STATE OF NEW HAMPSHIRE

before the

PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire d/b/a Eversource Energy, Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty and Unitil Energy Systems, Inc.

Joint Utilities' Petition for Waiver of Certain Provisions of the Puc 2200 Rules

Docket No. DE 23-063

JOINT INTERVENORS REPLY BRIEF

June 28, 2024

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INTRODUCTION

Pursuant to the May 15, 2024 "Procedural Order re: Briefing Schedule" issued by the New Hampshire Public Utilities Commission ("the Commission"), the Community Power Coalition of New Hampshire ("CPCNH" or "the Coalition") and the Conservation Law Foundation ("CLF") (together, the "Joint Intervenors") submit this reply brief responding to the initial briefs submitted on June 28th, 2024 by the New Hampshire Department of Energy ("NH DOE") and the Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource"), Unitil Energy Systems, Inc., ("Unitil") and Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty ("Liberty") (together, the "Investor Owned Utilities" or "IOUs").

REPLIES

I. Accomplishments of the NH EDI-EBT Working Group To-Date

The NH DOE reported that the NH EDI Working Group's Technical Standards Subgroup is continuing to meet "*to discuss and document the EDI transactions supported by each utility as well as the specific capabilities and requirements of the utilities and suppliers relative to the provision of data necessary for dual-billing [for net metered and time of use customers on competitive supply]*" while the Business Policy Subgroup had suspended meetings pending a determination on whether utilities "*would be entitled to cost recovery for these IT upgrades*." (NH DOE Initial Comments, p. 4.) These statements align with the Joint Intervenors' representations to the Commission. (Joint Intervenors Initial Brief, pp. 17-18.)

In contrast, the IOUs asserted that the NH EDI Working Group is "*finalizing a complete set of EDI Standards for New Hampshire that reflect current practices*" with the expectation that "*the soon-to-be-finalized New Hampshire EDI Standards will embody the functionality that is currently being supplied by the Utilities today,*" indicating in a footnote that the IOUs currently

operate in accordance with the Massachusetts EDI Working Group (IOUs Initial Brief, p. 4.)

The Joint Intervenors observe that this is not an accurate characterization of the NH EDI Working Group's activities to date, nor any agreed upon intention going forward. As both the NH DOE and Joint Intervenors have explained, the NH EDI Working Group is simply documenting how each utility's EDI system currently functions. The Joint Intervenors have previously detailed how the NH EDI Working Group is updating the Massachusetts EBT Working Group Guide, with notations documenting each IOU's incomplete implementation of NH EDI Standard requirements, and is also working to finalize an EDI guide for the New Hampshire Electric Co-op ("NHEC"), which mostly implemented the NH EDI Standards requirements. (Joint Intervenors Initial Brief, pp. 17.)

As such, the IOUs' suggestion that the EDI guides being prepared somehow represent "*the soon-to-be-finalized New Hampshire EDI Standards"* is improper. The EDI guides that the NH EDI Working Group is finalizing cannot replace the NH EDI Standards, which the Commission approved and directed all utilities to implement in Order No. 22, 919 (May 4, 1998). The extent to which each utility's current EDI system capabilities complies with the requirements of the NH EDI Standards remains pending the Commission's determination of such. If the Commission subsequently orders the IOUs to enable new functionality, as required under the NH EDI Standards or otherwise, the NH EDI Working Group would reconvene and update the EDI guides to reflect the IOU-specific changes implemented.

II. Requirements of the NH EDI Standards and the Extent to which the IOUs have Implemented Them

The IOUs assert that the NH EDI Standards "*were designed to work with the then-existing functionality of each of the Utilities' billing systems*" but that *"[e]xisting EDI Standards place no mandate on the Utilities to have certain billing functionality*." (IOUs Initial Brief, p. 4.)

The Joint Intervenors disagree. The Commission adopted the Statewide Electric Utility Restructuring Plan on February 28, 1997, which established an Electronic Data Interchange (EDI) Working Group to develop a consensual plan for the transmission of electronic information.[1] The Commission subsequently issued Order No. 22,875 on March 20, 1998, addressing various motions for rehearing or clarification relative to the policies and legal positions articulated in the Statewide Electric Utility Restructuring Plan, which explicitly rebutted PSNH's assertion that "*RSA 374-F does not authorize the Commission to unbundle metering and billing services for any customer."* It also affirmed the Commission's authority, responsibility, and intent to determine "*the type and quality of services provided*" by utilities to "*accommodate the retail access policies of RSA 374-F*" and to take pro-competitive actions in "*circumstances where electric utilities may exploit their privileged status to inhibit the development of a competitive retail electricity market*."[2] Shortly thereafter, on April 2, 1998, the Working Group filed with the Commission a report "*recommending the adoption of business rules and related standard transactions and formats for the electronic transfer of customer information,*" and requesting that the Commission rule on "*several issues on which the group members could not reach consensus*."[3] In Order No. 22,919 issued May 4, 1998, the Commission ruled on each of the contested issues, stated that "*each distribution company is directed to implement the report's requirements,*" ordered "*that the recommendations of the EDI Working Group as set forth in the above mentioned report and as clarified in this order are approved pending the outcome of a rulemaking to implement EDI standards,"* and further ordered *"that each distribution company implement the report's requirements*."[4]

