STATE OF NEW HAMPSHIRE

BEFORE THE PUBLIC UTILITIES COMMISSION

Docket DE 24-073

OFFICE OF THE CONSUMER ADVOCATE

Show Cause Proceeding

Reply Brief in Support of Dismissing Proceeding

I. Overview

Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty ("Liberty" or the "Company") submits this reply brief pursuant to the August 28, 2024 and November 18, 2024 Procedural Orders issued by the New Hampshire Public Utilities Commission (the "Commission"), allowing legal briefs on the preliminary legal issues posed by the Commission at the August 27, 2024 prehearing conference and in response to the initial briefs of the Department of Energy ("DOE") and the Office of the Consumer Advocate ("OCA"). The Commission's August 28, 2024 Procedural Order posed two questions: (1) is Liberty in contempt of the terms of the settlement agreement approved in Docket DE 19-064 by Order No. 26, 376 (the "Settlement Agreement") based on an alleged failure to fulfill its requirements for vegetation management as encompassed in the settlement; and (2) if the Company is found in contempt, what is the appropriate remedy.

As discussed herein, Liberty does not dispute that it has an obligation to comply with the Settlement Agreement; nor does Liberty dispute that a bargain was made in relation to the vegetation management program ("VMP"). However, DOE and OCA are arguing a violation of the Settlement Agreement and attendant customer harm that has *not occurred*, along with the imposition of financial penalties that are not appropriate, nor supported by record evidence or

applicable Commission precedent. Liberty is not "in contempt" of the Settlement Agreement and does not deserve a penalty under the circumstances.

A review of the facts presented by Liberty each year in its annual VMP reports and in the Faber/Green Testimony demonstrate that the Company has complied with the Settlement Agreement and protected its customers from harm in the context of extenuating circumstances. Over the past four years, the Company performed vegetation management work consistent with the goals of the VMP and has recovered only those costs authorized by the Settlement Agreement. Accordingly, contrary to OCA's unsubstantiated allegation, customers have received the "benefit of the bargain" struck in the Settlement Agreement (OCA In. Br. at 15). Customers could only be deprived of the benefit of the bargain struck in the Settlement Agreement if customers had paid for services performed through the VMP that were not provided by the Company, or if customers had paid for the VMP and service reliability had declined below levels that would be expected in line with a four-year maintenance cycle. <u>This has not occurred</u>. Instead, the interests of customers have been served at all times.

As discussed further below, the "benefit of the bargain" encompassed in the Settlement Agreement in relation to the VMP was that the Company would "maintain" the four-year cycle trim cycle it had in place over the past four years. In exchange, the Company's annual cost recovery for vegetation management was set at $2,200,000 through base rates with an opportunity to request an additional 10 percent ($220,000) through the VMP adjustment factor, an annual reconciling mechanism (DE 19-064, Settlement Agreement, at 11). This level of funding was approximately equal to the then-current annual cost of the four-year cycle being conducted through the VMP, demonstrating a measure of parity in the "bargain" inherent in the Settlement Agreement. This construct also provided predictability in terms of VMP funding for both the

Company and its customers,[1] along with the customer protection that the Company could collect no more than its *actual* costs up to the cap. If the Company spent less than $2,200,000, the difference was to be either refunded to customers or carried forward to offset the next year's VMP spending (id.). In addition, the Company was held accountable through the requirement to file annual reports with the Commission detailing its actual vegetation management performance in the prior year (DE 19-064, Settlement Agreement, at 11).

At issue in this proceeding is solely whether the Company's *vegetation management performance* should be considered a breach of the Settlement Agreement – and it should not. The "benefit of the bargain" for both customers and the Company involved an exchange of a commitment to continue the VMP, while recovering the current cost of the VMP, for purposes of maintaining service reliability. In light of this exchange, it is not sufficient for OCA to simply point to the number of miles trimmed on an annual basis between 2020 and 2024 as indicative of a failure by Liberty to provide customers with the "benefit of the bargain." Customers received VMP benefits for every dollar of the program that they supported and, in addition, their service reliability was well maintained. Based on the facts, Liberty has not failed in any obligation to customers.

The extenuating circumstances that Liberty encountered in *implementing* the VMP were unforeseeable and beyond any expectation for the VMP, preventing the Company from completing more miles of cycle trim in those years than it did. Yet, notwithstanding the extenuating circumstances, Liberty was able to complete 72% of the trim miles in 2022 and 65% of the trim miles in 2023 (see Faber/Green Testimony at 26). Thus, to the extent that it was *impossible* for the Company to maintain an exact four-year cycle trim under the circumstances, Liberty's actions

[1] This is consistent with the fact that the primary purpose of Docket DE 19-064 and the resulting settlement agreement was to set just and reasonable base distribution rates.

in response to those challenges were reasonable, appropriate and warranted under the circumstances (id. at 5, 10, 33).

It is not disputed that Liberty faced circumstances beyond its control that limited its ability to perform planned vegetation management work (see Docket DE 22-014, Exh. 1; see also Faber/Green Testimony at 5 and Section IV[2]). It is also not disputed that rising cost pressures have required the Company to reprioritize work on an annual basis to develop a plan that is cost-effective, while meeting the overarching objectives of the VMP (Faber/Green Testimony at 25). Accordingly, the issue before the Commission is whether the Company's response to the unforeseeable circumstances and cost pressures occurring in the time span 2020 through 2023 was reasonable, prudent and in line with commitments made in the Settlement Agreement. To that end, the Company has demonstrated that, at every step, the Company took reasonable and prudent steps to conduct the VMP to the maximum extent of its ability; to protect customers in the long term in terms of price volatility; and to ensure that a safe and reliable electric system is maintained (see, e.g., Faber/Green Testimony at 16-18, demonstrating the Company's SAIDI and SAIFI performance has remained stable or improved from 2019 to 2023).

