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' MOTION FOR REHEARING/RECONSIDERATION AND REQUEST FOR ORAL HEARING

NOW COME Charter Communications, Inc. ("Charter"), Cogeco US Finance, LLC d/b/a Breezeline ("Breezeline"), and Comcast Cable Communications, LLC ("Comcast") (collectively, "Petitioners"), and pursuant to RSAs 541:3 and 541:4 respectfully move for rehearing/reconsideration of Order No. 26,775 ("the Order") insofar as it denied Petitioners' request that the Commission determine that the pole attachment rates of Consolidated Communications of Northern New England Company, LLC ("Consolidated") are unjust and unreasonable, and did not recalculate those rates using the Federal Communications Commission's ("FCC's") cable rate formula. Petitioners also respectfully move for rehearing/reconsideration of the Order insofar as it does not order Consolidated to cease billing joint use ("JU") charges as of the date the Petition for Resolution of Rate Dispute ("the Petition") was filed (*i.e.*, August 22, 2022), or to refund Petitioners the JU charges they paid Consolidated since that time, as required by N.H. Code Admin. R. Puc 1303.07. Petitioners also respectfully request that the Commission hold a hearing to take oral argument regarding the Motion. In support of this Motion, Petitioners state as follows:

I. REHEARING STANDARD

A motion for rehearing must specify every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. RSA 541:4. The Commission may grant rehearing or reconsideration for 'good reason' if the moving party shows that an order is unlawful or unreasonable." *Eversource Energy and Consolidated Communications*, DE 21-020, Order No. 26,772 (Feb. 8, 2023) at 3 (citations omitted). "Good reason" is 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." *Id.*

Petitioners respectfully submit that the substantial information provided below in accordance with RSA 541:4 demonstrates that the Order is unlawful and unreasonable, and that good reason exists for rehearing.

II. SUMMARY

The record demonstrates that, through expert testimony, Petitioners met their burden of proving, by a preponderance of the evidence, that Consolidated's rates are unjust and unreasonable when compared with (1) rates charged by Consolidated in Maine (the New Hampshire rates are *over three times the rates it charges in Maine* for poles Consolidated acquired and operates as part of an integrated system), and (2) rates produced using the FCC's cable rate formula which is objectively reasonable, cost-based, widely-utilized, and judicially-approved. Petitioners also demonstrated, through expert testimony, that the FCC's cable rate formula satisfies all six of the Commission's rate review standards, and therefore that formula should be used to set just and reasonable rates for Consolidated in order to resolve the instant dispute.

Consolidated failed to successfully rebut Petitioners' evidence. The only formulaic attempt by Consolidated to justify its excessive, unjust and unreasonable pole attachment rates was an unprincipled adjustment to a depreciation figure that Consolidated, itself, provided to the Commission in response to a Commission order in DE 21-020 ("the Pole Transfer Docket"). In contrast, Ms. Kravtin's surrebuttal testimony comprehensively and persuasively explains why Ms. Davis's adjusted depreciation figure is incorrect and therefore cannot be used to justify Consolidated's excessive, unjust and unreasonable pole attachment rates.

In another effort to support its excessive pole attachment rates, Consolidated argued that those rates only recover 15 percent of Consolidated's total pole costs which the Commission found "places a greater burden on Consolidated in offering competitive services." Order at 10. However, this finding overlooks Ms. Kravtin's expert testimony that the FCC's cable rate formula, which allows a pole owner to recover a *maximum* of 7.41 percent of its total pole costs, allocates an appropriate share of the cost of the entire pole to cable attachers and has been upheld by the courts as fully compensatory. Ms. Kravtin further testified that use of the FCC cable formula would have a positive effect on competitive alternatives because it would enable pole attachers, who are Consolidated's competitors, to redirect excess pole rent fees that they currently pay Consolidated to investments in broadband and competitive service offerings. Exhibit ("Exh.) 3, Bates pp. 16-17; Exh. 13, Bates pp. 3-4, and p. 6. The finding also overlooks that Petitioners must also pay Consolidated "make-ready" charges that cover Consolidated's true incremental costs for accommodating Petitioners' attachments. Exh. 3, Bates p. 9. Payment by Petitioners of pole rental rates that exceed those calculated under the FCC cable formula therefore constitutes "contribution over and above economically efficient prices" *id.* and is unjust and unreasonable.

As explained further below, rehearing/reconsideration is required because: the Order overlooks or mistakenly conceives of record evidence; the parties were not given notice as required by RSA 541-A:33, V that the Commission would be relying on information from the Pole Transfer Docket in making its decision in the instant docket; the Order imposes evidentiary requirements that are not contained in the Commission's rules; the Order relies on improper speculation rather than record evidence; the Order ignores the requirement in N.H. Code Admin. R. Puc 1303.06 (a) that electric distribution company pole owners may not be treated differently than competitive telecommunications company pole owners for pole attachment rate purposes; and the Order does not require that Consolidated cease billing JU charges as of the date the Petition was filed and order refunds paid by Petitioners to Consolidated as of the date the Petition was filed.

Good reason for rehearing also exists due to new, relevant information that could not have been presented at the time of hearing. On February 22, 2023, after the hearing in this matter, Consolidated announced it received a grant of $40 million for broadband deployment in New Hampshire.[1] Given that the Commission found that "the lack of evidence concerning broadband deployment" prevents the Commission from determining that its fourth rate review standard (broadband deployment) supports any reduction in Consolidated's rates, Order at 11, this new evidence must be considered. Moreover, Consolidated's receipt of this substantial broadband funding provides it with a significant competitive advantage over Petitioners which undercuts the Commission's findings that Consolidated "must recover its pole costs through its competitive offerings" and that competition is impeded because Consolidated must bear 85 percent of its pole costs. Order at 10. Because Consolidated's $40 million broadband grant is

[1] https://www.consolidated.com/about-us/news/article-detail/id/893/consolidated-communications-awarded-40-million-in-grants-to-aid-in-building-fiber-to-57000-homes-in-new-hampshire

new and relevant evidence that could not have been presented at the hearing, it constitutes good reason for rehearing. *Eversource Energy and Consolidated Communications,* DE 21-020, Order No. 26,772 (Feb. 8, 2023) at 3 (citations omitted).

III. PROCEDURAL HISTORY AND MATERIAL FACTS

1. On August 22, 2022, the Petitioners filed the Petition seeking the Commission's resolution of a dispute with Consolidated over the pole attachment rates and JU fees Consolidated is charging under agreements executed several years ago by the parties' predecessors. Exh. 1, ¶ 6, Bates pp. 9-10; *see also* Exh. 5, Bates p. 6; Exh. 6, Bates p. 13; and Exh. 7, Bates p. 7.

2. Consolidated's current pole attachment rates of $11.67 for an attachment on a solely owned pole, and $6.84 for an attachment on a pole that Consolidated jointly owns with another utility were not set according to any particular formula and have not changed for several years. Exh. 4, Bates p. 16.

3. Consolidated's New Hampshire rates are considerably higher than 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. Exh. 13, Bates pp. 18-19. Consolidated lowered its Maine pole attachment rates from $12.60 to $3.56 for solely owned poles, and from $6.30 to $1.78 for jointly owned poles, on February 8, 2022 approximately two years after the State of Maine adopted the FCC's cable rate formula. Exh. 1, Bates pp. 18-19; Exh. 2, Bates p. 9. These rates equate to the rates calculated using the FCC's cable rate formula. Exh. 2, Bates p. 13.

