STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

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

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

Docket No. DE 23-063

Reply Brief of the Office of the Consumer Advocate

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to this docket, and pursuant to the briefing schedule adopted by the Commission in its procedural order of May 15, 2024 (tab 46) submits the following brief in reply to (1) a letter submitted by the Department of Energy ("Department") on June 14, 2024 captioned "DOE Initial Comments" ("Department Comments"), (2) a joint brief (tab 49) submitted on June 14, 2024 by intervenors Community Power Coalition of New Hampshire ("CPCNH") and Conservation Law Foundation ("CPCNH/CLF Brief"), and (3) a brief (tab 50) submitted jointly by the three subject utilities ("Utility Brief"). In general, as reiterated here by our specific responses to these pleadings, it is the position of the Office of the Consumer Advocate that the Commission should not allow the state's investor-owned electric utilities to thwart or inhibit the robust development of community power aggregation in our state, whether via temporary rules waivers, permanent rules waivers, or otherwise.

I. Introduction

This proceeding began a year ago when the state's three investor-owned electric distribution utilities filed a petition seeking waivers, on either a temporary or a permanent basis, of certain requirements of N.H. Code Admin. Rules Puc 2205.16. In relevant part, Puc 2205.16 governs the billing services the utilities must make available to community power aggregation ("CPA") programs established by municipalities or counties pursuant to RSA 53-E. CPA programs need these billing services to discharge their principal purpose, which is to provide default energy service[1] to participating customers within the relevant municipal or county borders. Obviously, providing default energy service requires a means to be paid for such service – which, in turn, means that a CPA program must be able (1) to ascertain, for each monthly billing cycle, how much electricity each participating customer has used, and (2) apply the applicable billing determinants to such usage and render a monthly bill to each customer accordingly.

Utilities presently enjoy a monopoly on metering retail electric usage in New Hampshire for purposes of the transmission and distribution service they provide on a monopoly basis. For all practical purposes, this metering monopoly leaves CPA programs captive to the utilities with respect to metering the service they provide

[1] RSA 53-E:3, II(a) authorizes municipalities and counties to "[e]nter into agreements and provide for energy services," including *inter alia* "[t]he supply of electric power and capacity." The Electric Utility Restructuring Act defines "default service" as "electricity supply that is available to retail customers who are otherwise without an electricity supplier and are ineligible for transition service and is provided by electric distribution utilities under RSA 374-F:3, V or as an alternative, by municipal or county aggregators under RSA 53-E." Read in conjunction with each other, these two provisions mean that electricity provided by CPA programs is default energy service just as the backstop service offered by the incumbent distribution utilities is.

as well.[2] Therefore, the utilities control the usage data CPA programs need in order to bill customers.

Beyond that, New Hampshire law permits a CPA program to take the usage data it receives and bill customers directly – an expensive and complicated undertaking that would, in significant part, duplicate efforts the utilities themselves make when they bill the same customers every month for the transmission and distribution service the utilities continue to provide on a monopoly basis. Therefore, Rule 2205.16(d)(1) allows CPA programs to opt for "consolidated billing service" – i.e., relying on the applicable utility to render one consolidated monthly bill for both the utility's service and that of the CPA program.

In their petition as filed on June 14, 2023 – more than a year ago – the utilities stated that they "do not have billing system capability enabling them to comply with Puc 2205.16(d)(1)" and thus "require either temporary waivers from that provision while the necessary implementation work is conducted or permanent waivers should the Commission determine that implementation costs, which would be borne by all customers, are not in the public interest." Petition at 1. The utilities also seek a waiver on a temporary or permanent basis of a specific requirement for provision of data to CPA programs: "[t]he most recent 24 months of usage data in kWh for each reported interval if available, or 12 months otherwise,"

[2] RSA 53-E:4, IV authorizes a CPA to "contribute to the cost of electric utility provided meter upgrades, jointly own revenue grade meters with an electric utility, or provide its own revenue grade electric meter," but this "would be in addition to a utility provided meter" and is "subject to a commission finding it is in the public good, assuring that meters used for distribution tariff implementation remain under the control and majority ownership of the electric distribution utility."

for customers of newly established CPA programs (Puc 2204.02(a)(2)), and Puc 2205.13(a)(7) (applicable to customers once they have been participating in a CPA program).