Because the facts matter in this case, Liberty fully supports any additional process that the Commission may establish, including an evidentiary hearing, to enable the development of a full evidentiary record on which to base the Commission's decision regarding OCA's allegations. Allowing an evidentiary hearing would also address the issues raised in the OCA's December 18,

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[2] The Company filed a motion requesting a procedural schedule that allowed for additional process including testimony on November 1, 2024. The Commission denied the Company's motion but provided an opportunity for testimony to be filed on December 13, 2024. Liberty filed the Faber/Green Testimony on December 13, 2024 to provide additional details regarding its vegetation management program performance beginning in 2020. The OCA filed a motion for reconsideration on December 18, 2024 seeking, in part, to exclude the Faber/Green Testimony. The Company has filed its opposition to that motion.

2024 Motion for Reconsideration because it would allow the OCA to conduct cross-examination of Liberty's witnesses on these issues.[3]

II. Response to the Initial Briefs of DOE and OCA

This proceeding was initiated in response to a petition filed by the OCA asserting that Liberty has failed to comply with the vegetation management requirements included in the Settlement Agreement and that an investigation was necessary because vegetation management is "a critical component of reliability and cost-effectiveness" (OCA Petition at 1, 2). In support of this argument the OCA states that it is "concerned residential customers are paying higher than necessary rates due to necessary vegetation management taking place during storm restoration events rather than through more controlled and cost-effective vegetation management programs" (id. at 8). The OCA also expresses concern with "the extent vegetation contributes to Liberty's outages and how that might have been further mitigated with a four-year trim cycle (id.). However, these assertions are not supported by the relevant history and notably, the OCA has failed to present any evidence that supports its own assertions. Customers are not paying higher rates than necessary and the record shows that reliability has remained on an overall positive trend. Fundamentally, there is no customer harm that has occurred and no basis for penalizing Liberty for any alleged harm.

In their initial briefs, the OCA and DOE point only to the number of miles trimmed each year without addressing the objectives of the VMP; the circumstances that prevented additional trimming; Liberty's mitigation efforts to address unforeseeable challenges arising after the Settlement Agreement was agreed to and approved; or the reliability of the Company's system throughout this period of time. The Faber/Green Testimony addresses the circumstances that led

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[3] Liberty filed its opposition to the motion for reconsideration on December 26, 2024.

to this proceeding and demonstrates that Liberty acted reasonably and appropriately, while striving to meet its obligations under the Settlement Agreement. There was never any point where Liberty made a decision to forego its obligations under the Settlement Agreement. Instead, the record shows that Liberty has made every attempt to stay on course, despite circumstances outside of its control that blocked the Company's ability to complete more miles of cycle trim than it did. An overview of these circumstances derived from the relevant proceedings and the Faber/Green Testimony is set forth below.[4]

A. The Company Has Demonstrated its Compliance with the Settlement Agreement in Light of the Circumstances at the Time

1. Introduction

The Settlement Agreement language at issue in this proceeding is as follows:

> Under the VMP, 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.

DE 19-064, Settlement Agreement, at 11.

As detailed above, the Settlement Agreement reflects three parameters pertaining to the "benefit of the bargain" between customers and the Company pertaining to the Company's VMP: (1) continuation of a four-year trim cycle; (2) continuation of existing annual filings and reporting;

[4] It is notable that the Company's vegetation management plan and performance have been the subject of multiple proceedings since 2020: DE 21-049, DE 21-138, DE 22-014, DE 23-031, DE 23-039, and DE 24-044. See Faber/Green Testimony at 30, Table 3.

and (3) recovery of up to a cap of $2,420,000, subject to a reconciliation for any underspending, in order to conduct the VMP.

The Company has not recovered any VMP expenses beyond the amounts permitted by the Settlement Agreement and there is no dispute on this point (DOE In. Br. at 4).[5] It is also not disputed that the Company has complied with the VMP reporting and annual filing requirements. See, Dockets DE 21-049, DE 21-138, DE 22-014, DE 23-031, and DE 24-044; see also Faber/Green Testimony at 30, Table 3. Thus, at issue is whether the Company's *actual vegetation management performance* should be considered a breach of the Settlement Agreement – and it should not. The circumstances in this case are important and start with the fundamental purpose and execution of the four-year trim cycle.

In fact, the Company has maintained the VMP in every year since the Settlement Agreement was approved: 2020, 2021, 2022, and 2023. In each year, the Commission has conducted a proceeding to review the Company's vegetation management performance and to consider any reconciliation of actual vegetation management costs, as allowed by the Settlement Agreement. Each year, the proceeding has resulted in a Commission Order finding that the Company's vegetation management activities in the prior year were generally consistent with the program goals and parameters authorized by the Settlement Agreement. See Order Nos. 26,478, 26,620, 26,805, and 26,998. The DOE and OCA have not opposed Commission-approval of the Company's annual VMP adjustment factors which are based on the actual vegetation management work conducted.

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[5] As permitted by the terms of the Settlement Agreement, the Commission authorized the Company to carry forward the unspent portion of its calendar year 2021 budget to 2022. DE 22-014, Order No. 26,620, at 4. As a result, Liberty recovered a total of $2,749,187 for work completed in 2022. In all other years, the Company's vegetation management costs have been limited on an annual basis to $2,420,000.

