

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 22-060

ELECTRIC DISTRIBUTION UTILITIES

**Consideration of Changes to the Current Net Metering Tariff Structure, Including
Compensation of Customer-Generators**

Order Granting Rehearing and Amending Prehearing Order

ORDER NO. 27,018

June 14, 2024

In this order, we grant rehearing and amend our prehearing order requesting answers to record requests, requiring only the electric distribution utilities' responses to the questions raised while allowing other parties to provide responses at their discretion.

I. BACKGROUND AND PROCEDURAL HISTORY

The Commission convened this docket pursuant to RSA 362-A:9, which directed the Commission to open an adjudicative docket to consider changes to the net metering tariff after receiving a Value of Distributed Energy Resources (VDER) Study from the New Hampshire Department of Energy (DOE). The DOE filed the VDER study in the fall of 2022 and, since that time, the parties to this docket have all filed position statements to the Commission recommending changes to the net metering tariff.

On April 11, 2024, the Commission held a prehearing conference at which a majority of the parties represented that they intended to file a settlement agreement and were close to finalizing such agreement. Two parties represented that they did not intend to join the settlement: the New Hampshire Department of Energy (DOE) and the Community Power Coalition of New Hampshire (CPCNH). With the exception of Walmart, Inc., which did not appear at the prehearing conference, the remaining

parties (the Settling Parties) requested that the Commission set a deadline to file a settlement to help them finalize their negotiations. At the prehearing conference, the Commission noticed many of the questions subsequently issued in the Prehearing Order, affording an opportunity for comment. Some parties expressed that they were not prepared to address questions at the time. *See* Tab 83, Transcript of Hearing Held 4/11/24 at 41. One of the parties seeking rehearing, the Conservation Law Foundation (CLF), asked whether the questions would be issued as record requests or with an opportunity for comment. *See Id.* at 83-84. The Commission responded in the affirmative, noting that the record requests at issue would be issued in the Prehearing Order to prepare for hearing. *See Id.* at 84 and 90. No objections were stated by any of the parties or members of the public at the prehearing conference.

In an April 24, 2024, prehearing order the Commission set a deadline of May 31, 2024 for the Settling Parties to file a settlement agreement. The Commission also directed all the parties to submit a filing stating which dates they would be available for a hearing in August. Finally, the Commission directed the Settling Parties to provide information with respect to a list of questions laid out in the prehearing order. The list included questions that: (1) were intended to produce direct, factual responses, such as how any proposed rates would compare to those in other states; and (2) implicated policy and legal considerations, such as whether any proposed rates would be just and reasonable or would constitute a cross-subsidy.

The Commission did so because it believed that the responses to these questions are relevant to the Commission's independent obligation to determine that any net metering rates set in this docket are just and reasonable under RSA 374:2 and RSA 378:3. Notably, the parties to this docket have the burden to show that their proposed rates are just and reasonable. RSA 378:8. The Commission's questions,

therefore, were intended to provide the parties with insight into areas of inquiry prior to hearing relevant to the proposal of recommended rates to the Commission.

On May 6, 2024, the Office of the Consumer Advocate (OCA) filed a motion for rehearing of the prehearing order, challenging only the Commission's ability to issue these questions to the Settling Parties. On May 14, 2024, CPCNH, CLF, Clean Energy New Hampshire (CENH), and Granite State Hydropower Association (GSNH) (collectively, the Joint Intervenors) filed a separate motion for rehearing that also challenged the Commission's authority to issue the questions to the Settling Parties. No other party has responded to either motion. On May 31, 2024, in lieu of filing a settlement agreement, Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource) filed a notice that the settling parties had not yet reached settlement.

II. LEGAL STANDARD FOR REHEARING

The process for seeking rehearing of our orders is described in statute. Under RSA 541:3, any party or person directly affected may seek rehearing of our orders by filing a motion within 30 days of issuance. We may grant rehearing, if, in our opinion, "good reason" is established by the moving party. RSA 541:3. If we grant rehearing, RSA chapter 541 does not require us to hold another hearing. Although we may do so, we may also simply reconsider the matter and reissue our original order or an amendment of it. See 5 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 we "overlooked or mistakenly conceived in the original decision." *Dumais v. State Pers. Comm'n*, 118 N.H. 309, 311 (1978) (citation and quotations omitted). 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 our order is unlawful or unreasonable. *See* RSA 541:4.

III. ANALYSIS AND AMENDMENT TO APRIL 24, 2024 PREHEARING ORDER

After reviewing the parties' motions and considering the moving parties' arguments supporting collaboration between the majority of the parties toward settlement, the Commission orders as follows. First, the Commission **AMENDS** its prehearing order to only require each of the three electric distribution utilities—Eversource, Unitil Energy Systems, Inc. (UES), and Liberty (Granite State Electric) Corp. d/b/a Liberty (Liberty)—to submit answers to the Commission's questions in the prehearing order. These answers may be submitted in the form of technical responses or analytical briefing, where appropriate. The utilities may submit either individual filings or a joint filing. The other parties to this docket may—but are not required to—submit filings in response to the Commission's questions. Second, the Commission **EXTENDS** the deadline for the parties to respond to the Commission's questions to July 8, 2024. Any party may file a response to an initial filing by July 26, 2024.

