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 Granting in Part and Denying in Part Rehearing Requests

O R D E R N O. 26,885

September 13, 2023

In this order, we grant rehearing and amend portions of our final order on a petition to resolve a rate dispute between several pole attachers and a utility pole owner. Though we grant rehearing, we deny the request to adjust the disputed pole attachment rates, except for the joint use charges. We do not change our ruling that these joint use charges are unreasonable. We do, however, amend our prior order to require a refund of all joint use charges back to the date the petition was filed.

I. BACKGROUND AND PROCEDURAL HISTORY

On August 22, 2022, Charter Communications, Inc., Cogeco US Finance, LLC, and Comcast Cable Communications, LLC (collectively, Petitioners) filed a petition requesting resolution of a rate dispute concerning Consolidated's pole attachment rates (Petition). Petitioners are companies that attach equipment to utility poles. Consolidated, as owner of the poles, charges Petitioners an attachment rate. Petitioners contend that Consolidated's pole attachment rate is too high.

On February 17, 2023, we issued Order No. 26,775, a final order resolving the pole attachment dispute (Final Order). In our Final Order, we held that Consolidated

must cease billing joint use charges[1] as of the date of the Final Order, but Petitioners failed to meet their burden to demonstrate that Consolidated's pole attachment rates were otherwise unjust or unreasonable. Consolidated requested rehearing of both Order No. 26,674 (our order denying its earlier motion to dismiss) and part of the Final Order. Petitioners filed a timely objection and their own motion for rehearing of the Final Order, to which Consolidated filed a timely objection.

On March 21, 2023, we denied Consolidated's motion for rehearing of Order No. 26,674 and suspended the Final Order pending our review of all outstanding arguments for rehearing. On March 31, 2023, we ordered briefing on the probative value of new evidence proffered by Petitioners in their motion for rehearing. The parties subsequently filed the required briefs in April.

II. LEGAL STANDARD FOR REHEARING

The process for seeking rehearing of our orders is described in statute. Under RSA 541:3, any party or person directly affected may seek rehearing of our orders by filing a motion within 30 days of issuance. We may grant rehearing, if, in our opinion, "good reason" is established by the moving party. RSA 541:3. If we grant rehearing, RSA chapter 541 does not require us to hold another hearing. Although we may do so, we may also simply reconsider the matter and reissue our original order or an amendment of it. *See* 5 Gordon J. MacDonald, New Hampshire Practice: Wiebusch on New Hampshire Civil Practice and Procedure § 62.33 (3d ed. 2010).

A successful motion may establish a "good reason" to grant rehearing in three ways. First, by showing that there are matters that we "overlooked or mistakenly conceived in the original decision." *Dumais v. State Pers. Comm'n*, 118 N.H. 309, 311

[1] A "joint use charge" is a type of pole attachment charge. It is a fee demanded by Consolidated when Consolidated and another company both have equipment attached to a utility pole. The pole, however, is not owned by Consolidated, but a third-party utility.

(1978) (citation and quotations omitted). Second, by presenting new evidence that could not have been presented at the original hearing. *See Appeal of Gas Serv., Inc.*, 121 N.H. 797, 801 (1981). Third, by any other means that demonstrates our order is unlawful or unreasonable. *See* RSA 541:4.

III. ANALYSIS AND AMENDMENT TO ORDER NO. 26,775

We begin by addressing four over-arching legal arguments raised by Consolidated and Petitioners. We then discuss our rulings on the six specific pole attachment rate review factors we must consider when reviewing pole attachment rates. After reviewing each factor, we determine that Petitioners fail to demonstrate, by a preponderance of the evidence, that Consolidated's pole attachment rates – other than its joint use charges – are unjust or unreasonable. We conclude our analysis with a determination that these unreasonable joint use charges must be refunded back to the date Petitioners filed their dispute.

A. EVEN WHEN THERE IS A VOLUNTARY CONTRACTUAL AGREEMENT, WE HAVE AUTHORITY TO ADJUDICATE WHETHER POLE ATTACHMENT RATES ARE JUST AND REASONABLE

In its motion for rehearing, Consolidated asserts two errors specific to our Final Order: (1) that we lack jurisdiction over this matter, and (2) that even if we have jurisdiction, our analysis must be curtailed by the text of the contracts concerning the pole attachment rates. Though they do not challenge our jurisdiction, Petitioners question our adjudicative authority to "balance the interests" of Petitioners and Consolidated.

Regarding jurisdiction, we have already denied Consolidated's first argument. *See* Order No. 26,674 (Denying Consolidated's Motion to Dismiss) and Order No. 26,787 (Denying rehearing of Order No. 26,674). As a result, we do not repeat at length our authority to adjudicate disputes that arise after parties enter into a

voluntary agreement. Consolidated's motion does not provide good reason to grant rehearing on this point. The request for rehearing on this issue is denied.

As for Consolidated's second argument, we find it unpersuasive. Consolidated asserts that the contracts between the parties expressly authorize the joint use charges we found to be unreasonable. Because the contracts authorize these charges, Consolidated contends that its lack of ownership of the poles subject to the joint use charges – a finding we relied on in our decision – is irrelevant. In Consolidated's view, if the text of a contract authorizes a pole attachment charge, our analysis must end. Although unstated, the logic of Consolidated's argument is that a utility may enter a contract that allows it to impose an unjust or unreasonable pole attachment charge. Per Consolidated's reasoning, the text of the contract is all that matters. Put another way, if there is a voluntary agreement, whether or not a rate or charge is just and reasonable should be of no concern to us.

