

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

NATIONAL GRID USA, et al

Docket No. DG 11-040

**JOINT PETITION FOR AUTHORITY TO TRANSFER OWNERSHIP OF GRANITE
STATE ELECTRIC AND ENERGYNORTH NATURAL GAS, INC. TO LIBERTY
ENERGY UTILITIES CORP.**

Liberty's Motion for Rehearing of September 26, 2017, Secretarial Letter

Liberty Utilities (EnergyNorth Natural Gas) Corp. ("EnergyNorth") and Liberty Utilities (Granite State Electric) Corp. ("Granite State"), both d/b/a Liberty Utilities (together "Liberty" or "the Companies"), through counsel, respectfully move the Commission pursuant to RSA 541:3 to reconsider portions of its order issued by a September 26, 2017, Secretarial Letter (the "Secretarial Letter") that "directs Liberty to continue to provide the customer service reports that have been provided in the past and to work with Staff to develop a mutually agreeable successor set of customer service metrics and reporting framework by December 1, 2017."

Liberty seeks reconsideration because the Secretarial Letter:

- (1) Violates RSA 365:28 and due process by amending settlement agreements and the Commission orders approving them in Docket Nos. DG 11-040 and DE 16-383 without notice and a hearing;
- (2) Commits errors of law by incorrectly interpreting Order No. 25,370 (May 30, 2012); and
- (3) Imposes arbitrary and capricious reporting requirements on the Companies that create an administrative burden with no demonstrated need.

In support of this motion, Liberty states as follows:

Background.

1. By letter dated May 5, 2017, attached as Exhibit A, the Companies notified the Commission that they intended to cease filing the Companies' reports on Customer Service Metrics,¹ EnergyNorth's Call Answering Reports, and EnergyNorth's customer satisfaction survey results because these filing requirements expired under the terms of the April 10, 2012, Settlement Agreement in Docket No. DG 11-040 (the "11-040 Settlement"), as approved by Order No. 25,370 (May 30, 2012) (the "11-040 Order").

2. The Commission Staff issued a July 21, 2017, Recommendation, attached as Exhibit B, that disagreed with Liberty's positions and recommended that the Commission "direct Liberty to continue to report EnergyNorth's performance relative to the call answering and the customer service metrics established in DG 11-040 and to continue to provide the Commission with the results of the annual customer satisfaction survey for EnergyNorth."

3. The Companies replied by letter dated July 31, 2017, attached as Exhibit C. Liberty accepted Staff's recommendation that it continue filing EnergyNorth's call answering reports (Granite State's call answering reports were revised and reinstated via settlement in Docket No. 16-383 and are not at issue), and also agreed to continue filing the results of EnergyNorth's annual customer satisfaction survey. However, the Companies persisted in their argument that the 11-040 Settlement provided a clear end-date for their obligation to file the Customer Service Metrics, which end date occurred on September 30, 2015.

¹ "Customer Service Metrics" consist of reports on bill accuracy, estimated bill percentages, and percent of bills with exceptions that were established in DG 11-040. These reports will be collectively referred to as the "Customer Service Metrics."

4. The Secretarial Letter, attached as Exhibit D, adopted Staff's recommendation and directed Liberty, first, to "continue to provide the customer service reports that have been provided in the past." The Companies interpret the phrase "that have been provided in the past" to refer to the Customer Service Metrics as defined in footnote 1. To the extent this phrase includes other reports that have expired, Liberty reserves the right to challenge those unspecified reports as part of this motion.

5. Second, the Secretarial Letter added a new requirement that Liberty must "develop a mutually agreeable successor set of customer service metrics and reporting framework by December 1, 2017."

Liberty's Motion.

6. Liberty seeks reconsideration because the requirement to file Customer Service Metrics expired under the plain terms of the 11-040 Settlement, and by indefinitely extending that obligation the Secretarial Letter violates RSA 365:28, due process, and is otherwise unlawful.

7. Liberty also seeks reconsideration of the Secretarial Letter's requirement to "develop ... a successor set of customer service metrics and reporting framework." This requirement for "successor" metrics was not the subject of any prior notice or hearing at which Liberty had the opportunity to be heard, appears in no prior settlement agreement or order, ignores that the parties negotiated reporting requirements at arms' length as embodied in the existing settlement agreements, and is not supported by any demonstrated need. Moreover, the 16-383 Settlement, approved only six months ago, already includes successor metrics for Granite State, which were negotiated with Staff and the OCA during that docket.

Legal Standard.

8. RSA 541:3, titled “Motion for Rehearing,” allows parties to seek reconsideration of an administrative order. *See Public Serv. Co. of N.H.*, Order No. 25,847 (Dec. 3, 2015). The Commission will grant reconsideration for “good reason,” that is, if the moving party shows that the order is unlawful, unreasonable, or the Commission “overlooked or mistakenly conceived” matters when issuing the challenged decision. *Dumais v. State*, 118 N.H. 309, 311 (1978).

