

STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Investigation into Effects of the COVID-19 Emergency on Utilities and Utility Customers

Docket No. IR 20-089

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY'S MOTION FOR REHEARING

Pursuant to New Hampshire Code of Administrative Rules Puc 203.07 and RSA 541:3, Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource” or “the Company”) hereby moves for rehearing of Order No. 26,495 (July 7, 2021) (the “Order”) in the instant docket. The Order was made without proper notice and an opportunity to be heard in violation of due process, and it is based upon mistaken assumptions and conclusions that create practical barriers to accomplishing even the limited goals it seems to permit. In support of this motion, Eversource states as follows:

1. As described in the Order, on March 17, 2020, Governor Christopher T. Sununu issued Emergency Order #3, pursuant to Executive Order 2020-04 (March 13, 2020) (“Emergency Order #3”). That emergency order took steps that, so far as Eversource is aware, had never happened before in this State generally or with respect to utilities specifically. Emergency Order #3 temporarily prohibited “[a]ll providers of electric, gas, water, telephone, cable, VOIP, internet, and deliverable fuels service in the State of New Hampshire” from disconnecting or discontinuing service for non-payment. Order at 1. Emergency Order #3 also prohibited the charging of late payment fees for arrearages accrued during the state of emergency and required that customers be given the opportunity to make reasonable payment arrangements for arrearages

incurred. *Id.* Emergency Order #3 stated that the Commission was to provide assistance and guidance to public utilities in implementing the provisions of the emergency order.

2. On March 31, 2020, the Commission issued the undocketed Order No. 26,343 implementing Emergency Order #3. After describing the Commission's general jurisdiction and authority, the entirety of the guidance in that order was as follows:

ORDERED, that public utilities, as defined in RSA 362, and the New Hampshire Electric Cooperative, Inc., shall not disconnect or discontinue service for non-payment for the duration of the state of emergency declared in Executive Order 2020-04; and it is

FURTHER ORDERED, that public utilities, as defined in RSA 362, and the New Hampshire Electric Cooperative, Inc., shall not charge any customer any fees for late payment for arrearages accrued during the state of emergency declared in Executive Order 2020-04; and it is

FURTHER ORDERED, that, at the end of the state of emergency declared in Executive Order 2020-04, each public utility, as defined in RSA Chapter 362, and the New Hampshire Electric Cooperative, Inc., shall provide the opportunity for its customers having arrearages accrued during the period of such state of emergency to make a reasonable payment arrangement providing for payments over no less than a six-month period.

Order No. 26,343 at 2-3. Accordingly, by an act of government, Eversource and other utilities were prevented from charging and collecting costs related to their businesses that had been approved by the Commission for inclusion in utility tariffs,¹ and from engaging in aspects of their business that have been deemed by the Commission to be reasonable and prudent means of managing costs charged to customers in the State.

3. On June 4, 2020, the Commission issued an Order of Notice opening the investigation in the instant proceeding, stating:

Pursuant to its authority under RSA 374:3, RSA 374:4, and RSA 365:5, the Commission has determined that it is necessary to investigate the impacts of the COVID-19 pandemic on New Hampshire public utilities with rates regulated by

¹ "[T]he vehicles by which utility rates are set, the tariffs or rate schedules required to be filed with the PUC, do not simply define the terms of the contractual relationship between a utility and its customers." *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980) (citations omitted). "They have the force and effect of law and bind both the utility and its customers." *Id.*; see also *Appeal of Verizon New England*, 158 N.H. 693, 695 (2009).

the Commission and on NHEC, and on their customers. Accordingly, the Commission is commencing this investigation to consider necessary and appropriate changes to existing policies and practices regarding utility operations, collections, revenues, finances, accounting, customer assistance measures, and ratemaking impacts, in light of the pandemic.

Order of Notice in Docket No. IR 20-089 at 2. Therefore, the Commission made explicit that it was commencing this investigation “to consider” changes to existing policies and practices.

Notably, the Commission’s notice did not specify that it was intending to review or adjudicate issues pertaining to the collections of costs, but only that it was reviewing potential future changes to various policies in light of the pandemic.

4. On August 18, 2020, the Staff of the Commission (now Staff of the Department of Energy) (“Staff”), filed a memorandum recommending the Commission issue an order authorizing utilities to create regulatory assets for waived late payment fees and incremental bad debt due to the pandemic. On October 13, the Staff submitted its analysis of utilities’ bad debt expense and late payment fees during the pandemic to that point. On November 13, 2020, the Staff altered its initial recommendation arguing that the Commission should authorize regulatory asset treatment for incremental bad debt, but not for waived late payment fees. On December 4, 2020, Eversource and other parties filed responses to the Staff’s recommendation. While the Office of Consumer Advocate recommended that regulatory asset treatment be denied for all pandemic-related costs, each of the rate-regulated utilities disagreed with the Staff’s revised recommendation. In its response, Eversource noted that the Staff’s analysis in its revised recommendation was based upon inaccurate comparisons and judgments. Specifically, Eversource noted that “amounts attributable to waived late payment fees are greater than determined by the Staff and are not immaterial.” December 4, 2020 Response of Eversource in Docket No. IR 20-089 at 2. Further, Eversource noted that in its most recent required monthly

