STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DG 06-107

and

Docket No. DE 21-073

LIBERTY UTILIITES (GRANITE STATE ELECTRIC) CORP d/b/a LIBERTY

2019 and 2020 Annual Storm Fund Reports

Department of Energy's Brief in Lieu of Closing Arguments and Response to Liberty's August 5, 2022 Filing

NOW COMES the Department of Energy (DOE) and files this brief in lieu of closing argument regarding the meaning of "Major Storm," as defined in the parties' Settlement Agreement (May 15, 2007) in Docket No. 06-107, and in support of DOE's Reports and Recommendations recommending that: a) the Commission disallow $340,882 in storm costs related to an August 5, 2020 storm event because the event did not meet the "major storm" criteria and did not meet the pre-staging criteria outlined in Order No. 24,777 (July 12, 2007) (Dkt. No. 06-107) (major storm) and Order No. 25,638 (March 17, 2014) (pre-staging criteria); and b) disallow $706,838 related to storm events on January 9, 2019, October 17, 2019, and October 31, 2019, because the events did not meet the "major storm" criteria outlined in Order No. 24,777. See Exs. 22 and 12, respectively.

DOE also asks the Commission to memorialize two of the parties' agreements reached during the hearing, subject to further Commission review in other dockets. These agreements render moot other issues in pending DOE Report and Recommendations on the 2019 and 2020 Storm Reports at the present time.[1]

[1] Specifically, the DOE asks the Commission to memorialize Liberty's agreement to refund an approximate $1.8 million over-collection to ratepayers from the major storm fund through the tariff and Storm Recovery Adjustment Factor (SRAF) in a future rate adjustment proceeding, including an opportunity for DOE input on the period of time over which the return of funds will occur. See Tarif No. 21, Original page 26 (SRAF); July 21, 2022 Hearing Transcript at 222-27, 247 and 275-78 (Liberty agrees to return over-collection); see Exhibit 22 (as of

In support of disallowance of recovery from the major storm funds for storm events identified above, DOE notes that Liberty Utilities (Granite State Electric) Corp d/b/a Liberty (Liberty or the Company) bears the burden of proof. *See* Gerwatowski and Laflamme Testimony at 16-17 (May 15, 2007) (Dkt. 06-107) (filed with the Settlement Agreement at issue here) (Company has the burden to show storm funding is inadequate); N.H. Code Admin Rules Puc 203.25 (party seeking relief shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence).

In summary, the DOE argues:

- Pursuant to standard statutory and contractual rules of construction, the plain meaning of "concurrent troubles" is troubles that "occur at the same time" and the plain meaning of "[qualifying] troubles" is "troubles that occur on primary and secondary lines [exclusive of service lines];"

- The plain meaning of "[qualifying] troubles" and "concurrent troubles" referenced above is consistent with the industry use of those terms;

- Liberty's "reliance" is misplaced and cannot serve to bar disallowance of expenses from the major storm fund, when neither Audit Staff nor the Commission ever endorsed or expressly accepted Liberty's interpretation of the relevant Settlement Agreement language, and when Liberty never raised the issue with PUC Staff or otherwise provided Staff with a written interpretation.

- Finally, DOE requests partial and modified approval of its Reports and Recommendations regarding Liberty's 2019 and 2020 Storm Reports.

More specifically, DOE states as follows.

1. DOE *does not agree* with Liberty's assertion that "the relevant facts are not in dispute." *See* Liberty August 5, 2022 filing at 1. By way of example, Liberty has not addressed the plain meaning of "[qualifying] troubles" or "concurrent", and PUC Staff never endorsed or expressly accepted Liberty's

December 31, 2020, per attached Audit report the over collection was $1,861,473). The refund is expected to be addressed promptly, probably in the next rate adjustment proceeding. The DOE also asks the Commission to memorialize that DOE has withdrawn, without prejudice, the audit issue regarding Liberty's capitalization of fleet depreciation expenses, including but not limited to fleet expenses incurred during pre-staging and major storms, and to further memorialize that DOE intends to address those issues in a future rate case. See Exhibit 12, 22, July 21, 2022 Hearing Transcript (Tr.) at 186, 235, 239.

interpretation of the relevant Settlement Agreement language. Indeed, until the dispute at issue, Liberty never articulated its interpretation or even discussed the issue with PUC Staff (now DOE Staff).

