STATE OF NEW HAMPSHIRE

BEFORE THE PUBLIC UTILITIES COMMISSION

Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty

Docket No. DE 23-044

2023 Default Service Solicitations

Motion for Rehearing of Order No. 27,025

NOW COMES the New Hampshire Department of Energy (DOE or Department), a party to this docket, and moves pursuant to RSA 541:3 for rehearing of Order No. 27,025 (Order), entered by the Commission in this docket on June 24, 2024.

In support of this request, the Department states as follows:

I. Introduction

This proceeding concerns Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty's (Liberty or Company) purchase of an amount of 2020 vintage Class III Renewable Energy Certificates (RECs), in July 2020, at prices above the then current and applicable Alternative Compliance Payment (ACP) rate per megawatt-hour (MWh).

New Hampshire's Renewable Portfolio Standard (RPS) statute, RSA 362-F, enacted in 2007, establishes the State's renewable energy policy and sets compliance requirements for load serving entities, including Liberty. The RPS statute requires each electricity provider to meet portions of customer energy load with renewable energy from different sources. The RPS statute divides renewable energy sources into 4 separate classes (e.g. Class I-IV). RPS compliance may be achieved by purchase of RECs or, if sufficient RECs are not available in the market, by paying the class-specific ACP rate per MWh. The Department has the authority to review and adjust the Class III requirement downward from 8% of the entity's default electricity sales,

annually, within certain limits. *See* RSA 362-F:4, VI. The ACP rate is set by statute and adjusted annually by the Department based on the Consumer Price Index, per the methodology provided in statute. *See* RSA 362-F:10, III. Each year, the new ACP rates are calculated and published on the Department's website[1] by January 31 for that compliance year. *Id*. A compliance year runs from January 1 through December 31 of each year. Load serving entities then have until June 30 of the following year to document compliance with the RPS requirements. Prior to the creation of the Department of Energy, these duties and authorities related to RPS compliance and ACP calculation rested with the Commission.

In compliance with the statutory requirement described above, by January 31, 2020, the Class III ACP rate, along with ACP rates for all other RPS classes, was published on the Commission website. In July 2020, Liberty bought 35,497 Class III RECs which is an amount of Class III RECs sufficient to meet its estimated 8% Class III requirement for 2020. As noted above, Liberty was not required to document compliance with the Class III REC requirement, through REC purchases or payment of the ACP rate, until June 30, 2021. The Class III requirement, at the time Liberty committed to purchase the RECs was 8% of its total default energy sales for 2020. Again, as noted above, that 8% compliance obligation was set by statute, subject to any future reduction by the Commission. For 2020 RPS compliance, and over the subsequent two compliance years, 2021 and 2022, Liberty used as many of the RECs purchased in July 2020 as it could pursuant to RSA 362-F:7, I.

Issued on June 24, 2024, Order No. 27,025 permits Liberty to collect from ratepayers an amount equal to the cost of the remaining unused RECs at a price equal to the then-current ACP.

[1] Inflation Adjusted Alternative Compliance Payment ($ per Megawatt Hour), https://www.energy.nh.gov/renewable-energy/renewable-portfolio-standard (last visited July 24, 2024).

The Department submits this Motion for Rehearing because Commission Order No. 27,025 includes statements of fact regarding the RPS compliance process that indicate a misunderstanding of that process upon which the Commission based its decision. Furthermore, even if the Commission finds its statements do not exhibit a misunderstanding, the Commission unreasonably and unlawfully authorized Liberty to collect these monies from ratepayers, resulting in unjust and unreasonable rates.

II. Legal Standard for Rehearing

The process for seeking rehearing of Commission orders is described in statute and further clarified in various caselaw. Under RSA 541:3, any party or person directly affected may seek rehearing of Commission orders by filing a motion within 30 days of issuance. The Commission may grant rehearing, if, in its opinion, "good reason" is established by the moving party. RSA 541:3. If the Commission grants rehearing, RSA chapter 541 does not require it to hold another hearing. Although it may do so, the Commission may also simply reconsider the matter and reissue its original order or an amendment of it. *See 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 the Commission "overlooked or mistakenly conceived in the original decision." *Dumais v. State Pers. Comm'n*, 118 N.H. 309, 311 (1978). 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 the order is unlawful or unreasonable. *See* RSA 541:4.

