

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

Public Service Company of New Hampshire d/b/a Eversource Energy and  
Consolidated Communications of Northern New England Company LLC  
d/b/a Consolidated Communications

Joint Petition to Approve Settlement and Pole Asset Purchase Agreement

Docket No. DE 21-020

Motion for Leave to File Reply to Objections and Reply to Objections

NOW COMES the Office of the Consumer Advocate (“OCA”), a party to this docket, and (1) moves for leave to file a reply to the objections interposed on August 16, 2021 to the OCA’s previously filed motion to dismiss the proceeding, and (2) in the event the Commission grants the motion for leave to reply, submits the following reply to the objections interposed by Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH”) and Consolidated Communications of Northern New England Company LLC d/b/a Consolidated Communications (“Consolidated”). In support of these requests, the OCA states as follows:

**I. Motion for Leave to Reply**

The Commission’s procedural rules, N.H. Code Admin. Rules Ch. Puc 200, contemplate that parties to contested cases may file motions and objections thereto. See Rule Puc 203.07. There is no provision in the rules for a party that has submitted a motion to reply thereafter to objections interposed by other parties.

However, Rule Puc 201.05 provides that in the absence of statutory preclusion the Commission may waive any provisions in its rules upon a finding that the waiver “serves the public interest” and the waiver will not “disrupt the orderly and efficient resolution of matters before the commission.” Rule Puc 201.05(a). Therefore, to the extent Rule Puc 203.07 precludes the submission of replies to objections to motions, a waiver of that prohibition is appropriate in the present circumstances.

Specifically, it would serve the public interest for the Commission to consider the reply of the OCA because both PSNH and Consolidated have made significant misstatements in their objections, upon which the Commission should not unwittingly rely. Granting the requested rules waiver will not disrupt the orderly and efficient resolution of matters before the Commission given that the Commission has not yet ruled on the underlying dismissal motion. The proposed reply would simply furnish the Commission with additional information that will be useful as the agency makes its ruling on, presumably, the same timetable it would otherwise have adopted.

Finally, although the question of whether to allow a reply in these circumstances could reasonably be described as a teapot tempest, resolving the procedural question favorably to the OCA would advance notions of fundamental fairness that are at the heart of the due process principles that apply to administrative proceedings in New Hampshire. *See Appeal of Mullen*, 169 N.H. 392, 397 (2016) (noting that the “ultimate” due process standard is “fundamental fairness,” which involves “justice, decency and fair play”) (citations omitted).

## II. Reply to PSNH Objection

On April 2, 2021, the OCA appeared at the prehearing conference in this proceeding and, when given an opportunity to state an initial position, we advised that we were “not taking a specific position at this time on the petition before us.” Tr. 4/2/21 at 34. We said we perceived both advantages and disadvantages in the proposed transaction from the perspective of residential utility customers, indicating that we looked forward to “exploring those issues further with the parties.” *Id.* We suggested that settlement was a possibility, *id.* at 35, a statement of the obvious that could plausibly be made at every prehearing conference before the Commission. PSNH apparently understood these initial remarks of the OCA as some kind of implicit promise to support the petition at some point in the future and now expresses surprise and shock that the OCA has sought dismissal. In fact, PSNH accuses the OCA, and presumably its counsel, of being “disingenuous” because we moved away from our initially stated position of neutrality. PSNH Objection to Motion to Dismiss Petition (“PSNH Objection”) at 2.

The Merriam-Webster online dictionary defines “disingenuous” as “lacking in candor.”<sup>1</sup> Rule 3.3 of the New Hampshire Rules of Professional Conduct – entitled “Candor Toward the Tribunal” – states that a lawyer “shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” N.H. Rules of

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<sup>1</sup> <https://www.merriam-webster.com/dictionary/disingenuous>.

Professional Conduct, Rule 3.3(a).<sup>2</sup> The OCA has not, in fact, been disingenuous in connection with this proceeding, in part because to do so through counsel would be to commit a willful violation of Rule 3.3. The OCA has simply done what it implicitly reserved the right to do at the prehearing conference – take substantive positions in this proceeding as the docket progressed through discovery toward its scheduled hearing date.

Publicly accusing counsel for the OCA – the licensed attorney whose name appears at the end of this pleading – of having been disingenuous in the context of a contested case at the Public Utilities Commission has potential bar discipline consequences and is also potentially corrosive of the attorney’s reputation for high ethics and integrity. The allegation is false and defamatory. The Commission should direct PSNH either to substantiate its claim or withdraw it. In doing so, the Commission would send a useful message, at a critical juncture in the history of utility regulation in New Hampshire, that this style of pleading has no place in Commission proceedings.

