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Via electronic mail only

Daniel Goldner, Chairman
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

Re: Docket No. DE 23-068 Statewide Energy Efficiency 2024-2026 Triennial Plan
Joint Utility Position Statement on the Administrative Record

Chairman Goldner:

By this letter, 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 Utilities; and Northern Utilities, Inc. (the “Utilities”) present their consensus legal position regarding the exhibits and evidentiary record in this docket, as raised by the Public Utilities Commission (“Commission”) in its pre-hearing order issued October 12, 2023 (the “Order”). Pursuant to Puc 203.27(c), the Utilities respectfully contest the material that the Commission intends to enter into the evidentiary record through official notice for the reasons discussed herein.

In relevant part, the Order states that the Commission “intends to take official notice of the written responses to the Commission’s written inquiries issued over the course of this proceeding, including having written responses adopted by witnesses during hearing sessions. The parties were afforded the opportunity to provide responses to the Commission’s statement of intent, and the parties made position statements that were preliminary in nature.” (Order at 2). Respectfully, this approach is legally flawed.

At its crux, the material that the Commission seeks to admit as evidence this proceeding through “administrative notice” is not the type of material that qualifies for administrative notice under Puc 203.27 (a), nor does it constitute “evidence” under Puc 203.23. First, Puc 203.27(a)(1) authorizes the Commission to take administrative notice when a *party* presents any fact which could be judicially noticed in New Hampshire courts. A judicially noticed fact must be one not subject to reasonable dispute.¹ In this case, the responses to the Commission’s record requests were not “presented” by the Utilities as facts to support their petition or the 2024-2026 Triennial Energy Efficiency Plan (“the Plan”). Thus, the responses do not represent evidence put forward

¹ See N.H. R. Ev. 201(a).

by the respective Utilities as part of their burden of proof in this proceeding. In addition, neither the requests nor responses constitute facts that “are not subject to reasonable dispute.”² Many of the requests pose various hypotheticals and conditions that are “subject to reasonable dispute” because they concern matters beyond the scope of this proceeding which is delineated in RSA 374-F:3, VI-a (d). While the Utilities stand by the veracity of their responses, the Utilities dispute the factual relevance and legal appropriateness of applying the information provided in those responses to the Commission’s deliberations in this docket in which no party contests approval of the Plan. Second, Puc 203.23 (a) identifies the parties “entitled to offer evidence at hearing in an adjudicative proceeding”. The Commission is not listed among those parties. Accordingly, it is improper for the Commission to introduce into the evidentiary record material that no party has offered as evidence.

Third, there are procedural and legal flaws in that it is not possible to subject the responses to cross-examination. Key to the Commission’s proposal to admit this material into the record is the proposition that one or more witnesses will adopt the record responses at hearing as if the information is part of the witness’ own testimony. Respectfully, the Utilities would like to clarify that their witnesses will not adopt the written responses to the Commission inquiries as if it were their own testimony, as this process is entirely contrary to administrative law principles. Evidence admitted to the record must be subjected to cross-examination or other contest and this fundamental right is defeated where the Utilities’ own witnesses are asked to appear at hearing to sponsor questions and responses that would then be subject to cross-examination by the Utilities themselves. Accordingly, in light of the procedural irregularities noted above, to the extent that Commission seeks to question the Utilities’ witnesses at hearing about the record requests, the witnesses will provide the Commission with truthful and fulsome responses, though subject to the Utilities’ objection to the use of the responses in this matter. Although the Utilities do not contest the veracity of the responses provided to the Commission’s requests, the requests pose various hypotheticals and conditions that are “subject to reasonable dispute” given the scope of the proceeding.

Lastly, at the October 10, 2023 pre-hearing conference in this docket, the Commission suggested it may take official notice of the requests and responses pursuant to RSA 365:19, which was enacted in 1951 long before the reorganization of the Commission and its staff and the creation of the New Hampshire Department of Energy. However, the Administrative Procedures Act (RSA 541-A) and Puc 200 rules supersede this provision because they are more specific than RSA 365:19 in regard to adjudicative procedures.³ Should the Commission elect to proceed under RSA 365:19, the Utilities respectfully request that the Commission issue a list of the specific requests of which it intends to take administrative notice at least five business days in advance of hearing, *i.e.*, on or before October 18, which is the same procedure applicable to other evidence submitted to the record of an adjudicated proceeding. There are 93 multi-part Commission-issued requests and associated responses. The Commission’s provision of a list of specific responses that the Commission intends to question witnesses about or make a part of the record will afford the Utilities and other parties “whose rights may be affected [to] be afforded a reasonable opportunity to be heard with reference thereto or in denial thereof.” (RSA 365:19). The list will also promote administrative efficiency by assisting the witnesses in their hearing preparation. By proceeding in

² *Id.*

³ *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).



this manner, the Utilities do not waive any potential current or future claims under the Administrative Procedures Act or the Puc 200 rules as to the relevance or the propriety of the written inquiries and responses as a part of the record in an adjudicative proceeding should the Commission rely upon this material in a decision and order in this matter.

Notwithstanding the due process concerns that the Utilities have regarding the Commission’s suggestion to take administrative notice of some or all of the responses at issue, the Utilities greatly appreciate the Commission’s candor regarding its approach to developing the record in this matter. The Utilities see this procedural problem as arising from a change in the organizational structure of the Commission and its staff without associated changes in law and regulation to properly accommodate the Commission’s desire to understand, investigate and compile information in this adjudicative docket. The Commission’s willingness to provide the Utilities with the opportunity to share input and positions on these important legal issues is duly acknowledged and appreciated. The Utilities thank the Commission for its efforts in reaching an informed, just and reasonable decision in this proceeding.

Consistent with current policy, this position statement is being filed electronically only; paper copies will not follow.

Thank you,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY

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cc: DE 23-068 Service List