[1] PUC Order No. 22,514 (February 28, 1997), from PUC 1997 Orders folio view: p. 218.
[2] For a compilation of relevant excerpts from Order No. 22,875, refer to Joint Intervenors Initial Brief, Appendix A.
[3] PUC Order No. 22,919 (May 4, 1998).
[4] *Ibid.*

There has not been a subsequent rulemaking on EDI standards, and so the NH EDI Standards, as clarified in Order No. 22,919, remain in force. Relevant here is that the NH EDI Standards (i) require utilities to provide suppliers, on a monthly billing cycle basis for each individual customer, various customer usage and account data, including 2-part and 3- part TOU usage data, negative usage data (NM customer net excess generation), and distribution tariff rates for each customer, and (ii) require utilities to accept TOU rates and credits from suppliers for use in rate ready consolidated billing. (*See* Joint Intervenors Initial Brief, pp. 11-17.) Since the issuance of Order No. 22,919, certain EDI implementation details were also approved in Puc 2000 rules, in dockets DRM 10-014 and DRM 16-853, and in at least one docket, DE 08-081, the Commission considered and approved by Secretarial Letter two minor changes in the NH EDI Standards at the request of utilities in advance of PSNH's implementation of their new billing system.[5] EDI standards may also be addressed in Commission approved tariffs. The IOUs' distribution tariffs and supplier service agreements obligate each utility to provide suppliers with customer account and usage data explicitly in accordance with the NH EDI Standards (including for the express purpose of enabling dual billing for competitive supply customers).[6]

In short, the NH EDI Standards (i) impose requirements that are explicit, detailed, and designed to enable competitive choice for all customers, including TOU and NM customers, whether billed on a dual billing or rate ready consolidated billing basis; (ii) were adopted, with the Commission's clarifications on all issues of non-consensus, shortly after the Commission

[5] DE 08-081, Proposed Change in Electronic Data Interchange with Competitive Suppliers (May 16, 2008), p. 1.
[6] *See* DE 23-063, Community Power Coalition of New Hampshire and Conservation Law Foundation Motion for a Supplemental Order of Notice, Testimony, and Pre-Hearing Conference, and to Grant Additional Temporary Waivers to Eversource, Unitil, and Liberty Utilities (March 28, 2024) ("Joint Intervenors Motion"), at ¶ 4.
See also: Eversource Electric Supplier Master Services Agreement, Sections I and VII.A.1; Eversource Terms and Conditions for Suppliers, Section 2(a); Unitil Terms and Conditions for Competitive Suppliers, Sections I.2.I, II.2.14, and III.6.A.2; Unitil Competitive Electric Supplier Trading Partner Agreement, Sections I and VII.A.ii; Liberty Utilities Terms and Conditions for Competitive Suppliers, Sections 62.ii, 62.iii.1.n, and 62.iv.5.c; and Liberty Competitive Energy Supplier Service Agreement, Sections II, VI.B.1 and VI.D.

rebutted PSNH's assertion that it had exceeded its authority in ordering utilities to unbundle metering and billing to provide the services necessary to enable the competitive market; and (iii) have continued in force largely unchanged, apart from minor modifications made by the Commission at the request of the IOUs. As such, the Joint Intervenors see no basis for the IOUs' assertion that the NH EDI Standards "*place no mandate on the Utilities to have certain billing functionality.*" (IOUs Initial Brief, p. 4.)

The IOUs' assertion that the NH EDI Standards "*were designed to work with the then-existing functionality of each of the Utilities' billing systems*" (IOUs Initial Brief, p. 4) is also not accurate. As a threshold matter, when the NH EDI Standards were adopted, none of the utilities billing systems were capable of exchanging customer account and usage data with suppliers or billing customers on behalf of suppliers. The need to do so in a standardized and extensible fashion was why the NH EDI Standards were created in the first place. It was understood, and self-evident, that each utility would need to invest in significant reprogramming to operationalize the new requirements. Further, it was anticipated that "*New Hampshire's standards will evolve in an orderly and timely manner*" and "*be modified and enhanced as market or regulatory requirements dictate.*"[7] To underscore this point, the Joint Intervenors observe that the NH EDI Standards were developed between February 1997 and April 1998, while HB 485 — which created net metering as an option and supply choice for retail customers, including by authorizing suppliers to "*determine the terms, conditions, and prices*" for compensating NM customers for their excess generation — was introduced in January 1997, underwent 11 work sessions,[8] passed the House on January 15, 1998, and became effective on August 25, 1998.

[7] NH EDI Standards, DR 96-150, Consensus Plan for the Transmission of Electronic Data in New Hampshire's Retail Electric Market (April 2, 1998) ("Consensus Plan"), p. 42.
[8] Note that Gary Long, a former President of PSNH, testified against the bill as introduced on behalf of PSNH. *See* House legislative history on HB 485 enacted as Chapter 129, NH Laws of 1998, p. 18.