The DOE and OCA are now arguing that despite the Commission's orders, the Company is in contempt of the Settlement Agreement and must absorb the costs associated with any and all miles not completed over the past three years (OCA Petition at 4; OCA In. Br. at 17; DOE In. Br. at 7). However, there are three problems with this argument. First, as described above, there was no requirement stated in the Settlement Agreement that a certain number of miles must be completed in any given year and such a guarantee would not be consistent with best practices for vegetation management (Faber/Green Testimony at 10). Yet, this is the singular claim that OCC and DOE allege, *i.e.*, that the Settlement Agreement required that the Company complete a certain number of miles trimmed each year.

Second, the unprecedented circumstances that arose subsequent to the Commission's approval of the Settlement Agreement were the direct and exclusive reason that a greater number of trim miles could not be completed and these circumstances prevented the physical completion and/or the cost-effective completion of the alleged trim miles. Whether the Company's response to these circumstances was reasonable and in line with the obligations of the Settlement Agreement is a question of fact. However, there are no facts showing that the Company failed to take any actions that were reasonably available to it in order to complete more miles during the term of the Settlement Agreement. Accordingly, the Company cannot be "in contempt" of the Settlement Agreement.

Third, there has been no harm to customers. Customers have not paid any more than allowed by the Settlement Agreement and have received the level of VMP services for which they have paid. Further, the Company's reliability (a metric used to evaluate vegetation management programs) has not declined during the relevant timeframe and, in fact, has remained excellent over the five-year period from 2019 to 2023 (Faber/Green Testimony at 16-18). Liberty continued to

make cost-effective investments in its system in other ways to maintain and improve the reliability of its service to customers (id.).

Lastly, as discussed above, the Company's annual vegetation management filings provided an overview of the Company's annual planning process, which is founded on best-practices that Liberty described in detail in the Faber/Green Testimony. The annual planning process is not a simple math exercise to divide total miles (Faber/Green Testimony at 6-15; see also DE 23-039, Testimony of Heather Green and J.M. Sparkman ("Green/Sparkman Testimony") at II-353-354). Thus, despite the DOE and OCA's attempts to characterize their claims as relying on the "plain language" of the Settlement Agreement, there is no statement in the Settlement Agreement specifying the number of miles to be trimmed each year and this interpretation of the Settlement Agreement is not consistent even with the Commission's own regulations for tree trimming (DOE In. Br. at 3; OCA In. Br. at 8, referring exclusively to the Settlement Agreement language regarding a four-year cycle and ignoring the flexibility embodied in Puc 307.10).

2. Language of the Settlement Agreement

As an initial matter, the trim cycle governs how a utility *plans* its vegetation management; it is not an absolute, nor has it ever been treated that way under New Hampshire law or precedent (DE 22-014, Exhibit 1, at Bates 006, emphasis added; see also Faber/Green Testimony at 10). As detailed in the Company's Initial Brief, the structure of Liberty's VMP was "maintained" by the Settlement Agreement, as is traceable to the 2006 docket, DG 06-107, approving the merger of KeySpan and National Grid (Liberty In. Br. at 3). That 2006 docket included approval of a VMP for Liberty that began in 2009, the elements of which were carried forward to subsequent VMP plans (id. at 3-13). The annual pro rata trim mileage is a starting point (Faber/Green Testimony at 10). In addition, the length of the trim cycle balances the amount of trimming per year with the

number of miles; a longer trim cycle addresses fewer miles per year but requires more trimming on those miles (DE 22-014, Exhibit 1, at Bates 006). Trim cycles do not guarantee a specific number of miles because a utility must also address emergent conditions through interim, spot or trouble tree trimming (id.; see also, Faber/Green Testimony at 10). It is also Liberty's practice to trim an entire circuit (versus splitting up the circuit) and the circuits are not the same length (Faber/Green Testimony at 10). Lastly, the four-year planning standard is always subject to revisions and reprioritization based on actual field conditions (id.).

Vegetation management planning accounts for both planned and unplanned tree work (Faber/Green Testimony at 9, Green/Sparkman Testimony at II-354). This "unplanned" tree work referred to by Liberty and included in the vegetation management plan is work that must be completed "off-cycle" because it is determined to be necessary to ensure safety and reliability (id.). This "unplanned" work can result in deferred planned cycle work. Reprioritizing some level of cycle work is not unusual or inconsistent with best practices when the Company has deferred such work to ensure it is meeting its obligation to ensure that the system is safe and reliable (Faber/Green Testimony at 10, stating that cycle trimming may be deferred due to emergent conditions including reliability concerns).

With this in mind, the Company develops an annual work plan that will meet the overriding performance objectives associated with the vegetation management program, which include: safety, reliability, efficiency, customer satisfaction and environmental responsibility (DE 22-014, Exhibit 1, at Bates 008, Faber/Green Testimony at 10). To develop its annual plan, the Company considers these objectives and prioritizes work to achieve an optimized portfolio of projects that consider reliability performance data (id.). This annual process ensures that the Company is designing an annual vegetation management plan that balances these objectives in a cost-effective

manner (see id.). Accordingly, it is not sufficient to look only at the number of miles that the Company has trimmed each year in determining whether the Company has met its vegetation management obligations under the Settlement Agreement. The language "shall maintain" refers to the Company's commitment to continue its existing VMP, in all of its parts.

To that point, the Settlement Agreement does not specifically define the parameters of "a four-year cycle for tree trimming and vegetation management," nor can it be reasonably construed as doing so. Maintenance of a "four-year cycle for trimming and vegetation management" has a broader context that purely one quarter miles trimmed annually, as evidenced through the Company's long-standing vegetation management planning process (Faber/Green Testimony at 10; see also, Liberty In. Br. at 3-10, providing the history of the Company's VMP).[6] Liberty's position that the Settlement Agreement was not intended to make any substantive changes to its VMP is supported by the Settlement Agreement itself which devotes just one paragraph to VMP. Had the parties intended to create a new, stricter standard for VMP work the Settlement Agreement would have required a significant level of detail to define that new standard.