On the merits of the pending dismissal motion, PSNH takes exception to the OCA’s assertion that it would be a violation of the Settlement Agreement approved in the recent PSNH rate case, Docket No. DE 19-057, to recover costs associated with the Company’s proposed acquisition of a massive swath of pole plant from Consolidated via the PSNH Regulatory Reconciliation Adjustment (“RRA”)

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<sup>2</sup> The New Hampshire Rules of Professional Conduct are available at <https://www.courts.state.nh.us/rules/pcon/>.

mechanism as approved in DE 19-057. PSNH relies on sophistry and convoluted logic to get to such an extraordinary position.

Section 9.1 of the DE 19-057 Settlement Agreement<sup>3</sup> explicitly and unambiguously states that the RRA is “intended to allow the Company to request recovery or refund of [a] limited set of costs” that are “identified in that section of the Agreement: certain regulatory costs, “[v]egetation management program variances” described elsewhere in the agreement, certain property tax expenses, lost-base distribution revenues attributable to net metering, and “[s]torm cost amortization final reconciliation and annual reconciliation updated for actual cost of long-term debt.” According to PSNH, it is now permissible for the Company to add an entirely new category to this enumerated “limited set of costs” in the RRA because the costs of the proposed pole transfer “were never contemplated as part of the Settlement Agreement” and thus were not “any part of the calculus underlying the Settlement Agreement.” PSNH Objection at 5. PSNH further contends that the Settlement language about limited costs includable in the RRA “means that the Company could not recover the costs associated with the proposed [pole] transaction *without approval by the Commission.*” *Id.* at 6 (emphasis in original), because pole purchases were never under discussion in DE 19-057. .

By that remarkable logic, the utility could agree to purchase the Piscataqua River Bridge and then seek inclusion of those costs in the RRA as well. There is a vast universe of potential plant additions and other potential costs (many of them more likely to pass screens for prudence and used/usefulness than a bridge

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<sup>3</sup> Available at <https://www.puc.nh.gov/Regulatory/Docketbk/2019/19-057.html>, tab 58.

acquisition); the fact that the extent of such a universe could not be ascertained as DE 19-057 was reaching its denouement is precisely why PSNH's settlement counterparties bargained for language limiting what is acceptable for inclusion in the RRA.<sup>4</sup> Those who are willing to believe otherwise and accept PSNH's self-servingly strained interpretation of the Settlement Agreement should inquire about whether there is a bridge for sale not just along the New Hampshire-Maine border but in Brooklyn as well.<sup>5</sup>

Much of the remainder of PSNH's objection is taken up by an elaborate paean to the virtues of the state's biggest electric utility acquiring the pole plant it shares with the state's financially challenged and ever-withering successor to what was once the Verizon landline telephone network. For purposes of the pending dismissal motion, these virtues can be assumed *arguendo*. As the OCA explained in our motion, the Commission should not lose sight of the basic paradigm underlying rate cases and cost-of-service regulation. Utilities are constantly updating, refurbishing, and otherwise improving their plant-in-service; indeed, their franchises obligate

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<sup>4</sup> Of course those counterparties could not have known what was in the minds of PSNH's executives as the Settlement worked its way through the protracted negotiations that took place in connection with DE 19-057. PSNH claims that the pole acquisition "was not contemplated and/or considered at the time the Settlement Agreement was entered and approved." This is notably ambiguous with respect to whether the pole transfer was under active negotiation – and thus "contemplated" by PSNH -- as the Settlement was being "entered and approved," much less while the rate case issues were being resolved by the parties to DE 19-057. In this regard, the Commission should take note of how Consolidated characterizes the chronology. *See* Consolidated Objection to Consumer Advocate's Motion to Dismiss Petition ("Consolidated Objection") at 2-3 ("While the Joint Petitioners negotiated the Settlement Agreement and resolutions of the financial and operational issues that arose between them, Eversource *simultaneously* proceeded to negotiate a settlement in Docket DE 19-[0]57") (emphasis added).

<sup>5</sup> *See, e.g.,* [https://en.wikipedia.org/wiki/George\\_C.\\_Parker](https://en.wikipedia.org/wiki/George_C._Parker) (describing the notorious career of con man George C. Parker (1860-1936) who "made his living conducting illegal sales of property he did not own, often New York's public landmarks, to unwary immigrants").

them to do this. But utilities do not get to raise their rates every time their rate base increases; that is what rate cases are for.

