

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

Docket DE 20-002

Unitil Energy Systems, Inc.

2020 Least Cost Integrated Resource Plan

**MOTION OF COMMISSION STAFF TO COMPEL UNITIL ENERGY
SYSTEMS, INC. TO RESPOND TO DATA REQUEST**

Pursuant to New Hampshire Code of Administrative Rules Puc 203.09(i), Commission Staff (Staff) hereby moves the Commission to compel Unitil Energy Systems, Inc. (Unitil or the Company) to respond to a data request submitted to it by Staff in accordance with the procedural schedule for this proceeding.

In support of this Motion, Staff states as follows:

1. The Commission issued a secretarial letter on May 27, 2020, which established a procedural schedule in this docket. That schedule was subsequently amended by a July 23 secretarial letter. The schedule provided the opportunity for parties to serve Unitil written discovery requests on August 14, 2020 with responses due from Unitil by August 28, 2020.
2. Staff submitted discovery requests to Unitil on August 14 which sought, in pertinent part, various Institute of Electrical and Electronics Engineers (IEEE) standards the Company uses to determine conductor and power transformer ratings.
3. Unitil provided responses to the Staff data requests on August 28. Unitil did not formally object to Staff's request, but instead responded that "Unitil is unable to provide these standards, because they are copyrighted material and licensed for use by the purchaser only." (Response Staff 4-3, provided as Attachment 1 to this Motion)

4. The instant docket requires Staff to review how the Company plans for the needs of its distribution system. The Company is in possession of various IEEE standards which it uses to determine conductor and transformer power ratings, an issue relevant to this proceeding. Without those documents, Staff will be unable to fully assess whether the Company is actually planning its system at the lowest reasonable cost to ratepayers. RSA 378:37-:40.

5. Unitil's response that it is "unable to provide these standards, because they are copyrighted material and licensed for use by the purchaser only," misunderstands the context within which Staff requests these documents and the law regarding such a request.

6. The Commission has the authority to "at any time ... inspect the books, papers, and records," of a public utility. RSA 365:6. The IEEE standards are documents in possession of Unitil within that authority of the Commission.

7. Federal copyright law generally protects copyrighted works from unauthorized reproduction. U.S. Const. art. I, § 8, cl. 8; 17 U.S.C. § 106. However, reproduction of copyrighted works may be permissible if that reproduction represents a fair use of that work. 17 U.S.C. § 107. In determining whether a reproduction is a "fair use," 17 U.S.C. § 107 requires courts to consider: (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the work. Courts throughout the country have found that production of copyrighted works for litigation purposes constitutes a "fair use." See *Religious Technology Center v. Wollersheim*, 971 F.2d 364, 367 (9th Cir. 1992) (finding the reproduction of copyrighted documents for litigation purposes a fair use); *Borum v. Smith*, 2017 WL 3014487, at *4 (W.D. Ky. July 14, 2017) (describing copyright

concerns during the discovery process as untenable); *Moran v. deSignet Int't*, 557 F. Supp. 2d 378, 386-387 (W.D.N.Y. 2008) (finding litigation-related software access would not impact value of software and therefore was a fair use); *City Consumer Servs., Inc. v. Horne*, 100 F.R.D. 740, 747-48 (D. Utah 1983) (finding copyrighted documents accessible via discovery).

8. In this case, Staff's review of the relevant standards would not be commercial in nature and should not adversely affect the value of the copyrighted work. Staff's comparison of the utility's practices against the standard would simply affirm the value of the standards as acceptable for electric distribution system planning in New Hampshire. Unitil therefore may rely on the fair use doctrine as an affirmative defense should the copyright holder bring suit against it based on its reproduction of the documents for the limited and non-commercial use of discovery in this proceeding. In the alternative, the Company could purchase sufficient copies of the documents so as to provide them for review in response to Staff's data request. Unitil therefore should be compelled to respond to Staff's Data Request 4-3 and provide copies of the IEEE standards documents.

9. The documents so produced may nonetheless be subject to confidential treatment if found warranted. Under N.H. Admin. R., Puc 203.08, when documents submitted to the Commission or Staff are identified as confidential, the documents will be treated as confidential unless otherwise ruled by the Commission. If the Company wishes to limit the replication or uses of the documents at issue, it can request that they be treated as confidential.

10. N.H. Admin. R., Puc 203.09(i)(4) requires parties to make a good faith effort to resolve any discovery dispute prior to filing motion to compel. Staff certifies that it made a good-faith effort during the September 11, 2020 technical session to resolve informally the discovery matters discussed herein. During that technical session, the Company committed to work with

Staff to further evaluate how it might provide the requested documents. However, N.H. Admin. R., Puc 203.09(i)(2) requires that motions to compel be filed within 15 business days of receiving the applicable response. The deadline for filing a motion to compel related to the August 28 data responses is therefore September 21, 2020.

11. Staff looks forward to working with Unitil as it further evaluates its options to comply with the data request at issue, but files this motion to preserve the Commission's opportunity to review the relevant facts and law should the Company find it is unable to provide the requested documents.

WHEREFORE, Staff respectfully requests that the Commission order Unitil to provide the information requested in Staff Data Request 4-3.

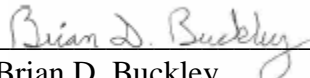
Respectfully Submitted

September 21, 2020

By Brian D. Buckley
Brian D. Buckley
Staff Attorney/Hearings Examiner
New Hampshire Public Utilities Commission
Brian.D.Buckley@PUC.NH.Gov

Certificate of Service

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



Brian D. Buckley

Unitil Energy Systems, Inc.
Docket No. DE 20-002
PUC Staff Information Requests – Set 4

Received: August 14, 2020
Request No. Staff 4-3

Date of Response: August 28, 2020
Witness: Jacob Dusling

Request:

Reference Response 3-1(d).

- a. Please provide all of the IEEE stds. utilized in the conductor and Power transformer ratings.
- b. Please include all documentation as referenced in Response 3-1att1 (These ambient temperatures listed above were developed based on recommendations from the following IEEE guidelines, ISO-NE PP7, and state regulations)
- c. Does the Company utilize Massachusetts state regulations and ISO-NE PP7 for NH subtransmission (distribution supply) lines? If so, why?

Response:

- a. Unitil is unable to provide these standards, because they are copyrighted material and licensed for use by the purchaser only. IEEE standards and guidelines can be purchased from the online IEEE Standards Store at <https://www.techstreet.com/ieee>.
- b. The latest version of ISO-NE PP7 and its associated attachments can be found at <https://www.iso-ne.com/participate/rules-procedures/planning-procedures/>.

The latest version of Massachusetts's 220 CMR 125.00: Installation and maintenance of electric transmission lines can be found at <https://www.mass.gov/regulations/220-CMR-12500-installation-and-maintenance-of-electric-transmission-lines>.

As stated above Unitil is unable to provide IEEE standards, because they are copyrighted material and licensed for use by the purchaser only. IEEE standards and guidelines can be purchased from the online IEEE Standards Store at <https://www.techstreet.com/ieee>.

- c. Unitil's overhead conductor (subtransmission and distribution primary conductor) rating methodology has been in place for over twenty years and is based on good utility practice, sound engineering judgement and widely accepted parameters and assumptions. This rating methodology is utilized in both of the Company's electric subsidiaries, Unitil Energy Systems in New Hampshire and Fitchburg Gas and Electric Light Company in Massachusetts.

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Since its original issuance in 2000, the Company has not had a need to revise the parameters it is utilizing for rating overhead conductors to comply with Massachusetts regulations and/or ISO-NE PP7 requirements.