

STATE OF NEW HAMPSHIRE
BEFORE THE NEW
HAMPSHIRE PUBLIC UTILITIES COMMISSION

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
d/b/a EVERSOURCE ENERGY

Notice of Intent to File Rate Schedules

Docket No. 19-057

DIRECT TESTIMONY OF ROBERT A. BERSAK

May 11, 2022

1 **Q. Please state your name, position and business address.**

2 A. My name is Robert A. Bersak. I am a retiree of Eversource Energy (“Eversource”). I
3 retired effective May 1, 2020, after more than 33 years with Eversource. At the time of
4 my retirement, I was an officer of Eversource Energy Service Company with the position
5 of Chief Regulatory Counsel. I provided legal services to all the subsidiary companies of
6 Eversource Energy including Public Service Company of New Hampshire d/b/a
7 Eversource Energy (“PSNH” or the “Company”). My current address is 1 Swackhamer
8 Road, Whitehouse Station, New Jersey.

1 **Q. What were your principal responsibilities in this position?**

2 **A.** As Chief Regulatory Counsel, I was responsible for Eversource's legal practice for its
3 operating subsidiaries before the respective state and federal utility regulatory authorities,
4 including the New Hampshire Public Utilities Commission (the "Commission"), the
5 Massachusetts Department of Public Utilities, the Connecticut Public Utilities Regulatory
6 Authority, the Maine Public Utilities Commission, the Vermont Public Utility
7 Commission, and the Federal Energy Regulatory Commission. I had managerial and
8 supervisory authority over Eversource's state and federal regulatory attorneys located in
9 New Hampshire, Massachusetts, Connecticut, and Washington, DC.

10 **Q. Please summarize your professional and educational background.**

11 **A.** I graduated from the University of Colorado at Boulder in 1974 with a Bachelor of
12 Science degree in Engineering. I received a Juris Doctor degree from the University of
13 Cincinnati in 1977. I am admitted to the bars of New Hampshire, Connecticut, Ohio, and
14 New Jersey, as well as the U.S. Court of Appeals for the Armed Forces, the U.S. Court of
15 Federal Claims, and the U.S. District Courts for the Southern District of Ohio and the
16 District of New Hampshire. I am in retired/inactive status.

17 I was a Judge Advocate for the United States Air Force from 1978 until 2008, when I
18 retired from military service as a Colonel. I began my practice of utility law while
19 stationed at Pease Air Force Base, New Hampshire, beginning in 1981 when I
20 represented the federal executive agencies of the United States before this Commission
21 regarding PSNH and New England Telephone matters. I was selected as one of three Air
22 Force lawyers to create the Air Force Utility Litigation Team, an office dedicated solely

1 to the representation of the Air Force and other federal executive agencies before utility
2 regulatory agencies nationwide. In that job, I represented the United States before utility
3 regulators and courts in over a dozen states and drafted federal acquisition regulations
4 governing the procurement of public utility services by all federal agencies.

5 I began my employment with Northeast Utilities (now Eversource) in 1986 (when I left
6 active military service and became a member of the U.S. Air Force Reserve). I was part
7 of the Northeast Utilities due-diligence teams during the 1988 PSNH bankruptcy. I
8 began working in New Hampshire on behalf of PSNH during the Northeast Utilities
9 management-services period in 1990.

10 **Q. Have you previously testified before the New Hampshire Public Utilities**
11 **Commission or other regulatory bodies?**

12 A. Yes. I have previously provided testimony to this Commission. I have also testified
13 before a subcommittee of the U.S. Senate energy committee regarding hydroelectric
14 project licensing legislation. While in the Air Force, I also provided expert testimony
15 before a number of courts in the United Kingdom regarding the impact of criminal court
16 convictions of U.S. airmen on their military careers.

17 **Q. What is the purpose of your testimony?**

18 A. The purpose of this testimony is to discuss and provide factual background as the
19 Company's Chief Regulatory Counsel regarding the perspective of the Department of
20 Energy ("DOE") on the timing of the filing of the Company's 2019 distribution rate case,
21 which was docketed as DE 19-057, and DOE's recommendation that use of outside legal

1 counsel for that rate review effectively should be deemed imprudent. As all of the
2 internal regulatory attorneys at Eversource reported to me either directly or indirectly, I
3 was uniquely aware of their experience, expertise, and availability to assist with the 2019
4 PSNH distribution rate case.