Further, a level of discretion and flexibility inherent in tree trimming is memorialized in the Commission's rules regarding tree-pruning standards. See, Puc 307.10(b) and (c) (allowing for flexibility based on landowner consent and the health of the trees). Accordingly, it cannot be argued that the "plain language" of the Settlement Agreement requires the Commission to reach the conclusion that Liberty was bound to complete a specific number of miles each year.

An agreement is considered ambiguous where the parties "reasonably differ as to its meaning." Behrens v. S.P. Const. Co. Inc., 153, N.H. 498, at 503 (2006), citing, Appeal of Town

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[6] Each year the Company files a vegetation management plan for the upcoming calendar year in November that includes the number of miles it intends to trim. The Company reports on its actual performance in a report submitted in March for the prior calendar year. The planned miles in the November report never match the actual miles in the March report due to actual field conditions.

of Durham, 149. N.H. 486, 487 (2003). In the context of the Settlement Agreement, the word "maintain" is meant as "continue" in relation to the existing VMP, while the DOE and OCA are attempting to portray that Liberty was committing to a new four-year trim cycle that allowed for no deviation from a trimming schedule that would be fixed at one-quarter of the circuit inventory per year. However, the terms that would be needed to attach that specificity are *not* evidenced by the Settlement Agreement.

In terms of actual performance, the Company's annual planning process was upended in 2021 when the Company's vegetation management contractor breached its contract with the Company and abruptly ceased work (Faber/Green Testimony at 21). As detailed in Docket DE 22-014, the Company issued a request for proposals ("RFP") in 2020 for vegetation management work that would allow the Company to meet a four-year trim cycle within the budget established in DE 19-064 (DE 22-014, Exh. 1, at 10; Faber/Green Testimony at 19). ClearWay was one of only four companies that responded to the RFP and was the lowest cost bid. The Company held a pre-bid acceptance meeting with ClearWay in October 2020; at that meeting, Liberty sought assurance that ClearWay's bid was sufficient to allow it to complete the four-year trim cycle (Faber/Green Testimony at 19). Based on assurances from Clearway and the results of the RFP process, the Company hired ClearWay to perform a four-year contract beginning in January of 2021[7] (id.).

[7] While ClearWay was relatively new to the Company's system, it had performed well in 2020 (DE 22-014, Exh. 1, at 10; Faber/Green Testimony at 20). ClearWay's per-mile cost in its bid also allowed the Company to maintain a four-year trim cycle over the four-year VMP cycle (id.). Based on these considerations, Liberty awarded its vegetation management work to ClearWay. Had ClearWay performed pursuant to the terms of its contracts, the Company would have been able to maintain the four-year trim cycle agreed to in the Settlement Agreement.

In 2021, the Company planned for ClearWay to perform 234.87 miles of trimming in furtherance of a four-year trim cycle[8] (Faber/Green Testimony at 20). ClearWay began to fall behind immediately (in January) (id.). Liberty provided additional supervision and training to ClearWay's employees to assist and get the cycle trimming back on track (id.). The Company also hired the firm Environmental Consultants, Inc. ("ECI") to triage the situation and oversee ClearWay crews (id.). On February 17, 2021, Liberty held a meeting with ClearWay and ECI; at this meeting, ClearWay assured the Company that it would be able to complete the work under the terms of the contract (i.e., at the agreed to price) (id. at 20-21). Despite Liberty's efforts and ClearWay's repeated assurances, in March 2021, ClearWay breached its contract and pulled all of its crews out of New Hampshire (id. at 21). ClearWay first notified Liberty that it needed to leave the existing jobs in New Hampshire as soon as possible on March 12, 2021; ClearWay crews began to walk off the job the next day (March 13, 2021) and by March 15, 2021 there were no ClearWay crews left on the Company's system (id.). As a result of this breach, the Company was forced to find replacement crews on an expedited timeline which the Company did (id. at 21-22).

Liberty immediately sought replacement contractors to perform the 2021 VMP work (Faber/Green Testimony at 21). As a result of ClearWay's abandonment of the cycle trim work, Liberty was left severely behind schedule with respect to 2021 cycle trim work (id. at 21-22). Liberty recognized that the impacts of this would have a cascading effect into future years (id. at 22). To mitigate this cascading effect, Liberty hired a replacement contractor, Asplundh Tree Expert, LLC ("Asplundh"). Asplundh's bid in response to the 2020 RFP was the runner up bid to ClearWay (id.). However, by the time Liberty sought to contract with Asplundh in March 2021, Asplundh's rates had increased as a result of the ongoing economic disruptions resulting from the

[8] As discussed above, the Company uses cycle trimming as a planning standard but actual performance is anticipated to deviate based on emergent conditions in the field.

pandemic (id.). The remaining bidders to the 2020 RFP were unable or unwilling to complete any additional work during 2021 (id.). As a result, Asplundh was the only viable option to address cycle trimming in 2021. However, because of how far behind ClearWay was at the time it breached the contract, Asplundh was not able to catch up (id.). Liberty was forced to hire an extra crew from Florida comprised of 16 workers (id.). The cost of these supplemental crews was in the range of $40,000 per week to assist Asplundh (id.). This level of cost was not reasonable, sustainable or advisable for the interests of customers over the longer term (id.). The OCA conveniently ignores all of these considerations.

