

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 21-020

EVERSOURCE ENERGY AND CONSOLIDATED COMMUNICATIONS

Joint Petition to Approve Pole Asset Transfer

Order on Motions to Dismiss, Compel, and for Rehearing

O R D E R N O. 26,534

October 22, 2021

This order grants in part and denies in part the Motion to Dismiss filed by the Office of the Consumer Advocate and requires the Joint Petitioners to propose a new recovery mechanism by November 15, 2021, for consideration by the Commission. This order also dismisses the Motion for Rehearing filed by the Office of the Consumer Advocate. Finally, this order grants the Motion to Compel filed by New England Cable and Telecommunications Association, Inc.

I. PROCEDURAL HISTORY

On February 10, 2021, Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource) and Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications (Consolidated) (together, Joint Petitioners), filed a petition (Petition) requesting that the Commission approve a transfer of interests in utility pole assets from Consolidated to Eversource pursuant to the terms of a Settlement and Pole Asset Purchase Agreement. In addition, the petition requested that the Commission approve Eversource's use of its Regulatory Reconciliation Adjustment (RRA) mechanism to recover costs associated with its purchase of Consolidated's interest in utility pole assets.

On February 23, 2021, the Office of the Consumer Advocate (OCA) filed a letter of participation in this matter. On March 29, New England Cable and

Telecommunications Association, Inc. (NECTA) filed a petition to intervene, which was granted by the Commission.

On August 4, 2021, the OCA moved to dismiss the Petition. On August 16, Eversource and Consolidated filed separate objections to the OCA's motion to dismiss. On August 19, the OCA filed a request for leave to file a reply to Eversource's and Consolidated's objections, together with its reply. The OCA's motion for leave to file a reply to the objections of Eversource and Consolidated was granted through a procedural order dated September 10, 2021.

On August 13, 2021, NECTA moved to compel Consolidated to respond to certain data requests. Consolidated filed a partially assented-to motion to extend the deadline for filing an objection to NECTA's motion to compel on August 23, 2021, and an objection on August 25, 2021. Consolidated's motion to extend the deadline for filing an objection was granted through a procedural order dated September 10, 2021.¹

On September 23, 2021, the OCA filed a motion for rehearing of the September 10, 2021, procedural order. According to the OCA, the procedural order implicitly denied its motion to dismiss and requested a written order. On October 1, Consolidated replied to the OCA's motion for rehearing, noting that the procedural order took no action whatsoever on the merits of the OCA's motion to dismiss.

¹ On September 23, 2021, the OCA filed a Motion for Rehearing of the September 10 procedural order. Specifically the OCA construed the procedural order as a "rejection of the OCA dismissal motion." OCA Mot. for Reh'g (Sept. 23, 2021). The September 10 procedural order, however, makes no mention—explicit or implicit—of denying the OCA's August 4 motion to dismiss. The Commission is aware of no provision of law equating the grant of a motion for leave to file a reply with a dismissal of the underlying motion. The procedural order had neither the intent nor the effect of denying the OCA's motion to dismiss. The OCA's motion for rehearing is, therefore denied. In any event the OCA's motion is rendered moot by the present Order ruling on the August 4, 2021 motion to dismiss.

The petition, motions, objections, and other docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted to the Commission's website at:

<https://www.puc.nh.gov/Regulatory/Docketbk/2021/21-020.html>.

II. POSITIONS OF THE PARTIES

A. Motion to Dismiss

i. OCA

The OCA moved for the Petition to be dismissed. The OCA argued the Commission cannot authorize the requested cost recovery mechanism because it would violate terms of a settlement agreement that the OCA and Eversource entered into, and the Commission approved through Order No. 26,433 (December 17, 2020), in Docket DE 19-057.

According to the OCA, sections 9.1 and 10.6 of the DE 19-057 settlement agreement bar Eversource from the rate recovery through the RRA as proposed. The OCA characterized section 9.1, relating to Eversource's Regulatory Reconciliation Adjustment (RRA) mechanism, as limiting the use of the RRA to a limited enumerated set of expenses that does not include costs associated with the acquisition of pole assets. The OCA characterized section 10.6, relating to step increases for non-revenue producing capital expenditures, as barring of any request for recovery of capital costs outside the limited step increase framework until Eversource's next rate case.

