

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 23-103

CONSOLIDATED COMMUNICATIONS HOLDINGS, INC. AND
CONDOR HOLDINGS LLC
JOINT PETITION TO APPROVE TRANSFER OF CONTROL

**Objection by Consolidated Communications Holdings, Inc. to
Motion to Compel Responses to Data Requests by the New Hampshire Electric Cooperative**

NOW COMES Consolidated Communications Holdings, Inc. (“Consolidated” or “CCHI”), by and through its undersigned attorneys, and respectfully objects to the Motion to Compel Responses to Data Requests (“Motion”) filed by the New Hampshire Electric Cooperative (“NHEC”).

Introduction

1. This Docket solely relates to a joint request from Consolidated and Condor Holdings LLC (“Condor”, and together with Consolidated, hereinafter the “Petitioners”) for approval by the New Hampshire Public Utilities Commission (the “Commission”) of a transaction which (if consummated) would result in, among other things, the change of *indirect ownership and transfer of control* of CCHI’s subsidiaries: Consolidated Communications of Northern New England Company, LLC (“CCNE”) and Consolidated Communications of Maine Company (“CCM”) to Condor pursuant to RSA 374:30, II (the “Transaction”). *See* Joint Petition to Approve Transfer of Control, Dec. 27, 2023 (the “Joint Petition”), p. 1; *see also* Commencement of Adjudicative Proceeding and Notice of Prehearing Conference, February 16, 2024 (“Initial Order”), p. 1. If the Commission approves the relief in the Joint Petition, then

following the closing of the Transaction (as defined in the Joint Petition), Condor will become the direct holder of all of the common stock of CCHI and the indirect parent of CCNE and CCM, and CCHI, which is currently a publicly traded company, will become privately held. Joint Petition, at 5.

2. This objection relates to NHEC's Motion seeking extensive information concerning various detailed operational issues of one of Consolidated's subsidiaries, CCNE. Such matters have no relevance to the proposed Transaction before the Commission. Instead, Consolidated contends that NHEC seeks this information primarily for purposes unrelated to this proceeding. Specifically, Consolidated believes that NHEC is exploiting the discovery process in this Docket as a means to (i) influence settlement negotiations between Consolidated and NHEC in unrelated civil litigation in the New Hampshire Superior Court and (ii) seek information to aid additional civil litigation likely to follow the conclusion of the current proceeding absent a settlement.

3. For the reasons set forth below, NHEC's Motion lacks merit and NHEC's data requests fail to adhere to principles of relevance, reasonableness, and common sense. The Motion should be denied.

Factual Background

1. On December 27, 2023, Consolidated and Condor petitioned the Commission to allow the transfer of indirect ownership and control of CCNE and CCM to Condor pursuant to RSA 374:30, II. The proposed Transaction is structured as a change of ownership at the holding company level only. The closing of the Transaction will not affect any of the operations or legal identities of CCNE, CCM or any other operating subsidiary of CCHI. As further detailed in the Joint Petition, the Licensees will continue to operate under the current policies and procedures,

and all existing obligations, including agreements, tariffs, contracts, and other arrangements, will be unaffected by the Transaction. Joint Petition, p. 7.

2. Completely independent from this matter, NHEC and Consolidated are currently involved in contentious and long-running litigation in New Hampshire Superior Court, captioned as *New Hampshire Electric Cooperative, Inc. v. Consolidated Communications of Northern New England, LLC*, Docket No. 216-2020-CV-00555 (hereinafter the “State Court Litigation”). In the State Court Litigation, the parties are presently litigating vegetation management issues arising from the parties’ General Agreement Joint Use of Wood Poles, dated July 1, 1977 (the “Joint Use Agreement” or “JUA”), and a related Intercompany Operating Procedure attached thereto.

