

**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 Denying Motion to Dismiss

O R D E R N O. 26,764

January 23, 2023

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., Cogeco US Finance, LLC d/b/a Breezeline, and Comcast Cable Communications, LLC (collectively, the Petitioners). The Petition requested that the Commission resolve Petitioners' dispute with Consolidated Communications of Northern New England Company, LLC (Consolidated) regarding unjust, unreasonable, and unlawful: (1) annual pole attachment rental rates imposed by Consolidated; and (2) joint use charges imposed by Consolidated on poles in which Consolidated has no ownership interest.

On November 16, 2022, Consolidated filed a motion to dismiss (Motion) the Petition. The Petitioners objected to the Motion on November 28, 2022, and supplemented the objection on December 12, 2022.

II. POSITIONS OF THE PARTIES

A. Consolidated

In its Motion, Consolidated argued that the Petitioners are each bound by the terms of their respective pole attachment agreements with Consolidated. Consolidated stated that the attachment agreements required the Petitioners to give Consolidated notice of their disputes with rates within 30 days of receiving notice of the rate increase. In this case, according to Consolidated, the rate increase occurred at an unspecified date in the past, and the Petitioners never gave notice of their objections to the rate changes.

Further, Consolidated argued that the terms of the attachment agreements require the Petitioners to terminate their pole attachment agreements in order to negotiate new rates. In response to the Petitioners' claims that termination subjects them to the risk of being forced to remove their facilities from Consolidated poles, Consolidated maintained that, notwithstanding the contractual right, it would be illegal for Consolidated to deny the Petitioners access to the poles in the event of a termination.

Finally, Consolidated claimed that the attachment agreements clearly allow it to charge the Petitioners an attachment fee for attachments on joint use poles in which Consolidated has no ownership interest.

B. The Petitioners

The Petitioners claim that Commission precedent, RSA 374:34-a, and the Commission's Puc 1300 rules permit the Petitioners to maintain this action against Consolidated. The Petitioners argue that these same legal authorities grant the Commission the authority to establish new just and reasonable pole attachment rates, charges, terms and conditions. The Petitioners cite a Commission order granting

review of attachment rates for an attaching carrier with an existing pole attachment agreement. See *Time Warner Entm't Co., L.P.*, Order No. 25,387 (July 3, 2012) (Time Warner Order).

III. COMMISSION ANALYSIS

In ruling on a motion to dismiss, the Commission will accept as true all of the factual assertions contained in the petition, supporting pleadings, and testimony to determine whether those facts, and all reasonable inferences therefrom, could support the relief requested. *Eversource Energy*, Order No. 26,534 at 7 (October 22, 2021). In addition, the Commission will construe all inferences in the light most favorable to the Petitioners. *PNE Energy Supply, LLC*, Order No. 25,881 at 3 (April 8, 2016). The Commission engages “in a threshold inquiry that tests the facts in the complaint against the applicable law.” *Eversource Energy*, Order No. 26,534 at 7.

In this case, we accept the following facts alleged by the Petitioners. There are existing attachment agreements in place for each of the Petitioners with Consolidated. Those agreements, including the attachment rates, have been in effect since before Consolidated acquired the poles from FairPoint Communications, Inc. in 2017. The Petitioners have attempted on several occasions to negotiate new attachment rates. However, Consolidated has refused to negotiate new rates with 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.

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).

The Commission has adopted rules to guide its regulation of pole attachments:

Puc 1303.02 Lack of Agreement. A person requesting a pole attachment and entitled to access under these rules and unable, through good faith negotiation, to reach agreement with the owner or owners of a pole or poles subject to this chapter, may petition the commission pursuant to Puc 203 for an order establishing the rates, charges, terms, and conditions for the pole attachment or attachments. Good faith negotiation shall include adherence to the timelines established through rulemaking by the Department for negotiating and implementing pole attachments, unless each party agrees to following alternate timelines. Such a petition shall include the information required for complaints to the FCC made pursuant to the terms of 47 C.F.R. §1.1404(d) through (m) in effect on October 1, 2017.

Puc 1303.03 Dispute Following Agreement or Order. A party to a pole attachment agreement, or a party subject to an order of the commission establishing rates, charges, terms, or conditions for pole attachments, may petition the commission pursuant to Puc 203 for resolution of a dispute arising under such agreement or order.

N.H. Admin. R., Puc 1303.02 and 1303.03.

The Commission's rules on rate setting allow for both Commission review of attachment rates at the formation of an agreement, Puc 1303.02, and further review after an attachment agreement has been executed, 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*. In the Time Warner Order, the Commission found that it had jurisdiction under RSA 374:34-a over rate setting issues. Time Warner Order at 14 (citing *In the Matter of Mile Hi Cable Partners, LP*, 17 F.C.C.R. 6268, 6271 (2002)). The Commission also found that it had authority to review "the terms of the parties' agreement, with particular emphasis on the rate setting provisions, to determine if they are just and reasonable in light of the relevant and applicable state and federal law." Time Warner Order at 15. "To the extent any terms may be found to be unjust or unreasonable, the Commission will ... order revisions to the agreement." *Id.*

Accordingly, we deny the Motion to Dismiss. We will consider the Petition and the evidence presented by the parties in this matter in order to determine whether the rates provided by Consolidated in its pole attachment agreements with the Petitioners are unjust or unreasonable.

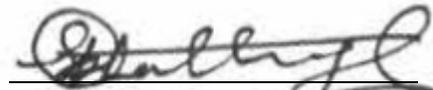
Based upon the foregoing, it is hereby

ORDERED, that the Motion to Dismiss is DENIED.

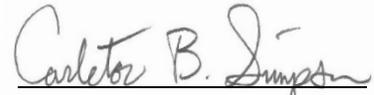
By order of the Public Utilities Commission of New Hampshire this twenty-third day of January, 2023.



Daniel C. Goldner
Chairman



Pradip K. Chattopadhyay
Commissioner



Carleton B. Simpson
Commissioner

Service List - Docket Related

Docket#: 22-047

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