We decline to adopt such a constrained view of our authority. We have statutory authority to regulate pole attachment agreements to ensure the rates, charges, terms, and conditions are just and reasonable. *See* RSA 374:34-a. Our rules adopted in New Hampshire Code of Administrative Rules, Chapter Puc 1300 exist to ensure the rates, charges, terms, and conditions for pole attachments are "nondiscriminatory, just, and reasonable." N.H. Admin. R., Puc 1301.01. Adopting Consolidated's assertion that our analysis must cease at the terms of the contract is an invitation to abdicate our responsibility to act as arbiter between the interests of the customer and the interests of the regulated utility. RSA 363:17-a. We decline to do so and deny Consolidated's request for rehearing on this point.

Petitioners question our authority to balance the interests of Petitioners and Consolidated. Petitioners' Motion at 35. An arbiter is one with the power to decide a

matter in dispute, such as a judge. *See Appeal of Public Serv. Co* 122 N.H. 1062 (1982) (Discussing the judicial function we exercise as commissioners). As noted above, by statute we must function as the arbiter between the interests of the customer and the interests of the utility. When we consider the interests of the pole owner and the attachers as required by statute and rule, we must weigh the evidence presented. *See* RSA 374:34-a and N.H. Admin. R. Puc Chapter 1300. The role of an arbiter requires the weighing – or balancing – of many matters to render a decision. As a result, we reject the contention that balancing the interests of Consolidated and Petitioners is an error as a matter of law. We deny Petitioners' request for rehearing on this point.

B. WE CANNOT DEFER A DECISION ON DISPUTED POLE ATTACHMENT RATES BASED ON A SEPARATE PROCEEDING

In our Final Order, we deferred considering pole attachment rate adjustments until uncertainties surrounding a potential sale of utility poles by Consolidated were resolved. Final Order at 8.[2] Petitioners argue, however, it is unlawful and unreasonable for us to decline to adjudicate the justness and reasonableness of the disputed pole attachment rates at issue in this proceeding based upon economic uncertainties posed by a separate proceeding. We agree.

Under the pole attachment rates paradigm, we must render a decision that ensures the disputed rates are nondiscriminatory, just, and reasonable as of the date of the petition. N.H. Admin. R. Puc 1301.01. Our analysis based upon uncertainties about a potential sale reviewed in a separate proceeding and deferring consideration of any rate changes based upon those uncertainties was in error. And, because the Final Order did not render a "decision on each issue," our order failed to comply with

[2] This sale of utility poles by Consolidated was examined and ultimately authorized in a separate proceeding. The sale was finalized on May 1, 2023. *See generally* Docket No. DE 21-020.

RSA 363:17-b. As such, we grant rehearing in order to reconsider and render a decision on whether all of Consolidated's pole attachment rates were unjust or unreasonable as of the date the rate dispute petition was filed.

C. THE NEW EVIDENCE PRESENTED BY PETITIONERS DOES NOT ESTABLISH GOOD REASON TO GRANT REHEARING

Petitioners seek to admit new evidence that could not have been presented at the hearing. As a result, Petitioners argue there is good reason to grant rehearing. *See Appeal of Gas Serv., Inc.*, 121 N.H. 797, 801 (1981) (presentation of new evidence that could not have been presented at the original hearing can provide good reason to grant rehearing).

Petitioners propose two new exhibits: (1) a press release from Consolidated's website announcing a $40 million award in American Rescue Plan Act (ARPA) grant funds to aid in building fiber internet services to 25,000 unserved homes throughout New Hampshire, and (2) documents submitted to New Hampshire's Governor and Executive Council to authorize the State entering into a contract with Consolidated for the $40 million in funds. Petitioners argue these proposed exhibits are relevant to four rate review factors we must consider under N.H. Admin. R., Puc 1303.06.

It is undisputed that these documents could not have been presented before or during the hearing held in January of 2023. But we are not required to grant rehearing to accept all new evidence that could not have been presented at the original hearing. Proposed evidence – regardless of when it is presented – may be properly excluded if it is irrelevant, immaterial, or unduly repetitious. RSA 541-A:33, II; N.H. Admin. R., Puc 203.23(d). We must consider the probative value of a proposed exhibit when determining whether to reopen the evidentiary record after it has been closed. N.H. Admin. R., Puc 203.30. If late submission of additional evidence does not

enhance our ability to resolve the matter in dispute, the evidentiary record will not be reopened.

Accordingly, if the new evidence is subject to exclusion, we lack good reason to grant rehearing. As detailed in the proposed exhibits, construction funded by this $40 million grant is not expected to begin until the end of 2023. Petitioners' Response to March 31, 2023 Procedural Order at 3. Completion may not occur until 2024. *Id*. The proposed evidence is too attenuated to bear on the fairness and reasonableness of the disputed pole attachment rates. This future project is not relevant to our review of Consolidated's pole attachment rates in effect on August 22, 2022 (the date Petitioners filed their rate dispute).

We note, however, Petitioners are not precluded from filing a future rate dispute as circumstances change. As Petitioners correctly note in their motion for rehearing, just because "pole attachment rates may have been acceptable . . . in the past, does not mean that those rates are just and reasonable today" or in the future. Petitioners' Motion for Rehearing at 19.

We conclude the proposed new evidence by Petitioners is properly excluded from our consideration under RSA 541-A:33, II. Accordingly, we hold Petitioners fail to establish good reason to grant rehearing for the admission of new evidence. We deny their request for rehearing on this issue.

D. WHEN REVIEWING POLE ATTACHMENT RATES WE MUST CONSIDER FIVE FACTORS IN ADDITION TO THE FORMULAE ADOPTED BY THE FCC IN 47 C.F.R. §1.1406(d).

