

STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

Docket No. DE 24-073

OFFICE OF THE CONSUMER ADVOCATE

Petition to Initiate Investigation

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

Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty, through counsel, respectfully submits this brief on the questions posed by the Commission of “[w]hether the Company is in contempt of the terms of the settlement agreement as contained in docket 19-064....by allegedly failing to fulfill its requirements for vegetation management as contained in the settlement,” and “[i]f the Company is found in contempt, what is the appropriate remedy?”

The Commission should find that Liberty is not in violation of the DE 19-064 Settlement for several equally dispositive reasons.

**I. Summary of Argument**

First, the OCA misreads the DE 19-064 Settlement. The few words pertaining to the Vegetation Management Program (“VMP”) taken in the context of the program’s long history cannot be interpreted to include any performance guarantees for miles of lines trimmed or dollars of VMP spent as the Office of the Consumer Advocate (“OCA”) argues in its petition. The

language the OCA cites only required that Liberty “shall maintain a four-year cycle for tree trimming and vegetation management and shall continue with the filings and reporting requirements currently in place.” Taken in context, that language is not a guarantee of certain mileage completed or dollars spent for VMP because such an interpretation would represent a fundamental change to the VMP that the settlement language unequivocally did not intend. The plain language of the DE 19-064 Settlement does not support OCA’s arguments.

In addition to the clear language in the DE 19-064 Settlement, the circumstances of this case do not support a finding of noncompliance with Puc 307.10. The Commission has long accepted that it will take Liberty years and millions of dollars to reach compliance with the side clearance requirements of the rule, and any failure to comply with the rule’s five-year trimming cycle should be excused due to the ClearWay Industries’ breach and the loss of contributions from Consolidated Communications, described below.

Third, the breach by ClearWay, Liberty’s prime tree trimming contractor, and Consolidated’s failure to contribute toward the VMP costs as a joint pole owner, which were unanticipated and outside of Liberty’s control, constitute good cause for Liberty not fully completing the planned VMP miles. The notion that the DE 19-064 Settlement imposed an absolute strict liability standard for VMP, taken in the context of the consistent administration of the VMP, is not reasonable and is a gross misreading of the document.

Fourth, requiring Liberty to perform certain VMP tasks without allowing the Company to recover the resulting costs would amount to an unconstitutional taking. To the extent the OCA intends to force Liberty shareholders to fund tree trimming for free, such a request is contrary to law. The DE 19-064 Settlement does not support such relief.

Finally, Liberty’s conduct caused no harm to customers. Customers only paid for the VMP work Liberty performed.

## II. Argument

### **A. The OCA misreads the DE 19-064 Settlement. The settlement did not include any performance guarantees of miles of lines trimmed, which would represent a fundamental change to the VMP.**

The OCA’s claim that Liberty violated the DE 19-064 Settlement relies solely on the cherry-picked language in the DE 19-064 Settlement that “the Company shall maintain a four-year cycle.” The OCA notes that, beginning with 2021, the Company did not trim sufficient miles to maintain a four-year trim cycle. In effect, the OCA interprets the DE 19-064 Settlement to impose a guarantee that Liberty would trim a certain number of miles. The VMP does not have – and has never included – such a performance guarantee. Nor can the language of the DE 19-064 Settlement be read in that way.

#### **1. Docket No. DG 06-107.**

Liberty’s VMP was first established in Docket No. DG 06-107, which docket addressed the KeySpan -National Grid merger and the resulting ownership change of EnergyNorth Natural Gas and Granite State Electric. Even though the VMP approved in DG 06-107 covered the period 2009 through 2013, it included the elements of the VMP that remain in place today.