3. NHEC initiated the litigation in the Hillsborough County Superior Court (Northern District) on July 31, 2020. CCNE then counterclaimed and together the parties’ various claims and defenses implicate a wide range of data relative to the operations of the two companies and their vendors as well as the parties’ compliance (or lack thereof) with the Joint Use Agreement. Eventually, CCNE voluntarily non-suited its counterclaims without prejudice related to utility pole ownership parity and other issues related to the maintenance and ownership of utility poles. CCNE filed the nonsuit in order to streamline the State Court Litigation.¹ Despite making this concession, NHEC has continued to attempt to offer testimony and exhibits at the forthcoming trial in the State Court Litigation about utility pole parity, the JUA and other

¹ NHEC opposed CCNE’s nonsuit without prejudice. The Superior Court’s Order, dated September 12, 2023, at p. 5 contains the Court’s ruling on the issue (emphasis added): “Though Plaintiff did not specifically request Defendant to voluntarily non-suit its counterclaims, *Plaintiff did ask Defendant to streamline the case if possible*. The Court agrees that a voluntary non-suit here accomplishes that goal. Defendant explained at the hearing that the damages sought for counterclaims III–V are distinct from the other counts in the case, *demonstrating that it makes sense for those claims to be tried separately from the vegetation management issue.*”

issues related to the parties' solely owned and jointly owned utility poles. *See Consolidated Motion In Limine* (cited at NHEC Supp. to Mot. to Compel, at 2). Discovery in the State Court Litigation closed on January 31, 2024, although multiple fact and expert discovery depositions remain to be taken (by agreement of counsel) prior to the start of the jury trial on June 3, 2024.

4. During the course of discovery in the State Court Litigation, NHEC propounded on CCNE multiple rounds of Requests for the Production of Documents. NHEC also propounded Interrogatories to be answered by CCNE. All told, NHEC propounded 85 document requests and 13 interrogatories. In totality, these discovery requests cover every facet of CCI's operations and dealings with NHEC. Given the sheer scope of these discovery requests, NHEC already has any information it may need from CCI to properly evaluate the Joint Petition. Additionally, many of these discovery requests mirror or are substantially similar in scope to NHEC discovery requests in this Docket. *See NHEC's Interrogatories, March 19, 2021 ("Attachment A")*, *NHEC's First Set of Requests for Production of Documents, March 19, 2021 ("Attachment B")*, and *NHEC's Third Set of Requests for Production of Documents, February 9, 2022 ("Attachment C")*.

5. In March 2024, in this proceeding before the Commission, NHEC propounded data requests on CCNE and CCM seeking a wide range of information dating back to 2017 wholly unrelated to an indirect transfer of control of CCNE in the present Docket. Consolidated timely objected to the requests as irrelevant and improperly seeking information related to utility pole-based issues in the current State Court Litigation and the claims in state court to be tried separately from vegetation management issues.

6. For example, in the State Court Litigation, NHEC Request for Production No. 24 asks for "All communications and documents concerning CCI's decisions as to whether or not it

would set new poles or replacement poles pursuant to the JUA.” Attachment B, at p. 9. In their data requests NHEC now asks Consolidated to provide information that is captured by that document request. *See* Request No. 1-06 (identify the number of poles replaced to storm events the past five years); Request No. 1-11 (identify the number of days it takes for Consolidated to replace a pole after a request from NHEC); Request No. 1-12 (identify the difference between the number of poles Consolidated has replaced and the number of poles NHEC has requested be replaced); Request No. 1-13 (explain Consolidated’s scheduling process for replacing poles). NHEC’s document requests also repeatedly request information on reliability and outages. Request No. 1-03, 1-04, 1-07 – 1-10. Yet, NHEC already asked for this information in the State Court Litigation. *See* Attachment A, Interrogatory No. 9; Attachment B, Request No. 25 (asking for outage information since 2008).

7. The Motion concerns all 18 of NHEC’s requests on which NHEC and Consolidated have not reached agreement. The data requests can be characterized generally as seeking information related to utility pole parity and related pole ownership issues, as well as service outages, Commission investigations (or how Consolidated “...addressed alleged failures...”) related to utility pole ownership and storm response. None of these topics relate to the Transaction before this Commission. Instead, NHEC’s data requests (other than the data request seeking information about prior Commission investigations) tie back to the Joint Use Agreement, operations between the two companies, and contractual issues arising between NHEC and Consolidated under the Joint Use Agreement. Consolidated believes that NHEC seeks this information to gain leverage in any settlement discussions that might be resumed prior to the jury trial on June 3 and, barring settlement, to support its State Court Litigation after the deadline to complete discovery ended. Consolidated also believes NHEC seeks this information

to address the nonsuited claims in the State Court Litigation that ultimately will be tried in the Superior Court separate from vegetation management issues scheduled for trial starting June 3, 2024.