9. Here, the Commission “overlooked or mistakenly conceived” the terms of the 11-040 Settlement, revived reporting requirements for previously expired Customer Service Metrics, and directed unspecified “successor” metrics, all in violation of law and of due process, and which directive is also arbitrary and unreasonable.

Discussion.

10. The reports at issue in this motion are the Customer Service Metrics, the call answering reports (only if the Secretarial Letter’s vague reference to “reports that have been provided in the past” was intended to revive the older version of these reports), and the “successor” metrics first mentioned in the Secretarial Letter. To help keep the various metrics and their revisions clear, below is a table that describes their origin and development.

Source of Report	DG 06-107 National Grid - KeySpan merger	DG 11-040 Liberty acquisition of GSE and EN	DE 16-383 GSE rate case	Liberty letters 5/5/17, 7/31/17	Secretarial Letter 9/26/17	In dispute?
Reports (1) – (4)	Monthly call answering reports (1), and 12-month call answering reports (2). For GSE and EN	Continued (1), and continued (2) as a rolling 12-month report. For GSE and EN	For GSE: restated (1); established YTD report (3) in place of rolling 12-month report in (2); and new bills held more than 30 days report (4).	GSE acknowledged (1), (3), and (4). EN agreed to provide (1), (3), and (4).	Not addressed specifically, but “directs Liberty to continue to provide the customer service reports that have been provided in the past.”	Continuation of (1), (3), and (4) not disputed. Disputed if Secretarial Letter requires rolling 12-month report (2).
Report (5)		Customer Service Metrics (5) added for both GSE and EN.		Liberty claims (5) expired under terms of 11-040 for both GSE and EN.	Re-imposed (5) for both GSE and EN.	Disputed.
Report (6)					Imposed (6) “successor set of customer service metrics.”	Disputed.

Customer Service Metrics.

11. It is important to recall that the Settling Parties’ reason for requesting the Customer Service Metrics in the 11-040 Settlement -- and the Commission’s intent in approving them in the 11-040 Order -- was to help ensure the orderly transition from National Grid to Liberty. The Settling Parties explicitly did *not* intend to impose an indefinite reporting requirement on the Companies.

12. The following quotes are from the 11-040 Order, which approved the 11-040 Settlement and make this intent clear. The first quote is from the section titled “Summary of Settlement Agreement.”

Pool C will consist of \$10,000,000 to be held in escrow as a means for Staff to administer certain performance metrics set forth in Attachments N (Customer Service) and O (Gas and Electric Safety) to the Settlement. Those metrics are intended to ensure that specified performance levels are maintained by the utilities during the period when National Grid is providing transition services, and that the continued provision of those services at the same performance levels by Liberty

Energy for a one-year period following cut-over from National Grid is not rendered defective as a result of any system, database, data, process and/or procedure error that is directly attributable to National Grid.

Order at 16-17 (emphasis added). The next quote is from the section of the 11-040 Order containing Staff's position regarding the settlement.

Staff stated that a number of customer service-related metrics are established through the terms of the settlement to help identify potential problems in the areas of billing accuracy, percentage of bills that are estimated, billing exceptions, call center responsiveness, and customer call handling during major storm events. The metrics are intended to ensure that customer service will not deteriorate during the transition period.

Order at 24 (emphasis added).

13. At the hearing to approve the 11-040 Settlement, Staff repeated this intent *not* to make the Customer Service Metrics indefinite, but to limit them to Day N² plus 365.

Liberty will continue to meet the metrics established by Grid -- established for Grid in the period Day N plus 365. And, those metrics are designed to help identify potential problems before they become very big problems. They focus on areas such as billing, with metrics regarding the billing accuracy, percentage of bills that are estimated, bills with exceptions. They also focus on call center responsiveness, with the carryover of the commitments that National Grid had from 06-107 for certain service levels in their call center. Liberty continues those commitments. And, that commitment will extend beyond global Day N plus 365, that will be a continuing obligation of Liberty. Whereas these others are only through the global Day N plus 365 day period.

Transcript of Hearing Day 2, April 19, 2012, at 74-75 (emphasis added).

14. There is nothing in the 11-040 Settlement, in the 2012 testimony offered in support of the 11-040 Settlement, or in the 11-040 Order that contradicts the language highlighted above.³

² Per the 11-040 Settlement, "Day N" is defined as "[t]he date on which all Transition Services have transferred from National Grid to Liberty Energy." 11-040 Settlement at 32. Day N was subsequently determined to be September 30, 2014. Therefore, Day N plus 365 occurred on September 30, 2015.

³ See Bates 547-554, "Attachment N," of the 11-040 Settlement, included as Attachment E to this Motion, for details on the periods for the Customer Service Metrics to be in place.

15. The Recommendation, however, directly contradicts this clear intent. Rather than having the Customer Service Metrics last “for a one-year period” as stated in the 11-040 Order, or “only through the global Day N plus 365” as Staff testified in 2012, the Recommendation says that the “monthly reporting of performance for the customer service metrics agreed to in DG 11-040 also have no end date ...” (emphasis added).