5 **Q. As the Company's Chief Regulatory Counsel, were you aware of the preparations of**
6 **the Company's 2019 rate case filing?**

7 A. Yes.

8 **Q. What were the major considerations leading to the filing of this rate case in 2019?**

9 A. The timing of filing a rate case is always a function of myriad considerations. The
10 principal considerations regarding the timing of this particular rate case included prior
11 settlement restrictions, a substantial change to the Company's overall composition and
12 organization, including divestiture of the Company's generating business and a
13 streamlined staffing structure, as well as a growing revenue deficiency.

14 **Q. Please discuss the prior settlement restrictions affecting the filing of the rate case.**

15 A. The Company's prior rate case, docketed as DE 09-035, was resolved by a settlement
16 dated April 30, 2010. As part of that settlement, the Company agreed that, "Except as
17 provided for specifically under this Settlement Agreement, there will be no other
18 permanent distribution rate level changes for the five-year period (the term of this
19 Settlement Agreement) that begins July 1, 2010." The Commission approved the rate
20 case settlement by Order No. 25,123 dated June 28, 2010. Hence, PSNH general
21 distribution rates would not be subject to change through July 2015.

1 This rate change stay-out period was later extended until July 1, 2017 as a result of a
2 subsequent settlement. In 2015, the Company entered into the “2015 Public Service
3 Company of New Hampshire Restructuring and Rate Stabilization Agreement,” filed
4 with the Commission on June 10, 2015 (“2015 Settlement Agreement”). The 2015
5 Settlement Agreement included an additional two-year general distribution rate stay-out
6 agreement. The Commission approved the 2015 Settlement Agreement in its Order No.
7 25,920 issued on July 1, 2016 in Docket Nos. DE 11-250 and DE 14-238.

8 **Q. What was the substantial change to the Company’s composition and organization**
9 **that you referred to?**

10 A. The substantial change to the Company’s overall composition and organization that I was
11 referring to was the elimination of the Company’s generation business due to the
12 divestiture of its electric generating facilities.

13 Prior to that divestiture, PSNH had operations focusing on three distinct operating
14 segments; distribution, transmission, and generation (“D, T, & G”). With the divestiture
15 of the generation segment of the Company certain costs that were allocated among the
16 distribution and transmission segments of the business would change, in that they would
17 either be re-cast, or re-allocated. Hence, a consideration in the timing of the 2019 rate
18 case was to await the completion of the sale of all the Company’s generating facilities in
19 order to expeditiously examine to what extent such a sale would impact the distribution
20 business cost of service. As the divestiture of the Company’s generating assets was not
21 completed until the closing on the sale of the Company’s hydroelectric generation

1 facilities on August 27, 2018, the rate case process was delayed until then. The initial
2 rate case filing for establishment of temporary rates was therefore made in early 2019.

3

4 **Q. You mentioned a growing revenue deficiency, would you please discuss that**
5 **circumstance?**

6 A. Yes. Some settling parties to the 2015 Settlement Agreement estimated that as a result of
7 the Company's agreement to delay a general rate proceeding an additional two years the
8 Company's shareholders would bear a revenue deficiency of approximately \$70 million.
9 (See "Testimony of Senators Jeb Bradley and Dan Feltes," Docket Nos. DE 11-250 and
10 DE 14-238, July 10, 2015, at page 14.) The additional delay in filing a rate case created
11 further avoided rate increases for customers as the Company was not earning a
12 reasonable rate of return. The rate deficiencies were discussed in detail in the testimonies
13 of the Company's witnesses filed as part of Docket DE 19-057.

14 **Q. What did the DOE say about the Company's timing of the rate case filing?**

15 A. At page 16 of the Audit report, DOE asserts that "the Company determines the frequency
16 of rate cases, therefore the significant amount of time since the previous rate case is the
17 result of decisions made by the Company. The selection of 2018 as a test year, with the
18 sale of the Generation side of the business also complicated what could have been a more
19 streamlined rate proceeding, had that year not been chosen."