Argument

8. It is well settled that “discovery should be relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence.” *Re Public Service of New Hampshire*, 86 NH PUC 730, 731-32 (2001); *see also N.H. Ball Bearings, Inc. v. Jackson*, 158 N.H. 421, 429 (2009) (“[P]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action...”). Broad though it is, this standard “does not exempt discovery requests from principles of reasonableness and common sense.” *Re City of Nashua*, Order 24,654 (August 7, 2006), at 3 (*citing State v. Barnes*, 150 N.H. 715, 719 (2004)). The Commission “...is permitted to keep discovery within reasonable limits and avoid open-ended fishing expeditions or harassment to ensure that discovery contributes to the ordinary dispatch of judicial business...” *N.H. Ball Bearings*, at 430. At the outer limits, where a motion to compel seeks discovery of information which could under no circumstance be considered relevant, the motion must be denied. *Re PSNH*, 86 NH PUC at 731-32. The information NHEC seeks lies beyond the outer limits of reasonable discovery and is an open-ended fishing expedition related to NHEC/CCNE disputes that have nothing to do with this Docket.

9. In this proceeding, the only matter before the Commission for approval is the transfer of the indirect ownership and control of CCNE and CCM to Condor. New Hampshire RSA 374:30, II governs the Transaction and is at issue in this Docket. The proposed Transaction is occurring at the parent company level. And, as detailed in the Joint Petition, CCNE’s

operating procedures will continue in their current form and will not be impacted by the indirect change in control of CCNE or any other operating subsidiary of CCHI. The sole issue before the Commission therefore is whether the new entity to which the transfer of control is to be made is technically, managerially and financially capable of maintaining the obligations of an ILEC *set forth in RSA 362:8 and RSA 374:22-p*. RSA 374:30, II (emphasis added). In this proceeding, the Commission is not tasked with broadly analyzing either (i) CCNE's current operating policies and procedures or (ii) CCNE's business relationship, operations, and compliance with a private contract (i.e., the Joint Use Agreement) between CCNE and NHEC.

10. Notwithstanding the express language of RSA 374:30, II, NHEC claims that its data requests are relevant to determining whether Condor and Consolidated are "technically, managerially, and financially capable of maintaining CCNE's obligations as an ILEC joint pole owner in New Hampshire." Motion, at 3. NHEC is wrong. The New Hampshire Legislature expressly limited the standard of review under RSA 374:30, II to whether the utility transferee will be capable of maintaining ILEC based obligations that arise under RSA 362:8 and RSA 374:22-p. These statutes address ILEC obligations related to: basic service (RSA 362:8, IV, citing to obligations arising under 374:22-p), the provision of services to competitive local exchange carriers, interexchange carriers, and wireless carriers (RSA 362:8, III), certain issues related to availability of broadband services, soft disconnect processes and capital expenditure commitments within the state that arose prior to February 1, 2011 (RSA 362:8, II), and the Commission's authority under the federal Communications Act of 1934 (RSA 362:8, I).

11. RSA 374:30, II makes no reference to utility poles. The statute makes no reference, directly or indirectly, to proceedings before the Commission that "... can be used to identify ... shortcomings as an ILEC pole owner." Motion, at 6. There is no requirement in the

statute that requires a transferee utility to make a showing that it is "... capable of maintaining the obligations of an incumbent local exchange carrier to properly maintain and operate its distribution pole plant." *Id.* at 7. Indeed, NHEC's motion is devoid of a single statutory citation that supports its purported legal standard applicable to this Docket. CCNE's operation of pole plant has no relevance to the issues in the Docket.

