

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

ELECTRIC AND GAS UTILITIES

2021-2023 Triennial Energy Efficiency Plan

Docket No. DE 20-092

MOTION FOR RECONSIDERATION AND CLARIFICATION OF ORDER NO. 26,513

Pursuant to New Hampshire Code of Administrative Rules Puc 203.07 and RSA 541:3, Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty; New Hampshire Electric Cooperative, Inc.; Public Service Company of New Hampshire d/b/a Eversource Energy; Unitil Energy Systems, Inc. (UES); Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty; and Northern Utilities, Inc. (Northern) (collectively, the “NH Utilities”) hereby move for clarification and/or reconsideration of Order No. 26,513 (September 1, 2021) (the “Order”) issued by the New Hampshire Public Utilities Commission (the “Commission”) in the instant docket. Collectively, the NH Utilities have certain concerns about the procedural steps delineated in the Order and respectfully request further guidance and/or consideration of the due process concerns. If not clarified or reconsidered, the Order creates a level of uncertainty that needs to be addressed for the NH Utilities to comply with its terms in a meaningful and timely manner. In support of this motion, the NH Utilities state as follows:

I. BACKGROUND AND PROCEDURAL HISTORY

The Commission established the process for implementing New Hampshire’s Energy Efficiency Resource Standard (“EERS”) in Order No. 25,932 (August 2, 2016) (the “Planning Order”), requiring the state’s electric and natural gas utilities, as administrators of the programs offered to the public to meet the EERS, to “prepare the triennial EERS plans in collaboration

with stakeholders and the EESE Board as Advisory Council.” Planning Order at 10-11. In Docket No. DE 17-136, the Commission approved the first triennial plan with an implementation period of the EERS for years 2018-2020. (Order No. 26,095 (January 2, 2018)). The 2018-2020 Plan was updated for each of the years 2019 and 2020.

Subsequently, the Commission issued an Order *nisi* opening the instant docket for consideration of the 2021-2023 New Hampshire Statewide Energy Efficiency Plan (the “Proposed Plan”). Order No. 26,375 (June 30, 2020). The Proposed Plan was filed on September 1, 2020, after a nearly year-long stakeholder process and discovery took place in September and October 2020. Commission staff (now staff of the New Hampshire Department of Energy, or “DOE”), the Office of the Consumer Advocate (“OCA”), and several intervenors filed testimony on October 29, 2020. Further discovery was conducted on the content of the testimony; settlement discussions were held on November 19 and 20; and a settlement agreement signed or supported by all parties except Commission staff was submitted on December 3, 2020, along with rebuttal testimony by the OCA and by the NH Utilities. A hearing was held on the settlement agreement on December 10, 2020, which was extended to December 14, 16, 21, and 22, 2020. Three record requests were made of the NH Utilities during the course of those hearings to accompany the 46 other exhibits provided as part of the record supporting the settlement agreement’s approval. Thus, the record in this proceeding is fulsome.

On December 29, 2020, in lieu of a final order in this docket, the Commission issued Order No. 26,440 granting a temporary “extension of the 2020 energy efficiency program structure and System Benefit Charge rate beyond December 31, 2020” until a final order could be issued, which at that time was estimated by the Commission to occur within eight weeks. (Order No. 26,440, at 5). Since the conclusion of the hearings and issuance of Order No. 26,440,

the composition of the Commission has changed, with one Commissioner retiring and a new Commissioner appointed. Also, the vast majority of Commission staff was reassigned to the newly formed DOE, which transition took effect on July 1, 2021. The NH Utilities recognize that this unique confluence of circumstances has created an unusual situation for all parties involved as well as the Commission.

On September 1, 2021, the Commission issued the Order reopening the record to allow for a “series of record requests [to be issued] in the next two weeks.” Although a deviation from past practice, the NH Utilities recognize that the issuance of additional record requests may reasonably arise from the fact that the new Commissioner did not sit during the hearings and is seeking an opportunity to ask questions to help inform his decision. (Order 26,513 at 1).