The OCA also argued that Eversource's statutory service obligations require that the types of investments and operational improvements proposed in the petition be made within the company's existing rate structure until approved in a rate case.

ii. Eversource

Eversource objected to the OCA's motion to dismiss. Eversource argued that the OCA misinterpreted the terms of the settlement agreement in DE 19-057, that the OCA's argument relies on unfounded presumptions, and that the OCA's argument ignores public safety concerns. Eversource also commented on the timing of the OCA's motion, arguing that it was raised too late in the proceeding and after the OCA had taken a contrary position.

In support of its position that the settlement agreement does not bar its proposed recovery of costs through the RRA mechanism, Eversource argued that the DE 19-057 settlement agreement does not bar categories of costs or expenses that were not addressed in the underlying proceeding, and were unknown at the time the settlement agreement was entered into and approved. While acknowledging that the reasonableness of the costs and possibility of better recovery mechanisms are appropriate considerations in the instant docket, Eversource argued that the DE 19-057 settlement agreement does not preclude recovery of new costs. According to Eversource, the recovery of the net revenue requirement through a new component of the RRA would be lawful if approved by the Commission, and that nothing would prohibit the Commission from making such an order.

iii. Consolidated

Consolidated objected to the OCA's motion to dismiss. Consolidated argued that the settlement agreement in DE 19-057 does not preclude the transactions contemplated by the petition. Consolidated construed the agreement in DE 19-057 as being applicable only to the matters in raised in that docket, and that the instant petition falls outside of that scope.

Consolidated also argued the requested relief in this matter would yield considerable benefits to Eversource's ratepayers, including that scheduled inspections of utility poles would occur, improved emergent situation response, and other reliability and resiliency improvements. Consolidated cited to RSA 378:37 for the proposition that cost recovery in this matter is statutorily supported in order to ensure the financial stability of the state's regulated utilities.

iv. OCA Reply

With leave of the Commission, the OCA replied to the objections of Eversource and Consolidated. In reply to Eversource and Consolidated, the OCA argued the limited set of costs the RRA may be used to recover may not be expanded based on the premise that the cost was not contemplated and litigated in Docket DE 19-057. The OCA also disputed the premise that the Commission could approve of recovery of new costs despite the restrictions on Eversource's ability to recover new capital costs outside of step adjustments or expenses through the RRA by the DE 19-057 settlement agreement. According to the OCA, the Commission is not required to approve the requested transaction under other provisions of law. In response to the timing of its argument, the OCA stated that its motion to dismiss is not contrary to its position taken at the prehearing conference.

B. Motion to Compel

i. NECTA

NECTA moved to compel Consolidated to respond to NECTA's data requests 2-019 and 3-020. Based on the NECTA and Consolidated's pleadings, the disputed requests and responses are as follows:

Request 2-019:

Please refer to the 2017 ARMIS Report filed by FairPoint Communications for NH and provide figures updated to

12/31/2000 for the following categories: Gross Investment in Poles, Accumulated Depreciation – Poles, and Depreciation Rate – Poles.

Response to 2-019:

Consolidated Communications believes ARMIS data of December 31, 2000, is not in any way relevant to the matters at issue in Docket No. DT 21-020. To the extent the referenced date should have been December 31, 2020, Consolidated Communications does not have said data as it ceased filing ARMIS reports.

Request 3-020:

Please provide the same information in the ARMIS report prepared by FairPoint Communications for New Hampshire for 2017 (see response to STAFF 1-031-RV01) updated to December 31, 2020 for Consolidated (not the ARMIS report itself)."

Response 3-020:

Consolidated Communications does not have the requested information.

NECTA argued that the requested information is relevant to determining whether the price Eversource has agreed to pay for the interests in pole assets exceeds net book value, which in turn is relevant and material to determining whether the costs of the transaction will result in just and reasonable rates.