Given these changes to the prehearing order, the only issue raised in the motions for rehearing that the Commission must address is whether it has the power to propound questions and request answers from the utilities. As explained more fully below, the Commission concludes it does have the authority to direct the questions at issue to the utilities and therefore **DENIES** the relief requested in the motions to the extent they argue to the contrary. The Commission will address each motion more specifically below.

In analyzing the OCA's and Joint Intervenors' motions, the Commission first describes our legal authority to request that the utilities answer factual, policy, and legal questions posed by the Commission. We then respond to each of the OCA's and Joint Intervenors' challenges to that authority. RSA 365:19 states that the Commission has the authority to conduct "such investigation as in its judgment the public good may require" in "any case in which the commission may hold a hearing." In addition, RSA 365:15 states that the Commission "may also request any public utility to make specific answers to questions upon which the [C]ommission may need information." The Commission's power to issue questions to utilities is further authorized by RSA 12-P:10, which provides that: "The [DOE] or the [C]ommission may require any public utility or entity subject to its jurisdiction to make specific answers to questions upon which the department or commission may need information." Under these statutes, the Commission is not limited to the information and evidence that the utilities provide but can augment the record on its own authority, including by asking the public utilities to provide information the Commission deems relevant to a docket.

Even absent this express statutory authority, the Commission's authority to issue these requests is supported by the principle that "administrative entities generally have the implied or incidental powers reasonably necessary to carry out the powers expressly granted to them." Appeal of Jamar, 145 N.H. 152, 155 (2000). Because the Commission has the power and duty to fix rates, as well as the obligation to ensure that all rates are just and reasonable, *see* RSA 374:1-2; RSA 378:7, the Commission has the implied powers reasonably necessary to do so. In the Commission's view, this includes the authority to request information, answers and briefing from the utilities relevant to whether a proposed rate is just and reasonable.

Finally, the Commission's authority to request such information is supported by the Commission's rules. New Hampshire Code of Administrative Rules, Puc 203.32 states that "on its own motion, the [C]ommission shall allow parties to submit briefs at any point in adjudicative proceeding if the [C]ommission determines that such briefing would assist the [C]ommission in its determination of the issues presented." Puc 203.32(a). Black's Law Dictionary defines a "brief" as, among other things, "a document prepared by counsel as the basis for arguing a case, consisting of legal and factual arguments and the authorities in support of them." See Black's Law Dictionary 186 (7th ed. 1999). The Commission's requests in the prehearing order are fairly encompassed within the meaning of a brief because they request factual and legal authorities related to the utilities' contention that their proposed rates are just and reasonable. They are thus authorized by this rule.

In short, the Commission has the express authority under both statute and rule, as well as the implied authority attendant to its ratemaking authority, to request that the parties answer the questions in the prehearing order. The OCA and the Joint Intervenors offer several arguments against this conclusion, and the Commission will address each in turn. As the two motions for rehearing raise similar issues, the Commission will address their arguments together where appropriate.

First, the OCA argues that although the Commission has the authority to conduct investigations of its own accord under RSA 365:19, it has no authority to request that the utilities themselves provide or introduce evidence on the Commission's behalf. Echoing the electric distribution utilities' arguments in Docket No. DE 23-068, the OCA maintains that the Commission cannot compel the utilities' witnesses to present or adopt any evidence or opinions produced by the questions in

the prehearing order.¹ In making this argument, the OCA appears to read RSA 365:19 as only authorizing the Commission to have its own staff (or a retained outside party) investigate an issue and argues that because the statute does not expressly state that the Commission may request information from the parties as part of an investigation under that statute, the legislature necessarily intended that the Commission did not have the power to do so.

The Commission disagrees. With respect to the authority to issue the questions, the Commission has already noted that it has the power to issue questions and seek briefing from the public utilities independent of RSA 365:19. And, even assuming it does not expressly authorize these questions, there is nothing in RSA 365:19 that would preclude the Commission from issuing them. Therefore, RSA 365:19 does not preclude the Commission from directing these questions to the utilities.

With respect to how the responses to the prehearing order will be considered by the Commission, the Commission does not need to resolve this question at this time. While the Commission believes that the authority to ask the public utilities questions necessarily implies the authority to consider them in the decision-making process, that does not mean that the utilities' witnesses will be tasked with introducing any evidence that results from the prehearing order themselves. At this point, the Commission has simply requested that the public utilities respond to the enumerated questions. It has not ordered the utilities to present witnesses to introduce any evidence. If, after receiving the utilities' responses, the Commission desires to introduce any evidence into the record, it can consider the appropriate way to do so. In

¹ The OCA notes that the utilities made a similar argument in the docket for the 2024–26 Triennial Plan. Notably, however, the public utilities have not raised this issue in this docket and in fact have not challenged or joined the challenges to the prehearing order in any capacity.

any case, these evidentiary considerations do not preclude the Commission from asking the utilities to respond to the questions in the first place.

