THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY

Docket No. DE 17-160

MOTION FOR RECONSIDERATION

NOW COMES Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource" or the "Company") and, pursuant to Puc 203.05, Puc 203.07 and RSA chapter 541, hereby moves the New Hampshire Public Utilities Commission for reconsideration of Order No. 26,108 issued March 2, 2018 (the "Order") in the instant proceeding relative to the disallowance of certain consultant costs incurred by the Staff and the Office of Consumer Advocate ("OCA") and charged to Eversource. The Order overlooked relevant law, misapprehended the Company's positions, creates an unjustified material difference between similarly situated utilities, and renders a decision that amounts to an unconstitutional taking of property. Accordingly, the Order should be reconsidered. In support of this submission, Eversource says the following:

1. Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when a party states good reason for such relief. *Public Service Company of New Hampshire*, Order No. 25,361 (May 11, 2012) at 4. Good reason may be shown by identifying new evidence that could not have been presented in the underlying proceeding or by identifying specific matters that were overlooked or mistakenly conceived by the deciding tribunal. *Id.* at 4-5. A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *Id.* at 5. Eversource submits that for the reasons set out below, the Commission overlooked or mistakenly conceived important factual, legal, and policy matters in the Order and that reconsideration is therefore appropriate.

2. With respect to issues mistakenly conceived, in issuing the Order, the Commission concluded that Eversource "appeared to agree" with the Audit Report's conclusion that the consultant costs that had been expensed could not later be deferred based upon Eversource's statement in response to the audit that it would defer such expenses in the future. For clarity, Eversource's agreement to defer such expenses in the future was not, and is not, agreement that the accounting treatment argued by the Commission's Audit Staff was correct. As stated in Eversource's response to the audit, and as included in the Order, Eversource's position is that:

> The closing of the calendar year does not preclude recovery of a prudently incurred cost in rates. The 2017 entry was not a reclassification entry. The entry was to record a regulatory asset that was expected to be recovered in rates.

Order No. 26,108 at 3. Eversource does not agree that its treatment of costs incurred by the Staff and the OCA, and charged to Eversource, was inappropriate or that to allow recovery creates "an exception from the applicable accounting rules." *Id.* at 4. Eversource has agreed that it will act in a particular way in the future, but that does not mean that Eversource agreed it had acted inappropriately in the past. To the extent the Order concludes that Eversource is in agreement with the arguments of the Audit Staff, the Order misapprehends the facts.

3. Further to this point, the Audit Report at page 7, as quoted on page 3 of the Order, refers to FERC account 182 and states "The amounts included in this account are to be established by those charges which would have been included in net income, or accumulated other comprehensive income, determinations *in the current period under* the general requirements of the Uniform System of Accounts." (emphasis in original). The reason for this quotation seems to be to support the contention that anything outside the "current period" may not be included in Account 182. Page 8 of the Audit Report contains the full excerpt of the relevant provision of FERC account 182, but the full provision was not referred to in the Order, despite being directly relevant to the issues here. That provision states, in full:

> The amounts included in this account are to be established by those charges which would have been included in net income, or accumulated

> other comprehensive income in the current period under the general requirements of the Uniform System of Accounts ***but for it being probable that such items will be included in a different period(s) for purposes of developing rates that the utility is authorized to charge for its utility services.***

Audit Report at 8 (emphasis added). This provision indicates that amounts in Account 182 need not be entirely from the "current period" as seems to be argued by the Staff. Thus, Eversource did not, and does not, agree with the characterization of the treatment of the expense by the Staff as concluded in the Order.

4. As to matters overlooked, the Order overlooks both relevant facts and law. In its response to the Staff's recommendation, Eversource pointed out that in Order No. 26,091 the Commission had authorized full recovery of the consultant costs through Eversource's rates, and therefore the Staff's recommendation was requesting that the Commission amend its prior order, which would require notice and a hearing as required by RSA 365:38. In the Order, the Commission states that it "rejects" that argument on the basis that it intended the audit to cover a wider path than Eversource believed appropriate. Order No. 26,091, however, did not make Eversource's recovery of costs subject to the results of an audit. Therefore, rejecting Eversource's contentions on the scope of the audit is not a basis for failing to comply with RSA 365:38.

5. Order No. 26,091 specifically provides that "Eversource's petition to adjust its distribution rates to recover assessment costs and to recover costs incurred in connection with Commission proceedings is hereby APPROVED." Order No. 26,091 at 6. Thus, recovery consistent with Eversource's petition was approved and that approval was not conditioned upon any act or event. With respect to the accounting treatment, the Commission stated only "Finally, we agree that the Company's accounting treatment of the consulting fees should be reviewed by Staff." *Id.* at 5. While the "accounting treatment" was to be "reviewed," at no point in Order No. 26,091 was recovery conditioned upon the outcome of this review. *Compare with, e.g., Re Concord Electric Company*, Order No. 23,359 (Dec. 6, 1999) at 3 ("FURTHER ORDERED, that UNITIL shall budget $80,000 for program design, ***subject to audit and possible refund if so warranted***") (emphasis

added); and *Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty Utilities*, Order No. 26,005 (Apr. 12, 2017) (approving a settlement where recoupment of rate case expenses was specifically noted as being "subject to audit"). Making recovery contingent upon the audit represents a modification of Order No. 26,091, and Eversource is entitled to due process for such modification.