4. Consolidated's New Hampshire pole attachment rates also greatly exceed rates calculated using the FCC's cable rate formula and New Hampshire-specific data. Exh, 3, Bates p. 23. Those rates are $5.33 for a jointly owned pole, and $2.67 for a jointly owned pole. *Id.*

5. In October 2021, Petitioners provided Consolidated with written notice disputing Consolidated's pole attachment rates and requesting that Consolidated provide all supporting documentation for those rates, including Consolidated's calculation of the applicable rate under N.H. Code Admin. R. Puc 1304.06(a)(5) (now codified as Puc 1303.06(a)(5)) and 47 C.F.R. §1.1409(b) in effect as of October 1, 2017. Exh. 2, Bates p. 3. Consolidated did not respond to this letter.

6. On December 6, 2021, Consolidated provided information to the Commission in response to Commission Order No. 26,534 in the Pole Transfer Docket requiring Consolidated to provide restated GAAP figures for 2020 that reflect the difference between GAAP figures and regulatory accounting figures used in ARMIS reports ("the 2020 ARMIS Report"). Exh. 4, Bates p. 24. The 2020 ARMIS Report is intended to show the information Consolidated would have reported to the FCC had Consolidated filed an ARMIS Report with the FCC in 2020 and been subject to regulatory depreciation and accounting requirements. Exh. 3, Bates p. 26. The Commission accepted the 2020 ARMIS Report data in the Pole Transfer Docket, along with the methodology and calculation presented by Patricia Kravtin in that docket, for purposes of determining the net book value of Consolidated's poles. Order No. 26,729 (Nov. 18, 2022) at 17.

7. After having received no response from Consolidated for approximately five months after providing their initial rate dispute letter, Petitioners again notified Consolidated in writing that they continue to dispute Consolidated's pole attachment rates, but were willing to resolve the dispute by accepting rates up to $6.51 for solely owned poles and up to $3.26 for jointly owned poles. Exh. 2, Bates pp. 4-5. Two months later, in May 2022, Petitioners again notified Consolidated in writing that they wished to resolve the pole attachment rate dispute.

Exh. 2, Bates pp. 7-8. However, Consolidated refused to negotiate with Petitioners. Order No. 26,764 (Jan. 23, 2023) at 3. Because of Consolidated's unwillingness to negotiate with them, Petitioners filed the Petition.

8. Along with the Petition (Exhs. 1 and 2), Petitioners filed the direct testimony of Ms. Kravtin and attachments (Exhs. 3 and 4). In that testimony, Ms. Kravtin calculated cost-based pole attachment rates for Consolidated under the FCC's widely-accepted cable rate formula using cost data taken directly from Consolidated's 2020 ARMIS Report, and pole height data from survey reports provided in the Pole Transfer Docket. Exh. 3, Bates pp. 11, 24-26.

9. Consolidated filed a Motion to Dismiss the Petition on November 16, 2022. On November 28, 2022, Petitioners filed an Objection to Consolidated's Motion to Dismiss, and filed a Supplemental Objection on December 12, 2022. The Commission denied Consolidated's Motion to Dismiss, determining that the Commission had authority under RSA 374:34-a and N.H. Code Admin. R. Puc 1303.03 to determine whether pole attachment rates contained in Consolidated's pole attachment agreements with Petitioners are unjust or unreasonable. Order No. 26,764 (Jan. 23, 2023).

10. On December 15, 2022, Consolidated filed the rebuttal testimony of Sarah Davis, which included a revised 2020 ARMIS Report (Exh. 19, Bates p. 17) (further revised as reflected in Exh. 17). Petitioners filed surrebuttal testimony of Ms. Kravtin (Exh. 13) on January 19, 2023 explaining in detail why Ms. Kravtin correctly applied the 2020 ARMIS Report data to calculate Consolidated's rates, and why Ms. Davis's revisions to the 2020 ARMIS Report were improper. Exh. 13, Bates pp. 8-10.

11. 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 the Order which denied the Petition to reduce Consolidated's pole attachment rates charged to Petitioners and which ordered Consolidated to cease billing Petitioners a JU on poles Consolidated does not own. Order No. 26,775 at 13-14.

12. On February 21, 2023, Consolidated filed a 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 insofar as that order compelled Consolidated to cease billing JU charges. Petitioners filed an Objection to Consolidated's Motion for Rehearing on February 28, 2023.

IV. ARGUMENT

A. The Commission's Determination That Petitioners Had Not Met Their Burden Of Proof Is Not Supported By The Record.

1. Petitioners demonstrated, by a preponderance of the evidence, that Consolidated's pole attachment rates are unjust and unreasonable.

Contrary to the Order, the record supports a finding that Petitioners have demonstrated by a preponderance of the evidence[2] that Consolidated's pole attachment rates are unjust and unreasonable when compared with Consolidated's Maine pole attachment rates (which reflect rates established using the FCC's cable rate formula) and rates produced using the FCC's cable

[2] In a proceeding to resolve a dispute arising under a pole attachment agreement, Petitioners bear the burden of proving, by a preponderance of the evidence, that the agreement is not just, reasonable, or nondiscriminatory. N.H. Code Admin. R. Puc 1303.01 and Puc 203.25. "A preponderance of the evidence" means evidence, that when weighed against opposing evidence, has more convincing force, "'and from which it results that a greater probability is in favor of the party upon whom the burden rests.'" *Complaint of Robert Mykytiuk Against Lakes Region Water Co., Inc.*, DW 16-834, Order No. 26,037 (July 5, 2017) at 3 (citation omitted).

rate formula and New Hampshire-specific data. Petitioners submitted prefiled direct and surrebuttal testimonies of Patricia D. Kravtin, a leading expert on pole attachment rates.[3]

Ms. Kravtin's prefiled direct testimony establishes that Consolidated's existing pole attachment rates are not cost-based, were not set according to any particular formula, and greatly exceed pole attachment rates that Consolidated charges in Maine for poles it acquired from FairPoint Communications contemporaneously with its New Hampshire poles. Exh. 3, Bates pp. 7, 15-16. Consolidated lowered its Maine pole attachment rates from $12.60 to $3.56 for a solely owned pole, and from $6.30 to $1.78 for a jointly owned pole after the Maine Public Utilities Commission adopted the FCC's cable rate formula, and after Maine Cable Operators notified Consolidated of the maximum lawful pole rate that Consolidated could charge under that formula. Exh. 2, Bates p. 9; Exh. 1, Bates p. 19.

Consolidated did not rebut these assertions with any substantive or principled cost-based analysis as to why it is just and reasonable to charge pole attachment rates in New Hampshire that are over three times the rates it charges in Maine for attachments to poles that Consolidated acquired and operates as part of an integrated system. Instead, Consolidated merely asserted, in conclusory fashion, that it is "charging Joint Petitioners rates that are consistent with negotiated contracts as anticipated by New Hampshire Law," Exh. 19, Bates p. 9, and that Maine is a

[3] Ms. Kravtin has forty years of experience in the field of public utility economics, policy and regulation, including active involvement in a number of state and federal pole attachment rate proceedings concerning the calculation of just and reasonable pole attachment rates. Exh. 3, Bates p. 4. She has advised a number of state regulatory agencies, and testified as an expert witness in litigation concerning telecommunications competition, market power, barriers to entry, and access and use of poles. Exh. 3, Bates p. 5. She has also been actively involved broadband deployment matters, having testified extensively and authored a number of reports on the subject. *Id.*

different state whose pole attachment rules differ from New Hampshire's. Exh. 19, Bates p. 15. Based on the foregoing alone, Petitioners met their burden of proving, by a preponderance of the evidence, that the rates charged by Consolidated to Petitioners pursuant to their pole attachment agreements are unjust and unreasonable. Consolidated did not prove otherwise.