filing at that time, “through the end of October [2020] Eversource has not collected approximately \$2.6 million in fee revenue – nearly \$325,000 per month – due to the COVID-19 pandemic” and “a shortfall of approximately \$2.6 million, and which is growing by hundreds of thousands of dollars per month, is not ‘relatively small’ and ... should not be excluded from regulatory asset treatment.” *Id.* On December 16, 2020, Staff filed a memorandum reaffirming its recommendation of November 13. For over seven months after that memorandum, the shortfall continued to grow and nothing substantive occurred on this matter until the Order was issued.

5. In the Order, and without reconciling its decision with the scope of the proceeding as described in its Order of Notice, the Commission concluded that it would apply a public interest standard in its review of utilities’ collection of pandemic-related costs. Following that, and contrary to the recommendation of its own Staff, the Commission’s decision, in its entirety, pertaining to utility cost recovery arising from the pandemic was the following:

We have reviewed Staff’s recommendations and the Utilities’ and OCA’s responses to those recommendations, as well as the information the Utilities filed each month in this docket at the Commission’s direction. Based on the above, we find that it is not in the public interest to allow deferral accounting for COVID-19 related incremental bad debts and waived late fees. Thus, we decline to authorize deferral accounting for these items. Deferral accounting would preserve these cost[s] for recovery outside our traditional test year based rate case methodology, which we do not believe serves the public interest in this instance. We agree with Staff that there may be offsetting expenses from COVID-19. We agree with the OCA that the question of recovery of these expenses is best addressed in the context of each utility’s next rate case when such costs (to the extent they remain relevant under test year based rate-setting) can be appropriately considered in the context of each company’s full revenue requirement and overall rate of return.

Order at 8-9. The Commission then, despite denying the ability to defer and recover the pandemic-related costs, also required utilities to file additional reports on those same costs “in preparation for the next rate case”. Order at 9.

6. 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 legal and policy matters in the Order and that rehearing is appropriate. The Commission’s decision was made without proper notice and is based upon mistaken assumptions and conclusions that overlook practical barriers to achieving what it nominally permits.

7. As to the issue of notice, “Where governmental action would affect a legally protected interest, the due process clause of the New Hampshire Constitution guarantees to the holder of the interest the right to be heard at a meaningful time and in a meaningful manner.” *Appeal of Northern New England Telephone Operations, LLC*, 165, N.H. 267, 273-74 (2013) (quoting *Appeal of Pennichuck Water Works*, 160 N.H. 18, 36 (2010)). Moreover:

For more than a century, the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending “hearing.” To satisfy due process, the notice must be of such nature as reasonably to convey the required information and must be more than a mere gesture. Due process, however, does not require perfect notice, but only notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

In re School Administrative Unit #44, 162 N.H. 79, 87 (2011) (internal quotations and citations omitted). Similarly:

In any case in which the commission may hold a hearing it may, before or after such hearing, make such independent investigation as in its judgment the public good may require; provided, that, whenever such investigation shall disclose any facts which the commission shall intend to consider in making any decision or order, such facts shall be stated and made a part of the record, and any party whose rights may be affected shall be afforded a reasonable opportunity to be heard with reference thereto or in denial thereof.

RSA 365:19.

8. In this case, as noted above, the Commission’s Order of Notice specified that this was an investigative proceeding “to consider necessary and appropriate changes to existing policies and practices”. Order of Notice at 2. The Order does not require or examine any changes to existing policies and practices. Instead, the Order denies the ability to defer and/or seek recovery of legitimate costs while making no changes to any utility policies (nor indicating that the Commission considered such changes and rejected them). Neither Eversource, nor other utilities, were on notice that the Commission was contemplating such a decision and this decision was made without providing an opportunity to be heard on the matter. Such a conclusion is contrary to the requirements of due process. The Commission’s decision should be reconsidered to allow for proper notice and an appropriate opportunity to be heard on the merits.

9. With respect to the merits of the issue, as described in the Staff’s August 18, 2020 recommendation in this docket, regulatory assets are assets that result from rate actions of regulatory agencies and arise from specific revenues² that would have been included in net income determination in one 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

² Similarly, regulatory liabilities serve essentially the same purpose but pertain to costs, rather than revenues.

purposes of developing the rates the utility is authorized to charge for its services. *See* August 18, 2020 Staff Recommendation at 4. Accounting for regulatory assets allows public utilities to defer the recognition of certain costs and allows a utility to spread the expense over a longer period of time, enables a utility to track unanticipated costs, and allows a utility commission the ability to review those costs at the point in time when they are requested to be put into rates. Utilities are typically allowed to defer costs and record regulatory assets for items such as decommissioning costs, extraordinary repair and maintenance costs, storm damage costs and deferred taxes.³ In practice, utilities will defer costs to a regulatory asset account if a written order is received from their regulators (state and federal) that either implicitly or explicitly allows for such treatment, and the company believes there is a probability of recovery.

