

**STATE OF NEW HAMPSHIRE
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

Order Resolving Pole Attachment Rate Dispute

ORDER NO. 26,775

February 17, 2023

In this order the Commission determines that Petitioners have not met their burden of proof to demonstrate that the current pole attachment rates charged by Consolidated under pre-existing agreements are unjust or unreasonable. The Commission makes this determination based on the six factors provided in Commission rules as well as on the economic uncertainties imposed by the pending transfer of 69.64 percent of Consolidated's pole plant to Eversource. Nonetheless, the Commission determines that the joint use charges billed to Petitioners on poles in which Consolidated has no ownership interest are not just and reasonable and must be terminated.

I. PROCEDURAL HISTORY

This proceeding was initiated by a Petition for Resolution of Rate Dispute (Petition) dated August 22, 2022, filed by Charter Communications, Inc. (Charter), Cogeco US Finance, LLC d/b/a Breezeline (Breezeline), and Comcast Cable Communications, LLC (Comcast) and (collectively, the Petitioners). The Petition requests that the Commission resolve Petitioners' dispute with Consolidated Communications of Northern New England Company, LLC (Consolidated) regarding

annual pole attachment rental rates and joint use charges imposed by Consolidated under existing agreements.

On November 16, 2022, Consolidated filed a motion to dismiss the Petition. (Motion). The Petitioners objected to the Motion on November 28, 2022, and supplemented the objection on December 12, 2022. On January 23, 2023, the Commission issued Order No. 26,764 in which it denied the Motion. The Commission held a hearing in this matter on January 26, 2023, and Petitioners and Consolidated each filed post-hearing briefs on February 9, 2023.

The initial filing and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are available on the Commission's website at <https://www.puc.nh.gov/Regulatory/Docketbk/2022/22-047.html>.

II. POSITIONS OF THE PARTIES

A. The Petitioners

The Petitioners argue that Consolidated's pole attachment rates are unjust and unreasonable. Petitioners assert that the Commission has jurisdiction to consider this dispute over attachment rates based on 47 U.S.C. § 224(c), RSA 374:34-a, N.H. Code of Admin. R. Puc 1300 and Commission precedent. *See Time Warner Entm't Co., L.P.*, Order No. 25,387 (July 3, 2012).

The Petitioners collectively pay for approximately 350,000 attachments on Consolidated poles. Petition at 2. Petitioners argue that Consolidated's annual pole attachment rates of \$11.67 for solely owned poles and \$6.84 for jointly owned or joint use poles are not reasonable pursuant to the six factors identified in N.H. Code of Admin. R. Puc 1304.06.

Further, Petitioners claim that Consolidated's attachment rates do not match the rates Petitioners calculate based upon the Federal Communications Commission (FCC) cable attachment rate formula. *See* 47 C.F.R. §1.1404(d)(1). Petitioners begin their rate analysis with a report that Consolidated produced in Docket No. DE 21-020 pursuant to Order No. 26,534 (October 22, 2021). Order No. 26,534 compelled Consolidated to produce a 2020 ARMIS report by updating the 2017 ARMIS report filed by FairPoint Communications with adjustments for additional gross investment, accumulated depreciation, and depreciation rate for its pole plant through December 31, 2020. (2020 ARMIS Report).

According to Petitioners, if the FCC Cable Rate Formula is applied to the 2020 ARMIS Report assuming a pole height of 39 feet, the resulting pole attachment rates would be \$2.67 for jointly owned poles and \$5.33 for solely owned poles. Exhibit (Exh.) 3 at 20-21. Using a pole height of 37.5 feet, the Petitioners calculate a rate for a solely owned pole of \$6.31, and for a jointly owned pole of \$3.16. *Id.*

B. Consolidated

Consolidated argues that its current attachment rates charged to Petitioners of \$11.67 for solely owned poles and \$6.84 for jointly owned or joint use poles are just and reasonable when measured by the six factors contained in Puc 1303.06. Consolidated also disputes the Petitioners' calculation of the FCC cable rate.