Throughout this proceeding, Petitioners have spent considerable time and effort arguing that the FCC cable rate formula in 47 C.F.R. § 1.1406(d) (2018) satisfies all six of our pole attachment rate review factors under N.H. Admin. R., Puc 1303.06(a). Consequently, Petitioners continue to urge us to use only the FCC's cable

rate formula to establish Consolidated's pole attachment rates. Petitioner's Motion for Rehearing at 21. But finding the FCC's cable rate formula sufficient as the sole factor necessary to set just and reasonable pole attachment rates conflicts with the "Surplusage Canon" of interpretation for legal texts. This principle provides that we should give effect, if possible, to every word and every provision of a statute or administrative rule. *See*, *e.g.*, *Teeboom v. City of Nashua*, 172 N.H. 301, 314 (2019) (internal quotations omitted) (stating that "[c]onsistent with the interpretative canon that the legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect"). In following this principle, we should not adopt an interpretation that causes a provision to be duplicative or to have no consequence.

Here, our administrative rule on reviewing pole attachment rates mandates consideration of six factors. If the review and setting of just and reasonable rates required only the use of the FCC's cable rate formula, the five remaining factors would be rendered duplicative or meaningless. These five other factors cannot simply be swallowed by the FCC formula as Petitioners insist. The text of the rule reflects a lawful mandate to consider more than the FCC formulae. To adopt Petitioners' argument – that we need look no further than the FCC's cable rate formula to establish just and reasonable rates – renders Puc 1303.06(a)(1)-(4) and (6) superfluous. We decline to elevate the FCC's cable rate formula to the "be all, end all" factor of Puc 1303.06(a). To the extent Petitioners seek rehearing to calculate rates based solely on the FCC cable rate formula, we deny the request for rehearing.[3]

[3] On December 1, 2022, the Commission's adopted revised administrative rules for pole attachments became effective. Revisions included updating references to the FCC's pole attachment formulae in the Code of Federal Regulations (C.F.R.). These changes were necessary, in part, because the FCC previously made editorial revisions, including renumbering provisions, to its pole attachment complaint procedures contained in 47 C.F.R. Subpart J. *See* 83 Fed. Reg. 44,831, 44,840 (Sept. 4, 2018) and 83 Fed. Reg. 67,098, 67,121 (Dec. 28, 2018). Although the petition in this matter was filed under our old

E. OUR ANALYSIS UNDER THE SIX POLE ATTACHMENT RATE REVIEW FACTORS MANDATED BY PUC 1303.06(a)

In their motion for rehearing, Petitioners assert different grounds for rehearing based upon our analysis of the six different rate review factors under N.H. Admin. R., Puc 1303.06(a). We find that some of these grounds warrant rehearing and others do not. We deny Petitioners' request for rehearing of our analysis under factors two, three, and six. We grant their request for rehearing and amend our analysis under factors one, four, and five. For clarity, we address our analysis under each of the six factors below.

1. The First Rate Review Factor: Consideration of Relevant Federal, State, and Local Laws, Rules, and Decisions

Petitioners argue that our analysis under the first rate review factor is flawed for two reasons. First, Petitioners contend we overlooked evidence. Second, Petitioners argue we erred by impermissibly focusing our analysis on a separate proceeding before us. This second error, according to Petitioners, led us to improper rely on information from that docket and caused us to inappropriately defer a decision on whether pole attachment rate adjustments were required.

a. Petitioners Provide Good Reason to Grant Rehearing of Our Analysis Under This Rate Review Factor

As discussed above, we conclude that our deferral of a decision on rate adjustments based on a separate proceeding was improper. This error presents good reason to grant rehearing and to amend our Final Order. Accordingly, we grant Petitioners' request for rehearing and amend our analysis under this rate review factor. Because we reexamine the evidence in the record presented under this rate

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administrative rules, we note that no party to this proceeding has raised any concern regarding the FCC formulae applicable to this proceeding.

review factor and limit our amended analysis to the record in this proceeding, we do not need to address Petitioners' other grounds for rehearing under this factor.

b. Our Amended Analysis Under N.H. Code Admin. R. Puc 1303.06(a)(1)

Puc 1303.06(a)(1) requires us to consider "[r]elevant federal, state, or local laws, rules, and decisions." We find that the most relevant federal, state, and local laws, rules, and decisions are the following: RSA 374:34-a, N.H. Admin. R., Chapter Puc 1300, 47 U.S.C. § 224 (1996), 47 C.F.R. § 1.1401–1.1445, and *Comprehensive Review of Part 32 USOA, supra* ¶¶ 32–36. Upon reconsideration, we acknowledge Petitioners cited federal and state cases supporting the use of the FCC cable rate formula to set rates for pole attachments. We further find that the use of FCC cable rate formula alone to set pole attachment rates is supported in other jurisdictions. But holdings in other jurisdictions do not control our analysis here. No party directed our attention to federal or state decisions that require us to set pole attachment rates in New Hampshire based upon the FCC cable rate formula alone. And, as detailed above, the FCC's cable rate formula is only one of six factors we must consider under New Hampshire law.

Under federal law governing pole attachment rates, state regulatory commissions are permitted to regulate pole attachment rates. *See* 47 U.S.C. § 224 (1996). New Hampshire is one of the states that regulates pole attachments. *See States That Have Certified That They Regulate Pole Attachments*, Public Notice, 35 FCC Rcd. 2784 (2020). Federal law requires states such as New Hampshire to certify to the FCC that, when regulating pole attachment rates, the regulatory commission "has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services." 47 U.S.C. § 224(c)(2)(B) (1996). New Hampshire law is consistent

with this federal requirement.

New Hampshire law authorizes us to hear and resolve complaints concerning pole attachment rates. RSA 374:34-a, VII. This authority includes utility companies that are incumbent local exchange carriers (ILECs) operating as excepted local exchange carriers (ELECs), such as Consolidated. *See* RSA 362:7, III (3) (Although RSA 362:7 provides that ELECs such as Consolidated are generally no longer regulated as public utilities, we may continue regulating an ELEC's attachment rates). To implement this statutory provision, we have adopted specific administrative rules concerning our review of attachment rates, including the requirement to consider the interests of attachers as well as pole owners and their respective customers.