I. The plain meaning of qualifying major storms means "troubles" are "concurrent" with each other and that "[qualifying] troubles" are troubles that occur on primary and secondary lines, but not on service lines.

2. The purpose of Liberty's major storm fund is to mitigate the potential economic impacts of major storms affecting customers and service territories. *See* Settlement Agreement in Dkt. No. 06-017, Bates 047. As stated in the direct testimony of Ronald T. Gerwatowski and Michael D. Laflamme, filed May 15, 2007 in support of the Settlement Agreement at issue:

> The Storm Contingency Fund will operate similar to another storm fund approved by the Commission for Public Service Company of New Hampshire first approved in Docket DE 99-099. Granite State will credit the fund in the amount of $10,000 per month or $120,000 annually. Total [operations and maintenance (O&M)] costs of qualifying "major" storms will be charged to the fund. As indicated in Exhibit GSE-7 of the Granite State Plan, the NHPUC definition of "major" storms will be used to qualify storms. For Granite State this is defined as severe weather event or events causing 30 concurrent troubles and 15% of customers interrupted, or 45 concurrent troubles. Troubles are defined as interruption events occurring on either primary or secondary lines. The fund balance, whether positive or negative, will accrue interest at a rate equal to the Company's customer deposit rate. Granite State will also be required to file a Storm Fund Report with the Commission by April 1st of the subsequent calendar year detailing the credits to the fund along with details of any qualifying storm costs that were charged to the fund during the preceding calendar year. . . . The Company has the burden of showing the inadequacy of the funding level.

Gerwatowski and Laflamme Testimony at 16-17 (the referenced "Granite State Rate Plan" is a subset of material included in the Settlement Agreement and included in a series of references as "GSE" Exhibits). It should be noted that, by agreement, the Company must continue to cover costs of other service interruptions, including standard O&M costs of non-major storms, through its distribution rates.

3. The definition of a "[qualifying] major storm" is found in the Settlement Agreement. The same definition, including a requirement that the annual storm report include the number and length (i.e., the duration) of "outages" was approved by the Commission with the rest of the Settlement Agreement in

Order No. 24,777 at 14-15 (July 12, 2007). The Settlement Agreement states in relevant part:

> *Effective with the implementation of the Rate Plan, a storm contingency fund ("Storm Fund") shall be established to pay for all of the operation and maintenance costs incurred by the Company as a result of major storms. . . .*
>
> ***Definition of Major Storm***
>
> *For the purposes of the Storm Fund, a "Major Storm" shall be defined as a severe weather event or events causing 30 concurrent troubles and 15% of customers interrupted, or 45 concurrent troubles (Troubles being defined as interruption events occurring on either primary or secondary lines). . . .*
>
> [and]
>
> ***Annual Storm Fund Report***
>
> *Commencing April 1, 2009, and annually thereafter, the Company will file with the Commission a Storm Fund Report detailing the Collections credited to the Storm Fund and details of any qualifying storm costs that were charged to the fund during the preceding calendar year. The report will also include a description of the storm along with a summary of the extent of the damage to the distribution system, including the number of outages and length of outages.*

Exhibit 10 Bates 005-06 (bold emphasis in original; underlining added). As is apparent in the upper right-hand corner of Exhibit 10, both the definition of "major storm" and the description of the "annual storm fund report" appear in Settlement Agreement Exhibit GSE-7 and were intended to inform each other. See Ex.10 Bates 005-06 (designated at GSE-7)

4. The correct interpretations of the word "concurrent" and of the phrase "on either primary or secondary lines" are at issue in this proceeding.

5. It is undisputed that rules governing statutory interpretation, including the interpretation of contracts and settlement agreements, are applicable here. "When determining the purpose of a settlement agreement, [Courts] focus on the intent of the contracting parties at the time of the agreement. To determine the parties' intent, [Courts] consider the situation of the parties at the time of their agreement and the object that was intended thereby, together with all the provisions of their agreement taken as a whole." Poland v. Twomey, 156 N.H. 412, 414 (2007) (emphasis added); Liberty August 5, 2022 filing at 6. In addition:

> When interpreting a written agreement, [the Court] give[s] the language used by the parties its reasonable meaning considering the circumstances and context in which the agreement was negotiated, when reading the document as a whole. Absent ambiguity, the parties' intent will be determined by the plain meaning of the language used. Only when the parties to a contract reasonably disagree as to its meaning will the contract's language be deemed ambiguous. (emphasis added)

Appeal of the State of New Hampshire (New Hampshire Transportation Appeals Board), 147 N.H. 426, 133 (2002); McDonough v. McDonough, 169 N.H. 537, 541 (2016); Foundation for Seacoast Health v. HCA Health Services of New Hampshire, Inc., 157 N.H. 487, 492 (2008). Importantly,

> Where the language . . . is clear on its fact, its meaning is not subject to modification. [The Court] will neither consider . . . what might have [been] said nor add words that [were not] include[d]."