Petitioners also demonstrated, by a preponderance of the evidence, that Consolidated's current pole attachment rates are unjust and unreasonable when compared with rates produced using the FCC's cable rate formula. Using that widely accepted formula,[4] with a pole height adjustment reflecting actual pole height data and data provided by Consolidated in response to a Commission Order in the Pole Transfer Docket (*i.e.*, the 2020 ARMIS Report), Ms. Kravtin determined that just and reasonable Consolidated rates would be $5.33 annually for attachments to poles solely owned by Consolidated, and $2.67 for attachments to poles that Consolidated owns jointly with another pole owner. Exh. 3, Bates pp. 23-26. These cost-based, formulaic, just and reasonable rates are less than half of Consolidated's current rates of $11.67 for a solely owned pole, and $6.84 for a jointly owned pole, thereby rendering Consolidated's rates unjust and unreasonable.

Consolidated attempted to justify its current rates by improperly adjusting the depreciation figure contained in Ms. Kravtin's calculation, which had the effect of raising the net cost of a bare pole. Ms. Kravtin determined the net cost of a bare pole to be $86.38 using Consolidated's own data, including the depreciation figure of $35,765,000 provided to the Commission in the Pole Transfer Docket, which the Commission adopted in Order No. 26,729 (Nov. 18, 2022) for purposes of valuing the net book value of Consolidated's poles. Exh. 13,

[4] The vast majority of states that regulate pole attachments (*i.e.*, "certified states") have adopted the FCC's cable rate formula or some variation of it. Exh. 3, Bates pp. 14-15 and footnote 15.

Bates p. 14. Ms. Davis, who is not an accounting expert,[5] decreased Ms. Kravtin's depreciation figure to $10,588,000, arguing that a regulatory, instead of a GAAP accounting depreciation figure should be used. This adjustment increased Ms. Davis's net cost of a bare pole to $181.35, which Ms. Davis translated into pole rates that exceed Consolidated's current rates. Exh. 19. Ms. Davis made a subsequent, improper depreciation adjustment that resulted in higher rates. Exh. 17.

However, Ms. Kravtin's testimony clearly establishes that Ms. Davis's depreciation adjustments cannot reasonably be relied upon because they improperly mixed GAAP figures with regulatory accounting figures, are unsupported by documented figures, and are replete with inconsistencies and errors. Exh. 13, Bates p. 13, lines 8-15, and footnotes 24 and 25. Moreover, Ms. Davis's regulatory depreciation reserve figure of $10.5888 million (and revised figure of $11.250 million) makes no sense under regulatory accounting, as it appears from her work papers to have been rolled forward from a base 2017 revalued *GAAP* net book value of $40 million (versus the 2017 regulatory gross book value of $221 million). Exh. 13, Bates p. 16. These deficiencies in Ms. Davis's pole cost calculation render that figure meaningless, which in turn, renders her rate calculation meaningless. *Id.*

In contrast to Ms. Davis, Ms. Kravtin demonstrated the reasonableness of a net bare pole cost of $86.38 (derived using GAAP figures provided by Consolidated) by comparing that figure with the figures of $79.28 and $64.63 she derived using regulatory accounting figures in ARMIS reports provided to the FCC by FairPoint for year end 2017 and by Consolidated for year-end 2018, respectively. Revised Exh. 13, Bates p. 17. This comparison persuasively establishes that

[5] *See* Exh. 19, Bates p. 4 for a recitation of Ms. Davis's qualifications.

Ms. Kravtin's net bare pole cost figure is more reliable than Ms. Davis's. The net bare pole cost expressed on a true regulatory accounting basis using data submitted by FairPoint for year-end 2017 and by Consolidated for year-end 2018 are far closer to the 2020 GAAP-based accounting figures provided by Consolidated to the Commission in the Pole Transfer Docket that Ms. Kravtin used in her pole rate calculation than the revised/hybrid GAAP/regulatory accounting net bare pole costs calculated by Ms. Davis. Exh. 13, Bates p. 15. As the FCC has recognized, there should not be a huge variation between net book value under GAAP versus net book value under regulatory accounting. Exh. 13, Bates pp. 15-16; footnote 26.

Lastly, it is important to note that Ms. Davis admitted that Table 1 of Ms. Kravtin's prefiled direct testimony, Exh. 3, Bates p. 24 (showing Ms. Kravtin's pole rate calculation), reflects the steps needed to calculate pole attachment rates under the FCC's cable rate formula. Transcript. pp. 79-80. Ms. Davis also admitted that she has not performed a formal FCC rate calculation. Transcript, p. 80.

In view of the foregoing, the weight of the evidence demonstrates that Consolidated's pole attachment rates are unjust and unreasonable when compared with its Maine rates and the rates produced using the FCC's cable rate formula which has been upheld by the courts and is used by several states. Exh. 3, Bates pp. 13-16, and footnotes contained therein. The Petitioners also demonstrated that Ms. Kravtin's calculation of Consolidated's net bare pole cost is appropriate, just and reasonable, and that Ms. Davis did not successfully rebut that calculation. Therefore, Ms. Kravtin's pole attachment rate calculation, which is based upon Ms. Kravtin's net bare pole cost, is just and reasonable, while the rate asserted by Ms. Davis, which was not calculated using a principled approach, is unjust and unreasonable. Because Petitioners have shown that Consolidated's current rates vastly exceed Ms. Kravtin's just and reasonable rates,

Petitioners have met their burden of proving that Consolidated's existing pole attachment rates are unjust and unreasonable and must be reduced to the level produced under the FCC's cable formula. The Commission's finding to the contrary and its failure to lower Consolidated's pole attachment rates in light of the foregoing evidence constitutes good reason for rehearing.

2. Petitioners demonstrated, by a preponderance of the evidence, that the FCC's cable rate formula satisfies all six of the Commission's rate review standards, and therefore should be used to set Consolidated's pole attachment rates.

The Petition (Exh. 1, Bates pp. 20-30) and Ms. Kravtin's prefiled direct testimony (Exh. 3, Bates pp. 9-22) both discuss, in detail, how the FCC's cable rate formula meets each of the six standards set forth in N.H. Code Admin. R. Puc 1303.06(a) that the Commission must consider when determining just and reasonable pole attachment rates. More specifically, Petitioners presented the following evidence:

1) With respect to the first rate review standard (*i.e.*, relevant federal, state, or local laws, rules, and decisions), the Petition (Exh. 1, Bates pp. 21-23) and Ms. Kravtin's prefiled direct testimony (Exh. 3, Bates pp. 13-16) discuss federal cases that have upheld the FCC's cable rate formula as compensatory, and note that at the state level, the vast majority of states that regulate pole attachments have adopted the FCC's cable rate formula or some close variation of it.[6] Because these cases, state laws and decisions support using the FCC's cable formula to set just and reasonable pole attachment rates, they are all relevant to the issue of whether the Commission should

[6] These states include Maine, Vermont, Massachusetts, Connecticut, New York and New Jersey. Exh. 3, Bates p. 15 and footnote 12.

apply that formula to reset Consolidated's excessive rates to a just and reasonable level.