Moreover, to the extent some of the questions implicate legal or policy positions about why particular rates would be just and reasonable, the Commission fails to see how asking these questions prior to the hearing differs from the Commission's usual practice of asking questions to witnesses and counsel from the bench. If anything, providing these questions should streamline preparation by the parties' witnesses and counsel for the issues the Commission intends to inquire about at hearing.

Second, the OCA and the Joint Intervenors argue that the Commission's prehearing order violates its own procedural rules. Specifically, they argue that there is no mechanism in the Commission's rules that expressly authorizes the Commission to request data from the parties or rely on any responses as evidence. The Commission disagrees. First, as stated above, it is the Commission's view that Puc 203.32 authorizes the Commission to direct the parties to file briefs responsive to factual, legal, and policy questions relevant to a particular docket. Therefore, the Commission's rules authorize the questions posed in the prehearing order. And, equally importantly, nothing in the Commission's rules precludes the Commission from issuing questions to the public utilities.

Further, even if no express provision authorizing the Commission to issue these questions existed, the Commission would reject the OCA's and the Joint Intervenor's arguments because they rest on the faulty assumption that the Commission's powers are limited to those laid out in its rules. While the Commission agrees that it cannot violate its own rules,² the Commission's authority is not limited to what the rules

² However, the Commission may waive its own rules when doing so would serve the public interest and would not hinder the orderly resolution of a docket. *See* Puc 201.05. It is not necessary to do so here because the Commission's rules do not preclude the prehearing order questions in this docket.

expressly state. Ultimately, the Commission has the powers provided to it by state statute, as well as any powers reasonably implied by state statute, *Appeal of Jamar*, 145 N.H. at 155, and “administrative rules may not add to, detract from, or modify the statute which they are intended to implement.” *Genworth Life Ins. Co. v. N.H. Dep’t of Ins.*, 174 N.H. 78, 83 (2021). As noted above, the Commission’s view is that the questions at issue are authorized by the Commission’s statutory and implied powers. Therefore, even if the OCA and the Joint Intervenors were correct that the Commission’s rules do not expressly authorize the questions at issue, that would not preclude the Commission from issuing them under its statutory authority.

Third, the OCA argues that the Commission only has the authority under RSA 365:19 to introduce “facts” into the record, whereas, the OCA maintains, the prehearing order requests that the parties provide answers that may implicate legal and policy determinations. In addition, the OCA avers that some of the questions may require the utilities to make value judgments and assumptions to provide answers because they relate to complicated issues. This argument is not persuasive because it rests on the incorrect assumption that the Commission is solely relying on RSA 365:19. Although the Commission strongly questions the OCA’s interpretation of that statute, the Commission believes that its authority to issue the prehearing order questions is independently supported by the other authorities cited in this order. In particular, Puc 203.32 authorizes the Commission to direct the parties to file briefs, which would reasonably cover the parties’ legal and policy recommendations. Thus, even if the OCA’s interpretation of RSA 365:19 is accurate, that would not preclude the Commission from issuing the prehearing order questions in this docket. Furthermore, while the Commission agrees that many of its requests involve complicated questions that involve multiple variables, that is exactly why the

Commission would appreciate briefing and responses in the first place to enable a more efficient administrative process.

Finally, the OCA and the Joint Intervenors aver that, even if the Commission had the legal authority to issue the questions in its prehearing order, it should not do so in this docket because: (1) no final settlement has been reached; and (2) requiring the parties to respond to these questions may inhibit a final settlement. The Commission disagrees that either of these considerations weigh against the questions in the prehearing order. While the Commission encourages parties to reach settlement agreements, *see* Puc 203.20, the ultimate goal of a docket is not for the parties to reach a settlement but for the Commission to set just and reasonable rates, *see* RSA 374:2 (“All charges made or demanded by any public utility for any service rendered by it or to be rendered in connection therewith, shall be just and reasonable . . .”). In the Commission’s view, answers to the questions posed in the prehearing order would be relevant and helpful in determining whether any proposed rates are just and reasonable. Because the public utilities are proposing rates in this docket and bear the burden to show that any rates they propose are just and reasonable, it is appropriate to ask them to answer questions that arise from the Commission’s consideration of their proposals.

Based upon the foregoing, it is hereby

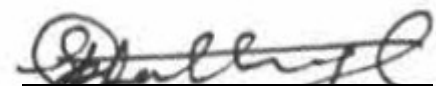
ORDERED, that the OCA’s and the Joint Intervenors’ Motions for Rehearing are **GRANTED**; and it is

FURTHER ORDERED, that the Commission’s April 24, 2024 prehearing order is **AMENDED** as provided in this order.

By order of the Public Utilities Commission of New Hampshire this fourteenth day of June, 2024.



Daniel C. Goldner
Chairman



Pradip K. Chattopadhyay
Commissioner



Carleton B. Simpson
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Docket#: 22-060

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