Due to the timing of ClearWay's breach (i.e., nearly four months into the calendar year) and the time necessary to retain replacement crews, the Company was able to complete no more than 83.94 miles in 2021 (DE 22-014, Exh. 1, at 12). The Commission accepted the Company's actions to mitigate the impacts of ClearWay's breach in its approval of the Company's 2021 VMP reconciliation finding. DE 22-014, Order No. 26,620 at 4 (finding that the Company's VMP activities are generally consistent with the program goals and parameters). Due to the significant costs to replace ClearWay in 2021 and workforce issues being experienced by the Company's vendor, the Company had to issue a new RFP in 2022 to obtain resources to continue work toward the mileage goals (Faber/Green Testimony at 22).

The 2022 RFP solicited bids for two circuits (id.) In response to the 2022 RFP, the Company received three bids (id.). This was a significant decrease from the number of bids received pre-pandemic (id.). Of the three bids received, only one was reasonable and included the ability to trim both circuits (id. at 22-23). However, the "reasonable" bidder was ultimately unable to perform any work and withdrew its bid (id. at 23). The remaining two bids were able to trim only one circuit (each), at a cost of 150% or 200% higher than the contractor that was awarded the 2022

work (id.). As a result, the Company continued to use Asplundh in 2023 and did not issue a new RFP for 2023 (id.). Liberty continued to work with Asplundh, its existing contractor, which saved time because no onboarding was necessary and this also allowed the Company to keep existing crews on location in Salem where crew attrition has been particularly problematic (id.).

Due to the increased costs associated with the replacement contractors, the Company adjusted its planned trimming for 2022 and planned to trim 152.93 miles (see DE 23-031, Exh. 1, at 22). The Company planned for 152.93 based on the updated costs for tree trimming and the availability of contractor resources. These increased costs were the result of not only the ClearWay contract breach but the well-known increase in vegetation management costs that has occurred post-pandemic.[9] The COVID-19 pandemic destabilized the operations of many vegetation management contractors due to a multitude of factors (Faber/Green Testimony at 23). These factors included: (1) an inability to hire due to the proliferation of unemployment compensation; (2) limitations on crew mobility and boarding; (3) restrictions on the use of three-person crews due to social distancing requirements; (4) an inability to obtain licenses (CDL, pesticide) due to state agency closures; and (5) increased absenteeism due to childcare and quarantine requirements (id.). Labor shortages for tree crews persist today (id.). Due to these factors, there was a severe labor shortage that affected the availability of tree crews and the Company simply could not obtain adequate labor resources to complete the cycle trim work (id. at 23-24).

These labor shortages seriously affected the cost-per-mile for contractors (Faber/Green Testimony at 24). Liberty's trimming cost was approximately $12,500 per mile in 2022. [10]

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[9] Increased vegetation management costs have impacted other New Hampshire electric utilities and mitigation measures have been explored by the Commission to address these known costs (see, e.g., DE 22-010, Exh. 1, at Bates 15 and 2022 June 23 Tr. at 165-166).

[10] DE 23-031, Exh. 1 at 22 (showing that the Company spent $2,027,508 to trim 162.41 miles).

Bringing on additional crews to the system to perform trimming in 2022, consistent with a four-year cycle, would have increased the costs to somewhere in the range of $20,000 to $40,000 per mile based on cost information received from Liberty's contractors (id.). Liberty determined that it was simply not in the interests of customers to pay these exorbitant costs (id.). To pay these costs would concede the Company's bargaining leverage by signaling to contractors that the Company would pay virtually any cost to conduct this work, thereby creating a substantial risk that the costs would never decrease and would be highly detrimental to customers in the long-run (id.).

Despite these challenges, the Company was able to complete a total of 162.41 miles in 2022, which exceeded the planned cycle trimming (id. at 15). Moreover, the 162.41 miles were completed as part of the Company's 2022 vegetation management plan performance at a cost that exceeded Liberty's annual cost recovery cap by $480,104 (id. at 15, 21). The Company did not seek recovery of these costs above the annual recovery level permitted in the Settlement Agreement.

As part of the Company's efforts in 2022 to mitigate the increased costs and continued workforce issues, the Company worked to encourage use of mechanized equipment and assignment of a dedicated crew in Salem to increase the Company's ability to respond to emergent work at this location (DE 23-031, Exh. 1 at 15-16). Based on the success of this dedicated crew in Salem during 2022, the Company maintained a dedicated crew in Salem for 2023 (DE 24-044, Exh. 1, at 14). However, due to an unanticipated amount of needed capital work and storm-related projects, the Company was not able to complete all planned work for Salem in 2023, with

approximately 19 miles remaining (id.).[11] Although work remained on the annual work plan, the Company was thorough and diligent in maximizing the funding and labor resources that it had. At no time did the Company ignore or forego its obligations under the Settlement Agreement; nor did the Company's performance result in "contempt" of the settlement provisions. Instead, the Company's VMP activities were generally consistent with the program goals and parameters outlined in the Settlement Agreement.

In addition to considering the Company's performance between 2020 and 2024 holistically, the Commission should also consider the benefit of the bargain that *Liberty* was receiving in exchange for the Settlement Agreement. The OCA has focused solely on the benefits that it expected to accrue to customers in an attempt to use the Settlement Agreement against Liberty. However, this interpretation misstates the settlement process and the Commission's determination that the Settlement Agreement was reasonable. Liberty agreed to accept a level of risk with respect to vegetation management costs in exchange for an increased level of funding through base distribution rates to support the *existing* VMP.