Relevant here is that even though net metering had not yet been implemented, and none of the utilities' billing systems were configured to accommodate negative usage data at the time, the NH EDI Standards were nevertheless designed to require provision of negative usage data from utilities to suppliers. (*See* Joint Intervenors Initial Brief, pp. 12-13, fn 17, and fn 18.) The only logical explanation is that the NH EDI Working Group was aware of NH's net metering legislation at the time, and duly anticipated and incorporated the functionality required for enabling competitive choice for NM customers into the NH EDI Standards.

In fact, the only instance where utility-specific requirements regarding the manner and extent of data to be exchanged with suppliers were incorporated into the NH EDI Standards relates to differing EDI transaction set data elements. Specifically, the only instance is where the Consensus Plan noted that *"[t]he Distribution Companies have documented their unique requirements as optional fields. This information is included in Appendix D … [suppliers and utilities] will have to work together to ensure that adequate testing of optional fields is performed.*"[9] Appendix D duly indicates that suppliers should anticipate, for example, that Unitil "*will provide if available*" shoulder kilowatt hour usage, shoulder kW demand, and shoulder kVa demand, whereas these fields are flagged as "*ignore*" for PSNH and CVEC (now Eversource, which did not at the time and still does not support 3-part TOU rates).[10] There is no instance where the then-existing utility-specific requirements documented in Appendix D would excuse any utility from the EDI and billing service requirements previously described by the Joint Intervenors. (*See* Joint Intervenors Initial Brief, pp. 11-17.)

Regarding how the provision of utility-administered billing services allowed for differences across billing systems, the NH EDI Standards stipulated that suppliers "*who select the [rate*

[9] Consensus Plan, p. 58.
[10] NH EDI Standards, Appendix D: EDI Data Formats, pp. D-17 to D-18.

ready] Consolidated Billing Option are limited to the rate structures, customer class definitions and availability requirements that are within the capabilities of the Distribution Company's billing system."[11] However, this stipulation did not mean that rate ready consolidated billing services were to be frozen in time, i.e., limited to the billing options that the IOUs had enabled for default service customers as of 1998 (which, as relevant here, included 2-part TOU supply rates for residential and small business customers in PSNH's territory, for example). The plain language requires establishing and maintaining parity of billing services provided by utilities to both competitive supply and default supply customers.

Furthermore, parity of billing services was supposed to be the *de minimis* requirement, given the additional NH EDI Standard requirement that suppliers be able to request and pay for implementation of pricing/rate structures not currently enabled for consolidated billing. [12] The Joint Intervenors have explained how this requirement was also reflected in Puc 2205.16(d)(2).[13]

As such, the Joint Intervenors submit that a more accurate characterization would be that the NH EDI Standards defined a comprehensive set of business rules and standard transaction and data formats to enable competitive choice for all customers, with sufficient flexibility to accommodate differing levels of utility metering and billing system functionality, while ensuring parity of utility data and billing services for competitive supply and default service customers, both at the outset of restructuring and over time as utility billing systems evolved.

III. Waivers to Puc 2204.02(a)(2), Puc 2205.13(a)(7) and Puc 2205.16(d)(1)

The IOUs reference the temporary waivers granted by the Commission — to Puc 2205.16(d)(1) for all three IOUs for the duration of this proceeding and to Puc 2204.02(a)(2) and

[11] Consensus Plan, p. 19.
[12] NH EDI Standards, Supplier Guide, Section III, D, 4.
[13] Joint Intervenors Motion, ¶ 6.

Puc 2205.13(a)(7) for Eversource until the utility achieves compliance — but then broadly asserts that "*the Utilities are not able to comply with the provisions, and so temporary waiver is necessary*." (IOU Initial Brief, p. 2.)

This indicates that all three IOUs are seeking waivers to each of the three aforementioned rules, whereas the Joint Intervenors have previously explained how the utilities differ in the extent to which each requires waivers to these rules.[14] (Joint Intervenors Initial Brief, pp. 7-11.)

The IOUs' Initial Brief goes on to represent, in reference to bringing all three IOUs into compliance with each of the three rules, that:

> *To determine whether permanent waiver is appropriate, the Commission needs only to determine whether the cost of the Utilities' proposal to implement bill-ready billing is in the public interest, which will require consideration of whether the estimated $9 million cost constitutes an unjust or unreasonable cost shift.* (IOU Initial Brief, p. 2.)

