STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire and Consolidated Communications of Northern New England Company, LLC

Joint Petition to Approve Pole Asset Transfer

Docket No. DE 21-020

Motion for Rehearing of Order No. 26,609 and Opposition to Motion for Rehearing of Consolidated Communications of Northern New England Company, LLC

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to this docket, and moves for rehearing of Order No. 26,609 as entered by the Commission on April 13, 2022. Further, in the interest of efficiency, via this pleading the OCA tenders its opposition to the motion for rehearing of Order No. 26,206 submitted by one of the joint petitioners in this docket, Consolidated Communications of Northern New England Company, LLC ("Consolidated"). In support of granting the OCA rehearing request and denying the one from Consolidated, the OCA states as follows:

## I. Introduction

In this case, the state's biggest electric utility – Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") -- seeks Commission approval of a deal by which Eversource would buy out the utility poles in its territory owned in whole or in part by the state's biggest provider of landline

telephone service, settle an ongoing dispute with the telephone company over tree-trimming expenses related to those poles, and send the resulting bill to Eversource's customers. Originally, Eversource and its counterparty – Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications ("Consolidated") sought to keep essentially all of the terms of the deal secret. But, via Order No. 26,609, the Commission (1) ruled that the purchase price must, in fact, be treated as public information, but (2) that the terms of the agreement by which Eversource and Consolidated settled their dispute over shared vegetation management expenses are entitled to confidential treatment under the Right-to-Know Law RSA 91-A. The latter determination was error, therefore warranting rehearing pursuant to RSA 541:3.[1]

## II. "Tangentially Related to Public Utilities:" A Flawed Finding

The Commission found as an initial matter that Eversource and Consolidated have a "heightened privacy interest" in the terms of the settlement they negotiated

[1] RSA 541:3 provides:

> Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

Although the Commission has sometimes elaborated on how it interprets the "good reason" requirement of the statute, what RSA 541:3 boils down to is a mandatory opportunity for the Commission (and other administrative agencies) to correct reversible errors and thus avoid subjecting themselves, and parties affected by their decisions, to appellate proceedings. This is because, in relevant part, RSA 541:4 provides: "No appeal from any order or decision of the commission shall be taken unless the appellant shall have made application for rehearing as herein provided, and when such application shall have been made, no ground not set forth therein shall be urged, relied on, or given any consideration by the court, unless the court for good cause shown shall allow the appellant to specify additional grounds."

because "litigation is expensive and can damage business relationships" and thus "the ability to negotiate and settle claims fairly and effectively is important." Order No. 26,609 at 11-12. Implicitly, the Commission accepted the Joint Petitioners' premise that disclosing the terms of their settlement agreement would compromise their ability to negotiate settlement agreements in the future. The OCA likewise accepts these determinations, *arguendo*.

Where the Commission erred is its determination that the public's countervailing interest in disclosure is "negligible." *Id.* at 12. According to the Commission, the settled claims are only "tangentially related to public utilities" and were "purely private disputes between private parties." This is utterly incorrect. The claims in question involved tree trimming expenses and, to the extent Eversource does not recover these expenses from Consolidated it can and will seek to recover such costs from customers.

In Docket No. DE 19-057, Eversource's most recent rate case, the Commission approved a settlement agreement that specifically allows the Company to seek recovery of actual tree-trimming expenses above and beyond the $27.1 million that was included in the annual revenue requirement to cover such costs. *See* Settlement Agreement on Permanent Distribution Rates of October 9, 2020 (tab 125) in DE 19-057 at 11; Order No. 26,433 (Dec. 15, 2020) (approving settlement). Albeit within a defined bandwidth, the applicable settlement provisions provide for a reconciling mechanism that results in the company's recoverable vegetation management expenses varying in either direction depending upon actual costs.

Presumably, the Company will seek a similar reconciliation mechanism when it files its next rate case, likely in 2023. In other words, the link between rates payable by customers and the extent to which Eversource compromises away its right to seek recovery of the same costs from Consolidated could not be more direct.

## III. Balancing Test Wrongly Applied

There is another, more fundamental reason why the Commission's decision to grant the confidentiality motion in part is error worthy of correction via RSA 541:3 *et seq*. The Commission erroneously invoked the balancing test used by New Hampshire Courts in reviewing agency decisions to withhold document or portions of documents pursuant to RSA 91-A:5, IV, as most recently enumerated by the New Hampshire Supreme Court in *Provenza v. Town of Canaan* on April 22, 2022.[2]

The three-part test involves (1) assessing the privacy interest at issue, (2) assessing the public's interest in disclosure, which derives from the right of the public to know what their government is 'up to,' and (3) balancing the two interests and ordering disclosure when the latter outweighs the former. *Provenza*, slip op. at 9 (citations omitted). However, as the Court explicitly acknowledged in *Provenza*, this test is a device used by *the judiciary* to review agency decisions to withhold documents under RSA 91-A:5, IV. *See id*. ("*Courts* must engage in a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy under RSA 91- A:5, IV") (emphasis added). The three-part