20 **Q. Do you agree with DOE's criticism of the rate proceeding timing?**

21 A. No, I do not. The timing of this rate proceeding was a function of the settlement
22 obligations discussed previously in this testimony and the impacts of the state-mandated

1 generation divestiture process. DOE's suggestion that a utility should be denied recovery
2 of rate-case expenses because of the complexity of the test year is factually incorrect and
3 off-base. Even if the Company had been able to select an earlier test year, there is no
4 evidence that such test year would have been "simpler," and recovery of rate case
5 expenses is not predicated on the alleged simplicity of the test year for the rate case.

6 As I noted earlier, the Company in two settlement agreements had agreed to delay the
7 filing of a general distribution rate proceeding, in Docket Nos. DE 09-035 and DE 14-
8 238, for years 2010-2015 and 2015-2017, respectively. Both filing delays were
9 supported by all parties to each settlement agreement, and both settlement agreements
10 were approved by the Commission. DOE does not say whether the filing should have
11 been made sooner or later, but either alternative would have had its own set of
12 complexities and both would have had attendant disadvantages. An earlier filing—had
13 the Company been allowed to make one—would have imposed rate increases on
14 customers that they were able to avoid, and would have resulted in a rate case being
15 conducted at the same time that generation divestiture was in process. This would have
16 put added pressure on both the Commission and the Company due to the complexity and
17 workload of the divestiture process. Also, a later filing would have exacerbated the
18 revenue deficiency.

19 Most important, waiting until a later date would not have made more internal legal
20 resources available to handle the proceeding, as the New Hampshire legal department had
21 been restructured after generation divestiture to staff only the number of attorneys

1 sufficient to manage the ordinary day-to-day regulatory workload, that being two
2 regulatory attorneys.

3 DOE's claim that "the sale of the Generation side of the business also complicated what
4 could have been a more streamlined rate proceeding" ignores the causal link between the
5 sale of generation and the need to file the rate case, namely, the need to re-allocate
6 administrative and overhead costs because of the impacts of generation divestiture, as I
7 have discussed above.

8 Lastly, the Audit (at page 10, and similarly on page 17) also notes, "the PUC does not
9 decide when utilities file petitions for changes in rates... ." This observation was made to
10 explain why it was reasonable for the Commission to engage outside counsel for this rate
11 proceeding due to workload at the time. However, the Company is constantly presented
12 with the issue of uncontrollable circumstances impacting the availability and workload of
13 in-house staff, and the same was true in this instance. From state or federal legislative
14 actions, to actions by sister agencies, to litigation, to the timing of dockets initiated by the
15 Commission, the Company is subject to numerous factors outside of its control that
16 determine staff availability to work on certain matters. Ultimately, timing is secondary to
17 the fact that PSNH staffs its legal department at all times only to handle the typical
18 regulatory workload for PSNH and Aquarion Water Company of New Hampshire; it was
19 not staffed for rate cases, which require a significant level of effort, attention and time,
20 and do not occur on an annual, bi-annual or even tri-annual basis. Customers benefit
21 from this structure because there are less costs to cover on an annual basis. But, for the

1 Company, it means that there was not in-house legal staff with sufficient availability to
2 cover the magnitude of a rate case in addition to all other matters facing the Company.

3 **Q. You stated earlier that DOE has recommended that use of outside legal counsel for**
4 **the rate case effectively should be deemed imprudent. Where is that**
5 **recommendation found?**

6 A. This recommendation is found in the DOE Final Audit of rate case expenses, dated
7 March 30, 2021 (the “Audit”), which is attached to the DOE memo asking that the
8 Commission adopt the Audit’s recommendations and filed in this docket on August 26,
9 2021 (the “DOE Recommendation”). The Audit recommends 100% disallowance of
10 Keegan Werlin outside counsel expenses. The basis for this recommendation is Puc
11 1907.01(a), which excludes “expenses for matters handled by service providers that are
12 typically performed by utility management and staff of the utility, based on their
13 experience, expertise, and *availability*” (emphasis added). The Audit found that “all of
14 the legal tasks performed by outside counsel for the rate case (e.g. preparing, reviewing,
15 legal filings, editing data responses, updating discovery logs, compiling materials,
16 internal meetings, testimony, hearings, etc.) should have been carried out by the
17 Company’s internal legal staff... .” Audit at 5.

