

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

OFFICE OF THE CONSUMER ADVOCATE
Show Cause Proceeding

Docket No. DE 24-073

NEW HAMPSHIRE DEPARTMENT OF ENERGY INITIAL BRIEF

The New Hampshire Department of Energy (DOE or Department) files this initial brief pursuant to a procedural order issued by the Public Utilities Commission (Commission or PUC) on August 28, 2024, allowing parties to the above-captioned docket to submit an initial brief on or before October 22, 2024.

I. INTRODUCTION

On May 10, 2024, the Office of the Consumer Advocate (OCA) petitioned the Commission to open an investigation pursuant to RSA 374:7 regarding noncompliance by Liberty Utilities (Granite State Electric) Corp. d/b/a/ Liberty (Liberty) with both N.H. Admin. Code Puc 307.10 and the DE 19-064 Settlement Agreement concerning Liberty's Vegetation Management planning and practices. By Procedural Order dated June 18, 2024, the Commission opened this adjudicatory proceeding to consider the issues raised by the OCA. By Procedural Order dated August 28, 2024, the Commission sought briefs on two issues:

1. Whether the Company is in contempt of the terms of the settlement agreement as contained in docket DE 19-064, Order No. 26, 376 (June 30, 2020), by allegedly failing to fulfil its requirements for vegetation management as contained in the settlement.
2. If the Company is found to be in contempt, what is the appropriate remedy?

II. ANALYSIS

1. **Briefing Question 1 - Whether the Company is in contempt of the terms of the settlement agreement as contained in docket DE 19-064, Order No. 26, 376 (June 30, 2020), by allegedly failing to fulfil its requirements for vegetation management as contained in the settlement.**

a. The Settlement Terms from DE 19-064 are Clear and Unambiguous.

The Settlement in DE 19-064 signed in May 2020 by parties to that docket (including Liberty, the Commission Staff (a predecessor to the Department of Energy) and the OCA) and approved by the Commission in June 2020 by Order No. 26,376 states:

The Company shall maintain a four-year cycle for tree trimming and vegetation management and shall continue with the filings and reporting requirements currently in place. The base rate increase agreed to in this Agreement includes an increase in the VMP spending to \$2,200,000 for 2020, which shall continue until changed in a future base rate case. The Company shall not recover any VMP expenses that exceed 10% of that amount, or in excess of \$2,420,000, through the annual reconciliation filing, or otherwise. The VMP spending shall be reconciled each year, with any under spending carried into the next program year or returned to customers, as determined by the Commission.

The NH Supreme Court has provided insight regarding what is meant by “ambiguous language” in contracts stating that “[a] clause of an agreement is ambiguous when the contracting parties *reasonably* differ as to its meaning.” *Town of Pembroke v. Town of Allenstown*, 171 N.H. 65, 71 (2018)(citations omitted). Here, there is no reasonable disagreement as to what the words in the DE 19-064 Settlement Agreement mean. This Settlement states clearly that Liberty agreed to a four-year trim cycle and that ratepayers would not pay more for vegetation management than \$2.2 million (plus 10% if needed). None of the terms used in the Settlement Agreement are ambiguous; four years means four years and \$2.2 million plus a 10 percent overage means just what it says.

b. In the Absence of Ambiguity, the Settlement Should be Read Using the Plain Meaning of the Words Contained Therein.

The Court in *Pembroke* states:

[a]bsent ambiguity, however, the towns' intent must be determined from the plain meaning of the language used in the 2006 agreement. *** It is axiomatic, though, that parties generally are bound by the terms of an agreement freely and openly entered into, and courts cannot make better agreements than the parties themselves have entered into or rewrite contracts merely because they might operate harshly or inequitably. A court cannot change the words of a written contract so as to make it express the claimed real intention of one or the other of the parties, or remake a contract to implement an alleged but unexpressed intention, if doing so would contradict the clearly expressed language of the contract.”

Town of Pembroke v. Town of Allenstown, 171 N.H. 65, 71-72 (2018)(citations omitted).

Similarly, the Commission has recently stated that:

interpretation of Commission orders must be based on the plain meaning of the words contained in them. Likewise, when interpreting a tariff, the Commission applies the principles of statutory construction and contract interpretation, which requires the Commission to first look at the plain and ordinary meaning of the terms of the tariff. In the context of contract law, the New Hampshire Supreme Court has stated that, when interpreting the plain language of a written document, an adjudicative body must give the language its reasonable meaning, considering the circumstances under which it was written, and reading the document as a whole. While the adjudicator must give the document the meaning intended by the parties when they wrote it, absent ambiguity, the intent will be determined from the plain meaning of the language used. Statutory interpretation follows similar principles.