2) With respect to the second rate review standard (*i.e.,* impact on competitive alternatives), Ms. Kravtin's expert testimony is that using the FCC's cable rate formula to set Consolidated's rates "would have a positive impact on competitive alternatives." Exh. 3, Bates p. 17. She explained in her testimony that rates produced by the FCC cable rate formula sufficiently compensate Consolidated for the use of its poles, while also leveling the competitive playing field and promoting competitive service offerings by enabling pole attachers, who are Consolidated's competitors, to redirect excess pole rent fees that they currently pay Consolidated to investments in broadband and competitive service offerings. *Id.* Ms. Kravtin explained that the FCC's cable rate formula produces a just and reasonable rate as it is not inherently biased in favor of any industry or competitor, is fully compensatory, and is based on a fully allocated cost standard that produces rates well above the pole owner's marginal cost. Exh. 3, Bates p. 16. Ms. Kravtin further explained that "any rate above this level will introduce market distortions vis-à-vis the competitive benchmark of efficient marginal pricing which will have a decidedly negative effect on competitive alternatives and competition generally." *Id.*

At hearing, Ms. Kravtin testified that one of the major factors in the competitive landscape is a level playing field between attachers and pole owners. Transcript, p. 34. Ms. Kravtin noted that attachers must both compete against the pole owner, and also depend on the pole owner for provision of an essential facility, without which the attacher cannot provide service. *Id*. She further testified that "one of the

ways of providing that level playing field, for an essential facility, is a …just and reasonable price…The rate is important." *Id.* She also opined that "one of the major things this Commission can do, as other state commissions, and the FCC has done federally, is try to provide that cost-based benchmark which is supposed to be the maximum rate." Transcript, p. 35. When asked by Commissioner Simpson about her sense of awareness of competitive market outcomes that might result through a change in pole attachment rates, Ms. Kravtin testified that a cost-based rate will allow the most efficient investment and decisions to get services to the market. Transcript, p. 37.

3) Regarding the third rate review standard (*i.e.*, potential impact on the pole owner and its customers), Ms. Kravtin testified that adoption of the FCC's cable rate formula would not negatively impact Consolidated or its customers. Exh. 3, Bates p. 17. Ms. Kravtin noted that because the FCC's cable rate formula complies with federal law and produces rates that are not confiscatory, neither Consolidated nor its customers are harmed by these rates. Exh. 3, Bates p. 18. She further explained that the FCC's cable rate formula determines the maximum allowable pole attachment rates to ensure that such rates are just and reasonable. Exh. 3, Bates p. 17. The formula allocates the cost of the entire pole by the percentage of usable space occupied by the attachment and that includes recovery of the owner's entire pole-related costs, including administrative, maintenance, taxes, depreciation and rate of return. *Id.* In addition, Ms. Kravtin noted that because Petitioners must also pay charges to Consolidated for any "make-ready" work needed to accommodate a new attachment, there is no financial harm to Consolidated or its customers from the application of the FCC cable

rate formula, as the cable rates and incremental make-ready charges allow the pole owner to recover all of its costs associated with pole attachments. Exh. 3, Bates p. 18.

4) Regarding the fourth rate review standard (*i.e.*, potential impact on the deployment of broadband services), Ms. Kravtin's testimony quotes language from an FCC decision supporting the position that the lower and more uniform pole attachment rates produced by the FCC's cable rate formula serve to eliminate barriers to broadband deployment, and promote broadband competition. Exh. 3, Bates pp. 18-19. This position is echoed in New Hampshire's Broadband Action Plan which states that pole attachment fees "should be consistent and competitive so that they do not hinder further deployment of broadband services." Exh. 3, Bates p. 19 and footnote 23. Ms. Kravtin testified that allowing a pole owner like Consolidated to charge Petitioners (with whom Consolidated competes for broadband customers) attachment fees exceeding the economically efficient level produced by the FCC's cable rate formula is directly contrary to this goal. She also noted that absorbing excessively high pole rents directly and negatively impacts the industry's ability to build out infrastructure needed to support the widespread deployment of advanced broadband services. Exh. 3, Bates p. 19. She concluded that reducing Consolidated's rates to those produced by the FCC's cable rate formula will positively impact the deployment of broadband infrastructure investment and high-speed internet service in New Hampshire, as excess pole rental fees that would otherwise be paid to Consolidated can be invested by Petitioners to support advanced broadband services. Exh. 3, Batest pp. 19-20.[7]

[7] At hearing Ms. Kravtin testified that lowering Consolidated's New Hampshire rates "will allow for a more efficient provision of broadband services, both in terms of getting the service out and continually improving the quality of

5) As for the fifth rate standard (*i.e.,* formulae adopted by the FCC in 47 C.F.R. §1.1406(d)) Ms. Kravtin's prefiled testimony described how the FCC's cable rate formula produces a just and reasonable rate for Consolidated. Exh. 3, Bates pp. 9-22. Her expert opinion is that the FCC's cable rate formula set forth in 47 C.F.R. §1.1406(d)(1) is "most consistent with effective pole rate regulation and the public interest" and satisfies all six of the Commission's rate review standards – both individually and collectively. Exh. 3, Bates p. 9. Ms. Kravtin's prefiled testimony further explains the basis for that opinion, including that the formula "is designed in a manner that is fully consistent and transparent with respect to the principles of cost causation and economically efficient pricing, is fully compensatory to the pole owner, and can be applied in a simple expeditious manner." Exh. 3, Bates p. 11.[8]

6) Lastly, with respect to the sixth rate factor (*i.e.*, any other interests of the subscribers and users of the services offered via such attachments or consumers of any pole owner providing such attachments, as may be raised), Petitioners asserted that this standard essentially equates to the regulatory "public interest standard" which Consolidated did not challenge. Exh. 3, Bates p. 21. As Ms. Kravtin explained, this rate factor takes into account not only the interests of utility pole owners, third party attachers, and both groups' customers, but also the greater "public good." *Id.* She explained that consideration of whether the FCC's cable rate formula produces rates that are for the public good includes analysis of the public benefits of that formula in

those services, because it will free up investment dollars that would otherwise…go to pay high monopoly-level rates, …to actually get service out to the consuming public." Transcript, pp 37-38.

[8] Ms. Kravtin's prefiled testimony also discussed the FCC's telecommunications rate formula contained in 47 C.F.R. §1.1406(d) and explained by that formula should not be used to establish Consolidated's rates in this docket. Exh. 3, Bates pp. 20-21.

addition to the private costs and benefits of the parties directly involved. *Id.* When considering the various interests comprising the public interest, Ms. Kravtin stated that the benefits of the FCC's cable rate formula outweigh any short-term nominal gain to the pole owner from the imposition of fees that far exceed the incremental or actual costs incurred in direct relation to the third-party attachments. Exh. 3, Bates p. 22. Lastly, but importantly, Ms. Kravtin noted that the National Association of State Utility Consumer Advocates has consistently supported the FCC cable rate, finding that the cable rate formula should be used for all pole attachments. *Id.*

Consolidated did not provide evidence addressing each of the Commission's six rate review standards discussed above, and did not rebut Petitioners' evidence that the FCC cable rate formula satisfies all six standards. While Ms. Davis's prefiled rebuttal testimony lists each of the six rate review standards, Exh. 19, Bates pp. 10-11, she did not discuss how Consolidated's rates meet each criterion. In response to a question asking her to describe how Consolidated's rates are consistent with N.H. Code Admin. R. Puc 1303.06, Ms. Davis offered only three observations: 1) Consolidated's rates were arrived at through negotiation "with large, sophisticated cable companies as anticipated by New Hampshire law"; 2) the rates have been in effect for over 9 years and have never once been challenged by any pole attacher until the cable companies participated in the Pole Transfer Docket; and 3) Consolidated's pole attachment rates represent only 15 percent of the cost of a bare pole, leaving pole owners (either jointly or solely) to absorb 85 percent of the pole costs. Exh. 19, Bates pp. 12-13. Ms. Davis also states that all attachers in the telecom space of a pole "are largely unregulated, and they aggressively compete for…customers. Consolidated, like other attachers, is actively engaged in the deployment of

broadband and its subscribers will equally benefit from a more equitable sharing of pole costs." Exh. 19, Bates p. 13.