[2] The Court's *Provenza* opinion is available at https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2022-04/2022028provenza.pdf.

balancing test is not the barometer by which the Legislature intended agencies themselves to make decisions on document disclosure under RSA 91-A:5, IV. This distinction is significant because the Right to Know Law is not a privacy statute; it is a disclosure statute. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) ("Congress did not design the FOIA [i..e.,federal Freedom of Information Act] exemptions to be mandatory bars to disclosure") (ruling out so-called "Reverse FOIA" actions); *American Civil Liberties Union of N.H. v. City of Concord*, 2021 WL 5779432 (N.H.) at *3 (In interpreting provisions of the ... Right-to-Know Law, we often look to the decisions of other jurisdictions interpreting similar provisions of other statutes for guidance, including federal interpretations of [FOIA]") (citations omitted).

There is, admittedly, not yet a direct New Hampshire counterpart to *Chrysler Corp. v. Brown*, ruling out reverse-Right-to-Know litigation. Indeed, in the recently decided *Provenza* case, the New Hampshire Supreme Court went to considerable lengths to avoid confronting this very question. *See Provenza* at 4-5 (describing the issue with clarity and citing *Chrysler Corp. v. Brown* and cases from other states). Noting that RSA 91-A:7 explicitly authorizes "[a]ny person aggrieved by a violation of this chapter to petition the superior court for injunctive relief," the Court framed the issue as whether a party with a legitimate privacy interest that could be compromised via public disclosure of a government document is such a "person aggrieved." *Id.* Although the Court suggested in *Provenza* that "[t]he legislature may wish to consider whether clarification as to who is entitled to seek relief under

RSA 91-A:7 is warranted," such a clarification is, in fact, not necessary. The General Court has already spoken with unmistakable clarity via the preamble to the Right-to-Know Law, which declares that "[o]penness in the conduct of public business is essential to a democratic society" and, therefore, the purpose of RSA 91-A is "to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." RSA 91-A:1. Hence the well-established principle, repeated most recently in *Provenza*, that the Court must "construe provisions favoring disclosure broadly, while construing exemptions restrictively." *Provenza* at 3 (citations omitted). Though the Court was able to duck the issue in *Provenza* (because the appeal concerned not just a police officer's effort to keep certain investigative records private but also a newspaper's quest under RSA 91-A:7 as a "person aggrieved" to obtain an injunction mandating disclosure of the same records), it is impossible to square the liberal, pro-disclosure rule of construction applicable to RSA 91-A with the notion that the Legislature intended RSA 91-A to serve by implication as a privacy statute. Indeed, such an unsustainable spin on the Legislature's intent would contravene the provision in the New Hampshire Constitution that government "should be open, accessible, accountable and responsive." N.H. Const., pt. 1, Art. 8.

Therefore, in the respectful opinion of the Office of the Consumer Advocate, the Commission erred by balancing privacy interests against disclosure interests. Essentially, the Commission enjoys unfettered discretion in treating records related to Docket No. DE 21-020 as public – and, in the circumstances of this case, the

agency should do precisely that. For the reasons already stated by the OCA in its opposition to the motion for confidential treatment, any privacy interests asserted by Consolidated are trifling and unworthy of being taken seriously by a New Hampshire utility regulator given this out-of-state corporation's track record in this jurisdiction.[3]

## IV. The Consolidated Rehearing Motion: Devoid of Merit

For much the same reasons that the Commission erred in granting confidential treatment of information related to the settlement of the vegetation management dispute, the pending Consolidated motion for rehearing is devoid of merit. Consolidated argues that the Commission misapplied the RSA 91-A balancing test described *supra*, by failing to credit a profound privacy interest on the part of the legacy telephone provider. According to Consolidated, "[i]f the Commission were to make public the negotiated purchase price for Consolidated interests in the utility poles, *all* negotiations would come to a halt on that item." Consolidated Motion for Partial Rehearing/Reconsideration (tab 82) at 4 (emphasis in original). By "all negotiations" Consolidated means negotiations on a purchase price for other pole assets the telephone company would like to sell to electric distribution utilities. According to Consolidated, once the Eversource purchase price is disclosed, that price "would be the maximum price for all of Consolidated's

[3] The OCA acknowledges that the PUC's procedural rules, particularly N.H. Code Admin. Rules Puc 203.08(a), suggest that certain information is "entitled" to confidential treatment pursuant to RSA 91-A:5. But it is well established that "agency regulations that contradict the terms of a governing statute exceed the agency's authority." *In re Wilson*, 161 N.H. 659, 662 (2011, citation omitted). Moreover, it is not unreasonable for the Commission's rules to contain a mechanism whereby a party may seek confidential treatment of information even if the party is not statutorily *entitled* to that treatment.

interests in the poles throughout Northern New England ("NNE") *regardless* of any other factors unique to any specific electric utility in any of the NNE states." *Id.* (emphasis in original).