In its pre-filed rebuttal testimony, Consolidated asserts that its 2020 ARMIS Report used by Petitioners to calculate rates for pole attachments reflects GAAP accounting methodology. Instead, Consolidated claims that adopting a regulatory accounting methodology, while accounting for Consolidated's pole additions from July 3, 2017, through December 31, 2020, would lead to an accumulated depreciation

figure of \$11,250,610 in the adjusted ARMIS 2020 report (2020 ARMIS Revised) instead of the \$35,765,000 shown on the original 2020 ARMIS Report. Exh. 17 at 1.

Using the 2020 ARMIS Revised, Consolidated calculated the FCC Cable formula rate at \$11.30 annually for solely owned poles assuming a 39-foot pole height, and \$13.57 annually using a 37.5-foot pole height. *Id.*

C. Department of Energy

The New Hampshire Department of Energy (DOE) appeared and participated in this docket but did not offer testimony and did not take a position on the Petitioners' request for adjustments to Consolidated's pole attachment rates.

III. COMMISSION ANALYSIS

A. Legal Authority

In this case, the Petitioners seek Commission review of the rates contained in existing attachment agreements between Consolidated and each of the Petitioners. The Commission's authority to set pole attachment rates is found in RSA 374:34-a.¹

The commission shall have the authority to hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments.

Id., VII.

Pursuant to this statutory authority, the Commission has adopted rules to guide its regulation of pole attachments. Those rules provide a description of the factors the Commission must consider when reviewing a request to adjust the attachment rates in an existing pole attachment agreement.

(a) In determining just and reasonable rates for the pole attachments of cable television service providers, wireless service providers, and excepted local exchange carriers that are not incumbent local exchange carriers to poles owned by electric utilities or incumbent local exchange carriers under this chapter, the commission shall consider:

¹ New Hampshire is one of the states certifying that it regulates pole attachments. *States That Have Certified That They Regulate Pole Attachments*, Public Notice, 35 FCC Rcd. 2784 (2020).

- (1) Relevant federal, state, or local laws, rules, and decisions;
- (2) The impact on competitive alternatives;
- (3) The potential impact on the pole owner and its customers;
- (4) The potential impact on the deployment of broadband services;
- (5) The formulae adopted by the FCC in 47 C.F.R. §1.1406(d) in effect on October 1, 2022; and
- (6) 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.

Puc 1303.06 Rate Review Standards.

The Commission's rules allow for Commission review of attachment rates in existing attachment agreements pursuant to Puc 1303.03. The Commission has interpreted Puc 1303.03 to allow a review of attachment rates after parties have entered into and begun performance of an attachment agreement. *See* Time Warner Order at 14 (citing *In the Matter of Mile Hi Cable Partners, LP*, 17 F.C.C.R. 6268, 6271 (2002)). A party filing a petition under this rule shall have the burden of proving that an agreement is not just, reasonable, and nondiscriminatory. Puc 1303.01.

We consider the Petition and the evidence presented by the parties in this docket in order to determine whether, based on the six factors listed above, the Petitioners have met their burden of demonstrating that the rates provided by Consolidated in its pole attachment agreements are unjust or unreasonable.

B. Record Evidence

The Commission finds the following facts relevant to this proceeding. The Petitioners filed the Petition in this docket on August 22, 2022, asserting that the rates Consolidated charged them under current attachment agreements are unjust and unreasonable. Those agreements, including the current attachment rates, have been in effect since before Consolidated acquired the poles from FairPoint Communications, Inc. in 2017. Petition at 13.

The rates charged under the existing agreements are \$11.67 per year for attachments to poles solely owned by Consolidated, \$6.84 per year for jointly owned poles, and \$6.84 per year for poles under joint use agreements in which Consolidated has no ownership interest. Petition at 2. Collectively, the Petitioners pay Consolidated for approximately 350,000 attachments. *Id.* Comcast is billed for 220,083 attachments and the balance of attachments is split between Charter, billed for 57,010 attachments, and Breezeline billed for 61,407 attachments. *See Generally*, Affidavits attached to Petition.