In granting rehearing under this rate review factor, we have amended our analysis to reconsider the evidence presented in the record and the controlling law. We conclude our review of the disputed rates must be principally guided by our general authority to determine just and reasonable pole attachment rates under RSA 374:34-a and N.H. Admin. R, Puc Chapter 1300.

2. The Second Rate Review Factor: Consideration of the Impact of Consolidated's Pole Attachment Rates On Competitive Alternatives

Petitioners argue rehearing of our analysis under this second factor is warranted for four reasons. First, Petitioners assert we improperly dismissed the competitive harm they suffered under Consolidated's attachment rates by considering the timing of Petitioners' rate dispute. Second, that we overlooked evidence. Third, that we unlawfully introduced a new evidentiary standard. And fourth, that we improperly speculated regarding the effect of Consolidated's pole costs. We disagree with each.

To Petitioners' first argument, we agree that the timing of a petition alleging a rate dispute alone is not determinative of whether disputed rates are anti-competitive. However, we disagree with Petitioners' contention that we are precluded from considering such facts.

In our Final Order, we questioned Petitioners' claim of anti-competitive effect of Consolidated's pole attachment rates because of the lengthy amount of time these rates were in effect and went unchallenged. The length of time a rate has been in effect may indicate the degree to which a rate is onerous, anti-competitive, and worth challenging. Accordingly, we properly considered this fact as one part of our analysis. But the fact that the disputed rates have been in effect for years is only part of our analysis regarding the anti-competitive nature of Consolidated's rates. We find no error in considering the length of time a rate has been in effect. We deny rehearing under Petitioners' first argument on this rate review factor.

We also disagree with Petitioners' second argument. We did not overlook evidence. Petitioners offered evidence, argued throughout the proceeding, and continue to argue, that the FCC cable rate formula satisfies all six rate review factors. We reviewed this evidence but rejected Petitioners' argument that our analysis must be centered upon this one formula.

We reviewed the evidentiary record provided. Our Final Order notes this record was relatively lacking regarding specific facts. Petitioners provided few facts directly supporting a finding of anti-competitive effect of Consolidated's rates. Instead, Petitioners relied upon testimony that the FCC cable rate formula produced competitive rates and that the rates Petitioners calculated under this formula were different than those in effect. Therefore – according to Petitioners – Consolidated rates

must be anti-competitive. Again, such evidence and argument provide little substance regarding the actual effect of the rates in the competitive marketplace.

The Final Order took note of the average number of companies with attachments on Consolidated's poles and the number of pole attachments held by Petitioners. We evaluated this limited data using our experience, technical competence, and specialized knowledge. *See* RSA 541-A:33, VI. We then rendered a finding based upon the record before us. As these actions were proper, we deny Petitioners' second argument for rehearing under this factor.

As for Petitioners' third argument – that we unlawfully introduced a new evidentiary standard – we note Petitioners bore the burden to prove the unreasonableness of the disputed rates. N.H. Admin. R., Puc 1303.01. Petitioners were free to submit whatever evidence of anti-competitive effect they chose to support a ruling that Consolidated's rates are unreasonable. By relying nearly exclusively on the FCC formula, Petitioners failed to direct our attention to evidence of an anti-competitive effect of Consolidated's rates. Such evidence would demonstrate, rather than merely state, the negative impact of Consolidated's pole attachment rates on competitive alternatives. The party bearing the burden of proof must provide sufficient evidence to support its assertions by a preponderance of the evidence. N.H. Admin. R., Puc 203.25. Such a requirement does not unlawfully introduce a new evidentiary standard. As a result, we find Petitioners' third argument meritless and deny rehearing based on this argument.

Finally, we conclude any error related to Petitioners' fourth argument to be harmless. Petitioners argue we engaged in improper speculation regarding the impact of pole costs on Consolidated's own competitive offerings. But such speculation is well-within the impacts we must consider in our third rate review factor under Puc

1303.06(a)(3). This provision requires us to consider the disputed rates and the potential impact of rate adjustments on the pole owner (i.e., Consolidated) and its customers. So, consideration as to whether unequal cost burdens may impact a pole owner and its customers is appropriate. As a result, we conclude that any error regarding this aspect of analysis is no more significant than its placement in our Final Order. Analysis of potential impacts on Consolidated and its customers properly belongs in our review of the third rate review factor, not the second. But we do not find this to be a material error that warrants rehearing or reconsideration. We deny rehearing based on this argument.

As described above, we conclude Petitioners fail to provide good reason to grant rehearing of our analysis under the second rate factor. We deny Petitioners' motion for rehearing of this rate review factor.

3. The Third Rate Review Factor: Potential Impacts of Pole Attachment Rates On Consolidated and its Customers

Petitioners argue rehearing of our analysis under this factor is warranted because (1) it overlooks aspects of the FCC's cable rate formula and (2) improperly finds impacts may be different for electric utilities and telecommunications utilities.[4] We disagree.

Regarding the first alleged error, Petitioners again center their argument on the need to rely solely on their calculations under the FCC cable rate formula. Per Petitioners, the rates produced by the FCC formula typically allocate more than 85 percent of the pole costs to the pole owner. Petitioners note courts outside of New Hampshire have held the FCC formula produces rates that fully compensate pole

[4] Petitioners also argue that new evidence requires granting rehearing. This argument is addressed in Section III. B. above and therefore not repeated here.

owners and fairly allocate pole costs between attachers and pole owner. Petitioners argue we are therefore wrong as a matter of law to find otherwise.

We reiterate that holdings in other jurisdictions do not bind our analysis. As discussed above, the FCC formula is only one of six factors we must consider.