18 **Q. Do you agree with that recommendation?**

19 A. No, I do not.

1 **Q. Why?**

2 A. The Company did not have the internal legal resources available to staff the 2019 rate
3 case proceeding. Therefore, the use of outside legal counsel was necessary, and Puc
4 1907.01(a) does not apply, as it requires that utility staff be available.

5 The Audit's claim that all of the rate case legal work should have been carried out by the
6 Company's internal legal staff seems to be based in part upon the response provided by
7 the Company that states, among other things, that "Eversource Energy has approximately
8 35 in-house attorneys currently providing legal services to each of the nine operating
9 companies in Connecticut, Massachusetts and New Hampshire, as well as the Eversource
10 parent, service company, transmission business, and various unregulated subsidiaries. ...
11 At present, there are 3 attorneys based in New Hampshire who work primarily on matters
12 for PSNH and Aquarion Water Company of New Hampshire." Audit at 5.

13 **Q. Please provide further details regarding the need for use of outside legal counsel.**

14 A. As I stated earlier, during the time of the generation divestiture process and the time
15 leading up to the 2019 rate case filing, I was the Company's Chief Regulatory Counsel.
16 It was largely my responsibility to ensure that all of Eversource's regulatory proceedings
17 had adequate legal resources.

18 I was aware that the rate case in question would await the completion of the sale of the
19 Company's electric generating facilities. At the time leading up to the sale of the
20 Company's thermal (coal, gas, oil, and biomass fueled) generating resources in January
21 of 2018, there were four Eversource attorneys based in Manchester. Upon the sale of

1 those thermal generating resources, one lawyer's position was eliminated as her duties
2 primarily related to generation environmental matters. That left three Company lawyers
3 once the sale of the thermal generating facilities was complete—two regulatory attorneys
4 including myself, and one real estate attorney. In late 2018, I was informed that the real
5 estate attorney would be retiring in May 2019. His practice included all of the
6 Company's New Hampshire real estate matters, as well as general litigation of
7 miscellaneous district/circuit court claims. Until an experienced replacement could be
8 found, I would be taking on all of this retiring attorney's work.

9 Lastly, at the time the rate case was being prepared and when the decision to hire outside
10 counsel was made, I was aware I intended to retire in the near future, likely during the
11 pendency of the proceeding, and in fact I retired in April 2020.

12 **Q. Did Audit staff have adequate information to make the determination that**
13 **Eversource had legal resources with the necessary experience, expertise, and**
14 **availability to handle the rate proceeding?**

15 A. No. As I just indicated, at or near the initiation of the rate case, I was aware that there
16 were not internal legal resources with the necessary "experience, expertise, and
17 availability" (per Rule Puc 1907.01 (a)) necessary to support a full distribution rate case
18 in New Hampshire that was likely to last over a year from start-to-finish, and in fact
19 lasted 18 months, not including the case preparation time leading up to its initial filing.
20 DOE assumes with no supporting evidence that, because Eversource had approximately
21 35 lawyers on staff in 2022, there would have been plenty of resources on hand and

1 available at the time of the rate case with the necessary experience and expertise to
2 participate as counsel in a comprehensive distribution rate proceeding, but this
3 assumption is incorrect.

4 As for the “35 in-house attorneys” at Eversource relied upon by the Audit to substantiate
5 the availability of internal resources, at the time of the filing of this rate proceeding, only
6 four were engaged in state regulatory proceedings, all of them were located in Berlin,
7 Connecticut, and all four of them were in my chain-of-command as Chief Regulatory
8 Counsel. Thus, I was familiar with their workload, expertise, and availability. Those
9 four attorneys were responsible for conducting all Connecticut regulatory matters for The
10 Connecticut Light and Power Company, Yankee Gas Service Company, and Aquarion
11 Water Company before the Connecticut Public Utilities Regulatory Authority. Due to the
12 workload in Connecticut at the time the PSNH rate case was to be prepared and set for
13 hearing, none of the four Eversource Connecticut-based regulatory lawyers had the
14 necessary availability to assist in New Hampshire. In fact, outside lawyers were already
15 assisting in Connecticut at that time due to the regulatory workload in that state. None of
16 the other in-house lawyers at Eversource had the experience or expertise necessary to
17 conduct a utility distribution rate case, which are the requirements in addition to
18 availability required to meet the exception for cost recovery under Puc 1907.01(a).