Public Service Company of New Hampshire, Petition for Change in Pole Plant Adjustment Mechanism Rates, DE 24-094, Order No. 27,057 at 9-10 (September 30, 2024) (citations omitted).

Thus, unless Liberty demonstrates that the Settlement Agreement Liberty signed is ambiguous, the Settlement Agreement should be interpreted using the plain meaning of the words contained therein.

c. Liberty Has Not Adhered to the Terms of the DE 19-064 Settlement Agreement Because Liberty Has Not Achieved Four-Year Cycle Trimming.

A key element of Liberty's vegetation management plan is trimming vegetation around its wires on a cyclical basis. Liberty's distribution wires total approximately 850 miles, so a four-year trim cycle equates to trimming over 200 circuit miles per year. DE 22-014, Tr. 4/19/22 at 20-22. At a 200 plus mile per year pace, after four years, the entire length of Liberty's wires will have been trimmed and then Liberty can repeat the cycle.

i. Liberty has Underperformed in Each Year of the Settlement in Terms of Miles Trimmed.

In 2021, Liberty trimmed 85 miles of circuits (at a cost of \$1.9 million). DE 22-014, Exh. 1 at 21-22. In 2022, Liberty trimmed 162 miles (at a cost of \$3.2 million). DE 23-031, Exh. 1 at 21-22). In 2023, Liberty trimmed 146 miles at a cost of \$2.1 million. DE 24-044, Exh. 1 at 21-22. To the best of DOE's knowledge, Liberty has not reported on 2024 miles trimmed. In the three years for which results have been reported, Liberty did not meet the obligation to trim over 200 miles per year. Thus, Liberty has not performed according to the terms agreed to in the DE 19-064 Settlement Agreement.

ii. Liberty Has Not Charged Ratepayers More than What was Allowed under the DE 19-064 Settlement Agreement

The corollary term in the DE 19-064 Settlement Agreement requires that Liberty not charge more than \$2.2 million plus 10% to ratepayers for vegetation management. Liberty has complied with this provision. In 2021 and 2023, when Liberty spent less than the \$2.2 million settlement amount, Liberty was approved to carry the underspending forward to the next years' vegetation management budget. DE 22-014, Order No. 26,620 at 4; DE 24-044, Order No. 26,998 at 5. In 2022, when Liberty spent more than the \$2.2 million, plus 10%, plus the Commission approved carry-forward underspend from 2021, Liberty did not recover the excess costs from ratepayers.

DE 23-031, Order No. 26,805 at 1-2. Thus, from a ratepayer perspective, to date, Liberty's customers have been afforded the protections provided by the cost recovery cap in the DE 19-064 Settlement.

iii. The Inescapable Conclusion is that Liberty is in Contempt of the DE 19-064 Settlement Agreement Regarding Performance

Given that ratepayers paid what was allowed under the Settlement Agreement but did not receive the benefit of the performance mandated by the Settlement Agreement, on balance it is inescapably evident that Liberty has not performed under the terms of the Settlement Agreement and therefore is in contempt of its terms.

iv. Liberty's Statements at the Pre-Hearing Conference in this Docket that Context is Key are Misplaced

Liberty argues that the context of the DE 19-064 Settlement Agreement is important to interpreting the document and that such context was ignored by the DOE (and OCA). DE 24-073, Pre-Hearing Conference 8/27/24 Tr. at 15. Liberty states that vegetation management costs have always been understood as a pass through and that inclusion of a base amount in base rates was a rate setting/rate smoothing technique – not a cap on vegetation management spending. Id. at 15-16.

Liberty's position should be rejected for two reasons. First, because the DE 19-064 Settlement Agreement is not ambiguous, context is not important when interpreting that settlement. As discussed above, the plain meaning of the Settlement Agreement terms govern, not any unstated understandings or interpretations based on context or surrounding circumstances. Liberty stands in violation of the plain terms of the Settlement Agreement.

Second, if the Commission were to review the context surrounding the DE 19-064 Settlement Agreement, the Commission would quickly see that Liberty's recount of that context is incorrect. The DE 19-064 Settlement Agreement is markedly different from the DE 16-383

Settlement Agreement that it replaced in that the DE 19-064 Settlement contains an additional ratepayer protection that was not in the DE 16-383 Settlement. That protective clause was not added by accident. The Settlement Agreement from DE 16-383 states:

The Company shall transition to a four-year cycle for tree trimming and vegetation management beginning in 2017. *** The revenue requirement increase agreed to in this Settlement adopts Liberty's proposal to increase the amount of VMP O&M spending included in base rates to \$1,500,000 for 2017 and continuing until changed in a subsequent base rate case.