Here, we found that there is a disparity in pole costs borne by Consolidated as pole owner and Petitioners as attachers. Final Order at 10. We found, based upon the record, that Consolidated bears 85 percent of pole costs. *Id.* at 6; *see also*, Exh. 19 at 13; Transcript of January 26, 2023 Hearing at 83-84. Both Consolidated and attachers provide broadband offerings in the same competitive services market. *See* Final Order at 10; Exh. 3 at 18 (Petitioners); Exh. 19 at 12 (Consolidated). Because Consolidated bears more pole costs and directly competes with pole attachers, we held that there is a greater burden on Consolidated. Final Order at 10. Holdings in other jurisdictions that the FCC formula fairly allocates pole costs between attachers and pole owners do not govern our analysis. We find no error in our analysis based on the factual record before us. We hold that Petitioners fail to provide good reason to grant rehearing of this portion of our analysis. We deny rehearing based on this argument.

Second, different pole owning utilities operate their businesses in different regulatory contexts. The text of Puc 1303.06(a)(3) requires us to consider the potential impact on the pole owner and its customers when examining the attachment rates imposed by electric utilities or ILECs. An ILEC operating as an ELEC is different than an electric distribution utility company. The regulatory environment for different types of utilities varies, as some utility sectors are more regulated than others.

So, when we examine the pole attachment rates charged by an electric utility, we must consider the potential impact of altering those rates on the electric utility and the electric utility's customers. And when we examine the rates of an ILEC, including an ILEC operating as an ELEC, such as Consolidated, we must consider the potential impact of altering the pole attachment rates on the ILEC and its customers. It is uncontested that Consolidated is an ILEC.

Because we did consider the regulatory treatment of Consolidated, we find no error in our analysis. We conclude Petitioners fail to provide good reason to grant rehearing and deny their motion for rehearing on this argument.

As both of Petitioners' arguments fail to provide good reason for rehearing, we deny Petitioners' request for rehearing of the third rate review factor.

4. The Fourth Rate Review Factor: The Pole Attachment Rates Potential Impact on the Deployment of Broadband Services

Petitioners argue rehearing of the analysis under this factor is warranted because we improperly introduced a new evidentiary requirement and overlooked evidence. Petitioners also assert rehearing is required because of new evidence. As discussed in Section III, B, we find this new evidence does not warrant rehearing.

In our Final Order, we held that the lack of evidence concerning broadband deployment precluded a ruling that Consolidated's pole attachment rates must be reduced. Petitioners acknowledge that neither Petitioners nor Consolidated provided evidence regarding the current penetration of broadband deployment across Consolidated's service territory. Petitioners' Motion for Rehearing at 31. Yet, Petitioners argue that our order was improper because no statute or rule requires the submission of specific evidence on broadband deployment.

Petitioners misconstrue our order. Our Final Order does not impose an unlawful evidentiary requirement. Rather, we note the record lacked certain evidence,

specifically evidence that Consolidated's pole attachment rates affect broadband deployment. The lack of this evidence led us to conclude that Petitioners failed to demonstrate Consolidated's rates negatively impacted the deployment of broadband services. This legal analysis is sound. When a party fails to submit sufficient evidence to support a legal conclusion, the appropriate result is to hold the conclusion is unsupported. We find no error in our Final Order on this point.

Petitioners also argue we ignored testimonial evidence on the potential deployment of broadband services. We grant rehearing on this point only to clearly address Petitioners' evidence. Upon reconsideration, we find Petitioners' witness, Ms. Kravtin, testified that a reduction in Consolidated's pole attachment rates could positively impact the deployment of broadband services because funds otherwise dedicated to paying Consolidated could be redirected to further broadband development. Exh. 3 at 19-20. Nevertheless, this testimony serves little evidentiary value regarding our assessment of Consolidated rates.

Ms. Kravtin testified that New Hampshire's Broadband Action Plan recognizes pole attachment rates impact broadband deployment, and that "excessively high pole [attachment rates] directly and negatively impact the cable industry's ability to meet financial and investment obligations including those related to the build out of infrastructure needed to support the widespread deployment of advanced broadband services." Exh. 3, at 19. In other words, if the pole attachment rates are too high, there is a negative impact on the deployment of broadband services. Or, if pole attachment rates are just and reasonable, there is a potential positive impact on the deployment of broadband services. We agree.

However, this testimony does little to inform us as to whether Consolidated's pole attachment rates are, in fact, negatively impacting the deployment of broadband

services. The testimony does not inform us as to whether or not the relevant broadband market is currently non-competitive. It is always the case that if one receives less money, one is able to do less; if one receives more money, one is able to do more. So, evidence beyond mere assertions is necessary to support finding rates impact broadband deployment.

Instead, Petitioners relied on the premise that their calculation under the FCC cable rate formula produced just and reasonable rates and, because Petitioners calculated these rates as lower than Consolidated's current rates, a reduction in rates would positively impact the deployment of broadband services. Petitioners' Motion for Rehearing at 31. No further evidence was provided. Petitioners failed to demonstrate that the current deployment of broadband services is trivial or non-competitive. No evidence in the record before us demonstrated that Petitioners' cost savings (through a reduction in pole attachment rates) is more likely to be invested in broadband deployment than any other project or priority. As a result, even upon rehearing and reconsideration, we find the evidentiary record to contain insufficient evidence to demonstrate that a reduction in Consolidated's pole attachment rates would meaningfully impact the potential deployment of broadband services.

Though we grant rehearing and reconsider our analysis, the outcome of our analysis under this fourth factor remains unchanged.

5. The Fifth Rate Review Factor: Consolidated's Pole Attachment Rates and the Formulae Adopted by the FCC in 47 C.F.R. §1.1406(d).

Petitioners first contend we erred under this rate review factor because we did not hold as conclusive a financial report prepared by Consolidated and previously accepted into evidence in a separate proceeding. Second, Petitioners assert we improperly gave this rate review factor less weight in our analysis. Because we did not

make a finding under this rate review factor, we grant rehearing to reconsider the evidence submitted by the parties and amend our analysis.