19 In the Audit, DOE relies upon an ambiguity in the Company’s response to the question of
20 how many lawyers the Company had in New Hampshire. The Company’s response
21 stated, “At present, there are 3 attorneys based in New Hampshire who work primarily on
22 matters for PSNH and Aquarion Water Company of New Hampshire.” Although that

1 response was correct when answered, (i.e., “At present,”), prior to the filing of this rate
2 proceeding I was aware that there were would be only two internal Eversource lawyers in
3 New Hampshire for several months of the rate case pendency. One of those lawyer’s
4 (Attorney Matthew Fossum) full-time responsibility was handling proceedings before this
5 Commission, and he would indeed be (and was) actively involved in the rate case.

6 The second of the two New Hampshire-based lawyers was me. In addition to my general
7 managerial responsibilities for overseeing Eversource’s legal regulatory needs in multiple
8 jurisdictions, there were many remaining generation divestiture matters I had to deal
9 with. I was also handling legal regulatory matters for Aquarion Water Company in New
10 Hampshire upon Eversource’s acquisition of that company. And, as I noted earlier, I
11 took on the handling of New Hampshire real estate and district/circuit court litigation
12 upon the Spring 2019 retirement of the Company’s real estate attorney.

13 Knowing that the New Hampshire legal department was not sufficiently staffed to
14 provide the necessary legal resources to handle the upcoming rate proceeding entirely in
15 house, I determined that the use of outside legal counsel would be necessary. As a result,
16 per the requirements of Puc Rule 1904.02 (b)(5), I initiated a request for proposals
17 (“RFP”) process to select outside legal counsel that had the availability, experience, and
18 quality capabilities to assist in a general rate case process at the lowest cost. The RFP
19 process resulted in the selection of the law firm of Keegan Werlin to assist Eversource’s
20 internal lawyer with the 2019 rate case process. This RFP process was discussed in the
21 Audit at page 2.

1 **Q. Why were you not available to assist on the rate case?**

2 As the rate case was being prepared and as it was proceeding during 2019 and up to my
3 retirement in early 2020, I was responsible for the following matters (and likely others
4 that have escaped my mind):

5 - Various real estate related filings before this Commission, including:

- 6 ○ DE 18-178 - Request for a License for Overhead Crossings of the Lovell and
7 Bearcamp Rivers
- 8 ○ DA 19-004 - Petition for License to Construct and Maintain Electric Lines
9 Over and Across Dudley Brook in the Town of Brentwood
- 10 ○ DA 19-007 - Petition for License to Construct and Maintain Electric Lines
11 Over and Across the Exeter River in the Town of Chester
- 12 ○ DA 19-008 - Petition for License to Construct and Maintain Electric Lines
13 Over and Across the Exeter River in the Town of Danville
- 14 ○ DE 19-028 - Petition for Licenses to Construct and Maintain Electric Lines
15 Over and Across the Merrimack River in Merrimack and Litchfield and Land
16 Owned by the State in Litchfield
- 17 ○ DE 19-078 - Petition for a License to Construct and Maintain Electric Lines
18 Over and Across the Lamprey River in the Town of Deerfield
- 19 ○ DE 10-094 - Petition for Licenses to Construct and Maintain Electric Lines
20 Over and Across the Squamscott River in the Towns of Stratham and Exeter
21 and Over and Across Land Owned by the State of New Hampshire in the
22 Town of Sandown