The Petitioners are direct competitors with Consolidated in the provision of communications services. Transcript of January 26, 2023 Hearing (Transcript) at 73. Petitioners are purely competitive entities and are not carriers of last resort. As a result, Petitioners have no duty to serve and may choose to offer their services only to customers they deem economic to serve. Petitioners and Consolidated both depend on attachments to poles in order to offer a range of communications services to customers in New Hampshire, including broadband. Petition at 2. In Consolidated's service territory, there is an average of one third-party attachment per pole. Transcript at 83. Under Consolidated's current pole attachment rates, the Petitioners pay roughly 15 percent of the bare pole costs shown in the 2020 ARMIS Report. Transcript at 63-64. This means that Consolidated must pay the balance of 85 percent of the pole costs on most of its poles. *Id.*

C. Legal Analysis.

1. Relevant Federal, State, or Local Laws, Rules, and Decisions

In considering Petitioners' request to find the Consolidated attachment rates under existing agreements unjust or unreasonable, we must consider various authorities and decisions. In this case, Order No. 26,729 (November 18, 2022)

(Transfer Order) and Order No. 26,772 (February 8, 2023) (Transfer Rehearing Order), bear directly on our analysis of attachment rates charged by Consolidated.

Consolidated and Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource) petitioned the Commission on February 10, 2021, in Docket No. DE 21-020, requesting approval of a sale to Eversource of Consolidated's interest in all of the poles it owns solely or jointly, or uses jointly in the Eversource service territory (Pole Transfer). Eversource and Consolidated estimated that the number of Consolidated's jointly owned poles in the Eversource territory was approximately 343,000 and the number of Consolidated's solely owned poles was approximately 3,800, although both numbers were subject to further inspection and verification. Transfer Order at 5. Consolidated's jointly or solely owned poles located within Eversource and Consolidated co-extensive franchise areas represent 69.64 percent of Consolidated's total pole plant. Transfer Rehearing Order at 8.

As part of the Pole Transfer, in addition to the purchase price, Consolidated agreed to pay Eversource \$5,000,000 a year for two years for its attachments to the Eversource poles. After this two-year transition period, Eversource would develop uniform pole attachment rates based on updated pole inventory, capital investment and operational costs. Transfer Order at 20.

The costs of the Pole Transfer, net of revenues received from the poles, would be recovered from Eversource customers through an annual charge known as the pole plant adjustment mechanism (PPAM). Transfer Order at 6. The Transfer Order allowed Eversource to assume all existing pole attachment agreements and to charge those existing attachment rates during the two-year transition. Pole Order at 20-21. As a result, any decrease in attachment rates charged to the Petitioners in this docket and imposed on the poles transferred to Eversource would decrease pole revenues to

Eversource and will potentially increase the cost recovery through the PPAM. Any such increase would be recovered from Eversource ratepayers.

Under the terms of the Pole Transfer agreement, the transaction is contingent on a final, non-appealable Commission order free and clear of contingences or conditions, as well as Commission approval of cost recovery acceptable to Eversource. Transfer Order at 6.

If consummated, the Pole Transfer will result in Consolidated divesting itself of its ownership interest in 347,000 poles, or approximately 69.64 percent of the poles it owns in New Hampshire. Transfer Rehearing Order at 8. Further, it would result in Consolidated owning and operating the remaining roughly 30 percent of its current pole plant in an altered footprint. Consequently, if the Pole Transfer occurs, Consolidated's costs and revenues will adjust as a result of fewer pole attachments remaining. 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.

Given the economic uncertainty posed by the potential Pole Transfer, we find that the Pole Transfer Order and Transfer Rehearing Order require us to defer consideration of pole attachment rate adjustments for Consolidated until the uncertainties surrounding the Pole Transfer have been resolved.

2. Impact on Competitive Alternatives.

The Petitioners have done business in New Hampshire for a number of years and have not requested a resolution of any dispute over Consolidated's pole attachment rates. Comcast was a party to the Time Warner dispute. *See* Time Warner Order at 4–6. The Time Warner Docket involved the pole attachment rates of Public

Service Company of New Hampshire (now Eversource). In the Time Warner docket, Comcast sponsored testimony by Ms. Kravtin, the same witness the Petitioners have used in this docket. *See* Order No. 25,453 at 2 (January 17, 2013). Therefore, Comcast clearly understood its right to have disputed pole attachment rates determined by the Commission. Nonetheless, Petitioners waited until Consolidated had contracted to divest itself of more than two-thirds of its pole plant to challenge the existing pole attachment rates. Had Petitioners been hampered in their competitive service offerings in Consolidated's service territory, they could have challenged the pole attachment rates earlier.