None of Ms. Davis's casual observations, individually or collectively, overcomes Petitioners' evidence establishing that Consolidated's rates are unjust and unreasonable, and should be set according to the FCC's cable rate formula. First, Ms. Davis's assertion that Consolidated's rates were arrived at through negotiation with large sophisticated companies ignores the fact that none of the Petitioners negotiated the current pole attachment rates charged by Consolidated. Section III. 1, *supra*. To suggest that the current excessive rates should remain in place simply because Petitioners' predecessors agreed to them several years ago ignores the fact that this Commission has the responsibility under RSA 374:34-a and N.H. Code Admin. R. Puc1303.01 to ensure that Consolidated's rates are, at all times, just and reasonable. Moreover, that Consolidated's pole attachment rates may have been acceptable to Petitioners (or their predecessors) in the past, does not mean that those rates are just and reasonable today. Ms. Davis's assertion also ignores that pole attachers and pole owners do not have equal bargaining power. As Ms. Kravtin testified, "the truth is, the pole owner has a substantial amount of leverage, because they own the pole, and they ultimately control the rights to the pole." Transcript, p. 35, lines 11-14. Therefore, even if Petitioners (or their predecessors) could be deemed "large sophisticated companies," they do not enjoy equal bargaining power when it comes to negotiating with pole owners, as demonstrated by Consolidated's refusal negotiate a resolution of the instant rate dispute. Order No. 26,764 (Jan. 23, 2023) at 3. Accordingly, it is unreasonable to assume that the size and sophistication of a pole attacher necessarily means that the pole attachment rates that it or its predecessor agreed to many years ago were the product of fair negotiations.

Second, Ms. Davis's suggestion that Petitioners' failure to challenge Consolidated's pole attachment rates for several years means that the rates are just and reasonable is illogical. As explained in Section B.2, *infra*, Petitioners did not have the cost-based information needed to calculate just and reasonable pole attachment rates for Consolidated until recently. Therefore, it is improper to suggest that because Petitioners did not challenge their pole rates for several years that Consolidated's rates are just and reasonable.

Third, the Commission cannot reasonably rely on Ms. Davis's assertions that because Consolidated competes with Petitioners, it should be allowed to recover a greater share of its pole costs than that currently recovered under its existing rates, or under rates set using the FCC's cable rate formula. Rates produced by the FCC's cable rate formula plus make-ready charges "provide contribution over and above economically efficient prices, and have shown over time not to affect the pole owner's investment in plant." Exh. 3, Bates p. 9. In view of the foregoing, to the extent that the Commission agreed with Ms. Davis's argument that Consolidated's competitive status entitles it to charge rates exceeding the just and reasonable level produced by the FCC's cable rate formula, the Order is unlawful and unreasonable.

Fourth, Ms. Davis admitted that her rebuttal testimony did not discuss the first rate standard (*i.e.*, relevant federal, state, or local laws, rules, and decisions) because she "didn't think there were any that were relevant in this case." Transcript, p. 78, lines 17-21. However, Ms. Davis's opinion about the lack of legal authority relevant to the instant rate dispute docket is incorrect, as demonstrated by the fact that the Petition and Ms. Kravtin's prefiled testimony cites several federal court cases, FCC decisions, and state laws adopting the FCC's cable rate formula. Exh. 1, Bates pp. 21-23, and footnotes 61-69; Exh. 3, Bates pp. 13-16, and footnotes 7-13

As demonstrated above, Consolidated's failure to rebut Petitioners' evidence that the FCC's cable rate formula satisfies all six rate review standards compels a determination in favor of Petitioners. Petitioners' expert testimony regarding each of the Commission's six rate review standards, when weighed against the lack of such evidence from Consolidated, clearly has more convincing force such that a greater probability is in favor of Petitioners. *Complaint of Robert Mykytiuk Against Lakes Region Water Co., Inc*., DW 16-834, Order No. 26,037 (July 5, 2017) at 3. Thus, the Petitioners met their burden of proving, by a preponderance of the evidence, that Consolidated's rates are not just and reasonable and that the Commission should use the FCC's cable rate formula to establish just and reasonable rates for Consolidated. Once Petitioners established that Consolidated's rates are not just and reasonable, the Commission was obligated to order revisions to the parties' pole attachment agreements to reflect just and reasonable pole attachment rates. Order No. 26,764 (Jan. 23, 2023) at 4. Its failure to do so constitutes good reason for rehearing.

B. The Order's Analysis Of The Six Rate Review Standards Is Unlawful And Unreasonable.

The Order's analysis of the six rate review standards set forth in N.H. Code Admin. R. Puc 1303.06(a)(1) is unlawful and unreasonable as it: overlooks or mistakenly conceives of record evidence; violates the official notice requirements of RSA 541-A:33, V; improperly imposes new evidentiary requirements; engages in improper speculation; improperly concludes that electric distribution companies and competitive telecommunications companies may be treated differently for pole attachment rate purposes; and/or is contrary to new evidence that could not have been presented at the hearing. Good reason exists for rehearing on each of the six rate review standards as discussed below.

1. The Order failed to consider relevant federal, state, or local laws, rules and decisions cited by petitioners, and impermissibly focused only on DE 21-020.

The first rate review standard is relevant federal, state, or local laws, rules, and decisions. N.H. Code Admin. R. Puc 1303.06(a)(1). Although the Order, at page 6, states that the Commission must "consider various authorities and decisions," the Order fails to consider or even mention Petitioners' evidence on this point. As indicated in Section IV. A. 2. 1), above, the Petition and Ms. Kravtin's prefiled direct testimony cites federal cases upholding the FCC's cable rate formula as a judicially approved means for establishing just and reasonable pole attachment rates and cites FCC decisions as well as statutes and decisions of many nearby states that have decided to adopt that formula to fulfill their duty to set just and reasonable pole attachment rates. Exh. 3, Bates p. 13-16 and footnotes 7-13. Yet, the Order fails to mention this information.

The Order also overlooks the fact that although Consolidated purchased its Maine pole assets at the same time that it purchased its New Hampshire pole assets, its Maine pole attachment rates are over three times less than the rates it charges Petitioners in New Hampshire. Maine (and many other states) has adopted the FCC's cable rate formula in fulfillment of its duties under federal law concerning state regulation of pole attachment rates. 42 U.S.C. §224 (c)(2)(B). This information is relevant to the instant dispute because it demonstrates the unjustness and unreasonableness of Consolidated's New Hampshire pole attachment rates and supports the adoption of the FCC's cable rate formula for resetting those rates. The Commission's failure to consider, or even acknowledge, Petitioners' evidence regarding the first rate review standard constitutes good reason for rehearing.