As detailed below, we conclude that we are not bound by a prior evidentiary ruling in a separate matter. We then examine the competing financial reports that are material to our rate analysis under this factor. Upon reconsideration, we find the report using the uniform system of accounts to be more consistent with our regulatory standards for accounting. Because we find Petitioners' competing evidence to be less credible, we conclude that Petitioners fail, under this rate review factor, to establish by a preponderance of evidence that Consolidated's attachment rates are unjust and unreasonable.

a. Prior Evidentiary Rulings in an Earlier, Separate Proceeding Do Not Control Future Commission Decisions

Contrary to Petitioners' implication, we are not bound to find evidence previously accepted to be more credible than competing evidence submitted later. As the New Hampshire Supreme Court has recently affirmed,

> [F]actfinders are free to disregard or accept, in whole or in part, conflicting expert testimony. This is true particularly when the expert opinion derives at least in part from narrative from the claimant . . . .

Appeal of Rancourt, 176 N.H. ___, ___, 2023 N.H. LEXIS 141 (decided August 16, 2023) (slip op. at 4) (citation omitted). Moreover, when good reasons exist, we are not prevented from changing its mind. *See Appeal of Pub. Serv. Co.*, 141 N.H. 13, 22 (1996) ("An administrative agency is not disqualified from changing its mind . . . .") (citation and quotations omitted). It is fundamental to our role that we review the evidentiary record before us in each proceeding and appropriately weigh competing evidence. As the trier of fact, we are "in the best position to measure the persuasiveness and credibility of evidence and [are] not compelled to believe even

uncontroverted evidence." *Appeal of N. Pass Transmission, LLC*, 172 N.H. 385, 401 (2019) (citation and quotations omitted).

Ultimately, when there is competing evidence concerning a material issue, we must determine what evidence is more credible. That evidence in one proceeding is later found to lack credibility in a separate proceeding is not necessarily unjust, unreasonable, or unlawful. With this in mind, we reconsider the evidence submitted by the parties concerning this rate review factor.

b. The Competing Evidence: Two Hypothetical Financial Reports

As described above, Consolidated is an ILEC operating as an ELEC in New Hampshire. As an ILEC-ELEC, Consolidated is not required to file annual Automated Reporting Management Information System (ARMIS) Reports.[5] These reports detail certain financial information of a utility and can assist us in our oversight function. FairPoint Communications, the prior owner of the utility poles, was required to file official ARMIS reports. But Consolidated is not and, in 2017, Consolidated took over FairPoint. As a result, no official ARMIS reports concerning the utility poles at issue have been filed since that time.

In a separate proceeding, Consolidated sought approval to sell most of its utility poles. See Docket No. DE 21-020. As part of that proceeding, the Commission ordered Consolidated to produce a hypothetical ARMIS Report to assist in determining the value of its utility poles. Order No. 26,534 at 10 (October 22, 2021). This hypothetical ARMIS Report (Initial Report) was not official and was not filed with

[5] An ARMIS report is a report prepared to meet federal requirements established by the FCC to facilitate efficient analysis of costs and revenue, to provide an improved basis for audits and other oversight functions, and to enhance the FCC's ability to quantify the effects of its policy proposals.

the FCC, but the Commission believed this Initial Report would help to determine the value of utility poles as the Commission reviewed the potential sale. *Id.*

In creating this Initial Report, Consolidated calculated an accumulated depreciation figure of $35,765,000 for its utility poles. Exh. 20. Here, Petitioners argue that the Commission previously determined the regulatory net book value of Consolidated's utility poles in Docket No. DE 21-020 using this report and their witness's (Ms. Kravtin's) calculations and methodology based upon this report. As a result, Petitioners argue the same methodology and valuation should now be used to calculate Consolidated's pole attachment rates. Transcript of January 26, 2023 Hearing at 115.

To that end, Petitioners submitted as evidence in this proceeding the Initial Report. Exh. 20. This is the same report the Commission previously accepted as evidence when reviewing the utility pole sale. Calculations using the same accumulated depreciation from the Initial Report in the FCC cable rate formula, yield pole attachment rates that are approximately half of Consolidated's current rates. Exh. 3 at 22. Petitioners argue this demonstrates the unreasonableness of Consolidated's rates.

Consolidated, however, submitted an alternative, hypothetical ARMIS Report in this proceeding (Revised Report). Exh.17. This Revised Report has a depreciation figure of $11,250,610. *Id.* Using the Revised Report numbers, the FCC cable rate formula produces rates that are slightly higher than Consolidated's current rates. *Id.* Consolidated argues this demonstrates the reasonableness of its pole attachment rates.

c. The Evidentiary Weight of the Reports

The parties dispute the accuracy and validity of the two financial reports, each focusing on the accounting methodology used. The Initial Report employs accelerated depreciation using a five-year depreciation schedule under the generally accepted accounting principles (GAAP). Exh. 19 at 14. This contrasts with the Revised Report, which is based on a 17 ½ years regulatory depreciation schedule under the Uniform System of Accounts (USOA). *Id.*

Petitioners attack the credibility of the Revised Report. They argue it does not simply use USOA, but improperly uses a mixture of both GAAP and USOA. Exh. 13, at 16. Further, Petitioners argue that the use of different accounting methods should not lead to a significant variation in results. *See* Exh. 14 at 5. Moreover, Petitioners emphasize that the Commission previously relied upon the Initial Report (and the numbers contained therein) in the Pole Transfer Docket. Petitioners argue the Revised Report lacks credibility and we must find the Initial Report credible, as the Commission did previously. Upon reconsideration of the evidence, including review of the reports and testimony concerning the reports, we disagree.