Hutchins v. Peabody, 151 N.H. 82, 84 (2004) (interpreting a statute).

a. Definition of "Troubles"

6. Turning to the definition of "major storm," the Settlement Agreement states, *"For the purposes of the Storm Fund . . . Troubles [are] being defined as interruption events occurring on either primary or secondary lines."* Ex. 10 at Bates 005. Primary lines and secondary lines differ in voltage carried, position on the poles, and function served. *See* Ex. 22 at 2; Ex. 12 at 2; Tr. at 296 (Eckberg) 66-68 (Strabone). While secondary lines and service lines may have similar voltage, and while service lines are attached to secondary lines, secondary lines generally serve more than one customer, are located on the public roadway, and often require more resources for repair." See Ex. 22 at 2, n.2; Ex. 12 at 002; Tr. 194, 296-98 (Eckberg) 66-68 (Strabone) 90-91, 94. Thus, primary and secondary lines are distinct from service lines. Service lines, which run from the secondary line to a residence or home, and which Liberty internally designates as "secondary/service" generally serve only one customer. Tr. at 194, 296-98, 76-79, 65, 72, 74, 83; *see* Exhibit 15; Exhibit 13 Bates 10, 16, 259, 260.

7. The Department's interpretation of qualifying troubles makes sense on its face because the definition literally defines "troubles" with reference to primary and secondary lines. In contrast, if, as Liberty argues, "any interruption event" on primary, secondary, and on service

lines "counts" as a qualifying trouble with regard to meeting major storm criteria, the literal specification of "primary and secondary lines" would be unnecessary and that language's specificity would be rendered superfluous. The stated definition would effectively be "troubles [are] defined as interruption events on any line" or "troubles are defined as interruption events..." However, superfluous language is inconsistent with the rules of contract construction as explained above. Every word in a settlement agreement or other contract is assumed to mean something. In the definition at issue, "on primary and secondary lines" effectively means "on primary and secondary lines, to the exclusion of service lines." *See* Ex. 22 at 2; Ex. 12 at 2.

8. The Department's interpretation also makes sense substantively. As the definition itself makes clear, the threshold for qualification as a "major storm" is interchangeably "30... troubles and 15 % of all customers interrupted" or "45 . . . troubles." Implicitly, this requires that 15 troubles constitute a sufficient magnitude to somewhat offset the "15 percent of customers interrupted" requirement. For Liberty, the 15 percent threshold would be approximately 6,621 customers. Tr. at 202 (Eckberg calculating 15 percent threshold). If qualifying troubles were to include service lines, then if a storm caused 45 customers to be without power, the storm would qualify as a "major storm." Similarly, 15 individual customers without power would offset 15 percent of Liberty's customer base. Such implications strain credulity. Instead, qualifying troubles must be on primary and secondary lines, exclusive of service lines, because those outages on primary and secondary lines generally leave multiple customers without power. *See* Exhibit 13 Liberty's 2011 Storm Report, Bates 120 (showing customer outages for Event ID 7657670 "Main line- overhead" of 640 customers, Event ID 7659936 "transformer" 13 customers, Event ID 7658325 "Tree broken limb" 52 customers, Event ID 7659987 "Secondary/Service" 1 customer, and Event ID7659988 "Secondary/Service" 1 customer. Tr. 76 (every trouble receives an Event ID); 296-298, 90-91.

9. Because DOE's interpretation of qualifying troubles is consistent with the language actually used in the Settlement Agreement, and with the most reasonable intent of that language—creating a threshold for major storms as those with more than 45 individual customers impacted, yet leaving regular storms covered by distribution rates— DOE's elucidation of what "[qualifying] troubles" means is reasonable. For the same reasons, Liberty proposed definition is not reasonable.

b. "Troubles" and "Outages" are not always Interchangeable.