- 1 ○ DE 19-095 - Petition for License to Construct and Maintain Electric Lines
2 Over and Across the Squamscott River in the Towns of Stratham and Exeter
- 3 ○ DE 19-097 - Petition for License to Construct and Maintain Electric Lines
4 Over and Across the Lamprey River in the Town of Deerfield
- 5 ○ DE 19-099 - Petition for License to Construct and Maintain Electric Lines
6 Over and Across Ashuelot River and Across Land Owned by the State of New
7 Hampshire in Winchester
- 8 ○ DE 19-110 - Petition for License to Construct and Maintain Electric Lines
9 Over and Across Land owned by The State of New Hampshire in Fitzwilliam
- 10 ○ DE 19-113 - Petition for License to Construct and Maintain Electric Lines
11 Over and Across Land Owned by the State of New Hampshire in Mason and
12 Greenville
- 13 ○ DE 19-115 - Petition for License to Construct and Maintain Electric Lines
14 Over and Across the Souhegan River and Land Owned by the State of New
15 Hampshire in Greenville
- 16 ○ DE 19-134 - Petition for License to Construct and Maintain Electric Lines
17 Over and Across Franklin Pierce Lake in the Town of Antrim
- 18 ○ DE 19-146 - Petition for License to Construct and Maintain Electric Lines
19 Over and Across Baboosic Brook in the Town of Merrimack
- 20 ○ DE 19-148 - Petition for License to Construct and Maintain Electric Lines
21 Over and Across Merrimack River in Bedford and Manchester and Across
22 Land Owned by State of New Hampshire in Bedford

- 1 ○ DE 19-149 - Petition for License to Construct and Maintain Electric Lines
- 2 Over and Across North Branch River and Steels Pond and Land Owned by
- 3 State of New Hampshire in Hillsborough and Antrim
- 4 ○ DE 19-157 - Petition for License to Construct and Maintain Electric Lines
- 5 Over and Across Lands Owned by the State of New Hampshire in Winchester
- 6 and Swanzey
- 7 ○ DE 19-165 - Petition for Amended Licenses to Replace Shield Wire Over and
- 8 Across the Pemigewasset River and Winnisquam Lake in Franklin and
- 9 Belmont
- 10 - Other real estate matters not involving Commission filings.
- 11 - District/Circuit court proceedings.
- 12 - Remaining generation divestiture matters
- 13 ○ Thermal generation divestiture open items:
- 14 ▪ Conservation Law Foundation/Sierra Club lawsuit in U.S. District
- 15 Court alleging violations of the EPA's NPDES permit for Merrimack
- 16 Station under the Clean Water Act. (Maximum exposure to Eversource
- 17 for that lawsuit was over \$340 million in civil penalties plus litigation
- 18 costs. With my participation in this matter, the plaintiffs ultimately
- 19 dismissed the Company from this litigation.)
- 20 ▪ NHDES permitting for an abandoned Mobil oil pipeline at the Schiller
- 21 Station facility
- 22 ▪ Campus load metering/billing issue for Merrimack Station

- 1 ▪ Payment disputes relating to a shipment of Ammonia to Merrimack
- 2 Station
- 3 ▪ Disestablishment of the Virtual Data Room supporting divestiture and
- 4 the information contained therein.
- 5 ▪ Completion of the mercury removal project at Schiller Station
- 6 ▪ On-going property tax appeals in various thermal generation towns
- 7 ▪ Substation access agreements
- 8 ▪ Preparation by Buyer & Seller of IRS Form 8594, “Asset Acquisition
- 9 Statement,” allocating the purchase price amongst the various assets
- 10 sold.
- 11 ○ Hydro Divestiture open items:
- 12 ▪ 2018 headwater benefits payments to U.S. Government
- 13 ▪ Repair/replace draft tube at Hooksett Hydro
- 14 ▪ Replacement of breakers and switching equipment at Amoskeag
- 15 Hydro
- 16 ▪ Preparation of corrective deeds based upon property tax issues arising
- 17 in several municipalities
- 18 ▪ On-going property tax appeals in various hydro towns
- 19 ▪ Preparation by Buyer & Seller of IRS Form 8594, “Asset Acquisition
- 20 Statement,” allocating the purchase price amongst the various assets
- 21 sold.
- 22 ○ Preparation of the Commission filing for the final audit of generation-related
- 23 costs (which was ultimately docketed as DE 20-005).