Specifically, the DG 06-107 Settlement required Liberty (a) to “provide a description of the activities along with targeted expenditures ... of the proposed Plans,” (b) to “itemize the proposed activities by general categories and provide budgets for both operations and maintenance expenses and capital investments expected from implementation of the Plans;” (c) “After review by Staff, [to] take all reasonable steps it deems appropriate to carry out and implement the Plans, taking into account the comments of Staff;” and, finally, (d) to “reconcile actual expenditures and investments with the Plans’ targeted spending levels at the conclusion of the Plans’ period *See* Attachment GSE-8 to the DG 06-107 Settlement that established the VMP, attached at Bates 024.<sup>1</sup>

An example of how the VMP program worked under the DG 06-107 Settlement is the reconciliation filing for the 2009 VMP year, Docket No. DE 10-140. In that year the Company spent approximately \$1 million more than the \$1.36 million that was in base rates. The Company’s filing explained the reasons for the increased spending. The Commission approved recovery of the extra costs through the REP/VMP Adjustment Factor,<sup>2</sup> finding that the total spending was “consistent with the goals and parameters of the ... vegetation management programs.” Order No. 25,126 at 6 (June 30, 2010). There is no reference to, nor discussion of, any metrics that had to be met to warrant recovery. This structure of the VMP has not changed.

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<sup>1</sup> This brief and its attachments are Bates numbered sequentially.

<sup>2</sup> The reconciliation filings also included review of capital spending related to the Company’s the Reliability Enhancement Plan, or “REP.” The REP was always separate from the VMP, although addressed in the same dockets, and was discontinued as part of the DE 19-064 rate case. *See* DE 19-064 Settlement at 10.

## 2. Docket No. DE 13-063.

The VMP approved in Docket No. DG 06-107 expired in 2013. In the Company's 2013 rate case, Docket DE 13-063, the Commission approved a settlement agreement that reestablished the VMP with the same elements of the prior VMP.

The terms of the VMP as established in the DE 13-063 Settlement continue to govern to the present, as will be demonstrated further below. Thus, key excerpts from the DE 13-063 Settlement follow:

### III. REP and VMP for FY 2014 and Thereafter

a. Beginning with November 15, 2014, **the Company will provide its REP and VMP plan (the "Plan") to Staff** for the following calendar year for Staff's review. The Company will meet with Staff in technical sessions to discuss the Plan, obtain comments, and answer any questions regarding the plan to be implemented for the subsequent calendar year. After review by Staff, **the Company will take all reasonable steps it deems appropriate to carry out and implement the Plan, taking into account the comments of Staff.** Review by Staff of the Plan does not relieve the Company of its obligation to operate its business and maintain safe, reliable service through expenditures and other capital investments in the ordinary course of business that are not set forth in the Plan, nor does it bind Staff to a particular position regarding the adequacy and/or effectiveness of the Plan.

b. **The Plan shall provide a description of the activities along with targeted expenditures and investments of the proposed Plan to be implemented during the following calendar year.** The Plan will itemize the proposed activities by general category **and provide budgets for both operation and maintenance ("O&M") expenses and capital investments expected from implementation of the Plan.** The O&M budget will be \$1,360,000 (the "Base Plan O&M") for the calendar year ("Base Plan O&M Budget"). **The Company may also provide for consideration an alternative Plan with O&M budgets that exceed the O&M Base Amount for the calendar year. The Company will reconcile actual expenditures and investments with the Base Plan O&M amount** of \$1,360,000 and shall be subject to the REP/VMP Adjustment Provision,

as set forth in Section IV below. All of the combined expenses will be counted against the Base Plan O&M amount, along with any REP-related O&M that does not relate to a VMP category.

IV. REP/VMP Adjustment Provision

a. During each calendar year, the Company shall track all O&M expenses incurred in implementing the components of the REP and VMP Plan. By March 15 of each year, the Company will make a reconciliation filing with the Commission. **To the extent that the Company, in implementing the Plan, incurs expenses in an amount less than the Base Plan O&M amount,** the difference between the Base Plan O&M amount and the amount of expenses actually incurred shall be refunded to customers or credited to customers for future REP/VMP program O&M expenditures, as the Commission determines is appropriate, with interest accruing at the customer deposit rate.

b. To the extent the Plan submitted for review prior to the calendar year includes a budget higher than the Base Plan O&M Budget **and the Company incurs expenses over the Base Plan O&M amount (consistent with the alternative budget reviewed by Staff), the incremental expense above the Base Plan O&M amount shall be included in rates,** subject to Commission approval, through a uniform adjustment factor on a per kilowatt-hour basis and recovered over a twelve month period, commencing for usage on and after May 1, with interest accruing at the customer deposit rate. Any over or under-recoveries at the end of the twelve month period shall be taken into account in the next REP/VMP Adjustment Provision reconciliation period.