Instead of considering the relevant federal, state, or local laws, rules, and decisions presented by Petitioners on the first rate review standard, the Order unreasonably focusses on

just one case, the Pole Transfer Docket. The Order concludes that any decrease in Consolidated's attachment rates in the instant docket that are charged for the poles transferred to Eversource "would decrease pole revenues to Eversource and potentially increase" costs to Eversource's ratepayers. Order No. 26,775 at pp. 7-8. The Order also speculates that if Consolidated transfers its poles to Eversource, its reduced pole inventory "would likely cause Consolidated to reorganize and reduce its pole maintenance and management arrangements. Thus, the pending Pole Transfer imposes uncertainties in Consolidated's costs, revenues, and financial operations." Order No. 26,775 at p. 8. The Commission then determined that the Pole Transfer Order (No. 26,729) and Transfer Rehearing Order (No. 26,772) pose "economic uncertainty" requiring the Commission "to defer consideration of pole attachment rate adjustments for Consolidated until the uncertainties surrounding the Pole Transfer have been resolved." *Id.*

Petitioners respectfully submit that it is unlawful and unreasonable for the Commission to decline to adjudicate the justness and reasonableness of Consolidated's rates in this docket based upon speculation that a rate decrease may cause a non-party's customers' rates to increase, and based upon economic uncertainties posed by the Pole Transfer Docket. There is no evidence in the record of the instant proceeding regarding what effect a reduction in Consolidated's pole attachment rates may have on Eversource's customers' rates if Eversource acquires Consolidated's pole assets and charges fees for attachments to the transferred poles that are lower than those currently charged by Consolidated. Indeed, the fact that Eversource will charge Consolidated's pole attachment rates and may potentially recover any revenue shortfall from its electric customers has no bearing on the issue in this docket of whether Consolidated's rates are just and reasonable. However, even if the Commission could lawfully consider the impact that a

decrease in Consolidated's pole rates might have on Eversource's electric rates (if the pole transfer transaction is consummated), the Commission must also consider, under N.H. Code Admin. R. Puc 1303.06(a)(4) and (6), the impact that excessive pole attachment revenues have on broadband customers, which include Eversource's ratepayers. The Commission's failure to do so is therefore unlawful and unreasonable.

The Commission is legally required to resolve the instant pole rate dispute based on the record evidence before it and must make findings of fact "based exclusively on the evidence and matters officially noticed in accordance with RSA 541-A:33, V." RSA 541-A:31, VIII. Inasmuch as the Commission based its decision upon speculative effects that the Order may have on the ratepayers of a utility (Eversource) that is not a party to this proceeding, and because the Commission did not take official notice of the record in the Pole Transfer Docket, the Order is unlawful and unreasonable.

Further, the Commission may not lawfully or reasonably rely on economic uncertainties that the Pole Transfer Docket may have on Consolidated as a basis for not determining Consolidated's just and reasonable rates in this docket. First, as the Commission noted, the Pole Transfer Docket and DT 22-047 "were not consolidated under N.H. Code Admin. R. Puc 203.19 and have remained separate throughout." Order No. 26,772 (Feb. 8, 2023) at 11. Second, the Commission did not rule on Petitioners' identical pole attachment rate claims that were raised in the Pole Transfer Docket, noting that Petitioners are seeking "relief from the Commission for excessive pole attachment rates in another docket, DT 22-047." Order No. 26,729 (Nov. 18, 2022) at 20. A fair inference from that statement is that the Commission would be adjudicating the justness and reasonableness of Consolidated's pole attachment rates in the instant docket rather than deferring such a decision due to "economic uncertainty" posed by the Pole Transfer

Docket. Order at 8. Third, as noted above, the Commission cannot properly rely on the record of the Pole Transfer Docket in the instant proceeding because it did not comply with the official notice requirements of RSA 541-A:33, V. Petitioners were not notified during the hearing or given an opportunity to contest that the Commission would be relying on material from the Pole Transfer Docket not otherwise in this record to make its decision in the instant docket. Lastly, Petitioners note that the Commission did not give the Joint Petitioners in the Pole Transfer Docket a deadline for determining whether they would move forward with the pole asset transfer under the terms and conditions imposed by the Commission in that docket. Therefore, it is unclear when the proposed transaction will close, if at all. The fact that the pole transfer transaction remains in limbo cannot lawfully prevent Petitioners from exercising their right to obtain an adjudication of Consolidated's just and reasonable rates in the instant docket, especially in light of the overwhelming and compelling evidence demonstrating that Consolidated's rates are excessive and must be reduced. In these circumstances, the Order is unlawful and unreasonable, and rehearing must be granted.

2. The Order: erroneously assumes that because Petitioners did not contest their pole attachment rates sooner, they have not suffered competitive harm; overlooks the evidence on competitive alternativesand unlawfully includes new evidentiary requirements for the second rate standard; and speculates that Consolidated's share of pole costs could hamper competition.

The Commission's second rate review standard requires the consideration of the "impact on competitive alternatives." N.H. Code Admin. R. Puc 1303.06(a)(2). This section of the Order is unlawful and unreasonable as it: 1) improperly concludes that Petitioners have not been competitively harmed by Consolidated rates because Petitioners did not file the Petition sooner; and 2) speculates that Consolidated's share of pole costs are unequal and "could hamper competition." Order at 8- 9.

The Order (at 8-9) improperly infers from the timing of the Petition that Petitioners have not been competitively hampered by Consolidated's excessive pole attachment rates. However, there is nothing in the record of this proceeding to support that conclusion. The Petitioners, through their membership organization, the New England Connectivity and Telecommunications Association, Inc. ("NECTA")[9] began disputing Consolidated's pole attachment rates in October of 2021. Exh. 1, Bates p. 15, para. 28. Consolidated subsequently refused to voluntarily provide Petitioners with data supporting the calculation of Consolidated's rates, and it was not until the Commission ordered Consolidated to provide that data in the Pole Transfer Docket that Petitioners were able to properly evaluate Consolidated's rates and conclude they are excessive. Exh.1, Bates pp. 14-17.

The Commission also noted that none of the parties provided data on rates of customer acquisition or competitive communications services penetration in Consolidated's service area. The Commission estimated the number of third-party attachers in Consolidated's service territory and concluded that there is "substantial penetration of competitive providers" therein. Order at 9.

The foregoing determinations are unlawful and unreasonable as they overlook Ms. Kravtin's prefiled and hearing testimony on the effect that Consolidated's excessive attachment rates have on competitive alternatives. As Ms. Kravtin testified, applying the FCC's cable rate formula levels the competitive playing field. Exh. 3, Bates pp. 16-17; Exh. 13, Bates pp. 5-6 and Transcript, pp. 35-36. Therefore, to the extent that Consolidated's rates exceed the rates produced by the FCC's cable rate formula, they are anti-competitive and therefore unjust and

[9] NECTA was formerly known as the New England Cable and Telecommunications Association.

unreasonable.[10] In light of Ms. Kravtin's expert testimony regarding the anti-competitive effect of Consolidated's excessive pole rates, and the lack of any record evidence to the contrary, it was improper for the Commission to speculate, based on the Commission's estimation of the number of third-party attachers in Consolidated's service territory, that there is "substantial" penetration of competitive providers, or to infer from those estimated penetration levels that Consolidated's rates are just or reasonable.

In addition, the Commission erred in determining that Consolidated's 85 percent share of pole costs under its current rules "could hamper competition." Order at 9. There is no record evidence demonstrating that Consolidated's rates are negatively impacting Consolidated's ability to compete with Petitioners. This speculation also overlooks that the FCC's widely accepted cable rate formula apportions less than 15 percent (*i.e.,* 7.41 percent) of pole costs to attachers and that the courts have held that this allocation provides just compensation to pole owners. Exh. 13, Bates pp. 3-4, and p. 6.

The Order further overlooks the value and competitive advantage Consolidated derives from owning and controlling its competitors' access to its poles. As Ms. Kravtin testified, a pole owner has substantial leverage over pole attachers because a pole owner ultimately has control over its competitor's access to the pole. Transcript, p. 35, lines 11-14. Such operational control can impede Petitioners' ability to provide service to their customers if access is delayed or otherwise affected by a pole owner's egregious operational requirements. Transcript, p. 35, lines 19-24. Thus, there is competitive value to Consolidated in owning poles. To the extent that the

[10] To the extent that the Order holds that Petitioners were required to provide data on rates of customer acquisition or competitive services penetration in Consolidated's service territories, the Commission is imposing new evidentiary standards that are not codified in its rules in violation of the rulemaking requirements of RSA 541-A.