6. Additionally, in Eversource's response to the Staff recommendation, it noted that RSA 363:28, III states that the Commission "shall" provide timely recovery of OCA consultant costs assessed against a utility, and that pursuant to RSA 365:38-a and Order No. 26,091, the Commission had authorized recovery of the Staff's costs. Other than a single passing reference, neither statute is cited or discussed in the Order at all. The Order overlooks these relevant statutory provisions granting Eversource the right to recover expenses it did not initiate, but nonetheless was required by force of law to pay. By ignoring these provisions, the Commission is ignoring the legal requirement that Eversource be permitted to recover these expenses.[1] Regardless of the Staff's disagreement with the treatment of costs at one time, recovery of those costs is not just permitted, such recovery is required by law. Contrary to the law, the Commission's Order bars timely recovery of the special assessment it lodged against Eversource. The Order should be modified to comply with the law.

7. Furthermore, as noted in Eversource's initial filing and in response to the Staff's recommendation, the consultant costs in issue here are the same costs for which full recovery has been permitted for Unitil Energy Systems, without having been subject to any audit at all. *See* Order No. 26,007 (April 20, 2017) in Docket No. DE 16-384. The Order, however, overlooks this fact entirely. The "accounting treatment" by Unitil of these expenses appears never to have been examined by the Staff and appears not to have formed any part of any determination about the recovery of the expenses. It could be that Unitil

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[1] RSA 365:38-a: "the entire amount of the award ***shall be immediately recovered by the utility"*** (Emphasis added); RSA 363:28, III: "***The public utilities commission*** shall charge a special assessment for any such amounts against any utility participating in such proceedings and ***shall provide for the timely recovery of such amounts for the affected utility***." (Emphasis added).

treated the expenses in precisely the same manner Eversource did, but that is entirely unknown. The Staff and the Commission make no effort to reconcile this disparate and unfair treatment of different utilities for the same expenses. "[I]n accordance with the United States Supreme Court, this State's equal protection guarantee is essentially a direction that all persons similarly situated should be treated alike." *Verizon New England, Inc. v. City of Rochester*, 151 N.H. 263, 270 (2004); N.H. CONST. pt. I, arts. 2, 12; U.S. CONST. amend. XIV. The Order does not explain why two utilities in the same state, seeking recovery of the same expenses, incurred by the same parties from the same consultants for the same purposes at the same time, should be treated differently. Relative to this issue, Unitil and Eversource are similarly situated, and should be treated alike by allowing recovery of the expenses assessed to them both. Failing to do so is contrary to Eversource's rights under the State and Federal Constitutions.

8. Finally, denying recovery of the costs incurred by the Staff and OCA, but assessed against Eversource by the Commission, amounts to a taking under Part I, Article 12 of the State Constitution and the "takings clause" of the Fifth Amendment to the United States Constitution ("nor shall private property be taken for public use, without just compensation"). "[O]ur constitution is explicit that 'no part of a man's property shall be taken from him' without due process and compensation." *Appeal of Public Serv. Co. of N.H.*, 122 N.H. 1062, 1070 (1982). "Because the constitution prohibits any taking of private property by whatever means without compensation, the just compensation requirement applies whenever the exercise of the so-called police power results in a taking of property." *Id.* (quotation omitted). "We see no greater right of the government to 'take' merely because a regulated utility is involved." *Id.* at 1071. Similarly, the United States Supreme Court has held:

> This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.

Stone v. Farmers' Loan & Tr. Co., 116 U.S. 307, 331, 6 S. Ct. 334, 345, 29 L. Ed. 636 (1886).

9. In this case, Eversource incurred an expense that was created by others, but which it was required, under force of law, to pay. "Utilities are required to pay consultant costs related to Commission investigations pursuant to RSA 365:37 and RSA 363:28, III." Order No. 26,108 at 1. Eversource's accounting treatment of that expense did not increase the expense, did not impose it upon those it should not have been, and did not alter the expense. The amount of the expenses incurred by the Staff and the OCA, and thus the potential burden on customers, was identical at all times. Eversource's treatment of the expense was neither illegal, nor contrary to proper accounting principles.[2] The expenses of the Staff and OCA were not included in any other rate or rate request and have not been somehow recovered elsewhere. In issuing the Order, the Commission is requiring Eversource to pay for expenses it did not initiate, and over which it has no control – expenses which it is entitled by law to recover – based upon the belief that one "accounting treatment" would have been better than another. Such belief is not a sufficient basis to conclude that Eversource must forego appropriate compensation, particularly in light of the Constitutional and statutory mandates that require recovery of those costs.

WHEREFORE, Eversource requests that the Commission reconsider Order No. 26,108 consistent with this motion and grant such further relief as may be just and equitable.

[2] The Commission's Audit Staff makes a passing reference to RSA 374:14 regarding false entries on the books of utilities, which the Order refers to in footnote 2. Despite the insinuation that comes from this reference, there is no accusation, much less any evidence, that Eversource ever made any false entry on its books.

Respectfully submitted,

Public Service Company of New Hampshire d/b/a Eversource Energy

March 30, 2018
Date

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

March 30, 2018
Date

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Matthew J. Fossum