None of the parties to this docket have provided any data on rates of customer acquisition, or competitive communications services penetration in various areas of the Consolidated service territory. As a result, the Commission must estimate competitive impacts based on the limited amount of data provided. Based on the number of attachments Consolidated bills to Petitioners, approximately 350,000, and testimony from Consolidated that it has an average of one third-party attacher per pole in its service territory, we find that there is substantial penetration of competitive providers in the Consolidated service territory. Exh. 19 at Bates page 13, Transcript at 83.

Further, as discussed in more detail below, Consolidated argues that under its current attachment rates, it must bear 85 percent of the pole costs, while Petitioners pay only 15 percent of the pole costs. Such unequal cost burdens could hamper competition.

3. Potential Impact on The Pole Owner and Its Customers

Petitioners seek to reduce the attachment rate for jointly owned poles from \$6.84 to \$2.67 which is an approximately 61 percent reduction in attachment rates.

Consolidated testified that its current attachment rates only reimburse it for 15 percent of its bare pole costs shown in the 2020 ARMIS Report. Thus, Consolidated argues that it must bear 85 percent of the pole costs, but must compete with Petitioners, who bear only 15 percent of the costs, to offer the same broadband services.

Such a disparity in pole costs creates a greater burden on Consolidated in offering competitive services. Because Consolidated is no longer a rate of return utility, *see* RSA 362:7 and :8, it must recover its pole costs through its competitive offerings. While it owns a legacy landline network as a former regulated telephone company, it deploys broadband facilities in order to offer broadband services and compete with the Petitioners. According to Consolidated, such unequal cost burdens disadvantage Consolidated and its customers and impede competition.

When poles are owned by a New Hampshire electric distribution utility, the utility may recover its pole costs through its regulated distribution rates. Those rates are charged to all customers connected to the electric distribution system. As a result, Consolidated argues that the FCC attachment formulae produce fairer pole adjustment rates for electric distribution utilities than they do for competitive communications providers. It is worth noting that the Time Warner docket dealt with attachment rates for Public Service Company of New Hampshire (predecessor to Eversource) an electric distribution utility. We find that the differing regulatory framework for electric distribution utilities and competitive communication 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.

4. The Deployment of Broadband Services

Both Petitioners and Consolidated testify that they offer competing broadband services; however, neither Petitioners nor Consolidated provided any evidence of the penetration of broadband deployment across the Consolidated service territory. In the absence of such evidence, we surmise based on the number of Petitioners' pole attachments on Consolidated poles (350,000) that Petitioners are attached to a substantial portion of Consolidated's poles. Nonetheless, given the lack of evidence concerning broadband deployment, we cannot find that this factor supports any reduction in the current Consolidated pole attachment rates.

5. Formulae Adopted by the FCC in 47 C.F.R. Section 1.1406(d)

Puc 1303.06 references section 47 CFR Section 1.1406(d) which includes both the FCC telecom and FCC cable formulas for setting pole adjustment rates. In their calculation of the FCC cable formula attachment rates, the parties to this docket each began with the 2020 ARMIS Report.

Beginning with the 2020 ARMIS Report, Petitioners' witness Ms. Kravtin calculated the attachment rate, using the FCC cable formula and assuming a 39-foot pole height, to be \$5.33 for a solely owned pole. Assuming a 37.5-foot pole height, the attachment rate would be \$6.31 for a solely owned pole. Using the alternative FCC telecom formula and based on the same 2020 ARMIS Report and 39-foot pole height, Ms. Kravtin calculated a pole rate of \$5.71 for a solely owned pole. According to Ms. Kravtin, the resulting FCC telecom rate is 7.1% higher than the FCC cable rate. Exhibit 22.