*See Bates 034 (emphasis added).* Note that the reconciliation is between the amount spent and the amount in base rates. The reconciliation is not to any fixed VMP metric such as miles trimmed. And the scope of VMP work to be performed under the DE 13-063 Settlement does not have any required metrics. Rather the scope is governed by a “plan” with “targeted” spending which the Company “will take all reasonable steps it deems appropriate to carry out and implement.” Prudent overspend shall be recovered (and not borne by shareholders) and underspend shall be returned to customers or carried into the next year (and not kept by the Company).

For an example of how the parties and the Commission administered the VMP following the 2013 rate case, *see* Order No. 25,785 (Apr. 30, 2015) issued in Docket No. DE 15-087. In that docket the Commission approved the VMP spending that was \$35,166, over the \$1,360,00 in base rates, finding “the activities performed by the Company during 2013 were consistent with the goals and parameters of the reliability enhancement and vegetation management programs.” Order 25,785 at 8. There was no discussion of whether Liberty met any pre-determined VMP metric.

### 3. Docket No. DE 16-383.

The Settlement Agreement resolving the Company’s next rate case, Docket No. DE 16-383, continued the VMP with no changes to the reconciling structure described above, although it did change the length of the tree trimming cycle from five years to four years, added reporting obligations, and increased the amount Liberty could recover for VMP work. The entirety of the VMP language from the DE 16-383 Settlement follows:

**The Company shall transition to a four-year cycle for tree trimming and vegetation management beginning in 2017.** Each year, as part of its REP/VMP reconciliation filing, the Company shall report the following reliability metrics by circuit all with existing exclusions: Customer Interruptions (CI), Customer Minutes Interrupted (CMI), System Average Interruption Frequency Index (SAIFI), System Average Interruption Duration Index (SAIDI), Customer Average Interruption Duration Index (CAIDI), and Customers Interrupted per Interruption (CII). The Company shall indicate by circuit whether each circuit is still on a five-year trim cycle or whether it has been transitioned to a four-year trim cycle.

The revenue requirement increase agreed to in this Settlement adopts Liberty’s proposal to increase the amount of VMP O&M spending included in base rates to \$1,500,000 for 2017 and continuing until changed in a subsequent base rate case. The Settling Parties also agree to increase the target capital investment to

\$1,500,000 annually, subject to review with Staff in the year prior to commencement of such investment.

DE 16-383 Settlement, at Bates 037.<sup>3</sup>

The DE 16-383 Settlement has two features that are important here: (1) it did not change the reconciling structure of the VMP as approved in the DE 13-063 Settlement; and (2) the first sentence highlighted above is the same as the allegedly mandatory language from the DE 19-064 Settlement that OCA cites in this docket, i.e., that the Company “shall” transition to a four-year cycle, but this language did not change the reconciliation process.

First, in Docket No. DE 18-034, the first VMP filing after the 2017 approval of the DE 16-383 Settlement, the Company’s filing included a Calendar Year 2017 Annual Report (which are filed in every VMP docket), testimony, and schedules. The 2017 Annual Report opened with a citation to the DE 13-063 Settlement: “These results for the CY2017 Plan are submitted consistent with the requirements in Attachment F to the Settlement Agreement in Docket No. DE 13-063.” The supporting testimony then described the VMP work performed also noted the governance of the DE 13-063 settlement:

Since 2014, the Company has continued its Vegetation Management and Reliability Enhancement Programs at agreed upon spending levels subject to annual Commission approval. See Order No. 25,638 (March 17, 2014) (approving the Settlement Agreement in Docket No. DE 13-063, the “Settlement Agreement”), as amended by Order No. 26,005 (April 12, 2017) (approving the Settlement Agreement in Docket No. DE 16-383).

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<sup>3</sup> The DE 16-383 Settlement also called for the Company to use the accrual accounting method for the VMP and other filings, Bates 039.