The intractable nature of this dispute has not prevented community power aggregation from moving forward in New Hampshire since CPA became a practical reality in the wake of the General Court's authorization four years ago of 'opt-out' CPA and the promulgation of the Puc 2200 rules in 2022. As noted recently by Public Service Company of New Hampshire in its default energy service proceeding, more than 50 of the state's municipalities are participating in CPA programs and an additional 20 aggregation plans have received Commission approval. Attachment LJL-1 to Exh. 1 in DE 24-046 at bates page 24. According to its web site, the CPCNH itself consisted of 57 member municipalities and two counties as of April 1, 2024. *See* https://www.cpcnh.org/about. Thus, the question presented by this docket is not whether community power aggregation will succeed in sweeping through New Hampshire – that ship has long since sailed – but is, rather, how fully the utilities must comply with the specific details of the rules governing the provision of usage and billing data and who (as between the CPA programs and the utilities' customers generally) will cover the resulting costs.

More specifically, though the utilities are furnishing some usage data to CPA programs, the utilities' self-imposed limitations on the scope and nature of the data provision is, at least according to CPCNH and Conservation Law Foundation,

having a stifling effect on the availability of alternatives to utility default service. As noted in the CPCNH/CLF brief,

> current systems employed by the utilities are hampering competition in New Hampshire. With limited exceptions, utilities are withholding TOU [time-of-use] usage and NM [net metering] excess generation billing determinants from suppliers. The rate ready consolidated billing systems administered by [the four electric distribution utilities in New Hampshire] — which are relied upon to bill virtually all residential and small commercial competitive supply customers — limit suppliers to offering customers a flat, volumetric energy rate. Interval meter data is withheld from CPAs and may be of questionable quality when accessed by [competitive suppliers] through Eversource's tariff EPO subscription service. Load estimation methodologies and settlement processes are incapable of accurately estimating or allocating net metered generation or TOU hourly usage to suppliers, fail to reliably incorporate or allocate individual customer interval usage data to suppliers, and are consequently growing increasingly inaccurate — all of which is causing undue cost shifts and market inefficiencies.

CPCNH/CLF Brief at 6. The OCA does not necessarily agree that the utilities are "hampering competition;" given that CPAs are instrumentalities of government and are not competitors in the sense that non-utility competitive energy suppliers are. Semantics aside, the OCA shares these concerns as expressed in the CPCNH/CLF Brief in light of the substantial delay in achieving the basic intent of community power aggregation: lower costs for all retail ratepayers. At some point, the lost savings opportunities will exceed the cost of implementing appropriate metering solutions.

On April 3, 2024, we filed a letter (tab 36) in which we concurred with separate requests from the utilities, CPCNH, and Conservation Law Foundation that the Commission issue a supplemental Order of Notice in the docket, schedule an additional prehearing conference, and clarify the scope of the docket in light of

events and discussions that have ensued since the case was initiated. The Commission conducted a prehearing conference on May 2, 2024, the results of which were memorialized in the Commission's procedural order of May 15, 2024 (tab 46). As noted in that order, the Commission requested briefing on three discrete questions: (1) whether the subject utilities are entitled to permanent or temporary waivers of Puc 2205.16(d)(1), Puc 2204.02(a)(2), and Puc 2205.13(a)(7) (the three rules provisions enumerated *supra*), (2) whether "implementation of billing features referred to by the Community Power Coalition of New Hampshire and Conservation Law Foundation . . . including dual billing for net-metered and time of use customers on competitive supply, is required under New Hampshire law,"[3] and (3) "what types of billing systems do the New Hampshire Electronic Data Interchange EDI Standards require utility EDI systems to support, and what work has been accomplished as of this date by the EDI Working Group to implement these standards." May 15 Procedural Order at 1. The Commission also invited parties to submit proposed drafts of a supplemental order of notice to govern the procedure going forward.

The OCA did not submit an initial brief or proposed language for a supplemental Order of Notice. Therefore, our advocacy here is limited to responding to the arguments tendered by the Department, the CPCNH and Conservation Law Foundation, and the utilities.

[3] As to this question, the Commission also requested a "comprehensive description of the features sought." May 15 Procedural Order at 1.

II. Rules Waivers

The utilities point out that they already enjoy a temporary waiver of Puc 2205.16(d)(1) and that the Commission has already granted Public Service Company of New Hampshire a waiver of the other two rules provisions "until customer generator export data can be provided in the reports required by those rules." Utility Brief at 2. As to temporary waivers, the utilities contend this is "necessary" because they are "not able to comply with the provisions." *Id.* As to permanent waivers, the utilities claim that "the Commission needs only to determine whether the cost of the Utilities' proposal to implement bill-ready billing[4] is in the public interest, which will require consideration of whether the estimated $9 million cost constitutes an unjust or unreasonable cost shift." *Id.*

As to both the temporary and permanent waivers, the logic of the utilities is flawed. The Puc 2200 rules became effective on October 10, 2022. The utilities have never explained why they did not, as of that date, begin diligent efforts to comply with the rules. "Not able to comply," in essence, amounts to "not willing to comply" absent permission from the Commission to recover the cost of compliance via some kind of special cost recovery mechanism. In no other realm known to the OCA does the Commission suffer utilities simply refusing to comply with rules, including those that impact the cost of providing service, unless the regulator agrees to an appropriate rate adjustment in advance. Rather, New Hampshire law