III. Certain Matters Were Overlooked or Mistakenly Conceived

The Commission should grant rehearing because there are certain statements made within the order concerning the RPS compliance process indicating a mistakenly conceived understanding upon which the Commission based its decision. According to the New Hampshire Supreme Court, the purpose of a rehearing "is to direct 'attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invites reconsideration upon the record upon which that decision rested.' " *Lambert Constr. Co. v. State*, 115 N.H. 516, 519, 345 A.2d 396, 398 [*312] (1975). In support of this assertion, the Department states as follow:

a. Misunderstanding of the Compliance Period

In multiple instances throughout the Order, the Commission's description of various facts established by the record regarding RPS compliance process indicates a mistakenly conceived understanding of that process. For example, the Order states, "The Company further noted that on April 20, 2021, in Order No. 26,472, the Commission lowered the Class III REC requirement for the ***2020-2021 compliance year*** from 8 percent to 2 percent[.]" *See Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty,* Order No. 27,025 at 3 (June 24, 2024) (emphasis added). The RPS compliance period runs from January 1st to December 31st of any given year. *See* Transcript of Hearing Held 12/12/23 - morning session, Docket No. 23-044, at 136. As such, there is only the 2020 compliance year and the 2021 compliance year. Order No. 26,472, cited by the Commission here, amends the 2020 compliance year Class III obligation. *See* Order No. 26,472 at 1.

Order No. 27,025 also states, "In navigating the shifting sands of the Class III REC compliance environment in the summer of 2020, with the potential of the (to-be-vetoed) HB 1234 increasing ACP rates to $55/MWh, ***and concerns about Liberty meeting the 8 percent Class III attainment level prevailing at that time*****,** the Company acted on the razor's edge of prudency in acquiring the RECs in question." *See Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty,* Order No. 27,025 at 5 (June 24, 2024) (emphasis added). The Company purchased the Class III RECs in question in July of 2020, a full 11-months before the 2020 RPS compliance deadline. The Commission's description regarding "concerns about Liberty meeting the 8-percent Class III requirement," demonstrates a mistakenly conceived understanding of when RPS compliance must be demonstrated. There was no impending deadline in July 2020, or other issue cited in the record, which should raise concerns about the Company meeting its requirement. In fact, what the Company did was purchase its full 8% requirement of Class III RECs, at a price well above the then published ACP, 11-months prior to the corresponding compliance deadline because legislation raising the ACP had passed the legislature but had not yet become law. *See* Supplemental Direct Testimony of John D. Warshaw Filed January 31, 2022 in Docket 21-087, Exh. 5, at Bates 10, lines 9-10.

b. Misunderstanding of the Class III Reduction Process

The Order states, "Class III RPS attainment levels dropped from 8 percent in 2019, to 2 percent in 2020 as discussed, 1 percent in 2021, ½ percent in 2022 and 2023, and ***can potentially increase to 8 percent*** for 2024 and beyond." *See Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty,* Order No. 27,025 at 4 (June 24, 2024) (emphasis added). Pursuant to RSA 362-

F:3, Class III REC[2] requirements are set at 8% unless *reduced* by the Department. The Class III REC requirements for the 2024 compliance year *are set by statute at* 8%, *unless reduced* by the Department pursuant to its statutory authority. The Department does not have the authority to "increase" the Class III requirement.

The Commission's Order further states, "We also encourage the DOE, within the Default Service proceedings then-pending, to give the Commission information regarding likely directional outcomes for REC attainment and ACP level-setting, whenever possible. *See Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty,* Order No. 27,025 at 5 (June 24, 2024). As the Commission is aware, current Default Service proceedings typically occur in June and December of each year, based on the 6-month rate periods established by Commission approved settlement. As stated in Hearing Exhibit 8, the Direct Testimony of Stephen R. Eckberg, each year, the new ACP rates are calculated and published in accordance with statute by January 31 for that compliance year. So, for example, by January 31, 2020, the Class III ACP rate, along with ACP rates for all other RPS classes was published on the Commission website no later than January 31, 2020. *See* Direct Testimony of Stephen R. Eckberg, Exh. 8, at Bates 7, lines 17-20. So, any future update provided by DOE on "ACP level-setting," would be the same in June as it is in December because the ACP level for that compliance year was established in January. This language in the order further demonstrates a mistakenly conceived understanding of the RPS compliance process which informed the Commission's decision because the ACP levels for any compliance period are set in January and do not change through the compliance year, subject to legislation signed by the Governor.

[2] Order No. 27, 025 appears to use the terms "Class III RPS" and "Class III REC" interchangeably throughout. However, there is nothing in the record to attribute the "Class III RPS," reference so for purposes of this Motion the Department will only reference "Class III REC" as that is the accurate description.