Most importantly, the Commission acknowledged that its review of Liberty's proposed reconciliation was based on the orders approving the DE 13-063 Settlement and the DE 16-383 Settlement:

On March 16, 2018, Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty Utilities (Liberty or the Company) filed the results of its reliability enhancement program (REP) and vegetation management plan (VMP) for calendar year 2017. Liberty filed the results pursuant to a settlement agreement (Settlement Agreement) approved in Order No. 25,638 (March 17, 2014) and Order No. 26,005 (April 12, 2017). The Company also filed supporting testimony and related exhibits.

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We find that Liberty's annual REP and VMP report and its REP and VMP activities in Calendar Year 2017 are consistent with the program goals and parameters authorized by the Commission. Regarding cost recovery, we approve Liberty's proposal to change the adjustment factor to 0.059 cents per kWh, an increase of 0.063 cents per kWh from the current rate credit of 0.004 cents per kWh.

Order 26,138 at 4-5 (May 31, 2018).

The Commission orders subsequently approving the VMP portions of the 2019 and 2020 reconciliations similarly stated that those filings were "consistent with the program goals and parameters authorized by the Commission," and similarly cited the prior rate case orders. *See* Order No. 26,244 at 6 (April 30, 2019) (CY 2018 VMP filing); and Order No. 26,352 at 7 (April 30, 2020) (CY2019 VMP filing).

Thus, the DE 16-383 Settlement did not change the fundamental operation of the VMP established in the DE 13-063 Settlement as a mechanism that reconciles the amount prudently spent to the amount in rates, and not as a review of whether the Company completed specific tasks with the allocated funding.

Second, even though the DE 16-383 Settlement stated, “Liberty shall transition to a four-year cycle,” there is no suggestion in the subsequent dockets that the Company bore the risk of meeting that new cycle with the allocated dollars. As in this docket, the Company fell short of the miles contained in the 2019 Plan and budget by 6 miles and again trimmed 22 miles fewer than budgeted in 2020. Yet none of the discussion at hearing nor any language in the orders in those dockets contemplated the Company not recovering costs for failure to fully meet the mileage targets of a four-year cycle. Regarding the CY2020 Report and the 22-mile shortfall, Staff supported Liberty’s VMP reconciliation request (the OCA chose not to participate in that docket), which the Commission approved, stating: “We find that Liberty’s annual REP and VMP report and its REP/VMP activities during 2020 are consistent with the program goals and parameters authorized by the Commission.” Order No. 26,478 at 6 (April 30, 2021).

Similarly, there was no discussion of the Company falling 6 miles short of its four-year trimming target in the review of the Company’s CY2019 VMP reconciliation. Staff supported the Company’s reconciliation request, the OCA stated that “I don’t have any basis for recommending to the Commission that it do anything other than approve the reconciliation that the Company has tendered here for approval,” (Transcript of April 27, 2020, Hearing in Docket No. DE 20-036, at 109), and the Commission approved the VMP reconciliation without comment. Order No. 26,352 (Apr. 30, 2020).

Thus, heading into the Company’s 2019 rate case, the DE 13-063 Settlement continued to govern the VMP; the DE 16-383 “shall transition to a four-year cycle” language had not converted the VMP into a mechanism that measured miles trimmed, as the OCA argues in this docket.

#### 4. Docket No. DE 19-064.

The background described above provides important context to the language in the DE 19-064 Settlement that is the basis of the OCA's petition. The VMP had been operating for approximately 15 years under the principles that the Company was to perform as much VMP work as it could prudently complete consistent with the targets contained in each year's VMP plan with the funding available, whether that funding was the amount in base rates or was an amount that prudently exceeded the amount in base rates, subject to Commission review. At no time had the VMP operated under the principal that the Company must complete a certain amount of VMP work with a fixed budget. The controlling standards, arising from the DE 13-063 Settlement, have been whether "the Company [took] all reasonable steps it deem[ed] appropriate to carry out and implement the Plan, taking into account the comments of Staff," and whether the VMP work performed was "consistent with the program goals and parameters authorized by the Commission."