[4] As explained by CPCNH, "bill-ready consolidated billing" allows CPAs and competitive energy suppliers to "perform customer bill calculations and transmit the amounts owed for supply back to the utility to present on consolidated bills." CPCNH/CLF Brief at 10.

requires utilities to meet their obligations, including those embedded in rules, and adjust rates as necessary in the ordinary course (i.e., via rate cases such as the one recently filed by Public Service Company of New Hampshire). A utility cannot evade its legal responsibilities by pleading "unjust cost shift," *see* Utility Brief at 2; otherwise, any capital expenditure of any size (e.g., new or upgraded substations, reconductoring projects) would be subject to challenge based on the lack of benefits to all customers or the potential for something less than full and complete cost recovery.

The Puc 2200 rules clearly contemplate circumstances in which the Commission will waive requirements contained in the rules. Rule Puc 2201.03 explicitly refers to rule Puc 201.05, the general provision governing waiver of the Commission's rules. Under Puc 201.05, a rules waiver must "serve the public interest," a determination that requires the Commission to consider whether (1) compliance would be "onerous or inapplicable given the circumstances of the affected person" or whether "[t]he purpose of the rule would be satisfied by an alternative method proposed." In the circumstances of this case, the utilities equate unwillingness with onerousness; this ground for waiver does not apply. Nor is non-compliance justified here because there is some other, plausible alternative that would allow CPA programs to get the billing data they need.

On the question of a permanent rules waiver, the Commission must reject this idea out of hand. Under the Administrative Procedure Act, there is no such thing as a permanent rules waiver, particularly when, as here, all or substantially

of the entities subject to the rule[5] are seeking to evade the requirement. Repeal rather than waiver is the appropriate remedy if an agency becomes convinced that a provision of its rules is unworkable or undesirable. Any other approach would contravene a core principle explicitly embedded in the Administrative Procedure Act, that "[r]ules shall be valid and binding on persons they affect, and shall have the force of law unless they have expired or have been amended or revised or unless a court of competent jurisdiction determines otherwise." RSA 541-A:22, II. Rules that are subject to implicit repeal via "permanent waiver" are not rules; they are mere suggestions.

III. Dual Billing for Net-metered and Time-of-Use Customers

The Office of the Consumer Advocate must respectfully disagree with the utilities' contention that "there is no requirement to enable CPAs to dual bill a specific type of customer." Utility Brief at 3. According to the utilities, "CPCNH has not proposed to provide a service to all CPAs – this is a request that only serves

[5]The New Hampshire Electric Cooperative ("NHEC"), one of the state's four electric distribution utilities, has a valid "certificate of deregulation" on file with the Commission, which entitles it to its own special 'free pass' with respect to compliance with the Puc 2200 rules. *See* Rule Puc 2201.03(b) (requiring the commission to waive application of specific provisions of the Puc 2200 rules "to a rural electric cooperative for which a certificate of deregulation is on file with the public utilities commission pursuant to RSA 301:57 if it finds upon petition of such a cooperative that compliance is not reasonably practical at a reasonable cost to the cooperative or CPA or CPAs requesting information or services from the cooperative"). The certificate, adopted after a vote of the NHEC's customer members, is more than two decades old – well before the arrival of opt-out community power aggregation. The theory underlying RSA 301:57, which allows a rural electric cooperative to avoid essentially all regulation by the Commission, is that when the owners of a utility and the customers of a utility are the same, there is nothing for the Commission, as the RSA 363:17-a arbiter between shareholder and customer interests, to do. But the disputes at issue in this docket are not between customers and shareholders – they are, in essence, disputes between utilities and municipalities (albeit municipalities acting through an agent). Taken together, these two sides are the only plausible alternatives available to residential customers in quest of affordable and flexible retail electricity – including residential customers who are NHEC members. The NHEC is not a party to the instant proceeding.

one entity, CPCNH. There is no rule or law that mandates the Utilities fulfill any particular business service objective of a single entity." *Id.*

The Commission should take steps to impose a utility attitude adjustment on this point. The utilities appear to consider the CPCNH as a business rival or, at least, an enterprise that is pursuing a self-serving business agenda. In reality, the CPCNH is a large and diverse group of municipalities – instrumentalities of government, led by duly elected public officials – that have opted to take advantage of RSA 53-E by acting jointly. The CPCNH is not the only community power aggregation program in the state; to the extent the CPCNH's advocacy leads to improvements in consolidated billing services those improvements inure, or at least can inure, to every New Hampshire municipality.