As a threshold matter, the IOUs' Initial Brief does not provide any explanation regarding why the IOUs believe that implementation of their bill ready billing proposal is necessary to achieve compliance with Puc 2204.02(a)(2) and Puc 2205.13(a)(7), or sufficient to do so, given that the IOUs' bill ready billing proposal did not address provision of hourly interval data used for load settlements to CPAs, which is necessary to comply with Puc 2205.13(a)(7).[15] Previously, the IOUs testified that each utility was or would soon commence provision of net excess generation data to CPAs pursuant to Puc 2204.02(a)(2) and Puc 2205.13(a)(7), on a near-term basis and regardless of whether their bill ready proposal was implemented, while acknowledging that provision of net excess generation data via EDI would be required for CPAs to be able to offer their own net metering programs.[16] However, this would be most

[14] In brief: (i) all three IOUs (and the NHEC) require partial waivers to Puc 2205.13(a)(7) for provision of hourly interval usage data used for load settlements, (ii) Eversource and Liberty further require partial waivers to Puc 2205.13(a)(7) for provision of negative usage data, (iii) all three IOUs require waivers to Puc 2205.16(d)(1) for provision of bill ready billing services, and (iv) each IOU should clarify their need for waivers to Puc 2204.02(a)(2).
[15] *See* Docket No. DE 23-063, at Tab 1.
[16] Docket No. DE 23-063, Joint Direct Testimony of Jared Lawrence, et al. (June 14th, 2023), pp. 11-12.

expeditiously implemented by enabling dual billing for TOU/NM customers, as the Joint Intervenors have proposed (*see* Joint Intervenors Initial Brief, Appendix C), and does not require approval of the IOUs bill ready proposal.

Regardless, the Joint Intervenors reject the IOUs' assertion that the Commission should decide whether permanent waivers to Puc 2205.16(d)(1) are warranted solely based on determining whether implementation of the IOUs' $8.9 million bill ready proposal is in the public interest. As explained in the Joint Intervenors' Initial Brief, the Commission may deem a waiver to be in the public interest upon finding that the "*purpose of the rule would be satisfied by an alternative method proposed*" pursuant to Puc 201.05(b)(2). Enabling dual billing for NM/TOU customers, along with the corresponding reforms to load estimation and settlement processes necessary to more accurately allocate NM/TOU customer hourly load to suppliers, satisfies the purpose of Puc 2205.16(d)(1), which is to is to enable suppliers to provide innovative rates and products to customers. (Joint Intervenors Initial Brief, pp. 10-11.) The NH DOE, in reference to both the Joint Intervenors alternative proposal and the IOUs bill ready proposal, correctly observes that "*the Commission should determine the reasonableness of any costs associated with the* ***varying paths of compliance*** *with this rule*". (NH DOE Initial Comments, p. 3, emphasis added.)

The IOUs instead assert that because the Joint Intervenors' alternative proposal does not satisfy "*the requirement to offer bill-ready billing*", it cannot be considered as a substitute to the IOUs' proposal. (IOUs Initial Brief, p. 3.) Essentially, the IOUs argue to preclude consideration of any alternative to their proposal, simply because Puc 2205.16(d)(1) explicitly requires utilities to implement bill ready billing; in doing so, the IOUs disregard the clear intent and purpose of Puc 201.05(b)(2), which grants the Commission discretionary authority to determine whether the

purpose of the rule — as opposed to the explicit requirements of the rule as-written — can be satisfied by an alternative proposal in the public interest.

IV. Legal Basis for Alternative Proposals to Satisfy the Purpose of Puc 2205.16(d)(1)

In response to the second issue identified by the Commission, regarding whether New Hampshire law requires implementation of the Joint Intervenors' alternative proposal,[17] the IOUs assert that the proposal "*is not an alternative to bill-ready billing for the reasons discussed in the Utilities' April 5 and April 30 objections*" filed in this docket. (IOUs Initial Brief, p. 3.) The Joint Intervenors respond in the subsections below to the relevant positions and assertions made in the IOUs' Initial Brief and prior objections.[18]

a. EDI and Billing Service Reforms; Updates to Puc 2200 Reports

The IOUs object to considering the Joint Intervenors' alternative proposal because "*[u]tilities currently allow competitive suppliers to dual bill, so that is already an option. However, there is no requirement to enable CPAs to dual bill a specific type of customer. CPCNH has not proposed to provide a service to all CPAs – this is a request that only serves one entity, CPCNH.*" (IOU Initial Brief, p. 3.) The IOUs also represent that the Joint Intervenors' alternative proposal is being advanced for CPCNH's sole benefit and that "*[a]n 'alternative' to Puc 2205.16(d)(1) that only serves one entity and fails to address all others who are affected by the rule cannot satisfy the intent of the rule*." (April 30 IOU Objection, ¶ 3.)