Thus, at the time that the Settlement Agreement was entered, the Company expected that the costs for maintaining a four-year trim cycle would be reasonably consistent with past practice and with the funding provided in the Settlement Agreement (Faber/Green Testimony at 18-19). The Company agreed to conduct the program, knowing that actual costs may vary above (or below) the level of funding established by the Settlement Agreement, as is consistent with the "ebb and flow" that pertains to utility ratemaking (DE 19-064, 2020 June 24 Tr. at 103). Cost of service ratemaking is never precise and the Company's testimony at the 2020 hearing in support of the

[11] It is not disputed that the Company completed only 146.34 miles out of its planned 165.09 miles. All incomplete miles were in the Salem area and were not completed due to the need to address capital and storm work (DE 24-044, Exh. 1, at 14).

Settlement Agreement acknowledged that reality. Consistent with this agreement, the Company absorbed approximately $480,000 in 2022 VMP costs, above the level allowed by the Settlement Agreement, which equates to approximately 20 percent of the total amount the Company is able to recover on an annual basis (DE 23-031, 2023 May 4 Tr. at 14). However, in other years, the issue with performing the work carried far beyond a simple cost overrun. In other years, labor shortages and exorbitant prices prevented the Company from performing any more work than it did.

In this context, the penalty of $3.58 million calculated by OCA to address an alleged "backlog" of trimming is beyond any level of reasonably foreseeable risk and associated cost, representing more than an entire year of vegetation management funding.[12] This level of "risk" far exceeds any ebb and flow that is accepted as part of utility ratemaking principles. Accordingly, requiring the Company to bear the cost of work that could not be performed due to exigent circumstances is an unwarranted and overly punitive result. Further, to suggest that the Company should have simply expended unlimited amounts to trim to a four-year cycle is contrary to the interests of customers who would ultimately bear the cost of future VMP work at higher than necessary costs.

For a frame of reference, Liberty's annual operating budget for 2023 was $20.5 million and its operating budget for 2024 is $28.5 million (Faber/Green Testimony at 39). Adopting the OCA's recommendation to require Liberty to absorb $3.58 million in vegetation management costs would require Liberty to absorb more than double the vegetation management recovery cap; an amount

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[12] As detailed in the Faber/Green Testimony, this $3.58 million figure was calculated by OCA based on illustrative figures included in the Company's 2023 Vegetation Management Plan (Faber/Green Testimony at 28. This figure is not based on an actual RFP response and was not intended to be relied upon for decision making (id.). It is likely that this figure would be much larger if based on actual costs information; however, the impacts of even this hypothetical calculation are significant and demonstrate that the OCA's recommendation is unreasonable.

that is 17.5 percent of the Company's 2023 operating budget and 12.6 percent of the 2024 operating budget (id.). This is not a reasonable result given the "benefit of the bargain" inherent in the Settlement Agreement for the VMP.[13]

Lastly, it is important to consider that the Settlement Agreement allowed the Company to file for a change in base distribution rates based on a 2022 test year (Settlement Agreement, § II(O)). Accordingly, the Settlement Agreement was devised to address the Company's vegetation management program from approximately 2020-2023, with the expectation that the Company could propose modifications based on the 2022 test year. In keeping with this expectation, the Company filed a petition to adjust its base distribution rates, including modifications to the VMP to address the rising costs and resource constraints that impeded the VMP beginning in 2021 (DE 23-039, Testimony of Heather Green and J.M. Sparkman). Thus, the Company's actions demonstrate that the Company has implemented the VMP as contemplated by the terms of the Settlement Agreement and the Commission should reaffirm its previous findings of consistency with the VMP goals and parameters.

This finding of consistency with the program goals and parameters was made based on full disclosure of the challenges that the Company has faced in recent years to maintain a four-year

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[13] With respect to terminated contributions from telecommunications providers, the Company acknowledges that the Commission directed the Company to explore ways to hold telecommunications providers accountable for vegetation management costs. Order No. 26,620. To meet this mandate, the Company evaluated options with respect to Consolidated Communications. However, based on the changes in the telecommunications industry, vegetation management work simply does not benefit telecommunications providers in the same way that it benefits electric utility companies based on how the telecommunications industry has evolved (Faber/Green Testimony at 31). Termination of cost sharing by Consolidated is not unique to Liberty or New Hampshire and the dynamics of these relationships are well-known to the Commission. See, e.g., Docket DE 21-020. Due to the timing of Consolidated termination of its agreement with Liberty in July 2019 (after the filing of Liberty's petition in DE 19-064), this loss of funding was not accounted for in the Settlement Agreement. The Company's pending petition to adjust distribution rates (DE 23-039) is the first opportunity to address this additional cost pressure as part of a holistic review of the Company's vegetation management plan.

trim cycle and with the full opportunity for both DOE and OCA to argue otherwise.[14] The Commission made its determination that the Company's program was implemented generally consistent with the terms of the Settlement Agreement on the same information that is being presented in this proceeding. Now DOE and OCA request the Commission to reach a wholly different conclusion including the imposition of penalties, which is thoroughly unwarranted and punitive. Accordingly, the Company requests that the Commission reaffirm its previous findings and dismiss the OCA's petition or issue a procedural schedule that allows the Company to introduce testimony and supporting evidence in support of its actions to conduct the VMP in order to address concerns raised by DOE and OCA.

