable.

21. Even if Section 3.1.3 could somehow be construed as preventing Petitioners from pursuing their statutory and regulatory rights to challenge Consolidated's excessive pole attachment rates and JU charges at this time, that section cannot be enforced because it is unjust and unreasonable. The last increase in the pole attachment rates currently charged by Consolidated occurred over a decade ago by Consolidated's predecessor, FairPoint. Exhibit 4, Bates p. 16. In the intervening years, the value of those poles depreciated, but the pole attachment rates did not decline. In 2021, when the Commission ordered Consolidated to provide cost data in DE 21-020, Petitioners then calculated pole attachment rates for Consolidated under the widely-accepted cable rate formula adopted by the Federal Communications Commission, and found those rates to be much lower than the rates charged by Consolidated. In these circumstances, Section 3.1.3 of the pole attachment agreement cannot be enforced so as to bar Petitioners' pole attachment rate complaint, as it would be unconscionable and oppressive for a pole owner's excessive rates to evade Commission review simply because those rates had not changed for several years. *See Pittsfield Weaving Co., Inc. v. Grove Textiles, Inc.*, 121 N.H. 344, 346 (1981) (portions of contracts that are unconscionable

and oppressive may be declared void and unenforceable). The gross inequality of the bargaining power between monopoly pole owners and their competitor-attachers must be considered in examining whether a contract term is unconscionable. *Id.* Because cable operators such as the Petitioners have no meaningful choice when it comes to obtaining pole space for their facilities, *Federal Communications Commission et al. v. Florida Power Corp.*, 480 U.S. 245, 247 (1987), and because pole owning utilities such as Consolidated have "often exploited their market position to charge excessively high attachment rates," *Southern Company Services, Inc. v. FCC*, 313 F.3d 574, 577 (D.C. Cir. 2002), any provisions of pole attachment agreements that could potentially be construed as preventing attaching entities from exercising their statutory and regulatory rights to challenge excessively high pole attachment rates and unreasonable charges are unconscionable and therefore cannot be enforced under New Hampshire law.

22. Paragraph 18 of the Motion claims that Petitioners are seeking extraordinary and unprecedented relief, and paragraph 19 asserts that to allow the Petition to proceed "in the face of a voluntary agreement would create unjustified and unlawful precedent." These claims are incorrect as they ignore the fact that relief sought by Petitioners is neither extraordinary nor unprecedented. As explained above, the relief sought by Petitioners is clearly authorized by long-standing precedent (*i.e.*, *Time Warner, supra)*, RSA 374:34-a, II and VII, and N.H. Admin. Code Puc 1304.03.

23. Paragraph 19 of the Motion states that "Petitioners cite no law that permits the Commission to order such an extraordinary remedy." This statement is patently false in light of the ample citations to and discussion of legal authority provided in the Petition, Petitioners'

Objection to Consolidated's Motion to Dismiss, Petitioners' Supplemental Objection to Consolidated's Motion to Dismiss, and Petitioners' Post-Hearing Brief.

WHEREFORE, the Petitioners respectfully request that the Commission:

A. Deny Consolidated's Motion for Rehearing/Reconsideration of the Commission's Order Denying Consolidated's Motion to Dismiss (Order No. 26,764) and Partial Reconsideration of Order No. 26,775;

B. Grant such additional relief as is just and appropriate.

**Charter Communications, Inc., Cogeco US Finance, LLC d/b/a Breezeline, and Comcast Cable Communications, LLC**

By their Attorneys,
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Dated: February 28, 2023

Certificate of Service

I hereby certify that on the date set forth above a copy of the foregoing Objection was sent electronically to the Service List for this docket.

Susan S. Geiger