The Joint Intervenors reject these assertions because they are simply false. We offer the following clarifications in response. First, IOUs are not providing all the billing determinants

[17] Procedural Order Re: Briefing Schedule (May 15, 2024), p.1: "*whether implementation of billing features referred to by the Community Power Coalition of New Hampshire and Conservation Law Foundation in their motion filed on March 28, 2024 and requested by other parties, including dual billing for net-metered and time of use customers on competitive supply, is required under New Hampshire law…"*

[18] *See* DE 23-063, Joint Utilities Objection to CPCNH and CLF Motion (April 5, 2024) ("April 5 IOU Objection"). See also DE 23-063, Joint Utility Objection to CPCNH Letter (April 30, 2024) ("April 30 IOU Objection").

required to charge TOU supply rates or provide credits to NM customers for their excess generation to all suppliers, both CEPS and CPAs. Second, the reason why there is no requirement to enable CPAs to dual bill a specific type of customer is because the NH EDI Standards require provision of billing determinants necessary for all suppliers (both CEPS and CPAs) to serve all customers on a dual billing basis (including TOU/NM customers). Third, the Joint Intervenors' alternative proposal would enable provision of innovative rates and products to customers for all suppliers (both CEPS and CPAs) on a nondiscriminatory basis.[19]

In fact, there is only one component of the Joint Intervenors proposal that would provide data to CPAs (all CPAs, not just CPCNH) but not CEPS (unless the CEPS was serving a CPA), and that is the proposed requirement that IOUs continue to identify TOU/NM customers on Puc 2204.03(a) and Puc 2205.05(b) reports. (Joint Intervenors Initial Brief, p. 20.) As previously explained, doing so is necessary for CPAs, in their capacity as default service providers, to successfully enroll NM/TOU customers, because this data is needed in advance of the opt-out notification and enrollment process.[20]

b. Load Estimation and Settlement Reforms

In their April 5th Objection, the IOUs speculate that (1) enabling dual-billing "*may likely be more costly than the Utilities' bill-ready proposal*" because of the "*addition and inclusion of modifying how load is settled,*" (2) assert that "*modifying load settlement is not a necessary consideration for making a determination regarding the Utilities' compliance with Puc 2205.16(d)(1)*" while cautioning that the proposed reforms carry "*possible federal jurisdictional*

[19] The Joint Intervenors' alternative proposal is to (1) on an expedited basis, enable dual billing for NM/TOU customers, along with corresponding reforms to load settlement to more accurately credit suppliers for TOU/NM customer hourly usage, and to subsequently (2) evaluate which of the following four consolidated billing options would best serve the public interest: reforms to rate ready consolidated billing, or IOUs bill ready consolidated billing proposal, or supplier consolidated billing, or to have a neutral 3rd party (instead of the utilities) administer consolidated billing on a statewide basis.

[20] *See* Joint Intervenors Motion, ¶ 17.

implications," and (3) claim that RSA 362:A-9, II and Puc 2205.15(b) do not impose compliance requirements, representing instead that the statute merely provides CPAs and CEPS the "*option to offer net metering credits*" contingent upon the Commission first finding the necessary changes to load settlements "*to be in the public interest*," and that, as such, the statute "*cannot inherently create obligations for the Utilities*." (April 5 IOU Objection, ¶ 4, 5, and 10.) In their April 30th objection, the IOUs represent that consideration of "*third-party management of the load settlement process… is not germane to the issues in the present docket*," and more generally assert that *"[l]oad settlement is not a component of bill-ready billing nor is modifying the process a necessary precondition of offering bill-ready billing… Load settlement is wholly unrelated to the Utilities' petition and their compliance obligation under Puc 2205.16(d)(1)…"* (April 30 IOU Objection, p. 2, fn 1 and ¶ 6.)

As relevant here, the Joint Intervenors have previously documented and explained that: [21]

- Current load estimation and settlement processes are shifting load reduction benefits away from the utility default service customers, increasing default supply costs, which the IOUs have acknowledged,[22] and which is increasing stranded cost charges;
- Revisions to load estimation and settlement are necessary to (i) correct the cost shift, and bring the IOUs into compliance with their affirmative obligation to mitigate stranded costs pursuant to RSA 364-F:3, XII(c) and RSA 374-F:3, XII(d), (ii) comply with the

[21] *See* Joint Intervenors Initial Brief, p. 3-7 and 20-21; *see also* Joint Intervenors Motion, ¶ 18 - 21 *and* CPCNH's Reply to Joint Utilities Objection to Community Power Coalition of New Hampshire and Conservation Law Foundation Motion, 4/26/24, pp. 5-8.

[22] *See* Joint Utilities response to CENH 3-002, section f, in Docket No. DE 22-060, Joint Rebuttal Testimony of Eversource, Liberty and Unitil, Attachment A, p. 4. In response to CPCNH's proposal to reform load settlements to explicitly assign NM customer generation exports to suppliers, the IOUs confirmed that "*The proposed calculation would favor (give some credit to) load assets with higher amounts of excess generation; and would give less or no credit to load assets with lower amounts of excess generation, compared to current methodology which distributes all excess generation credit uniformly according to a supplier's share of the total utility profiled load*." Given that the vast majority all NM customers are on IOU default supply service, the implication is that default supply load asset IDs stand to benefit from load settlement reforms.

plain language of RSA 362:A-9, II and Puc 2205.15(b), and (iii) provide a financial basis for suppliers to offer time-varying rates and compensation to NM customers for excess generation; and

- The IOUs proposal to enable bill ready billing was imprudent, as it would have cost ratepayers $8.9 million, while enabling little to no additional retail innovation or value for customers, precisely because the IOUs did not include the load settlement reforms necessary to provide suppliers with a financial basis to offer NM/TOU and other innovative products to customers, which is the entire purpose of enabling bill ready billing. As such, the Joint Intervenors observe that it is the IOUs' bill ready proposal that fails to satisfy the purpose of Puc 2205.16(d)(1).