10. Liberty asserts that "the parties do not dispute that the terms 'trouble' and 'outage' are interchangeable. Liberty August 5, 2022 filing at 2 n 2. While broadly accurate,[2] whether "troubles" and "outages" are interchangeable depends on the context of the referenced usage. DOE agrees that Liberty must track and repair all "troubles" (i.e., "outages) for any and all storms, including "major storms," whether the "trouble" inconveniences one customer or 640 customers. *See, e.g.,* Exhibit 13, Bates 120 (Event ID 7659987 and Event ID 765760). However, [*f*]*or the purposes of the Storm Fund,* as stated in the definition of "major storm" at issue, "[qualifying] troubles" and "[qualifying] outages" are only interchangeable, and only "count" with regard to meeting major storm criteria, when the troubles or outages occur on primary or secondary lines, exclusive of service lines. As discussed below, the "troubles" or "outages" must also be concurrent to come within the "major storm" criteria.

c. Definition of "Concurrent"

11. Dictionary definitions provide guidance to Courts with regard to the common usage of words the meaning of which is in dispute. *See* K.L.N. Construction Company, Inc. v. Town of

[2] See Exhibit 18 The October 2011 Snowstorm— New Hampshire's Regulated Utilities' Preparation and Response, a report prepared by the New Hampshire Public Utilities Commission dated November 20, 2012, at Bates 011, stating generically for all NH electric utilities, "Troubles refers to specific damage to the system, such as downed wires, a broken pole, or blown fuse; a single 'trouble ticket' could result in an outage affecting one customer or multiple customers." See Exhibit 19 Bates 014 (similar Commission report on a November 26, 2014 storm, using same generic definition of "troubles" for all utilities and all storms).

Pelham, 167 N.H. 180, 185 (2014) ("When a term is not defined in a statute, [Courts] look to its common usage, using the dictionary for guidance"); Hudson v. Farm Family Mutual Insurance Company, 142 N.H. 144, 146 (1997) (In matters of contract interpretation "[d]ictionaries are of some value . . . to the extent they inform [the Court] of the common understanding of terms. When disputed terms are not defined . . . [the Court] reads them in context and interprets the language as would a reasonable person . . . based on a more than casual reading . . .").

12. According to the Merriam-Webster dictionary, "concurrent" means "operating or occurring at the same time" and "running parallel." *See* Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/concurrent. This definition has been accepted by both DOE and by Liberty. *See* Ex. 12, Bates 02, 02.n (DOE's Report and Recommendation on 2019 Storm Report); Ex. 22, Bates 02, 02 n.2 (DOE Report and Recommendation on 2020 Storm Report); Ex. 27 (Liberty's July 22, 2015 Response to DOE combined data request 1-1 Bates 004). Using the Merriam-Webster definition of "concurrent," the plain meaning of "concurrent troubles" is therefore "troubles that occur at the same time" or troubles "running parallel" or "troubles acting in conjunction." *See* Exs. 12, at 02, 22 at 02, 27 at 04.

13. Using the dictionary definition to define "concurrent troubles" as "troubles that occur at the same time" is consistent with the Settlement Agreement requirement that the annual storm report provide data on both the number and the length (i.e., the duration) of outages, and not merely the number of outages. *See* Ex. 10 at Bates 006 (description of Annual Storm Fund). That definition is also consistent with and reflected in the DOE graphs showing the outages that occurred at the same time for the storm events at issue. *See* Ex. 12 at Bates 025-27; Ex. 22, Attachment 2, pp 1-3. *See* Transcript 193-96 (Eckberg describe DOE process for graphing concurrent troubles) 197-202. In fact, Liberty explicitly accepts DOE's graphs as accurately portraying the number of troubles that occurred at the same time for each storm event at issue, based on the data provided by Liberty in it 2019 and 2020 Storm Reports. *See* Ex.

27, Bates 000039 (Liberty response to DOE DR 1-4). Accordingly, DOE's interpretation of "concurrent troubles" is the only reasonable interpretation of that phrase.