When reading *all* the language in the DE 19-064 Settlement and its attachments, the language clearly confirms that the structure of the VMP described above did not change:

Under the VMP, the Company shall maintain a four-year cycle for tree trimming and vegetation management and shall continue with the filings and reporting requirements currently in place. The base rate increase agreed to in this Agreement includes an increase in the VMP spending to \$2,200,000 for 2020, which shall continue until changed in a future base rate case. The Company shall not recover any VMP expenses that exceed 10% of that amount, or in excess of \$2,420,000, through the annual reconciliation filing, or otherwise. The VMP spending shall be reconciled each year, with any under spending carried into the next program year or returned to customers, as determined by the Commission.

DE 19-064 Settlement, Bates 042. OCA's attempts to contort this language into a performance guarantee should be rejected.

The first sentence merely repeats the first sentence of the VMP language in the DE 16-383 Settlement (“The Company shall transition to a four-year cycle for tree trimming and vegetation management beginning in 2017”) and continues the reporting requirements of the DE 16-383 Settlement. As discussed above, the “shall maintain a four-year cycle” language in the DE 16-383 Settlement did not change the VMP from a program intended to prudently spend the allocated funds into a mandate that the Company meet the targeted trim schedule with only the allocated funding available.

The second and third sentences merely changed the amount of VMP funding in base rates and put a cap on the amount Liberty could recover in excess of that base amount. The last sentence in the DE 19-064 Settlement confirmed that the existing elements of the VMP program were not to change – actual costs were to be reconciled so that the VMP would continue to operate as a pass-through mechanism for prudent VMP expenses.

Finally, and notably, the Company’s CY2020 Plan was included as Attachment 7 to the DE 19-064 Settlement. Bates 043. Although the document was apparently attached to incorporate the budget for the 2020 REP investments contained that document, its inclusion establishes important knowledge held by the DE 19-064 settling parties, including the OCA.

The CY2020 Plan included two budgets for CY2020. The first was for \$3,444,000. This budget presented the funding that would be necessary to meet a four-year trimming cycle. It assumed contribution from FairPoint (now Consolidated) of \$838,880, which would have left Liberty’s portion to be \$2,605,120. Bates 054. Liberty acknowledged this amount was higher than the \$2 million that Liberty had proposed for the VMP in the DE 19-064 rate case filed several months earlier (and higher than the \$2.4 million ultimately approved). Liberty provided the

reasons for the increase, which were outside Liberty's control (e.g., the increased number of required tree removals to establish the required the 8-foot corridor required by Puc 307.12, traffic control or "police details" costs were rising dramatically, etc.). Bates 048-050.

The second, or "Alternate," budget presented in the CY 2020 Plan was for \$2,775,000, which assumed a \$673,591 FairPoint contribution, and thus \$2,101,899 for Liberty customers. Bates 055. The CY2020 Plan explicitly stated that this alternate budget "**does not align with our recent four-year cycle**, or 223 miles to be trimmed. Rather, it returns us back to a five-year cycle, or 175 miles of planned cycle trimming." Bates 050 (emphasis added).

Also attached to the DE 19-064 Settlement, as part of the CY2020 Plan, was the language from DE 13-063 that established the VMP, Bates 60, removing any doubt that all parties and the Commission intended the VMP to proceed in the same fashion after approval of the DE 19-064 Settlement.

Thus, to be clear, the parties signed, and the Commission approved, the DE 19-064 Settlement with actual knowledge that (1) the VMP terms as contained in the DE 13-063 Settlement would continue to govern, and (2) the amount to be provided in rates (\$2.2 million plus 10%, or a maximum of \$2.42 million) was not enough to pay for the trimming required to stay on the four-year cycle. The only reasonable interpretation of the DE 19-064 Settlement that can follow is that it continued the structure of the VMP that was established in the DE 13-063 Settlement as a mechanism that reconciled actual prudent costs incurred to the amount then in rates, and *not* as a mechanism that reconciled to a predetermined quantity of VMP work, with the Company bearing the risk of any shortfall. That is, the DE 19-064 Settlement continued the target of a 4-mile trimming cycle, knowing – and accepting -- that the funding provided would certainly fall short of

what was required to meet that cycle. The DE 19-064 contains no language supporting the OCA's position that the four-year cycle was a mandatory metric.