Regarding the "*possible federal jurisdictional implications*" of reforming load estimation and settlement processes alluded to by the IOUs, the Joint Intervenors do not foresee any instances where the proposed reforms contravene ISO-NE metering and settlement rules.

The Joint Intervenors' draft proposed updates to load estimation and settlement relate to (i) more accurate profiles for NM/TOU customers with non-interval meters, (ii) ensuring that interval metered and NM/TOU customer usage is appropriately allocated to the customers' suppliers, and (iii) ensuring that allocation of individual NM customer negative usage data to suppliers would not cause any supplier's load asset (the aggregate usage of all the supplier's customers) to go below zero in any interval (per ISO-NE requirements). (*See* Joint Intervenors Initial Brief, Appendix F.)

Relevant here is that ISO-NE rules require all available interval meter data to be used in settlements and establishes that non-interval metered loads should be "*estimated through load*

*profiling in accordance with **state** dictates and governing procedures."*[23] The Commission has authority to order reforms enhancing the accuracy of profiled load estimates and allocations to suppliers. Further, ensuring that interval meter data is appropriately used in settlements would serve to *safeguard* compliance with ISO-NE rules. For example, the Joint Intervenors observe that Eversource recently represented to the NH DOE that "*load settlement uses raw meter data*."[24] In response, CPCNH explained that this appeared to violate Eversource's Supplier Terms and Conditions and ISO-NE rules, which require interval data to be validated and used for resettlements,[25] and recommended that the NH DOE investigate the matter to ensure compliance.[26] Similarly, the Joint Intervenors have observed that "*residential and small commercial NM customers with interval meters on 3-part TOU rates are still being settled based on class average load profiles*,"[27] which appears to violate utility tariff and ISO-NE rules for settling interval meters.

Regarding the Joint Intervenors' proposed evaluation of whether it is in the public interest for a third-party to administer load estimation and settlement on a statewide basis, ISO-NE rules provide that Assigned Meter Readers, which report "*to the ISO the hourly and monthly MWH*" for settlements, "*may designate an agent to help fulfill its Assigned Meter Reader responsibilities*"[28] — which Liberty, Unitil, and NHEC have done, by contracting with the same third party, whereas Eversource currently employs in-house software. (Joint Intervenors Initial Brief, pp. 20-21.) The Joint Intervenors are unaware of any ISO-NE rules preventing the

[23] ISONE Market Rule 1, Accounting Manual (M28), Section 7.2.4, section 3 (interval data) and 4 (load profiling).
[24] NH DOE, Complaint CPT 2023-002, Eversource Reply to CPCNH Supplemental Complaint (06/11/24), p. 6.
[25] *Refer to:* (1) Eversource Supplier T&Cs, Section 7(d): Reporting of Supplier Loads for the ISO-NE Settlement Processes; (2) ISONE Operating Procedure No. 18, Metering and Telemetering Criteria (OP-18), Section V: Metering and Recording for Settlements, subsection B, 5; and (3) ISONE Market Rule 1, Accounting Manual (M28), Sections 5: Initial Settlement Process & Section 6: Resettlement Process.
[26] NH DOE, Complaint CPT 2023-002, CPCNH Reply to the Response filed on 6/11/24 by Eversource, p. 4.
[27] Joint Intervenors Motion, at ¶ 4.
[28] ISO-NE Tariff, Section I (Effective Date: 4/15/2024 –ER24-1245-000), p. 8 (emphasis added.)

Commission from directing all utilities to jointly contract with a single third-party to administer load settlements as their agent. This would not be inconsistent with ISO-NE's Transmission Operating Agreement and the ISO-NE metering and settlement process.[29] Further, the Commission has previously asserted its authority to determine "*the type and quality of services provided*" by utilities and "*place conditions on… utility franchise rights to accommodate the retail access policies of RSA 374-F*." (*See* Joint Intervenors Initial Brief, Appendix A.)

Lastly, the Joint Intervenors observe that reforms to utility load settlements will be required in advance of November 2026, when ISO-NE's new market rules enabling participation of DER Aggregations in compliance with FERC Order 2222 become effective.[30] DER Aggregators will be allowed to serve as the Assigned Meter Reader for DER assets, aggregated for participation in ISO-NE markets as supply resources, which will necessitate reconstituting (adding) the energy generated back in to individual supplier load assets for hourly settlements to avoid double-counting the DERs (e.g., as both retail load reducers and ISO-NE supply resources).[31] As such, utility load settlements will need to begin directly allocating excess generation (negative usage) to suppliers, which our proposed reforms would accomplish, to subsequently perform the load reconstitution step that will be required under the new rules. Our proposed reforms will therefore also be necessary to enable DER Aggregators to participate in the ISO-NE markets. Standardizing and modernizing settlements on a statewide basis will help promulgate a competitive market for DERs as is required under RSA 374-F, RSA 362-A:1, and RSA 362-A:9.