B. There Is No Support for OCA's Recommended Penalties

The OCA recommends not only that the Company must absorb any and all costs over and above the $2,420,000 in costs permitted for recovery pursuant to the Settlement Agreement, but also that the Commission should impose penalties against Liberty and Liberty's CEO (OCA In. Br. at 17). In support of this recommendation, the OCA cites to the statutory provisions that authorize the Commission to levy penalties, without providing any explanations for why it is appropriate for the Commission to exercise its penalty authority in this instance (id. at 16-17). As detailed above, Liberty has been forthcoming regarding the challenges facing its VMP over the last few years and *its plans to address those challenges.* Accordingly, the Commission's precedent

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[14] OCA has raised concerns regarding increasing police detail costs and DOE has raised issues regarding the Company's performance of the VMP in 2021 due to the ClearWay breach of contract (see, Dockets DE 22-014, DE 23-031). However, neither OCA nor DOE objected to the Company's recovery of VMP costs, indicating a perspective that customers were obtaining the VMP services for which they were paying. Further, the OCA's concerns with police detail costs was a concern that selectboards and police departments did not understand that these increased costs are passed on to customers and expressed concern with the increase to rates that results (DE 23-031, OCA Apr. 19, 2023 Ltr.). Accordingly, OCA's concerns with police detail costs were not concerns with any actions taken by the Company itself but with a passthrough cost over which the Company has no control.

does not support levying penalties in this instance and would be disproportionate to the actual circumstances detailed above.

In Docket DG 11-196, the Commission opened a proceeding to allow Unitil Corporation ("Unitil") to show cause for why the utility and its officers should not be subject to civil penalties pursuant to RSA 365:41 and RSA 365:42 based on Unitil's failure to meet *emergency response standards* related to its gas operations. The emergency response standards at issue in that proceeding were agreed to by Unitil pursuant to a settlement agreement; the emergency response standards relate to *safety* of the gas system. DG 11-196, Order No. 25,390. In lieu of levying any penalties against Unitil, the Commission approved a settlement agreement between Commission staff and Unitil that included a plan for how Unitil would meet the safety standards going forward, consequences if Unitil was unable to meet such standards, and reporting requirements. Id. at 27.

Here, there is no assertion that the Company's challenges regarding vegetation management have resulted in an adverse impact to customer or public safety. In fact, some of the challenges faced by Liberty in completing a certain number of miles each year are the result of its prioritizing of vegetation management to remove hazard trees and/or address storm work as these issues arose. See, e.g., Docket DE 24-044. In Docket DE 24-044, the Company explained that it had continued its proactive approach of keeping a dedicated crew in Salem (DE 24-044, Exh. 1, at 14; see also DE 23-031, Exh. 1, at 13[15]). The VMP for 2023 was designed to keep this dedicated Salem crew busy all year and also to have a dedicated crew available for unplanned and/or afterhours work (id.). However, due to the amount of capital and storm work that was greater than anticipated and that could not addressed with just one tree crew on-site, the Company was not able to complete all of the vegetation management work planned for the Salem circuits (id.). All of the

[15] The Company's use of a dedicated crew in Salem resulted in exceeding its planned mileage for 2022 by 9 miles (DE 23-031, Exh. 1, at 13).

planned trimming work that was not able to be completed in 2023 was on these Salem circuits and attributable to the need to perform unanticipated capital and storm work (id.).

Further, the Company's reliability (a main objective of any vegetation management program) has remained excellent during recent years (Faber/Green Testimony, at 16-18; see also DE 23-039, Direct Testimony of Anthony Strabone at Bates II-470, 471). Accordingly, there has been no harm to customers that would warrant the imposition of penalties. In addition, Liberty proactively included a proposal to address the challenges it has faced with respect to its VMP including moving to a more sustainable, five-year trim cycle and allocating funding to address the backlog of high-risk trees (DE 23-039, Direct Testimony of Heather Green and J.M. Sparkman, at Bates II-543). As detailed below, addressing the challenges that Liberty has encountered and approving a sustainable path forward is the correct remedy and is consistent with the actions taken in the Unitil case cited above, Docket DG 11-196.

Even more arbitrary is the OCA's recommendation of a penalty against the Company's parent company CEO. The imposition of a penalty on the officer or agent of a utility is only permitted based on the stringent language set forth in RSA 365:42 which requires that the actions are "willful." Here, the OCA has not indicated that such willful conduct has occurred (nor can it) and has failed to cite to any precedent that would support its recommendation. In Docket DW 00-247, the Commission did impose a penalty against the owner of a water system pursuant to RSA 365:42 finding that the record was "replete with examples of Mr. Fitzgerald's lack of cooperation in the transfer of utility assets and his neglect in the operation of the utility." Order No. 24,622 at 6 (May 12, 2006).

Here, the record is devoid of any examples of Mr. Huskilson's willful violation of the Settlement Agreement or failure to ensure that the VMP is implemented consistent with the

Settlement Agreement. In fact, the record does not contain even one example of willful actions (or inactions) by Mr. Huskilson or any executive of the Company to support such a finding. In determining that a penalty against the utility owner in Docket DW 00-247 was appropriate, the Commission referred to Mr. Fitzgerald's lack of cooperation in transferring a water system placed in receivership to a new owner, his personal failure to file required reports, and found that his failure to appear at the order to show cause proceeding was further evidence of his "disregard of the regulatory regime to which he is subject as the owner of a utility." Id. The utility owner in that proceeding had been directed to appear and show cause why such a penalty should not be levied and neither he nor his attorney appeared before the Commission in direct contravention to a Commission order. Id.