These statements are both misleading and self-refuting. Consolidated witness Michael Shultz testified at the March 15, 2022 hearing that New Hampshire and Vermont are the only states in which his company shares tree trimming responsibilities with electric distribution companies. Tr. 3/15/22 (tab 78) at 186 lines 3-12 (noting that this is "a unique situation"). Mr. Shultz further testified that "we've already sold the bulk of our poles in Vermont to Green Mountain Power," the electric utility that serves the vast majority of territory in that state, "[s]o, we've kind of gotten out of that obligation in Vermont." *Id.* at 191, lines 17-21. Here in New Hampshire, Consolidated is in the midst of litigation with the New Hampshire Electric Cooperative," *id.* at 184, lines 15-16, .That leaves only Granite State Electric Company d/b/a Liberty and Unitil Electric Services d/b/a Unitil as the only other utilities that are in a position to negotiate a comprehensive agreement with Consolidated of the sort at issue here, involving the sale of all pole plant owned by the telephone company and the concomitant termination of any tree trimming obligations.

Therefore, the claim that disclosure of the purchase price to which Consolidated has agreed with Eversource will somehow affect or, indeed, establish the purchase price Consolidated might obtain in other jurisdictions does not withstand skeptical scrutiny. Both via its motion and the testimony of its witness,

Consolidated acknowledges that the Eversource situation is unique, something the company would presumably point out to other potential counterparties. Most importantly, though, the claim that disclosure here would bring negotiations to a halt everywhere else is patently absurd. What Consolidated really means is that it may lose some of the negotiating leverage that arises out of information asymmetry. Any resulting "halt" in negotiations would be at Consolidated's election.

In these circumstances, what Consolidated is essentially asking the Commission to do is to protect its ability to extract free money, likely from ratepayers, beyond the Eversource service territory in New Hampshire. The Commission should not be fooled by Consolidated's effort to protect unfair negotiation leverage, at ratepayer expense, as a cognizable privacy interest. The Commission's job pursuant to RSA 363:17-a is to serve as the arbiter of the interests of New Hampshire's utility shareholders and New Hampshire's utility ratepayers – and, given that Consolidated is no longer a regulated utility in New Hampshire, neither of those RSA 363:17-a interests are advanced if the Commission adopts the result urged in the Consolidated rehearing motion.

Likewise, Consolidated's dismissive analysis of the public's interest in disclosure is unworthy of serious consideration. Consolidated contends that because the Commission has yet to rule on the merits of this case, and thus there has yet to be any impact of the transaction on electric rates, the public has essentially no interest in disclosure in pursuit of its right to know what the government is up to. Consolidated Motion at 6-7. Consolidated offers no case law or, indeed, no

Commission precent in support of this novel argument because it oozes contempt for the purpose of RSA 91-A and the disclosure-favorable lens through which the statute must be viewed, as described *supra*.

Moreover, for the reasons already discussed, the three-part balancing test does not even apply to the Commission's decision on whether to disclose publicly the material Consolidated seeks to keep secret. One reason agencies often use to justify non-disclosure in circumstances where the decision is a discretionary one is the difficulty the agency might confront in the future when the agency needs similar information. That is obviously not a consideration here. The Commission enjoys a plenary right to access the books and records of the utilities within its jurisdiction, *see* RSA RSA 374:18. Thus, the next time an electric distribution utility enters into an agreement with a telephone provider even remotely like the one at issue here, the Commission would face no difficulty in obtaining information about the transaction even if the electric distribution company were not obliged to seek Commission approval of the transaction.

## V. Conclusion

For the reasons stated above, the Commission should grant the motion for rehearing tendered by the Office of the Consumer Advocate, rule that unredacted documents setting for the terms of Eversource's proposed resolution of its dispute with Consolidated over tree-trimming are public documents, and deny the pending motion for rehearing of Order No. 26,206. Such an outcome would be consistent with "the greatest possible public access to the actions, discussions and records of

all public bodies, and their accountability to the people," *Provenza* at 8 and "our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted," *New Hampshire Center for Public Interest Journalism v. New Hampshire Department of Justice*, 173 N.H. 648, 653 (2020) (citations omitted).

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Grant the motion of the Office of the Consumer Advocate for rehearing of Order No. 26,609,

B. Deny the motion of Consolidated Communications of Northern New Hampshire Company, LLC for rehearing of Order No. 26,609, and

C. Grant such further relief as shall be necessary and proper in the circumstances.

Sincerely,

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

May 4, 2022

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.

Donald M. Kreis