

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Docket No. DE 23-026

Potential Jurisdictional Conflicts Related to Authorization of
Pilot Programs Under RSA 362-A:2-b

**JOINT UTILITIES' MOTION TO STRIKE SUPPLEMENTAL LETTER OR,
IN THE ALTERNATIVE, FOR LEAVE TO REPLY AND MODIFICATION
OF PROCEDURAL SCHEDULE**

Pursuant to N.H. Code Admin. Rule Puc 203.07, Public Service Company of New Hampshire d/b/a/ Eversource Energy ("PSNH"), Liberty Utilities (Granite State Electric) Corp. d/b/a/ Liberty ("Liberty"), and Unitil Energy Systems, Inc. ("UES") (collectively, the "Joint Utilities"), move to strike the "Supplemental Letter on Additional Federal Power Act Jurisdictional Rulings" ("Supplemental Letter") filed by the Community Power Coalition of New Hampshire ("CPCNH") on September 7, 2023, or, in the alternative, for leave to reply to the Supplemental Letter within a reasonable period of time and a modification of the procedural schedule to permit time for such reply prior to oral argument.

The Supplemental Letter filing represents an attempt by CPCNH to augment its Reply Brief filed more than eight weeks ago and more than seven weeks following the date and time originally scheduled for the oral argument session, well outside the approved procedural schedule and without any advance notice to other parties. As discussed below, the reference in the Supplemental Letter to federal court decisions issued after the filing of Reply Briefs is a mere pretext for CPCNH's attempt to enhance its arguments prior to the

oral argument session. Such an attempt to have the last word at the last minute is an abuse of the process set forth for this docket, to the potential detriment of the due process rights of the Joint Utilities and other parties, and should not be tolerated by the Commission. In support of this motion, the Joint Utilities further state as follows:

1. Pursuant to the approved procedural schedule in this proceeding, the Joint Utilities and CPCNH filed Initial Briefs on June 23¹ and Reply Briefs on July 10. The oral argument session was originally scheduled for July 20 but was continued at the request of CPCNH. The parties agreed to a rescheduled date for the oral argument on September 14, 2023, and the Commission set that date for the rescheduled session.

2. On September 7, 2023, in the late afternoon, CPCNH filed the Supplemental Letter, purportedly because it had just recently “identified additional precedent for two facets of the jurisdictional issue for which the Commission requested briefing and argument, namely: (1) the jurisdiction of the NHPUC over intrastate wholesale sales; and (2) the criteria for determining intrastate wholesale transactions subject to state jurisdiction.” Supplemental Letter at 1. CPCNH represents that some such additional precedent “includes case law that postdates CPCNH’s reply brief,” citing two circuit court

¹ CPCNH’s Initial Brief was actually filed late on June 26; neither the Joint Utilities nor any other party objected to that late filing at the time.

of appeals decisions issued after July 14, 2023.² The two post-brief cases are not only of no relevance, one of them renders the citing of one of the new pre-brief cases improper.³

3. But the six-page, single-spaced Supplemental Letter does far more than just alert the Commission to the *Advanced Energy* opinion; which, had it been submitted in a Motion to Lodge, the Joint Utilities could have quickly refuted on relevance grounds. Instead, the Supplemental Letter reframes arguments made in the CPCNH Reply Brief, contains new or at least enhanced legal arguments regarding FERC and state jurisdiction, and cites additional case law precedent that was not included in CPCNH's Initial or Reply Briefs and was decided well before the filing of either of those briefs.

4. The Supplemental Letter therefore represents an impermissible attempt by CPCNH to augment and enhance the legal arguments made and supporting precedent cited in its two prior briefs, less than one week prior to the scheduled oral argument session but more than two months after the deadline for filing Reply Briefs. Moreover, the Supplemental Letter was filed without any prior notice to the Joint Utilities, or to their knowledge, any other parties, much less after having obtained or even having asked for other parties' acquiescence to such filing. In effect, CPCNH seeks to unilaterally improve

² Based on a preliminary review, the Joint Utilities have identified fourteen federal case law citations in the Supplemental Letter that were not included in CPCNH's Initial or Reply Briefs, of which only two were decided in July 2023 or thereafter.

³ In the first post-brief case, *Advanced Energy United, Inc. v. FERC*, 2023 U.S. App. LEXIS 17894 (D.C. Cir. July 14, 2023) (*Advanced Energy*), a court merely sets forth the scope of FERC jurisdiction in introductory remarks by quoting the Supreme Court's *EPSA* case, the irrelevance of which already has been briefed by the Joint Utilities. The *Advanced Energy* case does not even *mention*, let alone *address*, the difference between intrastate and interstate commerce. Oddly, the second post-brief case (2023 U.S. App. LEXIS 18179 (2d Cir. July 18, 2023) *vacates* a pre-brief case that CPCNH now inappropriately seeks to rely on.

its position – or perhaps to counteract oversights in its two prior briefs – without other parties’ being afforded any meaningful opportunity to respond in writing prior to the oral argument session rescheduled for September 14 pursuant to a procedural order issued more than seven weeks ago.

5. CPCNH’s procedural tactics and “gamesmanship” must not be tolerated by the Commission. If the Commission were to accept the Supplemental Letter into the record without providing the Joint Utilities and other parties a meaningful opportunity to respond to it in writing prior to any oral argument session, that action would represent an impermissible departure from the approved procedural schedule that would potentially undermine the due process rights of the Joint Utilities and other parties in this adjudicated proceeding. Therefore, the Commission should strike the Supplemental Letter in its entirety and disregard it completely for purposes of this docket.

6. In the alternative, if the Commission decides not to strike the Supplemental Letter, then the Joint Utilities must be given an adequate opportunity to reply to it in writing prior to any oral argument that includes arguments included or case law newly cited therein. The Joint Utilities submit that two weeks would be an adequate period of time for preparation and filing of such a written reply. In this alternative, the oral argument should be rescheduled to a date following the deadline for filing of written replies to the Supplemental Letter, presumably to a date sometime in October 2023. The requirements of due process demand nothing less.

WHEREFORE, the Joint Utilities respectfully request that the Commission either:

- (1) strike the Supplemental Letter in its entirety and disregard it completely for purposes of this docket; or
- (2) in the alternative, accept the Supplemental Letter and provide the Joint Utilities and other parties not less than two weeks to reply to it in writing, while also modifying the procedural schedule to set a new date for the oral argument session following the date for submission of those written replies; and
- (3) grant such other or further relief as may be just and reasonable in the circumstances.

Dated: September 8, 2023

Respectfully submitted on behalf of the
Joint Utilities,



Jennifer L. Key
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, D.C. 20036
jkey@steptoe.com
202-429-6746



David K. Wiesner
Senior Counsel
780 N. Commercial Street
P.O. Box 330
Manchester, NH 03105-0330
David.Wiesner@eversource.com
603-634-2961

Counsel for Public Service Company of New Hampshire d/b/a Eversource Energy



Matthew C. Campbell
Senior Counsel
Unitil Service Corp.
6 Liberty Lane West
Hampton, NH 03842
campbellm@unitil.com
603-773-6543

Counsel for Unitil Energy Systems, Inc.



Michael Sheehan
Liberty Utilities (New Hampshire) |
Director, Legal Services
116 North Main Street
Concord, NH 03301
Michael.Sheehan@libertyutilities.com
603-724-2135 |

*Counsel for Liberty Utilities (Granite
State Electric) Corp. d/b/a Liberty*

CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached motion to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

Date: September 8, 2023


David K. Wiesner