The notable exception to this paradigm is of course, step adjustments – including the one recently approved in DE 19-057. Quite helpfully, the Commission used that occasion to remind its constituents why step adjustments between rate cases can be in the public interest: They are “a mechanism . . . for *limited use* between rate cases to allow a utility to collect additional revenue on investments that are generally non-revenue producing and are made to improve safe and reliable service.” Order No. 26,504 (July 30, 2021) in DE 19-057 at 5 (emphasis added). “Step adjustments are generally limited in scope and allow recovery for investments similar to those that have been reviewed in the underlying rate case that established the step adjustment provision.” *Id.* In that exact spirit, and as noted by the OCA in our dismissal motion, section 10.6 of the Settlement Agreement in DE 19-057 specifies that PSNH “shall not request recovery of any capital costs associated with plant placed in service outside of the above-described step adjustments until the Company’s next distribution rate case filing,” where “above-described” refers to a specific enumeration of precisely which projects were appropriate for inclusion in the three step adjustments to which the parties in DE 19-057 agreed. But PSNH now contends that this limitation applies only to “routine capital investments *specified and reviewed during the proceeding.*” PSNH Objection at 8 (emphasis in original). This absurd interpretation of the settlement

language is yet another attempt to market transportation infrastructure to the unwary.

### III. Reply to Consolidated Objection

Most of the objection Consolidated has interposed to the OCA's dismissal motion consists of some variation on the themes sounded by PSNH and deconstructed *supra*. Consolidated deems it "interesting[]" that the OCA "provides no alternative to the Settlement Agreement in terms of how Eversource could 'pursue these things' [i.e., comply with its franchise obligation via new investments] in the quest to meet the terms of New Hampshire's Energy policy" as enumerated in RSA 378:37. Consolidated Objection at 9. It is not the role of the OCA to substitute its judgment for that of a utility's executives and thus it is not our responsibility to provide an "alternative" to the terms and conditions to which PSNH agreed in DE 19-057. We agree with Consolidated that Eversource cannot "force" Consolidated – basically, for present purposes, not a regulated utility – "to undertake measures [PSNH] or the Consumer Advocate deem desirable for the electric grid." *Id.* But from this it does not follow that, as Consolidated appears to suggest, as long as PSNH manages to enter into an arms' length deal with Consolidated the Commission must approve it regardless of whether the deal is flatly inconsistent with the DE 19-057 Settlement Agreement or, indeed, established principles of public utility law in New Hampshire.

Consolidated accuses the OCA of claiming that PSNH "cannot undertake any actions whatsoever unless those actions fit within the confines of the



Distribution Rates Agreement.” *Id.* at 10. We plead guilty, if by this Consolidated means the OCA expects PSNH to abide by the terms of the Commission-approved Settlement of DE 19-057. The Settlement does not preclude PSNH from acquiring the pole plant it presently shares with Consolidated; indeed, our neutral stance at the prehearing conference was intended to communicate our view that such an ownership transfer has much to recommend it. The question is whether it is permissible for PSNH to add the costs of the transaction to its RRA, something the DE 19-057 clearly precludes. That may be a problem for purposes of the terms of PSNH’s agreement with Consolidated but, if so, as Consolidated points out “[t]he ‘way to pursue these things’ is to negotiate [another] agreement with the entity that co-owns the assets.” *Id.* at 9.

#### **IV. Conclusion**

For the reasons stated by the OCA in our dismissal motion, the Commission should issue an order dismissing the petition while inviting PSNH and Consolidated to file a new request, one that is congenial to the DE 19-057 Settlement Agreement. In its order, the Commission should explain why the arguments made in opposition to the motion are unpersuasive, and the Commission should admonish PSNH to eschew reckless allegations that impugn the integrity of attorneys who practice before the agency. In the meantime, the OCA looks forward to working with interested stakeholders on a plan that optimizes the ownership and maintenance of the utility poles in the PSNH service territory, with costs to be

recovered according to well-established principles of utility law and preexisting obligations of the parties.

WHEREFORE, the OCA respectfully request that this honorable Commission:

- A. Grant the OCA leave to file the reply tendered in this memorandum,  
and
- B. For the reasons stated herein, and those stated in the dismissal motion, dismiss the petition and close the docket when the order of dismissal becomes final.

Sincerely,



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Donald M. Kreis  
Consumer Advocate  
Office of the Consumer Advocate  
21 South Fruit Street, Suite 18  
Concord, NH 03301  
(603) 271-1174  
[donald.m.kreis@oca.nh.gov](mailto:donald.m.kreis@oca.nh.gov)

August 19, 2021

Certificate of Service

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



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Donald M. Kreis