14. By contrast, Liberty does not offer a reasonable definition of "concurrent troubles." There is no part of the definition at issue that can reasonably be understood, on its face, to define "concurrent troubles" as "troubles occurring concurrently with the storm event," as Liberty asserts. *See* Liberty August 5, 2022 filing at 2 para 3. In the Settlement Agreement definition, the adjective "concurrent" precedes "troubles" and references the troubles themselves (on primary and secondary lines). The words Liberty wishes to somehow imply (i.e., "occurring concurrently with the storm event") are wholly absent from the Settlement Agreement language. *See* Ex. 10 at Bates 005, 006. Adding words in order to interpret existing language is inconsistent with the standard interpretation of written contracts, wherein words are neither omitted nor added. *See* Hutchins v. Peabody, 151 NH at 84. Further, the phrase "occurring concurrently with the storm" which Liberty recommends be accepted, seems to suggest that qualifying troubles might occur even before or after the storm event at issue, unless otherwise stated, an entirely illogical suggestion. Finally, if the phrase "concurrent troubles" was, as Liberty suggests, indeed intended to describe "troubles occurring concurrently with the storm," then the parties could have omitted the word "concurrent' from the definition entirely. Because Liberty's interpretation would make the word "concurrent" superfluous, it also violates the applicable rules of contract construction. *See* Hutchins v. Peabody, 151 NH at 84. For these reasons, Liberty's interpretation of "concurrent" is unreasonable and must be rejected.

II. The plain meaning of "concurrent" and of "qualifying troubles" as troubles occurring at the same time, and on primary and secondary lines, but not service lines, is consistent with the industry use of those terms

15. The plain meaning of "concurrent" and of "qualifying troubles," as elucidated by DOE above, is consistent with the industry's use of those terms.

16. DOE's understanding of "[qualifying] troubles" is consistent with the typical pole top drawing introduced by Liberty at hearing. *See* Ex. 15. Liberty's witness testified that the accurate schematic had remained unchanged for at least twenty years and was accepted industry wide. Tr. 66 120 -21#. The same witness testified that the drawing was used by Liberty's customer service representatives to assist customers in reporting and describing power outages or other problems. *See* Ex. 15; Tr. 120-21. The drawing therefore is a good indication of the ordinary meaning of "primary," "secondary," and service lines. That drawing clearly labels three categories of wire: primary, secondary, and service. The drawing shows those categories' separate functions and locations, with primary wire at the top of the pole, secondary wire below primary wire on the pole, and "service to house" branching off from secondary lines and running "to house." *See* Ex. 15; Tr. 194, 296-98. This is consistent with what DOE reasonably asserts is the plain meaning of "[qualifying] troubles." Based on Exhibit 15, as stated in the Settlement Agreement itself, [*f*]*or the purposes of the major storm fund*, and consistent with industry standards, "troubles" are defined "*as interruption events occurring on either primary or secondary lines*, [exclusive of service lines]."

17. The Federal Energy Regulatory Commission (FERC) system of accounts also provides a narrow definition of "services," which treats service lines and related equipment as distinct from other overhead and underground conductors. The FERC system of accounts designates Account 369 Services as:

> the cost of installed overhead and underground conductors leading from a point where wire leaves the last pole of the overhead system or the distribution box or the manhole, or the top of the pole of the distribution line to the point of connection with the customer's outlet or wiring.

See Title 18 Code of Federal Regulations (CFR) Chapter 1, Subchapter C, Part 101 (FERC Accounting System, Account 369); DOE Exhibit 30a (DOE Response to NHPUC RR 1); also compare DOE Exhibit 30a with Liberty Exhibit 29 (omits FERC). This industry understanding of service lines as separate and distinct from overhead conductors

and devices in, for example, FERC Account 369 wherein "service" conductors lead from "the last pole. . . or the top of the pole of the distribution line to the point of connection with the customer's outlet or wiring," is wholly consistent with the Settlement Agreement description of qualifying troubles as "*... occurring on either primary or secondary lines.*" *See* Ex. 30a (DOE Response to Commission RR 1). This FERC accounting distinction is inconsistent with Liberty's suggestion that qualifying troubles "on either primary or secondary lines" include troubles on service lines.