Consolidated witness Ms. Davis testified that the Company lacked accounting expertise to report under the regulatory system of accounts as a result of its transition to a competitive entity and the termination of regulatory requirements to file ARMIS

reports. Transcript at 90-91. Further, Consolidated had revalued its assets following its acquisition of FairPoint in 2017. According to Ms. Davis, the 2020 ARMIS Report produced in the Pole Transfer docket was not an accurate presentation of Consolidated's net pole plant for purposes of calculating the FCC formulae.

As a result, Ms. Davis adjusted the accumulated depreciation shown on the 2020 ARMIS Report from the original \$35,765,000, Exh. 4 at 24, to \$11,250,610, Exh. 21. In response to Record Request 2, Consolidated explained its changes to the 2020 ARMIS Report that reduced the accumulated depreciation. Exh. 21. Based on those adjustments and a purported shift to regulatory accounting for depreciation, Consolidated produced its 2020 ARMIS Revised report. Consolidated then calculated the Cable Attachment rate using the 2020 ARMIS Revised to be \$11.29 per solely owned pole, based on the 39-foot pole height, and \$12.54 using the FCC rebuttable presumption of a 37.5-foot pole height.

The driver of the differing pole adjustment rates is the accumulated depreciation of \$35,765,000 versus \$11,250,610. Both parties appear to use the same calculation methodology for the FCC cable rate formula. The record in this expedited docket does not allow the Commission adequate time or record to thoroughly review and validate the adjustments made by Ms. Davis, nor to resolve the accounting and factual inconsistencies between the 2020 ARMIS Report and 2020 ARMIS Revised. The Commission notes, however, that the FCC's forbearance from its uniform system of accounts does not relieve Consolidated of requirements to maintain property records necessary to track substantial assets and investments in an accurate, and auditable manner.

In this case, under the FCC cable formula, based on the 2020 ARMIS Report, and without Ms. Davis's adjustments, the current Consolidated attachment rates are

higher than the rates calculated under the FCC cable formula. The accounting and reporting uncertainties in this case, however, cause us to give the FCC formulae factor less weight when considering Consolidated's current pole attachment rates, in light of the other factors listed in Puc 1303.06.

6. 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.

The Commission does not find evidence in the record that specifically addresses these subscriber and customer interests. Had the parties shared pricing of comparable competitive communications services, the Commission might have been able to assess customer impacts. 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.

D. Conclusion

Balancing 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 the existing pole attachment rates charged by Consolidated under pre-existing agreements are either unjust or unreasonable.

Notwithstanding our finding above, we find that the Petitioners did provide testimony showing that the joint use charge is unreasonable, Exhibit 13 at Bates Page 20, Transcript at 31–32. Consolidated did not rebut that evidence. Consolidated has not provided any support for the \$6.84 annual charge for joint-use poles. There was no testimony concerning any costs that this charge is offsetting. Further, Consolidated did not dispute Petitioners' claims that Consolidated has no ownership interest in joint

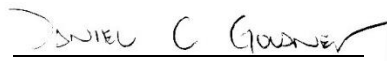
use poles. As a result, we order that Consolidated cease imposing a joint use charge on poles it does not own as of the effective date of this order.

Based upon the foregoing, it is hereby

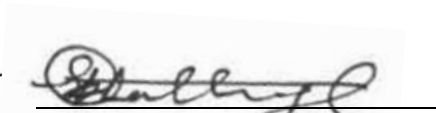
ORDERED, that the Petition to adjust attachment rates charged by Consolidated under attachment agreements with Petitioners is DENIED; and it is

FURTHER ORDERED, that Consolidated shall cease billing Petitioners a joint use charge on poles it does not own as of the effective date of this order.

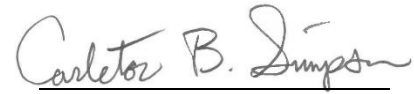
By order of the Public Utilities Commission of New Hampshire this seventeenth day of February, 2023.



Daniel C. Goldner
Chairman



Pradip K. Chattopadhyay
Commissioner



Carleton B. Simpson
Commissioner

Service List - Docket Related

Docket#: 22-047

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