16. The Recommendation does not cite supporting language from the 11-040 Settlement, from the 2012 testimony, or from the 11-040 Order. In the absence of such support, the plain language of the 11-040 Settlement and Staff’s contemporaneous testimony quoted above must control.

17. Thus, the Recommendation is in conflict with the 11-040 Order in that it recommends that the Commission should direct Liberty to provide reports pursuant to a requirement that expired under the terms of the 11-040 Order.

18. The Secretarial Letter adopted Staff’s recommendation. Therefore, the Secretarial Letter is similarly in error for directing Liberty to file reports that have expired under the terms of the 11-040 Settlement. The Secretarial Letter thus misapprehended the 11-040 Settlement and the 11-040 Order, which is grounds for reconsideration.

19. The Secretarial Letter also violates state law and due process. RSA 365:28 provides: “At any time after the making and entry thereof, the commission may, after notice and hearing, alter, amend, suspend, annul, set aside, or otherwise modify any order made by it.” And “[d]ue process requires a ‘meaningful opportunity to be heard,’ i.e., a hearing, ‘[w]here issues of fact are presented for resolution by an administrative agency.’” *Birchview by Saco, Inc.*, Order No. 23,649 (Mar. 7, 2001) (citation omitted).

20. Since the Secretarial letter modified the 11-040 Order without notice to Liberty and an opportunity for the Companies to be heard, it constitutes a violation of RSA 365:28 and due process – both grounds to grant this motion. *See Northern Utilities*, Order No. 24,901 (Sept. 25, 2008) (“We agree with Northern that it has not received a full and fair opportunity to cross examine Staff so as to ascertain fully, for itself and for the record, the full basis for Staff’s position on the appropriate transition. Accordingly, it is our determination that good cause has been shown for rehearing on this question.”); *Appeal of Office of Consumer Advocate*, 134 N.H. 651, 657-558 (1991) (“The PUC’s statutory power to reconsider and modify an existing order is limited only in that the modification must satisfy the requirements of due process and be legally correct”).

Successor Metrics.

21. Finally, the Secretarial Letter ordered Liberty “to work with Staff to develop a mutually agreeable successor set of customer service metrics and reporting framework by December 1, 2017.” This order is unlawful for two reasons.

22. First, and related to the above, this directive effectively orders Liberty to renegotiate the 11-040 Settlement, the settlement in DE 16-383, and requires a modification to the orders approving those settlement agreements. The parties vigorously negotiated the nature and specifics of these reporting requirements in the context of pending dockets, at a time when all were on notice that the Commission could order relief if the parties were unable to reach agreement. The Commission approved those agreements. Now, with no relevant docket pending, the Commission is without authority to unilaterally modify settlement agreements and orders without affording the affected parties notice and an opportunity to be heard. The directive to develop successor metrics thus violates RSA 365:28 and Liberty’s due process rights.

23. Second, there is no factual basis to justify an order imposing successor metrics. Staff's Recommendation should cite facts in support of a need for new metrics, and the Commission must have a basis to order any new reporting requirements. Otherwise, the Commission's directive would be unlawful as an arbitrary and capricious exercise of its authority. *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (Citation omitted).

24. The only factual basis for the "successor" metrics ordered in the Secretarial Letter is that "the Companies will be implementing a new customer information system in the near future." The Secretarial Letter uses this "fact" to "require these (or similar) reports as a gauge of Liberty's customer service performance." Since the Commission did not provide Liberty notice and an opportunity to be heard on this issue, the Commission does not know that implementation of a new customer information system has been pushed off by several years, undermining the basis for the successor reports. Also, the Companies understand that Unitil recently converted to a new CIS and, to Liberty's knowledge, the Commission did not require Unitil to file reports to "gauge [its] customer service performance." This combination of insufficient facts and possibly disparate treatment support a finding of arbitrary and capricious regulation. In addition, as stated above, the Customer Service Metrics were initially implemented to monitor a transition in ownership of the Companies, a situation much different than only the future implementation of a new customer information system.

25. Finally, as acknowledged in the Secretarial Letter, the Companies are seeking to reduce administrative burden. The arbitrary reinstatement of previously expired reporting requirements increases the Companies' administrative burden while providing the Commission and Staff with additional reports that have no current value.

WHEREFORE, Liberty respectfully requests that the Commission:

- A. Grant this motion and vacate the directive contained in the Secretarial Letter for Liberty to file the Customer Service Metrics and to develop "successor" metrics; and
- B. Grant such other relief as is just and equitable.

Respectfully submitted,
Liberty Utilities (EnergyNorth Natural Gas) Corp., and
Liberty Utilities (Granite State Electric) Corp., both d/b/a
Liberty Utilities

By their Attorney,



Date: October 26, 2017

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Certificate of Service

I hereby certify that on October 26, 2017, a copy of this Motion has been forwarded to the service list in this docket.



Michael J. Sheehan