The Order also stated that an additional hearing would be scheduled to occur “approximately two weeks after the receipt of complete responses to the record requests,” which is a necessary prerequisite for the incorporation of new evidence into the record for the proceeding. (Order at 3). However, the Order further stated that the additional hearing is not “an invitation for the parties to propound additional exhibits beyond the scope of the Commissioner’s post-hearing record requests, or to seek to re-litigate this matter.” *Id.* For the reasons stated below, this severe limitation on the scope of the hearing following the submission of the responses to record requests creates some concern for the NH Utilities regarding the application of N.H. Code Admin Rules Puc 203.30 and 201.05, in combination with RSA 541-A:31, and due process principles. Therefore, the NH Utilities respectfully request clarification and/or reconsideration of certain, limited procedural issues.

II. LEGAL STANDARD

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration where 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 specific matters that were overlooked or mistakenly conceived by the deciding tribunal. (*Id.* at 4-5). In the unusual circumstances that exist with a foundational transformation of the Commission’s organization; the creation of DOE; the appointment of a new commissioner; and a deviation from past practice involving the reopening of the record, good cause exists to assure that due process concerns are fully addressed to protect the due process rights of all parties participating in matters before the Commission.

III. LEGAL CONSIDERATIONS

The Order states that, because newly appointed Commissioner Goldner did not sit for the hearings in this docket, reopening the record pursuant to Puc 203.30(a) for a series of record requests from that Commissioner is appropriate. (Order at 1-2). The NH Utilities agree that unusual circumstances exist and that it is imperative that Commissioner Goldner have the information necessary to make an informed decision. At the same time, the NH Utilities are concerned that, typically, reopening the record for limited purposes after a robust adjudicatory process has occurred can have the potential to create due process concerns for the final deliberation of issues. These concerns are outlined as follows:

First, Puc 203.30(a) allows the Commission to reopen the record to “*authorize filing of exhibits* after the close of a hearing.” (emphasis added). Pursuant to Puc 203.22, *parties* are to present evidence by filing exhibits. Thus, typically, it is the parties that bear the obligation for creating and providing evidence that will be included as exhibits for the record, upon which the

Commission will base its decisions. A concern here is that the Commission, with the obligation to render an impartial decision on the merits, may request the production of information that may be unduly narrow and therefore not provide the opportunity to present – at this late date – a full picture of the merits of an issue raised. Conversely, potentially broader implications not previously raised in the proceeding may be invoked, which would not get the full benefit of an adjudicatory process given the narrowly framed scope of the hearing that will be afforded to that information according to the Order.

Second, reopening the record pursuant to Puc 203.30(a) typically does not apply to responses to record requests like those contemplated in the Order. Record requests are not typically created or submitted as late-filed exhibits of new information to the docket, but rather arise for the purpose of supplementing witness testimony at hearing. During the hearing, the record request is specified; parties have an opportunity to object to it or clarify what information is sought and for what purpose; and, the parties then determine what information will be provided in response prior to such response being admitted as an exhibit to the record. Here, the Order does not indicate whether the record requests will be tethered to any part of the existing record, including testimony and responses to record requests, nor does it limit those requests to the existing issues or scope of the docket. Instead, the Order indicates that questions will be forthcoming without specifying if some, all, or perhaps none of the answers will be treated as exhibits and, if only some will be entered, how to determine which to admit. This again raises the concern that a narrowly framed hearing on the responses to the record requests may not provide adequate due process to the NH Utilities or the other parties in the context of the overall proceeding.