IV. The Order is Unlawful and Unreasonable

Even if the Commission does not grant the Department's Motion for Rehearing because of overlooked or mistakenly conceived facts, the Commission should grant the Motion because the order is unlawful and unreasonable.

a. Unlawful Application of the Prudency Standard

The order states:

> REC ACP levels and Renewable Portfolio Standard (RPS) attainment levels have frequently shifted in response to the Legislature's, Commission's, and now, DOE's actions. Class III RPS attainment levels dropped from 8 percent in 2019, to 2 percent in 2020 as discussed, 1 percent in 2021, ½ percent in 2022 and 2023, and can potentially increase to 8 percent for 2024 and beyond. *See*: https://www.energy.nh.gov/renewable-energy/renewable-portfoliostandard (note Table with attainment levels; *see also* DOE Order Setting Class III Obligation, March 5, 2024, available here: https://www.energy.nh.gov/sites/g/files/ehbemt551/files/inlinedocuments/sonh/order-setting-2023-class-iii-obligation.pdf).
>
> In navigating the shifting sands of the Class III REC compliance environment in the summer of 2020, with the potential of the (to-be-vetoed) HB 1234 increasing ACP rates to $55/MWh, and concerns about Liberty meeting the 8 percent Class III attainment level prevailing at that time, the Company acted on the razor's edge of prudency in acquiring the RECs in question.
>
> *See Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty,* Order No. 27,025 at 4-5 (June 24, 2024).

The Commission should resolve this matter under the prudence standard, as stated in RSA 374-F:3, V(c).[3] In articulating the prudence standard, this Commission has accurately stated, that "[a] prudence review, […] involves an after-the-fact review of investment decisions, in light of actual performance, but limited to what was reasonably foreseeable at the time of the

[3] Any prudently incurred costs arising from compliance with the renewable portfolio standards of RSA 362-F for default service or purchased power agreements shall be recovered through the default service charge. RSA § 374-F:3, V(c).

decisions." *Public Service Company of New Hampshire*, Order No. 24,276 at 69 (February 6, 2004). Further, according to the Commission, "[o]ne of the critical prudence determinations is to not apply the perspective of hindsight, but rather to consider the actions in light of the conditions and circumstances as they existed at the time they were taken." *See* Order No. 24,108, 87 NH PUC 876 (2002). Here, the Commission's analysis bases its decision on what it perceives and describes as "shifting sands," using hindsight of the Commission as it exists currently, by utilizing facts not previously in the record, rather than what was actually performed by the utility and reasonably foreseeable in July 2020. All of the dates cited above to support the "shifting sands," of Class III REC compliance are dates occurring after July 2020 when Liberty made its decision to purchase the Class III RECs in question. Meaning, Order No. 27,025 is applying the perspective of hindsight by using the subsequent three-year Class III REC requirement level adjustments to justify some sort of unknown compliance variations to which it believes the Company should not be responsible for. Irrespective of any prior or subsequent Class III REC requirement adjustments, a prudent utility manager, eleven-months before any compliance deadline, should be aware of both current requirements and conditions, and the potential changes to Class III REC requirements and must be held accountable for any decisions made.

Moreover, the Commission's Order encourages Liberty in the future to, "respond to economic conditions relating to RECs as actually in place through effective legislation and rules, and to remain cognizant of the then-effective ACP level when making REC purchases." *See Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty,* Order No. 27,025 at 5 (June 24, 2024) (emphasis in original). Here, the Commission clearly appears to understand that the decision made by the Company in July 2020 – to purchase Class III RECs at a price above the then-applicable ACP rate – was imprudent by encouraging them to make prudent decisions in the

future. Such an analysis and reasoning is an unreasonable application of the prudency standard and sets a dangerous precedent. Based on this decision, utilities could make financial decisions based on pending legislation and have legal support for cost recovery even if the financial decision proves to be a bad one. Clearly, utilities must make decisions and act in accordance with existing statutory requirements, *not* possible or potential statutory requirements.

In fact, other New Hampshire electric utilities have made prudent decisions under similar circumstances. As recently as June 2024, the Department recommended approval of default energy service rates which included costs for unused Class III RECs in Docket No. DE 24-065. In that docket, Unitil Energy Systems, Inc. (Unitil) purchased, based on estimated retail sales, 14,500 RECs, or 25% of the total requirement for NH Class III on October 26, 2021. In other words, Unitil did not purchase the full 8% of retail sales requirement, but only purchased 2%. Additionally, the purchase price of those RECs was $33.80/MWh, which was below the 2021 Alternative Compliance Payment of $34.99/MWh. The purchase was made months before the REC compliance obligation was reduced by the Department to 1.0% on March 31, 2022. The Department recommended approval of recovery of these costs, and the Commission granted Unitil's request for recovery. This is an example of an entirely prudent REC purchase decision and contrasts the imprudent decision made by Liberty in July 2020.