The OCA ignores all of this history and present ad grounds its entire argument on reading *only* the first half of the first sentence of the DE 19-064 Settlement language in isolation. The OCA ignores that this sentence must be interpreted in the context of the VMP as established in the DE 13-063 Settlement and as administered ever since. The OCA's argument that a certain mileage target is the only factor governing a VMP reconciliation ignores past practice and precedent. Accepting the OCA's interpretation of the DE 19-064 Settlement would represent fundamental – and unintended -- change to the VMP.

**B. The Circumstances Do Not Support a Finding of Noncompliance with Puc 307.10.**

The Commission should also reject the OCA's request that Liberty should be penalized for not meeting the requirements of Puc 307.10, the relevant portions of which contain specific metrics for side clearance and for a five-year trim cycle: "utilities shall prune trees adjacent to all distribution circuits to the following minimum clearances on no more than a 5 year cycle [and] 8 feet to the side of the nearest conductor."

**1. N.H. Admin. Rule Puc 307.10.**

The Commission adopted Puc 307.10 in 2014. Relevant here, Puc 307.10(a) states "utilities shall prune trees adjacent to all distribution circuits to the following minimum clearances **on no**

**more than a 5 year cycle**: (1) 10 feet below the conductors; (2) **8 feet to the side of the nearest conductor**; and (3) 15 feet above the conductors, at time of pruning.” (Emphasis added.)

Granite State Electric Company, owned by Liberty since 2012, historically maintained a clearance of six feet “to the side of the nearest conductor.”<sup>4</sup> So when the Commission adopted this new 8-foot side clearance requirement, Liberty was instantly out of compliance. Coming into compliance involves removing thousands of large trees that are rooted in or have long grown into that that 2-foot swath of vegetation existing along hundreds of miles of Liberty’s lines, which removals have cost millions of dollars to date and will cost millions more to complete. The Commission has been aware of this issue through the annual VMP filings, where Liberty has described its efforts to chip away at this backlog at substantial cost. Through its approval of the many VMP dockets since 2014, the Commission has effectively granted a waiver of that 8-foot side clearance requirement to allow Liberty to make gradual and cost-effective progress toward the rule’s requirements.

As for the rule’s requirement that utilities maintain at least a five-year trim cycle, the OCA alleges Liberty violated this requirement beginning with 2021, which is the year of the ClearWay breach of contract and shortly after Liberty lost the funding from Consolidated.

## **2. ClearWay Industries.**

Calendar year 2021 was the first full year governed by the DE 19-064 Settlement, which was approved in June 2020. *See* Order No. 26,276 (June 30, 2020).

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<sup>4</sup> New Hampshire’s other electric utilities traditionally maintained a greater clearance.

Two unforeseen events outside Liberty's control substantially affected the VMP budget and substantially impacted Liberty's ability to perform the work necessary to meaningfully progress toward compliance with Puc 307.10 and to maintain a four (or five) year trimming cycle in 2021. The first was the failure of ClearWay to comply with its contractual obligation.

Liberty typically enters multi-year contracts with its tree contractors because longer term contracts result in better pricing, a more stable relationship with the vendor, and thus better overall performance. In 2020, Liberty selected ClearWay as its vendor to begin work under a new contract as of January 1, 2021, because the existing four-year contract was expiring at the end of 2020. ClearWay was the least cost bidder, had successfully worked for Liberty on a more limited basis in 2020, and Liberty conducted several interviews with ClearWay to confirm ClearWay's ability to perform.

Unfortunately, ClearWay was not able to perform the work. Shortly after March 12, 2021, ClearWay simply walked off the job because ClearWay said it could not meet its payroll obligations to its employees, having completed little work. Liberty was able to secure several contractors to step in and perform some of the work planned for 2021, but their prices were higher, and no contractor had the capacity to perform all the work contemplated by the ClearWay contract on such short notice. Liberty promptly filed suit against ClearWay.