18. Further, for the purpose of determining whether troubles meet the "major storm" criteria, the definition of "[qualifying] troubles," as explicitly stated in the Settlement Agreement, is "for the purposes of the Storm Fund." Therefore, a generic industry definition of "troubles," provided in NHPUC Reports on industry responses to the October 2011 Snowstorm and the November 26, 2011 Thanksgiving Snowstorm, Ex. 18 at Bates 011 n. 10 and Ex/ 18, at Bates 011 n.10, providing statistics on specific storms, is not applicable, notwithstanding Liberty's assertion that "troubles" and "outages" mean the same thing. *Compare* Ex. 10 at Bates 005-06 *with* Ex. 18 at Bates 011 n.10 *and* Exhibit 19 Bates 10 n.10; *see also* Liberty August 5, 2022 filing at 2, para. 3 and n.2.

19. DOE's interpretation of "concurrent troubles" as meaning "troubles occurring at the same time" is also consistent with the industry use of "concurrent." A Commission report entitled "After-Action Report of November 26, 2014 Thanksgiving Snowstorm New Hampshire's Regulated Utilities Preparation and Response (September 29, 2015) describes the scope of that storm's impact with regard to "concurrent" outages, and outages overall:

> At its peak, the storm resulted in over 238,000 of New Hampshire's approximately 700,000 electric utility customers losing power concurrently, which for many customers in the state means losing water and heat, and well as the use of lighting and electric appliances. The loss of power affected a population of approximating [sic] 480,000 [equivalent to nearly 37% of the 1.3 million NH citizens]

Exhibit 19 at Bates 006 (emphasis added). Thus, in the electric industry, the distinction between "concurrent troubles" and "troubles during the storm event" is well-established. *See* Tr.22-23 (discussing Exhibit 19). It should be noted that, in order for the Commission to assemble the November 26, 2014 storm statistics, each utility would have had to provide data on "concurrent" outages and on "outages during the storm." *See also* Ex. 18 Commission Report on October 2011 Snowstorm at Bates 006 (reporting the number of customers without power at peak, a concurrent measure and referencing, as a separate figure, "overall loss of power").

20. In its "Closing Statement" Liberty asserts that its definition of "concurrent troubles" to mean "troubles concurrent with the storm event" and its definition of "troubles on primary and secondary lines" to mean "troubles on all lines" is consistent with the industry usage of the terms "concurrent" and "troubles." *See* Liberty August 5, 2022 filing p. 3 para 5 and page 8. However, Liberty has not provided any evidence to support its assertions, nor has it explained why Exhibit 15, the typical pole top drawing provided by Liberty itself, shows three categories of wires (i.e., primary, secondary, and service lines).

21. DOE has shown that both the plain meaning of the terms at issue, and the industry usage of "concurrent" and the FERC system of accounting separate treatment of service lines, is consistent with the Settlement language at issue. Therefore, the Commission should approve the DOE Reports and Recommendations disallowing recovery from the storm fund for the four 2019-2020 storm events at issue. See Ex. 12, Ex. 22.

III. Liberty's "reliance" is misplaced and cannot serve to bar disallowance of expenses from the Major Storm Fund --PUC Staff never endorsed or expressly accepted Liberty's interpretation of the relevant Settlement language, Liberty never raised the issue with PUC Staff or otherwise provided Staff with a written definition of the terms now at issue

22. Liberty makes much of the fact that when reviewing Storm Reports filed from 2008 through 2018, the Commission's Staff did not question Liberty's decision to alternatively omit certain major storm criteria (e.g., "contemporaneous troubles") or to highlight other criteria (e.g., "number of storms") when Liberty presented storm events as "qualifying major storms." *See* Liberty's August 5 filing at 2-4;

Exhibit 20 ("Audit reviewed the storms EEI levels and the number of troubles and acknowledges that all of the storms charged to the storm fund qualify as a major storm or pre-staging event"). Liberty also asserts that DOE is attempting to "retroactively impose a different definition than was . . . commonly understood by Commission Staff in the past." Liberty's August 5 filing at 8. Liberty's reliance is misplaced and cannot serve to bar disallowance of recovery of 2019 and 2020 expenses from the major storm fund.

23. There is no evidence that the Commission's Staff ever endorsed or expressly accepted Liberty's interpretation of the relevant Settlement Agreement language, nor that Liberty ever raised the issue or provided an explicit interpretation of the relevant language, including but not limited to, a written definition of the terms now at issue in any Storm Reports it filed for periods prior to the 2019 Annual Storm Report.