Rate-regulated utilities are required to produce financial records in accordance with a USOA. *See* RSA 374:8, RSA 374:13, and *Re Uniform System of Accounts*, Docket No. 94-153, Order No. 21,310 (August 8, 1994). We acknowledge that, as an ILEC operating as an ELEC in New Hampshire, Consolidated is not required to annually report its finances to us, nor is there a statute or rule requiring Consolidated to use either GAAP or USOA. Further, we recognize that the FCC permits the use of GAAP accounting as a basis of pole attachment rates. *Comprehensive Review of Part 32 USOA supra.*

Nevertheless, when reviewing utility financials, the USOA is our preferred accounting approach. *See* N.H. Admin. R., Puc 307.04 (requiring electric utilities to follow USOA developed by Federal Energy Regulatory Commission (FERC)); Puc 411.04 (requiring telecommunications ILECs not operating as ELECs to follow USOA); Puc 507.08 (requiring gas utilities to follow USOA developed by FERC); Puc 607.07 (requiring water utilities to follow USOA); Puc 706.05 (requiring sewer utilities to follow USOA).

Additionally, while the FCC allows the use of GAAP accounting, the FCC recognizes that, without adjustment to the GAAP methodology, the two methodologies may lead to inconsistent pole attachment rates. 47 C.F.R. §1.1406(e) (2019).[6] As a result, the FCC allows adjustment to the GAAP methodology when carriers move from USOA to GAAP. *See* Exhibit 14; *Comprehensive Review of Part 32 USOA,* ¶¶32–36.

The purpose of adopting the USOA includes the need for clarity and transparency. One distinction between GAAP and USOA is the accounting treatment of depreciation. GAAP uses accelerated depreciation with shorter useful lives of assets and USOA uses regulatory depreciation with longer useful lives of assets. Exh. 19 at 14-15. A focus in utility rate proceedings often includes testimony on appropriate depreciation rates based on estimates of useful lives for different types of assets. The USOA provides for depreciation with the useful life of assets aligned with recovery

[6] "A price cap company, or a rate-of-return carrier . . . may calculate attachment rates for its poles . . . using either part 32 [USOA] accounting data or GAAP accounting data. A company using GAAP accounting data to compute rates to attach to its poles, ducts, conduits, and rights of way in any of the first twelve years after opting-out must adjust (increase or decrease) its annually computed GAAP–based rates by an Implementation Rate Difference for each of the remaining years in the period." 47 C.F.R. §1.1406(e) (2019). The latter accounts for the difference between attachment rates calculated under part 32 and under GAAP. *See id.*

periods for depreciation. Accordingly, when reviewing utility rates – including those for pole attachments – we find the USOA to be more appropriate.

Given our preference for the USOA methodology, we find the Revised Report to be slightly more credible evidence. Even so, we acknowledge that both parties raised substantial questions about the validity of each report. Both the Initial Report and the Revised Report use a mixture of GAAP and USOA accounting. The Initial Report begins with a value of poles based on Consolidated's predecessor FairPoint's numbers under USOA but then uses GAAP to determine an updated value. In contrast, the Revised Report begins with a value of poles based on GAAP, but then uses USOA to determine an updated value of the poles. Neither party provided a clear, step-by-step explanation of the accounting methodologies or calculations contained in the reports. Neither party submitted evidence that either report or the underlying data was subject to a professional audit. As a result, we find both reports lack credibility and neither report is entitled to substantial evidentiary weight.

d. The Formulae Established by the FCC Do Not Establish that Consolidated's Pole Attachment Rates are Unjust or Unreasonable

As detailed above, we find neither report to represent strong evidence. Based on the testimony and arguments presented in this proceeding, we find the Revised Report uses a more appropriate accounting methodology-USOA-for rate setting purposes. We therefore rely on this report for inputs in calculating the FCC cable formula rate. In doing so, we find Consolidated's current pole attachment rates to be generally consistent with the rates calculated using the FCC cable rate formula. Exh. 17. Accordingly, under this Rate Review Factor, we conclude that Petitioners fail to establish, by a preponderance of the evidence, that Consolidated's rates are unjust or unreasonable.

Yet, because the reports formed the basis for the parties' calculations under the FCC cable rate formula, we find that any calculations relying on these reports are similarly questionable. Accordingly, even upon reconsideration, we give less weight to this rate review factor in our analysis. Petitioners argue this is arbitrary, unlawful, unreasonable, and violates our own administrative rule. We disagree.

As discussed above, we must act as an arbiter and we are empowered to make evidentiary determinations. This includes an assessment of the credibility and strength of the evidence presented. Here, we find the evidence presented under this factor to be substantially lacking credibility. Accordingly, we place less weight on this factor in our ultimate analysis. The law does require us to consider six rate review factors, including the FCC cable rate formula. It does not, however, require us to elevate what we have determined to be unreliable evidence to be on par with what we determine to be credible evidence. *See DeLucca v. DeLucca*, 152 N.H. 100, 102 (2005) (stating that trier of fact is in best position to measure persuasiveness and credibility of evidence). Accordingly, we appropriately give this factor less weight in our overall analysis of whether Consolidated's pole attachment rates are just and reasonable.

Though we grant rehearing and amend our analysis under this rate review factor, we do not conclude Petitioners have established, by a preponderance of the evidence, that this rate review factor supports altering Consolidated's pole attachment rates.

6. Sixth Rate Review Factor: Any Other Interests of the Subscribers and Users of the Services Offered via the Pole Attachments or Consolidated's Consumers

Finally, Petitioners argue rehearing of the sixth factor is required because we overlooked evidence and improperly introduced a new evidentiary requirement. We disagree.