The Company provided this information relating to the ClearWay matter to the Department, the OCA, and to the Commission in the context of prior VMP hearings. There is no evidence to suggest, nor any finding, that Liberty acted imprudently in selecting ClearWay, in managing ClearWay during the short time they worked on Liberty's system, nor in triaging the



situation after ClearWay's default. The net impacts of ClearWay's default were unforeseen and out of Liberty's control.

### **3. Consolidated Communications.**

Liberty and Consolidated jointly own the vast majority of utility poles in Liberty's service territories, a common practice in New Hampshire. The joint ownership contract that governs the relationship between Liberty and Consolidated was signed in 1980 by their predecessors Granite State Electric Company and New England Telephone and Telegraph Company. A copy of the 1980 agreement is attached at Bates 065. Article 3 of the 1980 contract provides for Intercompany Operation Procedures, or IOPs, which consist of additions to the 1980 agreement that cover detailed, specific topics. IOP-J governed "tree trimming and clearing," and is at Bates 076.

IOP-J dictates how the two companies were to share the tree trimming responsibilities and costs and provided the formula to be used in allocating those costs. Relevant here, IOP-J also states as follows:

This arrangement shall continue for five years unless, after 3 years, both parties agree to modify it. This agreement will automatically renew itself each year unless either party notified the other in writing at least 30 days prior to the end of such yearly period that it wishes to modify or terminate the agreement."

Consolidated exercised its right under the above language to terminate IOP-J in 2020. Unfortunately, the contract and IOP-J did not provide a remedy for the non-terminating company, likely because both companies were regulated at the time and thus it seemed inconceivable that one would simply walk away from the tree trimming responsibilities the costs for which it could recover as a regulated company.

This was a second unforeseen development, and one that occurred outside Liberty's control, that caused Liberty – and its customers -- to lose approximately \$500,000 per year that Consolidated had contributed toward the VMP, and as much as \$800,000 that Consolidated would have been required to contribute given the higher VMP budgets.

Liberty took aggressive and prudent steps to mitigate these unforeseen events. Those efforts included promptly obtaining replacement tree trimming crews to perform as much trimming and other vegetation work as possible, which occurred in a piecemeal fashion because no one contractor had the capacity in the middle of a work year to assume all the responsibilities of the ClearWay contract. Liberty was able to complete a substantial amount of tree work, although admittedly well below what had been planned and at a higher cost given the exigent circumstances. There has been no challenge to those remedial efforts by Liberty. Indeed, there is no evidence that would support such a finding; Liberty made the best of a bad situation.

The loss of the Consolidated contribution combined with the ClearWay breach, both unplanned and outside Liberty's control, substantially impacted Liberty's ability to perform the necessary VMP work as required by Puc 307.10. Given these circumstances, the Commission should deny the OCA's request to find Liberty in noncompliance with Puc 307.10.

### **C. Liberty Had Good Cause to Trim Fewer Miles than Planned.**

In the alternative, to the extent the Commission finds that the DE 19-064 Settlement did impose a specific requirement on Liberty to trim a certain number of miles, Liberty had good cause for failing to meet that requirement for the same reasons discussed above. Two unplanned events

impacted Liberty's ability to complete the trimming miles that would satisfy either the four-year cycle from the DE 19-064 Settlement (if the Commission so finds), or the five-year cycle of Puc 307.10.

The ClearWay breach deprived Liberty of the workforce to complete its VMP tasks and the loss of Consolidated contributions deprived Liberty of a substantial amount of its planned budget. Together – not enough workers and not enough money – combined to severely affect Liberty's ability to complete the trimming it intended for 2021 and beyond. As Liberty has advised in several VMP hearings, the tree trimming contractor workforce in New England has been stressed for years as qualified employees are drawn to other parts of the country for better pay. Given that shortage and the fact that the available contractors were committed to other utilities, Liberty was only able to bring on contractors with fewer crews at higher cost to replace the work ClearWay had promised to do. Thus, given the fewer workers, higher prices, and less money, Liberty simply could not complete all its planned work.

The Commission should thus find Liberty had good cause for any failure to meet the requirements of the DE 19-094 Settlement or Puc 307.10.