[29] See ISO-NE Transmission Operating Agreement, section 3.06(a)(x): "*…each PTO shall, in accordance with Good Utility Practice:… provide the ISO with revenue metering data* ***or cause the ISO*** *to be provided with such revenue metering data.*"
[30] *See generally*, ISO-NE, Order No. 2222 Key Project.
[31] Related, the Commission will also need to approve a "coordination agreement" for utilities governing DER Aggregator registration, operations, dispute resolutions, and customer data confidentiality. The Joint Intervenors recommend standardizing this across all utilities to ensure efficient operations and lower barriers for DER firms.

c. Whether the Commission has "Deemed Prudent" Discriminatory Use of Essential Facilities

The Joint Intervenors reject the IOUs' implied assertion that the Commission's approval of billing system investments excuses their actions and inactions, including noncompliance with the NH EDI Standards, which have foreclosed the ability of suppliers to offer innovative rates and products to the vast majority of retail electricity customers. (IOUs Initial Brief, p. 4.)

The IOUs directly control the metering, data management, consolidated billing, and load settlement systems that are essential to enabling a competitive retail market. These are by definition "essential facilities", alternatively referred to as "bottleneck facilities" in recognition that monopolies can severely limit competition simply by denying equal access to competitors. In its legal analysis supporting and accompanying the Statewide Electric Utility Restructuring Plan, the Commission relied on antitrust doctrine and case law to provide the foundational legal basis obligating the use of utility-controlled essential facilities to enable competition:

> ***The United States Supreme Court has held that an "essential facility" does not have a legitimate expectation of earning a monopoly rent by denying the use of facilities to competitors who have no alternatives****… Although it is clear that "where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms," A.D. Neale, The Antitrust Laws of the U.S.A. 69 (1969), there are exceptions. For example, one court has found that if the sharing is impractical or would inhibit the party's ability to serve its customers, then there is no requirement that the essential facility be shared. Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978). This argument cannot work here.*[32]

The policy of New Hampshire is to promote retail service innovations, including TOU rates and NM programs, as well as distributed generation generally, **through competitive means** — as clearly articulated and affirmatively expressed over the past quarter-century by both the General Court and Supreme Court, and consistent with the State's two hundred-and forty-year-old constitutional directive favoring free enterprise over the perpetuation of monopolies. (*See*

[32] *See* PUC Order No. 22,514 (February 28, 1997), from PUC 1997 Orders folio view: pp. 382-383.

N.H. Const. pt. II, art. 83; *see also* Joint Intervenors Initial Brief, pp. 3-7.)

The Commission has taken various pro-competitive actions to implement this policy, including by ordering all utilities to implement the NH EDI Standards, recognizing that this was a critical step in the development of a competitive retail market for energy services. The IOUs have not implemented the NH EDI Standards requirements. Consequently, the IOUs are not, with limited exceptions, providing suppliers with the customer data and billing services required to serve TOU/NM customers. Similarly, the IOUs have not maintained the accuracy of their load estimation and settlement processes to keep up with net metered installations, not reformed load settlement to enable suppliers to provide innovative retail products, and to-date have not evinced any initiative to implement the requirements of RSA 362:A-9, II to do so.[33] As a result, the IOUs have perpetuated a monopoly over the provision of time-varying supply rates, credits for NM excess generation, and innovations in retail products and distributed generation and storage generally. This is contrary to state law and public interest.

Antitrust doctrine does not support the IOUs' implied assertion that these anticompetitive acts may be excused simply because the Commission has "deemed prudent" their essential facility investments. Directly relevant here is that regulated entities are only excused from complying with antitrust law under a specific set of conditions. For example, the basic rule applied by courts to determine whether state law and regulation shields a monopoly from violations of the Sherman Antitrust Act[34] —interpretation of which is also relevant to New

[33] More specifically, the IOUs have disclaimed any responsibility to do so, despite being the administrators of load settlement processes, and represented that CPCNH should submit "*a sufficiently detailed proposal upon which any implicated and interested party can evaluate and opine, and all requisite supporting materials, along with a request that the Commission open a separate dedicated docket for its consideration." See* April 5 IOU Objection, ¶ 10.
[34] *See* Sherman Antitrust Act of 1890, as amended (15 U.S. Code §2): "*Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states… shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.*"

Hampshire state courts interpretating state antitrust laws under the New Hampshire Consumer Protection Act[35] — hinges on (i) whether there exists a state policy, clearly articulated and affirmatively expressed, to displace competition with regulation, and (ii) whether state regulators are exercising a level of active oversight sufficient to enable state policy.[36]