Net metering and time-of-use rates are important, customer-empowering elements of the state's electricity related public policy. The former is explicitly enshrined in statute, see RSA 362-A:9, and the latter have met with favor by the Commission, most recently in 2022. *See* Order No. 26,604 (April 7, 2022) in Docket No. DE 20-170 (approving such rates for electric vehicle charging stations). In the RSA 374-F restructuring policy principles, the General Court has opined that "[c]ustomers should be able to choose among options such as levels of service reliability, *real time pricing, and generation sources*, including interconnected self generation." RSA 374-F:3, II (part of the "customer choice" policy principle, emphasis added). This principle exists against the backdrop of the longstanding requirement of New Hampshire utility law that no public utility "shall give any

undue or unreasonable preference or advantage to any person or corporation, or to any locality, or to any particular description of service in any respect whatever or subject any particular person or corporation or locality, or any particular description of service, to any undue or unreasonable prejudice or disadvantage in any respect whatever." RSA 378:10.

When the General Court adopted that language in 1911 – and the following section, RSA 378:11, which clarifies that "absolute uniformity . . . when the circumstances render any lack of university reasonable" – no one had imagined that electric utilities might have to cooperate with entities they (as noted above) regard in some sense as business rivals. The spirit of these bedrock utility statutes is that default service as provided by utilities and default service as provided by CPAs should be offered on a level playing field. In short, we agree with the CPCNH and Conservation Law Foundation that "[p]rovision of billing-quality customer usage data, at the granularity of interval recorded by customer meters and collected by utilities, is a basic market-enabling responsibility of the IOUs." CPCNH/CLF Brief at 9.

IV. Electronic Data Interchange (EDI) Standards

In November 2023, via Order No. 26,903 in Docket No. IR 22-076, the Commission ruled that its "EDI Working Group should be reconvened with a goal of determining whether the current EDI system is meeting the evolving electric system needs and if not, what changes may be required, and at what cost." Order No. 26,903 at 4. The Department of Energy has, accordingly, reconvened the EDI

Working Group. *See* Department of Energy Letter of December 15, 2023) (tab 72) in IR 22-076.

Nevertheless, the working group process appears to have broken down. That is the only conclusion to be drawn from the statements in the CPCNH/CLF Brief, that the working group "has done and can do nothing further, at present, to implement the NH EDI Standards, because the IOUs have asserted that they are already in full compliance thereof and have refused to consider modifying their EDI and billing systems to provide suppliers with [net metering and time-of-use] billing determinants and enable dual billing for [these] customers unless the Commission orders it." CPCNH/CLF Brief at 17.

The EDI Working Group is a relic of a bygone era. *See* Order No. 22,919, 83 NH PUC 277, 277 (1998) (adopting initial recommendations of the working group and noting it was authorized "for the purpose of developing a *consensual plan* for the transmission of electronic information") (emphasis added). The year 1998 was the height of contentious federal litigation over the implementation of restructuring pursuant to RSA 374-F. Thus the PUC of that era placed a high premium on regulating by stakeholder consensus – best reflected, perhaps, in the omnibus settlement of that litigation as ultimately approved by the Commission in Docket No. DE 99-099.

The OCA has little if any capacity to opine on the merits of proposed or potential EDI standards as discussed, for example, at length in the CPCNH/CLF Brief. From our front-seat vantage point, however, it has become clear that

appropriate EDI standards will not emerge via a Commission-endorsed consensus-seeking process. The Commission should use either its adjudicative process or its rulemaking authority to resolve the pending EDI issues. The instant docket is an appropriate opportunity to adjudicate the issues and, therefore, we recommend a supplemental Order of Notice that includes language to that effect.

V. Conclusion

The broad policy question this docket raises – or should raise -- is the extent to which the long-term costs and benefits of the improvements to utility systems sought by the CPCNH justify imposing the applicable costs on all customers. The OCA urges the Commission to issue a revised Order of Notice that places that issue front and center. Thus, for the reasons stated above, the Commission should deny the requests for temporary and permanent waiver of the rules, conduct a hearing to determine the current status of EDI and whether the utilities have made any progress in identifying and implementing a solution to the metering requirements of community aggregation, take testimony for options to move forward, establish an appropriate schedule for concluding this matter with progress milestones for the parties, and establish penalties for non-compliance by any of the parties commensurate with the adverse impacts of delay on retail ratepayers.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Deny the requested rules waivers, move forward with additional adjudicative proceedings as described above, and

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

Sincerely,

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Certificate of Service

I hereby certify that a copy of this pleading was provided via electronic mail to the individuals included on the Commission's service list for this docket.

Donald M. Kreis