- 1 - Independent Power Producer (IPP) and PURPA Qualifying Facility (QF) matters:
- 2 ○ Handling 2018 N.H. Laws, Chapter 379, “AN ACT relative to the use of
- 3 renewable generation to provide fuel diversity.” This included substantial
- 4 preliminary legal work leading up to Docket No. DE 18-002 - Eversource
- 5 Energy - 2018 Energy Service Solicitation (Eversource Energy Petition for
- 6 Commission Review of responses pursuant to RSA Chapter 362-H as Enacted
- 7 by Senate Bill 365), a proceeding before FERC docketed as EL19-10, and an
- 8 appeal to the New Hampshire Supreme Court.
- 9 ○ Handling 2018 N.H. Laws, Chapter 340, “AN ACT requiring the public
- 10 utilities commission to revise its order affecting the Burgess BioPower plant
- 11 in Berlin.” This work included substantial negotiations between Eversource
- 12 and Burgess, and led to Commission Docket No. DE 19-142 - Public Service
- 13 Company of New Hampshire d/b/a Eversource Energy - Rate Recovery of
- 14 Costs in Excess of the Cumulative Reduction Cap Under the Power Purchase
- 15 Agreement with Berlin Station, LLC
- 16 - A PSNH financing:
- 17 ○ Commission Docket No. DE 19-045 - Petition for Approval of Financing
- 18 (\$300,000,000 Mortgage Financing)
- 19 ○ Vermont Public Service Board Docket No. 19-0697-PET, “Public Service
- 20 Company of New Hampshire request for consent to issue up to \$300 million
- 21 in long-term debt and to mortgage its property.”

- 1 - Aquarion Water Company matters:
- 2 ○ Commission Docket No. DW 19-065 - Town of Hampton - Complaint by
- 3 Town of Hampton Against Aquarion Water Company. This docket also led to
- 4 an appeal to the New Hampshire Supreme Court.
- 5 ○ Commission Docket No. DA 19-079 - Eversource Energy - Affiliate Service
- 6 Agreement Between Eversource Energy Service Company and Aquarion
- 7 Water Company
- 8 ○ Provision of emergency service to Wiggin Way customers and long-term
- 9 acquisition of that service area per order of the NHDES, including negotiation
- 10 of a purchase and sale agreement with the homeowners' association and
- 11 discussion of tax issues created by the enactment of the Tax Cut and Jobs Act
- 12 of 2017 (Public Law 115-97) by Congress.

13

14 DOE's suggestion that I had the time to take on responsibilities for the 2019 rate case was

15 made without their knowing what matters I already had on my plate and without

16 consideration of my impending April 2020 retirement. I could not reasonably take on the

17 rate case process without adversely impacting all the other matters I was responsible for.

18 Nor was it reasonable to engage outside counsel to take on the many and varied issues I

19 was dealing with just to free me up to do something else.

1 **Q. In several places, the Audit report notes that the Company did not use outside**
2 **counsel during the previous rate case filed in 2009. Is that fact relevant to this case**
3 **that was filed a decade later?**

4 A. No, that fact is not relevant, other than for the proposition that when the Company had
5 internal legal resources available the Company used those resources during rate cases to
6 avoid the use of outside counsel. It is true that the Company did not engage outside
7 counsel for the 2009 rate case docketed as DE 09-035. The lawyers for that case were the
8 Company's Gerald Eaton and me. (Likewise in the rate proceeding prior to that, in 2006,
9 docketed as DE 06-028, Attorney Eaton and I also represented the Company without use
10 of outside counsel. And in the case prior to that, filed in 2003 and docketed as DE 03-
11 200, Attorney Eaton and I again were the Company's legal counsel. And the same for the
12 rate proceeding before that, filed in 1997 and docketed as DR 97-059—Attorney Eaton
13 and I represented the Company.) But in the ten years between the 2009 and 2019 rate
14 cases there were significant changes in the availability of internal lawyers who could
15 handle this rate proceeding. In 2009, the Company had six lawyers in its Manchester
16 office; for the 2019 case, the office was staffed much differently by design, with just two
17 regulatory attorneys and one real estate attorney, sufficient to cover the average workload
18 now that generation divestiture was complete.

19
20 Even the Audit itself explicitly states that how the Company handled the 2009 rate case
21 was not relevant—at page 17, the Audit notes, “Audit referenced previous PSNH rate
22 proceedings and the lack of the use of external legal counsel, *for informational purposes*

1 *only, and was not intended to presume use of any external firm should be excluded based*
2 *on historical cases.”* (Emphasis added).