**D. Requiring Liberty to Perform Certain VMP Tasks Without Allowing the Company to Recover the Resulting Costs Would Amount to an Unconstitutional Taking.**

Granting the OCA's request to hold Liberty accountable to the trimming requirements of Puc 307.10 and the DE 19-064 Settlement when the Commission has not approved funding sufficient to satisfy those standards would amount to an unconstitutional taking.

“The Takings Clause of the Fifth Amendment, which applies to the states through the Fourteenth Amendment, prohibits the taking of private property for public use without just compensation.” *10 Franklin Memorial Hospital v. Harvey*, 575 F.3d 121, 125 (1<sup>st</sup> Cir. 2009) (citing *Lingle v. Chevron USA*, 544 U.S. 528, 536 (2005)). A “regulatory taking” at issue here occurs when “some significant restriction is placed upon an owner’s use of his property for which justice and fairness require that compensation be given.” *Id.* (citations and internal quotation marks omitted). Reviewing claims of regulatory are “characterized by essentially ad hoc, factual inquiries.” *Id.* (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), other citation omitted). New Hampshire has parallel prohibitions against government takings. *See Appeal of Public Serv. Co. of N.H.*, 122 N.H. 1062, 1070 (1982); *N.H. CONST.* pt. 1, art. 12.

The Court in *Penn Central* identified three factors that, when applied to the facts of a particular case, will help determine whether a taking has occurred: (1) the economic impact of the regulation, (2) the extent to which the regulation interferes with “distinct investment-backed expectations,” and (3) “the character of the government action.” *Penn Central*, 438 U.S. at 124.

Here, there is a clear “economic impact” of the rule and of the OCA’s interpretation of the DE 19-064 Settlement. As illustrated in the budgets the Company has presented in the various VMP filings and rate cases, which budgets have not been challenged, the funds available through the VMP have simply been insufficient to complete the work necessary to come into compliance with the rule and with the OCA’s mandatory interpretation of the DE 19-064 Settlement.<sup>5</sup> Granting

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<sup>5</sup> *See e.g.*, the CY 2020 VMP Plan, attached to the DE 19-064 Settlement, referenced above, which presented a budget of to perform the work required to remain on the four-year cycle that was significantly higher than the funds available for VMP.

the OCA's request would compel Liberty to perform that work without allowing for recovery of the additional costs to not only meet the 8-foot requirement, but also exceed the minimum five-year cycle requirement of Puc 307.10, is an obvious "economic impact."

As for the second *Penn Central* factor, forcing compliance without allowing recovery of costs, or perhaps economically penalizing non-compliance through fines, would affect "distinct investment-backed expectations." No utility would voluntarily incur substantial costs without the expectation of being able to recover those costs in rates. Granting the OCA petition would force Liberty to perform VMP work without being compensated in rates.

Finally, "the character of the government action" that would arise from an order granting the OCA's request to have shareholders bear the financial costs or penalties of Liberty's inability to comply with and exceed, in part, the Commission rule and alleged failure to comply with the DE 19-064 Settlement would be a direct and obvious taking. That is, by issuing such an order the Commission would essentially be saying the Company must perform the vegetation work but cannot recover the costs to do so. It is difficult to envision a simpler example of an unconstitutional taking of the Company's property, which the Commission has refrained from doing in the many annual VMP cases.

#### **E. Liberty's Conduct Did Not Cause Harm to Customers.**

Finally, Liberty's conduct caused no harm to customers. Liberty's inability to trim the miles planned resulted from three outside factors: (1) the ClearWay breach; (2) the loss of Consolidated contributions; and (3) an inadequate amount of funding in rates. Due to these factors, Liberty acknowledges that customers did not receive the benefit of the VMP activities that were

*planned*, but Customers did get the benefit of the VMP activities that were *performed* and delivered, and customers have only paid for the VMP activities that were completed.

**III. Conclusion.**

For the reasons discussed in its petition and above, Liberty respectfully asks the Commission to deny the relief sought in the OCA's petition.

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

By its Attorney,



Date: October 22, 2024

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Certificate of Service

I hereby certify that on October 22, 2024, I electronically forwarded a copy of this brief to the service list.



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Michael J. Sheehan