In the record of the instant docket, specifically Exh. 5 at Bates page 10 Lines 9-10, a Company witness, Mr. Warshaw, states, "Subsequent to making all its purchases, the Company determined that it had inadvertently purchased its Class III RECs at a rate higher than the ACP." Determining that this 'inadvertent' purchase of these Class III RECs was a prudent decision is a facially unreasonable conclusion of the prudency analysis, and the Department urges the Commission to grant this request for rehearing. Understanding the complexities surrounding RPS

compliance, the Department agreed to allow Liberty a certain 'compromise,' over the 2020, 2021, and 2022 compliance years where the Company used a portion of these Class III RECs to meet its obligations. However, the only 'compromise' is that Liberty was able to recover any of the costs associated with the July 2020 RECs at the 2020 ACP rate for any RECs ultimately used. No further 'compromises,' or accommodations should be approved by the Commission surrounding the Company's original imprudent decision.

b. Unreasonably Implicating the Statutorily Authorized Reduction of Class III RECs

Finally, throughout the Order the Commission implies that the then Commission, and now Department's reduction of Class III REC requirements is an unreasonable burden placed on Liberty that would support a finding of prudency in the instant case. RSA 362-F:4, VI currently states:

> VI. After notice and hearing, the department of energy may modify the class III and IV renewable portfolio standards requirements under RSA 362-F:3 for calendar years beginning January 1, 2012 such that the requirements are equal to an amount between 85 percent and 95 percent of the reasonably expected potential annual output of available eligible sources after taking into account demand from similar programs in other states.

Prior to the creation to the Department of Energy, in July of 2020, RSA 362-F:4, VI read as follows:

> VI. After notice and hearing, the commission may modify the class III and IV renewable portfolio standards requirements under RSA 362-F:3 for calendar years beginning January 1, 2012 such that the requirements are equal to an amount between 85 percent and 95 percent of the reasonably expected potential annual output of available eligible sources after taking into account demand from similar programs in other states.

A plain reading of the statute finds that this is a largely unqualified authority currently granted to the Department of Energy, and previously resting with the Commission until July

2021. There are no deadlines or other requirements that the Commission or Department make any such determination during a specified period. Considering a statutorily authorized regulatory action as support for the "shifting sands" of compliance is an unreasonable consideration.

V. Conclusion

As described herein, the language of the Order indicates that the Commission determined the purchase of the Class III RECs in question was prudent based on a mistakenly conceived understanding of the record in this docket. Furthermore, the analysis applies facts known only to the Commission with the benefit of hindsight, and other unreasonable considerations. For the reasons stated above, the Commission should grant rehearing of Order No. 27,025.

WHEREFORE, the Department of Energy respectfully requests that this Commission:

A. Grant rehearing of Order No. 27,025;

B. Issue a revised Order finding that Liberty's decision, in July 2020, to purchase Class III RECs sufficient to meet an 8% compliance requirement at a price well above the published ACP rate was imprudent;

C. Issue a revised Order directing Liberty to return the amount of $864,640 in costs to ratepayers; and

D. Grant such further relief as shall be necessary and proper in the circumstances.

Respectfully Submitted,

/s/ Matthew C. Young

Matthew C. Young
Hearings Examiner/Staff Attorney
Department of Energy
21 South Fruit Street
Concord, NH 03301-2429
603.271.3670 (DOE main number)
Matthew.C.Young@energy.nh.gov

View Service Lists

(../Regulatory/regulatory.htm)

A A A

Service List - Docket Related

Docket# : 23-044 Printed: 7/24/2024

Email Addresses

ClerksOffice@puc.nh.gov
Michelle.Azulay@libertyutilities.com
Scott.T.Balise@energy.nh.gov
Clifton.Below@CommunityPowerNH.gov
brian.callnan@communitypowernh.gov
Michael.J.Crouse@oca.nh.gov
Tyler.Culbertson@libertyutilities.com
Deana.Dennis@CommunityPowerNH.gov
Energy-Litigation@energy.nh.gov
Aaron.Doll@libertyutilities.com
Stephen.R.Eckberg@energy.nh.gov
thomas.c.frantz@energy.nh.gov
Robert.Garcia@libertyutilities.com
golding@communitychoicepartners.com
Christopher.Green@libertyutilities.com
myka.hayward@libertyutilities.com
dmaganty@ascendanalytics.com
Alyssa.Maston@libertyutilities.com
Erica.Menard@libertyutilities.com
elizabeth.r.nixon@energy.nh.gov
amanda.o.noonan@energy.nh.gov
ocalitigation@oca.nh.gov
michael.sheehan@libertyutilities.com
karen.sinville@libertyutilities.com
Matthew.C.Young@energy.nh.gov
Adam.Yusuf@Libertyutilities.com

Without Email Addresses

All