NECTA argued that though its responses, Consolidated failed to object to its data response requests, and that although Consolidated may not have the requested information, it does have the information needed to calculate the requested information. NECTA requested an order to compel Consolidated to produce restated GAAP figures to reflect the difference between those figures and regulatory accounting figures used in ARMIS reports. According to NECTA, upon information and belief, this calculation would involve restating depreciation and taxes to reflect the different treatment under GAAP and regulatory accounting.

ii. Consolidated

Consolidated objected to NECTA's Motion, arguing that it is under no duty or requirement to produce that which it does not possess. Consolidated stated that it has provided GAAP data that rolls forward from its acquisition of FairPoint through December 21, 2020, therefore, to the extent NECTA needs additional financial analysis of the data already in its possession, NECTA can generate that analysis.

III. COMMISSION ANALYSIS

A. Motion to Dismiss

In ruling on a motion to dismiss, we determine whether the facts alleged in the petition and supporting pleadings and testimony, and all reasonable inferences, could support the relief sought. Decisions on such motions are made before a factual record is developed. This requires us to assume that all of the Joint Petitioner's assertions are true. *Public Serv. Co. of N.H.*, Order No. 25,213 at 71 (Apr. 18, 2011). However, we need not assume the truth of the statements in the plaintiffs' pleadings that are merely conclusions of law. *Clark v. N.H. Dep't of Emp't Sec.*, 171 N.H. 639, 645 (2019). We engage in a threshold inquiry that tests the facts in the complaint against the applicable law. *Id.*

The Joint Petitioners request authorization to transfer utility assets between companies pursuant to RSA 374:30, as well as Eversource's recovery of costs estimated to be higher than pole attachment fee revenues that Eversource would be entitled to under the proposed transaction. The petition proposes that this set of costs be recovered through new and existing inputs to Eversource's RRA mechanism; however, under the terms of the Petition, Eversource enjoys an escape clause from the transfer agreement if "cost recovery approvals acceptable to Eversource" are not obtained as a part of a final order in the instant proceeding. Petition at 5.

Through its motion to dismiss, the Office of the Consumer Advocate argues that the proposed cost recovery mechanism is prohibited under the terms of the settlement agreement in Docket DE 19-057, as approved by Order No. 26,433. Therefore, in order to pass on the OCA's arguments, we must consider the operative provisions of the settlement agreement in in Docket DE 19-057 as approved by Order No. 26,433. The OCA identifies two specific provisions Settlement Agreement:

9.1 The Company shall be authorized to implement an annual Regulatory Reconciliation Adjustment ("RRA") mechanism, which is intended to allow the Company to request recovery or refund of the limited set of costs identified below...

10.6 The Company shall not request recovery of any capital costs associated with plant placed in service outside of the above-described step adjustments until the Company's next distribution rate case filing, which shall be based on a test year ending no sooner than December 31, 2022, and which shall be filed no earlier than the first quarter of 2023.

Consistent with this Commission's past practices, violation of a settlement agreement approved consistent with the Commission's statutory authorities

[...] is tantamount to a violation of the Commission order approving it. We accord the obligations created under settlement agreements the same degree of weight and authority as other Commission orders and we will enforce settlement with the same vigor that we enforce other Commission rules and decisional decrees.

Re Union Telephone Company, Order No. 21,913 at 4 (November 20, 1995).

The Joint Petition requests a new component of the RRA for "annual net revenue requirement ... for the purchase, inspection, and replacement of the transferred poles." Petition at 4. We conclude that this specific request is precluded under the terms of the DE 19-057 settlement agreement approved by Order No. 26,433 because the recovery of new capital costs through the RRA is contrary to both sections 9.1 and 10.6 of the settlement agreement. Therefore, we grant the OCA's motion to dismiss in part. With respect to the remaining proposals to utilize existing

RRA categories for increased expenses, we do not, however, reach the same conclusion. Because property tax expenses and vegetation management work are variable expense items already included in the RRA, and are expenses not capital costs, we do not agree that they are *per se* precluded under the DE 19-057 settlement agreement.