DE 16-383, Exhibit 20 at 9-10.

The 2016 Settlement contains two primary elements concerning vegetation management:

1) that Liberty will trim on a 4-year cycle; and 2) that the amount included in base rates equaled \$1.5 million. The 2016 Settlement does not address whether any spending above the base amount of \$1.5 million would be charged to ratepayers. That explicitly changed in the DE 19-064 Settlement, which states in crystal clear terms that Liberty will not charge ratepayers for spending above the base rate amount of \$2.2 million plus 10%.

This significant additional provision was not included through inadvertence but rather to address the issue of cost control as outlined in the Commission Staff's testimony in DE 19-064.

Staff Witness Kurt Demmer testified:

Staff recommends a base rate spending level *that is viewed and adhered to as a budget*. That budget amount should allow for reasonable cost overruns or underruns; Staff recommends a 10% bandwidth. This is necessary for two reasons. *The first is cost control. If the Company is budgeting to a fixed amount, it will need to use cost control and prioritize the VMP budget.* The second reason is accountability. Staff finds it increasingly difficult to review annual VMP overruns to ensure the funds were used prudently. *** Staff recommends a \$1,678,000 base rate budget for Liberty's VMP (the budget Liberty submitted for 2018 in its VMP 2 filing).

DE 19-064, Exhibit 22 (Demmer Testimony) at 30-31 (emphasis added).

In the DE 19-064 Settlement, PUC Staff agreed to a higher amount in base rates than what it was recommending in its testimony (\$2.2 million in the Settlement as compared to \$1.678

million in testimony) providing additional support that this amount was meant to be a cap, not a target.

2. Briefing Question 2 - If the Company is Found to be in Contempt, what is the Appropriate Remedy?

As discussed above, Liberty's customers have not been charged more for vegetation management than what was allowed under the DE 19-064 Settlement. Thus, no immediate refund or rate reduction appears to be needed. However, it is also clear that Liberty has underperformed its cycle trimming obligations for the past three (and likely) four years and that has led to a backlog of work that should have been addressed by Liberty using the funding allowed under the DE 19-064 Settlement Agreement. The Department noted this backlog issue as early as 2022 and requested the opportunity to address the issues of backlog in future rate proceedings. DE 22-014, Tr. 4/19/22 at 129-130.

In Liberty's current rate case, DE 23-039, Department witnesses proposed a plan for Liberty to address this backlog of hazard trees and cycle trimming while increasing its vegetation management budget only about 10% above current levels. DE 23-039, Testimony of Dudley/Willoughby/DeVirgilio at 64 (Docket Tab 91). This rate case has not progressed as expected due to reasons unrelated to vegetation management. Whether the issue is resolved in DE 23-039 or in a future rate case, the Department's position is that Liberty, not its customers, should pay for addressing this backlogged work. The Department will pursue this remedy in DE 23-039 and/or future Liberty rate cases.

Or, as an alternative to waiting for resolution on the question of backlog in DE 23-039 or a future rate case, the parties in this docket could evaluate the cost of addressing that backlog (perhaps by calculating a cost per mile of cycle trimming and calculating how many miles have

been backlogged) and then requiring Liberty shareholders to contribute that amount to whatever vegetation management spending level is approved in DE 23-039 or in a future rate case.

III. CONCLUSION

WHEREFORE, for the reasons set forth above, the Department of Energy respectfully recommends that the Public Utilities Commission

1. Find that Liberty is in contempt of the DE 19-064 Settlement Agreement as it relates to vegetation management practices; and
2. Approve a remedy in DE 23-039 or a future rate case that prevents Liberty from charging ratepayers for backlogged work resulting from Liberty's failure to perform as required under the DE 19-064 Settlement Agreement; or
3. In this docket, establish a value for such under-performance and require Liberty's shareholders to contribute such amount to whatever future level of vegetation management is approved in DE 23-039 or a future rate case; and
4. Grant such further relief as is just and required.

Dated: October 22, 2024

Respectfully submitted,

New Hampshire Department of Energy

By its Attorney,

/s/ Paul B. Dexter

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Certificate of Service

I hereby certify that a copy of this pleading was provided via electronic mail to the individuals included in the Commission's service list for this docket on this date, October 22, 2024.

/s/ Paul B. Dexter

Paul B. Dexter, Esq.