24. This has been established because, during the course of discovery, DOE asked Liberty to provide:

> a narrative explanation and documentation -- including but not limited to all internal Liberty emails or meeting notes, and emails or meetings with DOE Staff [defined as inclusive of PUC Staff]—that document what Liberty asserts is the original meaning" of "troubles" and "concurrent" and any "change" to the meaning of those terms. Please distinguish between a change in the terms as defined, and any internal practice(s) Liberty may have adopted. Please describe changes to the definitions, if any, and Liberty's internal practices.

See Ex. 27 at Bates 00002. In response Liberty provided only one July 2013 email between Liberty and the prior owner of Granite State Electric Company, National Grid.

25. That 2013 email suggests that, during the transition of ownership of Granite State Electric, Liberty itself noticed a disconnect between the "concurrent troubles" requirement in the Settlement Agreement and the nature of the reports National Grid was filing with Commission Staff. National Grid told Liberty that "[w]e have traditionally interpreted 'concurrent trouble' to mean IDS events on the same day," without further support or explanation. *See* Ex. 27 at Bates 00004 (2013 email), 00003 (Liberty explains IDS "was the name of the system used at the time to capture outage data.") Liberty "relied" on that one sentence for the next decade, yet never brought the question, or the 2013 email, to the attention of Commission Staff.

26. In this context, one 2013 email, containing nothing more than National Grid's "interpretation" cannot serve to bar disallowance of recovery of expenses from the Liberty major storm fund. *See* Appeal of the State of New Hampshire (New Hampshire Department of Transportation Appeals Board), 147 N.H. at 132 (contractor who misread a State Request for Proposal, ignored a special provision highlighting changes, and who made no inquiries in advance of submitting the winning bid, was denied additional compensation of $247,438 for the disposal of 238,610 cubic yards of soil).

27. Moreover, Liberty has not shown that Commission Staff "commonly understood" the interpretations it now asks the Commission to adopt, notwithstanding Liberty's claim to the contrary. *See* Liberty August 5, 2022 filing at 8; Ex. 27 at 000037 (Liberty's Motion for Rehearing filed May 21, 2021 reference to "important facts" DOE allegedly "overlooked or mistakenly conceived" is limited to Liberty's past practice). Once the matters at issue came to light, PUC Staff asked the Company to start filing its annual storm reports into separate dockets, and Liberty agreed. *See* DOE Exhibit 30b (DOE response to NHPUC Record Request No 2).

28. The definitions of "concurrent" and "[qualifying] troubles" are unambiguous, thereby rendering irrelevant Liberty's past practice or reliance as to whether the storms at issue in the 2019 and 2020 Storm Reports qualify as "major storms." *See* Restatement 2nd of Contracts Section 235, Comment e ("…. the meaning of the contract cannot be stretched by the acts of the parties beyond what the language will bear. Such conduct by the parties, however, may be evidence of a subsequent modification of their contract"); *cf.* Bogosian v. Fine, 99 N.H. 340, 341-43 (1955) ("where evidence indicates that the parties did not divide the commercial premises at issue by any formula, the extent of the demised areas was not so free of ambiguity so as to preclude evidence of the parties' conduct.")

29. The Settlement Agreement language itself must serve as the approved yardstick for the four storm events at issue in this proceeding. As Liberty itself commented, with regard to pre-staging criteria while working with the Audit Division on a 2017 Storm Report Audit:

> The Audit Staff's recommendation that [PUC] Staff provide 'clear rules and instructions as to which costs are allowed during pre-staging events' may be

> understandable, but it is improper. The qualification of pre-staging costs is based on the words in the Commission-approved Settlement Agreement in Docket No. DE 13-063, not any future instructions from [PUC] Staff. Any modifications, potential limitations or clarifications to that Commission-approved Settlement Agreement cannot be made unilaterally.

See Ex. 24 at Bates 035 (emphasis added). Thus, Liberty agrees that any modifications or clarifications to Commission-approved Settlement Agreement language cannot be made unilaterally. The purpose of reaching agreement on explicit Settlement Agreement terms is the benefit of being able to enforce them as written, unless clarifications or changes are later agreed upon by the parties and approved by the Commission.