12. Moreover, it should not be lost on the Commission that CCNE recently sold 75% of its pole plant to Eversource. *See generally Eversource Energy and Consolidated Communications, Joint Petition to Approve Pole Asset Transfer*, DE 21-020; *see also* Order No. 26,772, at 8 (citing CCNE's 75% reference and stating that "... 69.64 percent is the result of dividing the equivalent number of sole poles identified in the Joint Petition by Consolidated's total equivalent pole figure provided in the 2020 ARMIS report produced for the Commission in this [Eversource pole sale] matter."). For the 25% to 30% of the poles CCNE continues to own, NHEC is one of three electric distribution companies which owns or uses poles in some manner with CCNE. The other two electric distribution companies are Liberty Utilities Corp. and Unitil Energy Systems, Inc., neither of which intervened in this Docket. There also are several small municipal based utilities which own or use poles with CCNE: Ashland Electric Department, Littleton Electric Department, New Hampton Village Electric Department, Wolfeboro Electric Department, and Woodsville Water & Light Department. Following NHEC's logic, the Commission would need to undertake an analysis of all of CCNE's utility pole-based activities with all three electric companies, plus the five municipal electric departments, to make a determination that the Joint Petitioners' proposed Transaction meets the legal standard set forth in RSA 374:30, II. Such a scenario does not comport with "principles of reasonableness and common sense." *Re City of Nashua*, Order 24,654, at 3.

13. Consolidated, through its operating subsidiaries, respectfully contends that it is currently maintaining its ILEC obligations set forth in the relevant statutory scheme applicable to this Docket. Because Consolidated's operating subsidiaries will remain intact after the consummation of the Transaction, Consolidated will continue to comply with its obligations. Because Consolidated's new ownership will not change this fact, NHEC's requests do not have any relevance to CCHI and Condor's capabilities.

14. NHEC's contention that the State Court Litigation only seeks to resolve vegetation management issues, and not the subjects of its data requests, is of no moment. The contention lacks credibility when considered in the context of the parties' civil litigation over the past 3 years and 9 months. The breach of contract claims at issue in the present State Court Litigation and the follow-on civil proceeding have no relation to the proposed Transaction before the Commission.

15. What is significant, however, is NHEC's apparent use of this proceeding to garner information to advance its own interests in the State Court Litigation. Consolidated contends that NHEC submitted these data requests in a misguided attempt to influence then-pending mediation between the parties concerning the State Court Litigation. NHEC then subsequently filed this Motion at 9:06 PM on April 17, the night prior to the April 18 mediation session held in the State Court Litigation. *See* Email from Attorney Terri L. Pastori, dated April 5, 2024, listing the discovery and mediation schedule ("Attachment D"). Such an effort is *per se* improper and provides all the basis needed for the Commission to deny the motion to compel.

16. Additionally, the data requests propounded by NHEC do not seek any information relevant to the inquiry before the Commission. NHEC is seeking information that it either already has as part of the State Court Litigation or now seeks to obtain after discovery closed in

the State Court Litigation on January 31, 2024. The Commission should not countenance NHEC's abuse of the discovery process in this proceeding to serve its separate interests.

17. Neither NHEC nor Consolidated should use this Docket to advance their separate interests in matters or disputes wholly outside of this Docket. *See* Order No. 26,772, at 9 (Commission citing RSA 541-A:31, III(c) and holding that the New Hampshire Administrative Procedure Act, RSA Ch. 541-A, provides that all parties in a contested case are entitled to notice that includes "reference to the particular sections of the statutes and rules involved."). Consolidated does not do so and instead seeks only to address matters relevant to the applicable legal standard related to the Transaction. NHEC, on the other hand, appears to be interested in using its discovery requests to gain the upper hand in unrelated matters and wants "conditions [that] can be attached to this transfer that will ensure that Consolidated, under its new ownership, 'is technically, managerially, and financially capable of maintaining the obligations of an incumbent local exchange carrier' to properly maintain and operate its distribution pole plant." The Commission should not permit such efforts and should limit this Docket to the particular sections of the statutes and rules involved.

Conclusion

18. For the above stated reasons, Consolidated respectfully requests that the Commission deny NHEC's motion to compel.

Respectfully submitted,

CONSOLIDATED COMMUNICATIONS
HOLDINGS, INC.

By its Attorneys,

Dated: April 29, 2024

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing objection was provided via electronic mail to the individuals included on the Commission's service list for this docket.

Dated: April 29, 2024

/s/ Matthew R. Johnson
Matthew R. Johnson, Esq.