3
4 The Audit then goes on to say “[r]ather, the text of the report indicates why the external
5 legal costs should be borne by shareholders.” Audit at 17. But the Audit supplies only
6 that, an indication, or rather a conclusion, with no support or reasoning behind it. The
7 entirety of the support for the Audit’s conclusion is as follows: “[a]side from the specific
8 instances of recommended disallowances below, Audit recommends 100% disallowance
9 for the external legal counsel. All of the time spent preparing, reviewing, editing data
10 request responses and updating logs, daily phone calls with what was called the “core”
11 rate case team, discussions among counsel and Eversource employees regarding
12 testimony, technical sessions, hearings, preparing and filing documents for submission to
13 the NH PUC, should have been accomplished by the legal staff of the Company.” Audit
14 at 5. This accomplishes nothing more than citing to Puc 1907.01(a) that Audit relies
15 upon, but that rule requires three things for costs to be excluded from recovery: staff with
16 expertise, experience and availability. The fact remains that there was insufficient
17 availability of staff attorneys with the necessary expertise and experience because the
18 Company’s legal department is not staffed to handle rate cases in addition to the typical
19 regulatory workload. While this leaner staffing structure generally benefits customers as
20 the costs reflected in rates for day-to-day operations are lower since the Company is not
21 staffing lawyers every day to manage the peaking-nature of a rate case level of activity, it
22 does mean the Company must hire outside counsel to support a surge in work brought on
23 by items like a rate case. When internal legal resources with the requisite experience and

1 expertise were available, as they were during the 1997, 2003, 2006, and 2009 rate
2 proceedings, the Company did not use outside counsel. But the Company did not have
3 internal resources available for the 2019 rate proceeding and I deemed the use of outside
4 counsel to be reasonable, necessary, and in compliance with the Commission's Part PUC
5 1900, "Rate Case Expenses" regulations.

6
7 **Q. Do you have any concluding remarks?**

8 **A.** Yes. The Company made a deliberate, reasoned, and rational decision regarding when
9 the rate case leading to Docket No. DE 19-057 would be filed based upon settlement
10 restrictions, generation divestiture, and the Company's revenue needs. DOE's suggestion
11 that the case should have been filed some other time is unsupported by the facts and
12 incorrectly impinges upon Company management's discretion.

13
14 Similarly, DOE's recommendation that there were sufficient internal legal resources
15 available to handle the rate case was made without any knowledge of the Company's
16 internal legal resources during the relevant 2018 to 2020 time period, of the experience or
17 expertise of lawyers not located in New Hampshire, of Eversource's New Hampshire
18 legal department staffing issues, nor of the workload that was already being handled.
19 Engagement of outside legal counsel to handle "peaks" in workload such as a rate case
20 proceeding was reasonable and is consistent with the Commission's Part PUC 1900,
21 "Rate Case Expenses" regulations and how utilities nationwide conduct such
22 proceedings. In a June 30, 2010 "Report on Rate Case Expenses," the then staff of the
23 Commission noted, "Overall, the trend among utilities over the past decade has been to

1 hire outside legal counsel. Use of in-house counsel was the exception rather than the
2 rule.”¹

3
4 Indeed, even the Commission itself had to engage outside counsel to assist with this rate
5 proceeding. In the Audit at paragraph 31 on page 10, the need for outside counsel to
6 assist the Commission in this proceeding was deemed to be justified by the workload
7 being handled by the Commission’s own legal staff, including “many other dockets” and
8 based upon “the workload, with the understanding that one of the seven attorneys was
9 retiring in 2019, along with the fact that the PUC does not decide when utilities file
10 petitions for changes in rates, the Legal and Electric divisions understood that the
11 workload would require external assistance.” The Commission’s justification for
12 engaging outside counsel is no different than the Company’s justification for engaging
13 outside counsel – there was no availability of in-house counsel due to existing workload,
14 many other dockets, and one of the two attorneys in New Hampshire soon retiring.

15
16 The outside legal expenses in issue were just and reasonable and in the public interest and
17 conformed completely with the Commission’s regulations in Chapter Puc 1900, “Rate
18 Case Expenses.” Therefore, the Commission should allow recovery of those costs.

19
20 **Q. Does that conclude your testimony?**

21 **A.** Yes it does.

¹ The report can be found here: <https://www.puc.nh.gov/Regulatory/CASEFILE/2008/08-009/LETTERS,%20MEMOS/08-009%202010-06-30%20STAFF%20REPORT%20ON%20RATE%20CASE%20EXPENSES.PDF>