Commission overlooked this point in its analysis of the second rate review standard, rehearing is warranted.

3. The Order's analysis of the potential impact on the pole owner and its customers overlooks that the FCC's cable rate formula produces compensatory rates; it also unlawfully determined that electric distribution company pole owners should be treated differently than competitive telecommunications company pole owners for pole rate purposes.

With respect to the third rate review standard (*i.e.*, potential impact on the pole owner and its customers), Petitioners respectfully submit that the Commission's determinations that the current allocation of pole costs between Consolidated and third-party attachers somehow unfairly burdens Consolidated[11] and its customers, and impedes competition, is erroneous as a matter of law. These findings completely overlook that the courts have determined that the FCC's cable formula (which allocates less than 15 percent of pole costs to attachers) produces rates that are fully compensatory to the pole owner and fairly allocates pole costs based upon the attacher's occupation of usable pole space. Exh. 13, Bates pp. 3-6. As Ms. Kravtin's surrebuttal testimony explains:

> The defining feature of the FCC cable rate formula is that it allocates the entire cost of the pole (for *both* "usable" and "unusable" space on the pole) based on each attacher's direct occupancy of space in proportion to the total space on the pole which is available for attachments. This type of direct cost-based allocator is very commonly applied to leasing arrangements in other sectors of the economy, for example, in the commercial and residential real estate sectors. By allocating the costs of the entire pole in direct proportion to the share of usable space occupied by each attacher (over and above any make-ready and other direct reimbursement fees the attacher already pays up front), the FCC cable rate assures full compensation for the costs associated with *both* the usable and unusable space on the pole attributable to the attacher. The proportionate allocator embodied in the FCC cable

[11] Consolidated argued it bears 85 percent of the pole costs and competes with Petitioners who bear only 15 percent of the costs. The Commission found that "[s]uch a disparity in pole costs creates a greater burden on Consolidated in offering competitive services." Order at 9-10. If Consolidated truly believed that its pole attachment rates (imposed by Consolidated since 2017) had not adequately recover costs associated with Petitioners' attachments, it could have raised those rates, but it did not.

> formula is both economically fair and efficient, a feature that underlies its widespread adoption in setting pole attachment rates nationwide historically.

Exh. 13, Bates p. 4. In view of the foregoing, there is no legal basis upon which to find that lowering Consolidated's rates would disadvantage Consolidated or its customers. Using the FCC's cable rate formula to set Consolidated's rates would ensure that Consolidated is not charging an attacher for a higher percentage of pole costs than those associated with the

Furthermore, there is no evidence in the record indicating that lowering Consolidated's rates to the just and reasonable level produced by the FCC's cable rate formula will impede Consolidated's ability to compete for broadband customers. New evidence that bears on this issue must be considered. On February 22, 2023, Consolidated announced that it has received a $40 million grant for broadband deployment in New Hampshire.[12] Consolidated's receipt of these substantial grant amounts undercuts the Commission's statement that Consolidated "must recover is pole costs through its competitive offerings." Order at 10. These grant funds demonstrate, contrary to the Commission's findings, that Consolidated's competitive efforts are not solely funded by Consolidated and its customers. Because the $40 million broadband deployment grant was awarded to Consolidated after the hearing in this matter, this information could not have been presented at the hearing. Accordingly, good reason exists for rehearing. *Eversource Energy and Consolidated Communications*, DE 21-020, Order No. 26,772 (Feb. 8, 2023) at 3 (citations omitted).

Also, in its analysis of the third rate review standard, the Commission accepted Consolidated's argument that because electric distribution companies are regulated, they can

[12] https://www.consolidated.com/about-us/news/article-detail/id/893/consolidated-communications-awarded-40-million-in-grants-to-aid-in-building-fiber-to-57000-homes-in-new-hampshire

recover pole costs through regulated distribution rates that are charged to all of their customers. Consolidated argued that the FCC attachment formulae produce fairer attachment rates for electric distribution companies than for competitive communications providers, and the Commission found that "the differing regulatory framework for electric distribution utilities and competitive communications providers in New Hampshire should be factored in weighing the respective FCC formulae under Puc 1303.06 for each of these groups of pole owners." Order at 10.

This finding is unlawful and unreasonable as there is no authority in either RSA 374:34-a or the Commission's rules to treat Consolidated differently from electric utility pole owners for purposes of establishing pole attachment rates. In fact, by its terms, N.H. Code Admin. R. Puc 1303.06 (a) clearly applies equally to both electric utilities and incumbent local exchange carriers like Consolidated. The Commission's finding also overlooks that electric distribution companies recover a fair, allocated proportionate share of pole costs from pole attachers; the remaining costs are appropriately recovered from ratepayers given that the poles are a fundamental component of electric service by the utility. Any allocation to pole attachers of costs above their fair and proportionate share would create an improper subsidy to electric ratepayers. Accordingly, there is no basis to support the Commission's determination that it must factor the difference in regulatory treatment that exists between electric and competitive communications companies when weighing the respective FCC formulae under Puc 1303.06 for each of these groups of pole owners. Moreover, the Commission cannot introduce a new "weighing" factor into it pole attachment rules. To do so would constitute unlawful rulemaking in violation of RSA 541-A.

4. The Commission's determination that it lacked evidence on deployment of broadband services overlooks record evidence and introduces a new evidentiary requirement that is not contained in the Commission's rules. New evidence on broadband deployment that could not have been presented at the hearing constitutes good reason for rehearing.

Regarding the fourth rate review standard – deployment of broadband services – the Commission found that "neither Petitioners nor Consolidated provided any evidence of the penetration of broadband service deployment across the Consolidated service territory" and "given the lack of evidence concerning broadband deployment, we cannot find that this factor supports any reduction in the current Consolidated pole attachment rates." Order at 11.

The Commission's finding that there is a lack of evidence concerning broadband deployment totally ignores Ms. Kravtin's testimony on this point and is therefore unlawful and unreasonable. Ms. Kravtin testified that reducing Consolidated's rates to those produced by the FCC's cable rate formula will positively impact the deployment of broadband infrastructure investment and high-speed internet service in New Hampshire, as excess pole rental fees that would otherwise be paid to Consolidated can be invested by Petitioners to support advanced broadband services. Exh. 3, Bates pp. 19-20; Transcript, pp. 37-38.

The Commission correctly noted that neither Petitioners nor Consolidated provided evidence regarding the penetration of broadband deployment across Consolidated's service territory. However, because neither the Commission's rules nor RSA 374:34-a require that such evidence be provided, the Commission cannot rely on the lack of such evidence as a basis for not reducing Consolidated's rates.

Further, good reason exists for rehearing on this issue as there is new information concerning broadband deployment that could not have been provided at hearing, and that

contradicts the above-stated finding. As noted elsewhere herein, Consolidated announced on February 22, 2023 that it was awarded $40 million in American Rescue Plan Act ("ARPA") funding to build fiber to nearly 25,000 unserved homes throughout New Hampshire.[13] The ARPA grant provides Consolidated with a significant competitive advantage over Petitioners who must invest their own funds to deploy broadband, and who must also pay Consolidated excessive pole attachment rates. Because the newly-awarded $40 million grant to Consolidated bears directly on the issues of broadband deployment, competition, and ultimately on Consolidated's pole rates, the Commission's determination that it cannot find that the broadband deployment factor supports any reduction in Consolidated's current rates must be reconsidered. Good reason, therefore, exists for rehearing.

5. The Commission erred in giving the formulae adopted by the FCC in 47 C.F.R. § 1.1406(d) less weight than the other five rate review standards.