10. As the Commission is aware, Eversource recently completed a rate case in Docket No. DE 19-057 and is, at present, implementing various aspects of the requirements of the settlement and order in that docket – requirements which extend out until 2022 at least. Moreover, pursuant to Section 10.6 of that settlement,⁴ the earliest that Eversource would be able to file a new rate case would be in 2023 based on a test year ended December 31, 2022. In that the earliest test year Eversource can use is 2022, and that the Governor permitted the State of Emergency to expire in mid-2021, Eversource’s next test year would not capture the impacts associated with fulfilling the Governor’s and Commission’s directives that were incurred prior to 2022. Therefore, though it nominally permits some level of recovery, by denying the ability to

³ As an example, in response to the Tax Cuts and Jobs Act of 2017 the Commission opened an investigation, IR 18-001, to examine how utilities would address the significant changes to their tax liability as a result of that law. In response, different utilities filed different proposals unique to their situations and, for some, the resolution involved the creation of regulatory liabilities. *See, e.g.*, Order Nos. 26,245 (May 2, 2019), 26,251 (May 10, 2019), and 26,340 (March 26, 2020).

⁴ See Exhibit 58 in Docket No. DE 19-057 at Bates page 24 (red).

employ a regulatory asset to defer the costs for inclusion in a later rate case, the Commission has, in all practical respects, denied recovery of any pandemic-related costs by Eversource.

11. The Order makes it plain that “the question of recovery of these expenses is best addressed in the context of each utility’s next rate case.” Order at 8-9. By foreclosing the ability of Eversource to use a regulatory asset to defer these costs for inclusion in a future rate case, there will be no “question of recovery” to address in the place the Commission admits would be best for review. The forum identified by the Commission for addressing these legitimate costs is not available to Eversource. Recovery has been denied. And, by denying creation of a regulatory asset for costs included in either an approved settlement agreement revenue requirement or final order determined revenue requirement, the Commission has essentially instituted a rate decrease for the period encompassed by the Governor’s declared state of emergency without determining that the overall rates during that period were unjust or unreasonable. *See* RSA 378:7.

12. Additionally, the Order notes that even in the circumstances outlined (that is, in a rate case), pandemic-related costs would only be considered “to the extent they remain relevant under test year based rate-setting”. Order at 9. Thus, the Commission is acknowledging that by a simple accident of timing some utilities may be permitted to seek recovery and others may not, but only to the extent they “remain relevant.” Should a utility have a current rate case or one that is imminent, these costs could be included, but for any other utilities that have just completed a rate case, or that have a stay-out provision, or that do not have a rate case planned, these costs are no longer eligible for recovery. The Commission offers no justification for such unequal treatment of essentially identical costs affecting all companies under its jurisdiction, and it does not specify what would make such costs relevant or not.

13. The costs of the pandemic are directly in line with the costs appropriate for regulatory asset treatment. They were unanticipated, significant, and have impacted all companies. All companies should be permitted to demonstrate their right to obtain recovery for those costs. Whether a utility may successfully make such a demonstration will depend on the evidence a utility may muster to support its claims. The point, however, is that there must, at a minimum, be an opportunity to seek recovery for legitimate costs that were incurred by utilities as a result of the State's actions. For the Commission to issue an order that effectively denies recovery, or makes it available only to some, is arbitrary and unfair and should be reconsidered.

14. Further to this point, the reasoning for the Commission's conclusion to deny use of a regulatory asset and to de facto deny recovery is not clear in the Order. The Order appears to deny the use of a regulatory asset on the basis that it is not in the public interest, but the Commission points to nothing specific in the record to support the conclusion that the public interest would not be served by allowing the costs to be deferred for inclusion in a rate case. *See* RSA 363:17-b, III (stating that each order of the Commission shall include a "decision on each issue including the reasoning behind the decision."). In that it is not clear *why* the Commission believes the public interest would not be served by allowing regulatory asset treatment, it is also unclear what information could or would justify such treatment. Thus, even if a utility could include pandemic-related costs in a test year, it is not clear what information would need to be provided to substantiate the proper treatment of those costs. Utilities should know the relevant standards for recovery of costs and should have the opportunity to provide evidence that meet those standards. Without that protection, the Commission could grant or deny cost recovery on any basis it deemed fit without any ability to challenge that determination or even understand its basis.

15. For the above reasons, Eversource submits that reconsideration of the Order is necessary and appropriate. Eversource and other utilities should be permitted the opportunity to defer the pandemic-related costs for inclusion in a rate case which the Commission admits is the place to best address those costs.

WHEREFORE, Eversource respectfully requests that the Commission:

- A. Grant reconsideration as provided above; and
- B. Grant such further relief as is just and equitable.

Respectfully submitted,
Public Service Company of New Hampshire d/b/a Eversource Energy
By Its Attorney

Dated: August 6, 2021



By: _____
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CERTIFICATE OF SERVICE

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

Date: August 6, 2021



Matthew J. Fossum