The Supreme Court has held that only state legislatures and state Supreme Courts may authorize anticompetitive activity,[37] and explained that the active supervision requirement "*is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts…that…actually further state regulatory policies*," while cautioning that "*[t]he mere presence of some state involvement or monitoring does not suffice,…state officials [must]…exercise power to review particular anticompetitive acts…and disapprove those that fail to accord with state policy."*[38] Consequently, regulated electric utilities have been found guilty of violating the Sherman Antitrust Act, even in states that have not embraced competition through restructuring, for foreclosing competition without sufficient regulatory oversight,[39] and for impermissibly interfering with competitive activities even *with* regulatory approval.[40]

NH's antitrust law similarly only authorizes regulated entities to engage in anticompetitive activities "*if such are permitted, authorized, approved, required, or regulated by a regulatory body acting under a federal or state statutory scheme or otherwise actively supervised by a regulatory agency*."[41] Absent these conditions, any restraint on trade or "*[t]he establishment,*

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[35] *See* Green Mountain Realty Corp. v. Fifth Estate Tower, LLC, 161 N.H. 78, 82-83 (2010)

[36] *See* California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980): "*These decisions establish two standards for antitrust immunity … First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself*."

[37] *See Hoover v. Ronwin*, 466 U.S. 558, 568 (1984).

[38] Federal Trade Commission v. Ticor Title Insurance, 504 U.S. 621, 634 (1992) (internal quotation marks and citations omitted) (emphasis added)

[39] *See* Columbia Steel Casting Co. v. Portland General Electric Co., 111 F.3d 1427 (9th Cir. 1996).

[40] *See* Cantor v. Detroit Edison Co., 428 U.S. 579, 592-598 (1976).

[41] *See* RSA 356:8-a Exemption for Authorized Activity (emphasis added).

maintenance or use of monopoly power, or any attempt to establish, maintain or use monopoly power over trade or commerce for the purpose of affecting competition or controlling, fixing or maintaining prices is unlawful." [42]

Relevant here is that there is no state policy permitting the IOUs to displace competition in New Hampshire's retail electricity market, and the Commission has not previously supervised the IOUs' EDI, billing, and load settlement processes to the degree necessary to promote customer choice through a competitive market for retail electric services, as is required to implement the policies of RSA 374-F and RSA 362-A:9. (*See generally,* Joint Intervenors Initial Brief, pp. 3-5 and Appendix A.) Nor has the NH DOE been aware of these issues.[43]

The Commission, until recently, "*believed that for the past twenty-four years EDI systems have operated under the original, interim standards*" implemented by Order No. 22,919[44] to help enable competition. Thus, while the IOUs prior billing system investments may all have been approved by the Commission, those determinations evidently did not include explicit evaluation and approval of the IOUs' deviation from the NH EDI Standards. Similarly, Eversource recently invested and deployed load estimation and settlement software that appears to have simply duplicated the basic functionality that existed at the outset of restructuring, and was not designed to incorporate DER excess generation, as explicitly required under RSA 362:A-9, II (Joint Intervenors Initial Brief, pp. 20-21). Regardless, their decision contravenes utility good practice given the proliferation of DERs and state policy of promulgating competitive markets. The Commission has ruled that "*[f]or the utility to use its monopoly position to require its customers*

[42] *See* RSA 356:3 Monopolies Prohibited *and* RSA 356:2 Restraints Prohibited.
[43] *E.g., see* NH DOE, New Hampshire 10-Year State Energy Strategy (July 2022), pp. 57-58, representing that "*CPA programs may also offer innovative services and rates for customers, potentially including … time-varying rates, and net energy metering generation credits for customers with solar PV or other distributed generation systems*." As relevant here, the NH DOE was apparently unaware the IOUs have effectively monopolized these retail services.
[44] *See* IR 22-076, Order of Notice (11/15/22), p. 3, fn. 2.

to pay for avoidable costs is a classic tying arrangement, inconsistent with antitrust principles."[45] The Joint Intervenors concur and observe that investment in settlement software that does not directly allocate negative usage data to suppliers, and consequently increases stranded cost and default supply charges while foreclosing competition, is a *prima facie* instance of the utility using its monopoly position to require customers to pay for avoidable costs.

The IOUs have an obligation to operate inside the law, which in New Hampshire is a policy framework promoting the competitive market for retail electric services, and not impermissibly foreclose competition, regardless of whether the Commission has sufficiently exercised active supervision over their investments and activities. As the US Supreme Court has so clearly articulated, "*Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests."*[46]

CONCLUSION

The Joint Intervenors urge the Commission to issue our proposed Supplemental Order of Notice, and to take all actions necessary to ensure that the facilities essential to the functioning of our retail market — metering, EDI, consolidated billing, and settlements — are reformed in tandem to enable market-based innovation and promote competition in customer services.

Respectfully submitted this 28th day of June 2024

Community Power Coalition of New Hampshire

Clifton Below

by Chair Clifton Below

Conservation Law Foundation

/s/ Nick Krakoff

by Senior Attorney Nick Krakoff, Esq.

[45] *See* PUC Order No. 22,514 (February 28, 1997), from PUC 1997 Orders folio view: p. 326.

[46] *See* Federal Trade Commission v. Ticor Title Insurance Co., 504 U.S. 621, 634 (1992)