Based on our conclusions above, we find that the Joint Petitioners have made sufficient allegations, both legal and factual, to go forward with its Petition for approval of pole assets transfer. Therefore, we deny the OCA's motion in part on that basis. The text of the Petition does not condition the proposed asset transfer on the exact recovery mechanism proposed in the Petition. Petition at 5 (conditioning closing on "cost recovery approvals acceptable to Eversource"). As such, we cannot conclude that no cost recovery mechanism excluding capital costs exists that would be acceptable to Eversource. We therefore decline to dismiss the Petition in its entirety as requested. However, we direct Eversource to file a proposed cost recovery mechanism that is not precluded by the Settlement Agreement and that is acceptable to it by November 15, 2021.

With respect to the timing issue raised by Eversource, we note that the Department of Energy raised the issue of whether the proposed use of the RRA mechanism was inconsistent with the DE 19-057 settlement agreement at the prehearing conference on April 2, 2021, so all parties were reasonably on notice that issues relating to the lawfulness and appropriateness of the RRA as a recovery mechanism might arise during the course of this proceeding. *See* Hearing Transcript of April 2, 2021 at 36-37.

B. Motion to Compel

In a discovery dispute, the Commission applies by analogy the standard applicable to civil litigation, which requires a party seeking to compel discovery to show that the information being sought is relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence. *See Public Service Company of New Hampshire*, Order No. 25,298 (December 7, 2011) (internal citations omitted). The Commission also weighs the effort needed to gather the requested information, the availability of the information from other sources, and other relevant criteria. *See Valley Green Natural Gas, LLC.*, Order No. 25,867 at 5 (February 17, 2016). In ruling on a motion to compel, the Commission enjoys “broad discretion in the management of discovery.” *Public Service Company of New Hampshire*, Order No. 24,342 at 23 (June 29, 2004) (*quoting YYY Corp. v. Gazda*, 145 N.H. 53, 59 (2000)).

Based on the pleadings before us, NECTA’s data requests seek information that is apparently not in Consolidated’s possession, custody, or control. As observed by the Commission in past orders, motions to compel responses to data requests that require new calculations or the creation of information are beyond the ambit of traditional valid discovery, however could theoretically be elicited on cross examination or requested by the Commission as an aid to deliberations. *See Public Service Company of New Hampshire*, Order No. 24,310 at 9 (April 16, 2004); *see also Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities*, Order No. 26,307 at 6 (November 6, 2019).

The information requested in NECTA’s data requests 2-019 and 3-020 appears relevant to the issues noticed proceeding, and we agree that the requested information would aid the Commission in evaluating the instant petition. We therefore direct Consolidated to produce the restated figures responsive to NECTA’s requests and file

those figures into the docket as a response to a Commission request for specific answers. See RSA 365:15.

Based upon the foregoing, it is hereby

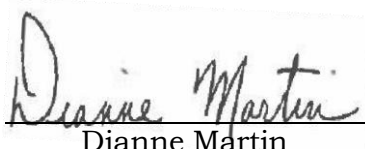
ORDERED, that the Office of the Consumer Advocate's Motion to Dismiss is GRANTED IN PART AND DENIED IN PART as set forth herein above; and it is

FURTHER ORDERED, that New England Cable and Telecommunications Association, Inc.'s Motion to Compel is GRANTED as discussed in the body of this order; and it is

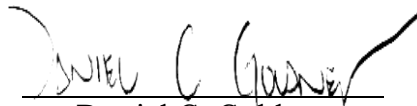
FURTHER ORDERED, that the Joint Petitioners are ordered to propose a new recovery mechanism as described herein above by November 15, 2021; and it is

FURTHER ORDERED, that the Office of the Consumer Advocate's Motion for Rehearing of the Commission's procedural order dated September 10, 2021, is DISMISSED as MOOT.

By order of the Public Utilities Commission of New Hampshire this twenty-second day of October, 2021.



Dianne Martin
Chairwoman



Daniel C. Goldner
Commissioner

Service List - Docket Related

Docket# : 21-020

Printed: 10/22/2021

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