Petitioners respectfully submit that the Commission erred in determining that accounting and reporting uncertainties in this case cause the Commission to give the FCC's formulae less weight than the other five rate standards. Order at 13. While Petitioners recognize that Ms. Davis's testimony raises accounting and factual inconsistencies between the 2020 ARMIS Report and her revised report, Ms. Kravtin's surrebuttal testimony, on the other hand, clearly and convincingly explains why Ms. Davis's depreciation adjustment is improper. Exh. 13, Bates pp. 8-10. Yet, the Order makes no mention of Ms. Kravtin's surrebuttal testimony on this point.

In addition, the Commission cannot ignore that Consolidated produced 2020 ARMIS in response to a Commission order. Exh. 3, Bates p.25-26. The Commission adopted the 2020

[13] https://www.consolidated.com/about-us/news/article-detail/id/893/consolidated-communications-awarded-40-million-in-grants-to-aid-in-building-fiber-to-57000-homes-in-new-hampshire

ARMIS report in the Pole Transfer Docket, as well as Ms. Kravtin's methodology that uses the data in that report, for determining the net book value of Consolidated's poles, and has clarified that such net book value would be used for purposes of calculating pole attachment rates. Order No. 26,772 (Feb. 8, 2023) at 7. Accordingly, because the depreciation figure used by Ms. Kravtin in valuing Consolidated's poles in the Pole Transfer Docket is the same as the depreciation figure she used in calculating Consolidated's pole attachment rates under the FCC's cable rate formula in this docket, there are no "accounting and reporting uncertainties" that would prevent the Commission from using the 2020 ARMIS Report figures to calculate a just and reasonable pole rate for Consolidated under the FCC's cable rate formula.

Lastly, it is improper for the Commission to invoke Consolidated's failure to provide correct information in response to a Commission order as a basis for giving the FCC formulae factor less weight than the other five rate review standards. In doing so, the Commission is essentially rewarding Consolidated for providing inaccurate information in response to a Commission order, which is unjust, unreasonable and unlawful. Furthermore, there is no authority for the Commission to give the FCC rate formulae factor any less weight than the other five rate review standards contained in the Commission's rules. Here, it appears that the Commission gave no weight at all to Petitioners' evidence regarding the fact that the FCC's cable rate formula has been upheld by the courts and is widely used by many states to set just and reasonable pole attachment rates. This contravenes N.H. Code Admin. R. 1303.06 (a) which states the Commission "shall consider" each of the six rate review standards set forth therein when determining just and reasonable pole attachment rates. The Commission's failure to do so, and its determination to give one factor less weight than the others, especially in light of the

comprehensive expert testimony regarding the FCC's cable rate formula, is arbitrary, unlawful and unreasonable.

6. The Commission erred in finding no evidence in the record that specifically addresses the interests of subscribers and users of services offered via such attachments, or consumer of any pole owner providing such attachments as may be raised. The Commission also unlawfully imposed a new evidentiary requirement for this rate review standard.

The Commission found no evidence in the record that specifically addressed the sixth rate review standard regarding subscriber and customer interests. Order at 13. The Order states that "had the parties shared pricing of comparable competitive communications services, the Commission might have been able to assess customer impacts," but given the record "the Commission is not persuaded that subscriber or customer interests would be impacted by a reduction in Consolidated's pole attachment rates." Order at 13. For the reasons discussed below, Petitioners respectfully submit that the Commission erred in making the foregoing determinations.

First, the Commission's assertion regarding the lack of evidence on this criterion completely overlooks the fact that Ms. Kravtin provided expert testimony as to how calculating Consolidated's pole attachment rates in accordance with the FCC's cable rate formula would satisfy the sixth rate review standard. Exh. 3, Bates pp. 21-22. The Commission therefore erred in finding that there was no record evidence on this issue.

Second, the Commission's rules contain no requirement that pricing of comparable competitive communications services must be submitted to the Commission for purposes of its assessment of the sixth rate factor. In the absence of a rule requiring such pricing evidence, it is unlawful and unreasonable for the Commission to find that the lack of that evidence constitutes a basis for finding that subscriber or customer interests would not be impacted by a reduction in

Consolidated's pole attachment rates. Attaching entities and pole owners need certainty regarding regulatory requirements for establishing just and reasonable pole attachment rules. Imposing new evidentiary requirements via Commission order constitutes unlawful rulemaking in violation of RSA 541-A, thereby rendering the Order unlawful and unreasonable. Rehearing, therefore, is required.[14]

C. The Order Improperly Balanced The Interests Of Petitioners And Consolidated.

The Order concludes by stating: "[b]alancing the interests of Petitioners and Consolidated in light of the six factors the Commission shall consider under Puc 1303.06, we find that the Petitioners have not met their burden of proof to demonstrate" that Consolidated's pole attachment rates are either unjust or unreasonable. Order at 13. Petitioners respectfully submit that this determination is erroneous as a matter of law, unreasonable, and unsupported by the record evidence.

First, there is no authority under either RSA 374:34-a or the Commission's rules for the Commission to balance the interests of Petitioners and Consolidated in light of the six rate standards. To the extent the Commission engaged in such a balancing in deciding this matter, it erred as a matter of law. Second, because the Order does not explain how the Commission balanced the parties' interests, it is arbitrary, capricious, and unreasonable. Lastly, as explained elsewhere herein, the record evidence does not support the Commission's determination that Petitioners did not meet their burden of proof.

D. Consolidated Must Be Ordered To Cease Billing And To Refund JU Charges As Of The Date Of The Petition.

[14] Inasmuch as several certifying states have adopted the FCC's cable rate formula, including the state of Maine where Consolidated's pole attachment rates are considerably lower than the New Hampshire rates it charges Petitioners in New Hampshire, it is reasonable to conclude that the FCC's cable rate formula meets the Commission's sixth rate review standard.

The Order states that Petitioners provided testimony showing that the JU charge is unreasonable, and that Consolidated failed to rebut that evidence, or provide any support for the charge. Order at 13. While the Commission ordered Consolidated to cease billing Petitioners a JU charge on poles it does not own as of the effective date of the Order, it did not require Consolidated to cease billing and refund to Petitioners the JU charges they have been charged since the filing of the Petition on August 22, 2022. N.H. Code Admin. R. Puc 1303.07 requires that upon determining an unjust and unreasonable rate, the Commission shall order a refund representing the difference of the amount actually paid and the amount that would have been paid under the rate established by the Commission, plus interest, as of the date of the Petition. In view of the foregoing, the Commission must rehear/reconsider the Order and require Consolidated to cease billing the JU charges for poles it does not own as of the date the Petition was filed, and include a refund provision consistent with the above-cited rule.

WHEREFORE, Petitioners respectfully request that the Commission rehear and/or reconsider Order No. 26, 775 and:

A. Determine that the pole attachment rates charged by Consolidated to Petitioners are unjust and unreasonable;
B. Establish just and reasonable annual pole attachment rates for Consolidated using the FCC's cable rate formula and Ms. Kravtin's methodology to arrive at rates of $5.33 for a solely owned pole and $2.67 for a jointly owned pole;
C. Pursuant to N.H. Code Admin. R. Puc 1303.07 and 1303.08, order Consolidated to refund to Petitioners with interest amounts that they paid Consolidated in excess of the just and reasonable rates established by the Commission;

D. Order Consolidated to cease charging and refund to Petitioners with interest the JU charges they paid to Consolidated since the date of the Petition in accordance with N.H. Code Admin. R. Puc 1303.07 and 1303.08;

E. Conduct hearing on the within Motion; and

F. Grant such further relief as it deems 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: March 20, 2023

Certificate of Service

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

G.

Susan S. Geiger