30. Liberty is mistaken when it claims that DOE is "attempting to impose retroactively a different definition..." Liberty August 5, 2022 filing at 8. DOE is not asking the Commission to disallow any of the Company's past recovery of expenses from the major storm fund with regard to Annual Storm Reports during the 2008-2018 period. Rather, DOE is asking the Commission to prospectively approve DOE's recommended disallowance of recovery from the major storm fund of storm costs included in Liberty's 2019 and 2020 Annual Storm Reports. Although there may have been some confusion on this point see Liberty's Motion for Rehearing (suggesting "new" DOE definitions being "applied retroactively") Liberty has acknowledged that DOE's "review of the 2019 Storm Report is not retroactive," and that it "does not claim that DOE's Report and Recommendation in Docket DE 21-073 is procedurally inappropriate." *See* Ex. 27 at Bates 000040.

31 Finally, by way of clarification, DOE is not asserting that the storm costs Liberty reported in the 2019 Annual Storm Report and the 2020 Storm Report are "imprudent." DOE is instead seeking to disallow recovery of those costs from the major storm fund, because the storms at issue were not "major storms," as defined in the applicable Settlement Agreement language. *See* Ex. 10; Order No 24,777 (approving the Settlement Agreement and quoting the definition of "major storm" and the description of "annual report").

IV. In Conclusion, DOE requests partial and modified approval of its *Report and Recommendations* regarding Liberty's 2019 and 2020 Storm Reports

32. Liberty bears the burden of proof in this proceeding. However, the evidence DOE has provided supports the Commission:

-Upholding the plain meaning of "major storm" and finding that, for the purpose of recovery from the Major Storm Fund, as stated in the settlement agreement, approved by the Commission in Order No. 24,777, and consistent with industry terms, "concurrent troubles" are troubles that occur at the same time, and "[qualifying] troubles" are troubles that occur on primary or secondary lines, but not on service lines.

-Finding that the definition of "major storms" is unambiguous, and thus that there is no basis to resort to evidence outside the written settlement agreement in order to determine which 2019 and 2020 storms qualify as "major storms."

-Finding that Liberty's asserted definition of "concurrent troubles" as "concurrent to the storm event" is unreasonable pursuant to the standard framework of statutory and contract construction;

-Finding that Liberty's asserted definition of qualifying troubles as "troubles on primary, secondary and service lines" is unreasonable pursuant to the standard framework of statutory and contract construction;

-Finding that unless and until the Commission explicitly alters the definition of a term in the settlement agreement, the original definitions are applicable to the 2019 and 2020 Storm Reports;

-Finding that Liberty did not confirm the meaning of "major storms" with DOE's (then PUC) Staff prior to filing Liberty's first storm report on or about May 31, 2013, and questioning Liberty's reliance upon a 2013 email from National Grid referencing a "traditional" meaning of "concurrent" that is inconsistent with the dictionary definition of "concurrent."

THEREFORE, and based on the above, DOE respectfully requests that the Commission:

A. Approve DOE's recommendation for disallowance of $706,838 in storm costs from the Major Storm Fund, and allowance of pre-staging costs of $710,657 from that fund;

B. Approve DOE's recommendation for disallowance of $340,882 in storm costs from the Major Storm Fund, and allowance of pre-staging costs of $586,313.48 from that fund;

C. Direct that disallowed storm cost expenses from 2019 and 2020 be booked as O&M expenses in 2022;

D. Memorialize Liberty's agreement to refund the approximate $1.8 million over-collection to ratepayers from the major storm fund through the tariff and SRAF factor in a future electric rate adjustment proceeding, including an opportunity for DOE input on the period of time over which the return of funds will occur, with the refund to occur promptly, see Tariff No. 21, Original Page 26 (explaining the Storm Recovery Adjustment Factor, or SRAF) Transcript at 222-27, 247 and 275 -78 (Liberty willing to return over-collection in Storm Fund); and

E. Memorialize that DOE has withdrawn, *without prejudice*, the audit issue regarding Liberty's capitalization of fleet depreciation expenses, including, but not limited to, fleet expenses incurred during pre-staging and major storms, and that DOE intends to address those issues in a future rate case. *See* Exs. 12, 22, Tr. 186, 235, 239.

Respectfully Submitted,

The NH Department of Energy

By its attorney,

/s/ Mary E Schwarzer

Mary E. Schwarzer
Mary.E.Schwarzer@energy.nh.gov
603 271-3670

Date: August 24, 2022

Certificate of Service

I hereby certify that on August 24, 2022, a copy of this brief has been forwarded to the service list by electronic mail.

/s/ Mary E Schwarzer

Mary E. Schwarzer