Our Final Order states the evidentiary record lacked evidence that specifically addressed subscriber and customer interests. Final Order at 13. Petitioners' claim this overlooks Ms. Kravtin's testimony that the FCC's cable rate formula addresses this factor because the FCC cable rate formula addresses customer interests for both the attachers and pole owner, as well as the greater public good. *See* Exh. 3, at 21. We disagree.

We did not overlook the witness testimony at issue. The testimony was hardly specific regarding the interests of customers of the attaching companies or the pole owner. Rather, the testimony was focused on bolstering Petitioners' argument that pole attachment rates should be set using the FCC cable rate formula. Exh. 3 at 19-20. We find no error in our characterization of the evidentiary record on this rate review factor.

Our Final Order also noted that the parties, both Petitioners and Consolidated, did not provide evidence regarding factors influencing the pricing of comparable communication services. We opined that such evidence may have allowed us to better assess customer impacts. Petitioners object to this portion of our analysis as introducing a new evidentiary requirement. Petitioners misconstrue our order. There is a difference between issuing a mandate and making an assessment of the record. We imposed no requirement on Petitioners or future litigants. Rather, we explained our reasoning to the losing litigant. Petitioners – who should have been most invested in providing a robust factual record – failed to do so in this instance. This underdeveloped factual record naturally led to a legal conclusion disfavored by Petitioners. This is appropriate legal analysis, not legal error.

We find Petitioners fail to provide good reason to grant rehearing and reconsider this portion of our analysis. We deny rehearing on the sixth rate review factor.

F. PETITIONERS FAILED TO DEMONSTRATE BY A PREPONDERANCE OF THE EVIDENCE THAT CONSOLIDATED'S POLE ATTACHMENT RATES, OTHER THAN JOINT USE CHARGES, ARE UNJUST OR UNREASONABLE

Petitioners bore the burden of proving by a preponderance of the evidence that Consolidated's pole attachment rates are unjust, unreasonable, or discriminatory. *See* N.H. Admin. R., Puc 203.25 and Puc 1303.01.

In our Final Order we found only one of Consolidated's pole attachment rates, the joint use charges, to be unreasonable. As described at length above, we find Petitioners' evidence in this proceeding at times to be thin, to lack credibility, or to be missing. Despite repeatedly declaring they have proved their claims by a preponderance of the evidence that all of Consolidated's pole attachment rates must be eliminated or reduced, we find the evidentiary record to be lacking and insufficient to meet their burden of proof. Petitioners' arguments that Consolidated did not rebut certain portions of their evidence does not mean we must find in their favor. *See DeLucca v. DeLucca*, 152 N.H. at 102 ("[T]he trier of fact is in the best position to measure the persuasiveness and credibility of evidence and is not compelled to believe even uncontroverted evidence.") (citation and quotations omitted).

Despite granting rehearing, reconsidering, and amending certain portions of our Final Order, the ultimate outcome concerning Consolidated's pole attachment rates remains unchanged. We deny Petitioners' request to adjust Consolidated's pole attachment rates beyond holding the joint use charges to be unreasonable and requiring these charges be terminated.

G. CONSOLIDATED MUST REFUND ALL JOINT USE CHARGES COLLECTED AS OF AUGUST 22, 2022

In our Final Order, we concluded the pole attachment rates called "joint use charges" and billed by Consolidated are unsupported. Final Order at 13. Consolidated provided no evidence to support imposing these charges for attachments to utility poles that Consolidated does not own but that Consolidated uses with another company (joint use). Consolidated did not dispute a lack of ownership interest (and, impliedly, a maintenance obligation) for these poles. *See id.* at 13-14. As a result, we concluded these charges were unreasonable. *See id.* Petitioners argue that the joint use charges, once found to be unreasonable, must be refunded by Consolidated back to the date the rate dispute petition was filed. We agree.

The rule, N.H. Code Admin. R. Puc 1303.07, provides:

> When the commission determines just and reasonable rates under this part that differ from the rates paid by the petitioner, the commission shall order a payment or refund, as appropriate. Such refund or payment shall be the difference between the amount actually paid and the amount that would have been paid under the rates established by the commission, plus interest, as of the date of the petition.

Under this rule, we are required to order either a payment or a refund once we determine just and reasonable rates different than those paid or charged. We reject Consolidated's argument that "as appropriate" provides discretion as to whether a payment or refund is ordered at all. Rather, "as appropriate" modifies whether our order is a payment due to rates that were found to be too low, or a refund due to rates that were too high. Here, we held the joint use rates to be unsupported and, therefore, too high. Under our administrative rule we are required to order a refund.

Accordingly, we grant Petitioners' motion for rehearing on this issue. We order Consolidated to refund any joint use charges paid by Petitioners to Consolidated from

August 22, 2022 to the present with annual interest at the prime rate. *See* N.H. Admin. R. Puc 1303.07 and 1303.08.

IV. CONCLUSION

We conclude that we possess the authority to adjudicate utility pole attachment rate disputes, even when there are voluntary agreements between the parties regarding the rates. We also conclude that the record before us does not support finding Consolidated's pole attachment rates as unjust or unreasonable. Finally, we require Consolidated to refund all joint use charges paid by Petitioners to Consolidated since the date of the Petition, August 22, 2022.

Based upon the foregoing, it is hereby

ORDERED, that all remaining arguments of Consolidated's Motion for Rehearing are **DENIED**; and it is;

FURTHER ORDERED, that Petitioners' Motion for Rehearing is **DENIED in part and GRANTED in part** as described in this order; and it is

FURTHER ORDERED, that Consolidated must refund with interest all joint use charges paid to Consolidated from August 22, 2022 forward as described above.

By order of the Public Utilities Commission of New Hampshire this thirteenth day of September, 2023.

Daniel C. Goldner	Pradip K. Chattopadhyay	Carleton B. Simpson
Chairman	Commissioner	Commissioner

Service List - Docket Related

Docket#: 22-047

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