Third, the Order asserts that “by scheduling an additional hearing, the Commission ensures the parties’ right of cross examination pursuant to RSA 541-A:33, IV is protected” (Order at 2). The NH Utilities appreciate the provision for an additional hearing on the record request responses, as a critical component of this procedural path. However, the rights of the parties to the docket may not be fully protected given that the Order restricts the parties from “propound[ing] additional exhibits beyond the scope of the Commissioner’s post-hearing record requests, or seek[ing] to relitigate this matter.” (Order at 3). The hearing is, therefore, potentially limited first by the way that record requests are stated, and then second by what the Commission determines is or is not within the scope of those record requests, after the requests are submitted. Thus, although parties could submit exhibits they feel germane or necessary in response to the record requests, those exhibits apparently could be excluded at the Commission’s discretion for being outside the scope of the post-hearing record requests, thereby restricting the parties’ “[o]ppportunity . . . to respond and present evidence and argument on all issues involved” as required by RSA 541-A:31 IV.

An additional concern relates to the right to cross examination. In this regard, the Order states that Puc 203.30(c) “requires the Commission to consider probative value of any new exhibit against the parties’ right of cross examination.” (Order at 2). But this excerpt from Puc 203.30(c) omits the majority of the language stated in 203.30(c). Puc 203.30(c) states in full:

In determining whether to admit the late filed exhibit into the record, the commission shall consider:

- (1) The probative value of the exhibit; and
- (2) Whether the opportunity to submit a document impeaching or rebutting the late filed exhibit without further hearing shall adequately protect the parties' right of cross examination pursuant to RSA 541-A:33, IV.

This rule is intended to protect the right of cross-examination possibly at the expense of admitting a late exhibit. Subpart (1) of this rule addresses whether, in the case of an exhibit with sufficient probative value, a document impeaching such an exhibit is sufficient for cross-examination purposes without having an additional hearing. This cannot be interpreted to mean that an exhibit's probative value should be weighed *against* a party's right to cross examine, as to do so would inherently create the possibility for a violation of due process and is contrary to the notice requirement of RSA 541-A:30, IV, that "opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved." With the Order's restrictive interpretation of Puc 203.30(c), it is not clear that the rights of the NH Utilities in having the opportunity to rebut the new evidence is protected.

IV. REQUEST FOR CLARIFICATION AND/OR RECONSIDERATION

The NH Utilities welcome the opportunity to provide additional information to assist in informing a decision by the Commission on the merits of this proceeding and certainly recognize that the unusual circumstances that have occurred warrant the submission of information to answer any questions the Commission may have. However, the NH Utilities have the following specific concerns and requests:

- (1) Time is of the essence. The NH Utilities have been operating the NHSaves programs under the temporary order with a lower funding amount than proposed by the settlement agreement pending before the Commission, which has resulted in adjusted program implementation and correspondingly lower energy savings achievements. Planned program ramp-up has not taken place in 2021, and some planned offerings have been paused or were not initiated. The NH Utilities are concerned that, whatever happens next, it is exceedingly important that a final

decision on the merits of the settlement agreement be issued as soon as possible and that any additional process afforded in this docket be conducted with consideration of the unfortunate delay that has already occurred and the associated ramifications for the implementation of the settlement agreement.

- (2) Adequate Scope for Additional Hearing. The scope of the post-response hearing on the record requests should provide a reasonable and adequate opportunity for the NH Utilities to present information deemed by the NH Utilities as necessary to support, rebut or otherwise address any new issues, requirements or implications raised by the record requests. Therefore, the Commission should define the scope of the subsequent hearing after accepting comment from the NH Utilities and other parties as to the appropriate scope and process for the subsequent hearing to assure that all issues germane to the final decision are afforded due process of law in the proceeding.

WHEREFORE, the NH Utilities respectfully request that the Commission:

A. Grant reconsideration and/or clarification as provided above; and

B. Grant such further relief as is just and equitable.

Respectfully submitted,

The NH Utilities: Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty; New Hampshire Electric Cooperative, Inc.; Public Service Company of New Hampshire d/b/a Eversource Energy; Unitil Energy Systems, Inc.; Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty; and Northern Utilities, Inc.

Date: September 16, 2021

By:  o/b/o the NH Utilities

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