Here, the facts simply cannot support a similar outcome. First, it is important to note that Mr. Huskilson assumed his current position as CEO in May 2024 well after the Settlement Agreement was entered into and approved in 2020, and after the Company experienced the vegetation management challenges leading to this proceeding.[16] As CEO of Liberty's ultimate parent company, Mr. Huskilson would not dispute that he is responsible for overseeing Liberty as an operating subsidiary of Algonquin Power & Utilities Corp. However, it would be impossible to apply the penalty provision which requires "willful" conduct when Mr. Huskilson was not even in this role at the time the alleged conduct occurred and where there has been no demonstration that Mr. Huskilson is directly involved in the day-to-day oversight of the vegetation management program such that a finding of *willful* violation of the vegetation management program could be

[16] In fact, before Mr. Huskilson had even assumed his role, the Company had already submitted its base rate proceeding in DE 23-039 further detailing those vegetation management challenges and proposing a remediation plan to address vegetation management on a going forward basis including the backlog that has resulted from ClearWay's breach of contract and increasing cost pressures. It is therefore clear that the Company was already taking steps to remediate these issues prior to any potential responsibility by Mr. Huskilson.

found (see Faber/Green Testimony at 41). At a minimum, such a finding would require further investigation by the Commission and should not be decided without additional process. For all these reasons, penalties are simply not warranted based on the evidence before the Commission and the OCA's proposed remedy must be rejected.

C. The Appropriate Remedy is Approval of a New Vegetation Management Plan and Associated Cost Recovery Framework

As discussed above, in Docket DG 11-196, the Commission initiated a docket in response to a petition filed by Commission staff requesting that the Commission investigate Unitil's emergency response performance as required by an approved settlement agreement. The remedy approved in that order to show cause proceeding (through a settlement agreement) was an update to the utility's operations to address the underlying issue. Order No. 25,390, at 27. Liberty agrees that changes to its VMP are necessary to address the change in circumstances that has occurred with respect to contractor crew availability and costs. In fact, prior to the initiation of this proceeding, the Company did file a petition to adjust its base distribution rates that included a proposal to modify its vegetation management plan by moving to a five-year trim cycle and allowing for a sustainable level of funding going forward (DE 23-039, Direct Testimony of Heather Green and J.M. Sparkman).

As the DOE and OCA have pointed out, review of this 2023 VMP proposal has been complicated by the DOE's motion to dismiss the Company's filing in DE 23-039 and the resulting delays in that docket. However, those delays do not change the fact that the appropriate remedy is a proceeding where the Company's VMP proposal can be reviewed and adjusted. The procedural irregularities of DE 23-039 have impacted only the timing of that review, not its necessity. In light of the concerns raised here it may be appropriate to convert the instant

proceeding into a review of the Company's vegetation management program in lieu of waiting to complete that review in the next base distribution rate proceeding.

Any such review of the Company's VMP must address two key components: (1) a performance plan to realign the program with a sustainable trim cycle; and (2) a cost recovery framework that allows the Company to complete all necessary work. The DOE and OCA's initial briefs attempt to bifurcate the VMP work from its costs by arguing that the Company should be held responsible for completing a guaranteed number of miles regardless of cost (DOE In. Br. at 7, 8; OCA In. Br. at 11). Such a cost recovery framework is problematic for two reasons.

First, the Company's VMP is specifically designed to achieve its objectives while balancing costs to customers (see, e.g., DE 23-039, Direct Testimony of Heather Green and J.M. Sparkman, at Bates II-522). Put another way, the Company prioritizes its VMP work to ensure it is only performing work that is reasonably undertaken and providing benefits to customers.[17] It is not reasonable to perform trimming without regard for the costs. This was confirmed by the circumstances experienced by the Company from 2020-2024. Vegetation management costs rose at an unprecedented rate; had the Company paid these exorbitant costs its customers may have been locked into those higher rates going forward (Faber/Green Testimony at 24). The Company took reasonable and good faith steps to limit customer cost impacts by refusing to pay usurious rates that the contractors were offering. Had the Company agreed to pay significantly higher costs simply to maintain a particular cycle of work, it would have sent a signal to vendors that higher bids are acceptable (id.).

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[17] Notably, no party has objected to the Company's annual VMP cost recovery filings even though the cost-per-mile has increased over time. Accordingly, it is not reasonably disputed that the actual costs incurred by the Company were prudent.

Second, the Settlement Agreement affords the Company with a level of cost recovery on an annual basis that the Company uses as a guideline for designing its annual VMP. The Company agreed to that provision in the Settlement Agreement based on the circumstances it knew at the time (i.e., the condition of its system, its existing VMP costs, etc.) and in response to concerns from DOE (DE 19-064, Exh. 22, at 29, expressing concern with rising costs and the Company's view of funding as a target versus a budget). Agreeing to a fixed amount of recovery was reasonable over the few years contemplated for the Settlement Agreement, based on what Liberty knew at the time and the concerns it was attempting to address. The actual circumstances that materialized over those few years drastically differed with respect to contractor crew availability (i.e., ClearWay breached its contract) and contractor crew costs creating a substantial obstacle to performance of the VMP, as contemplated.

As discussed above, requiring the Company to absorb a level of costs that far exceeds the $2,420,000 cap it is allowed to recover on an annual basis would be unreasonable absent a showing that the Company acted imprudently. For example, the OCA calculates that it would cost the Company $3.58 million over the allowed recovery cap to conduct trimming on the number of miles identified by OCA (OCA In. Br. at 15). Assuming this calculation is correct, the Company would be required to absorb costs that are significantly higher than the level of costs allowed for recovery. Four full years of vegetation management work has been completed since the Settlement Agreement was approved (2020, 2021, 2022, 2023). The maximum cost recovery for four years is $9,680,000. It is simply unreasonable to suggest that the Company was agreeing to absorb up to 37% above that cost (i.e., an additional $3.58 million) as an "insurance policy" for the VMP

under all range of circumstances that could possibly occur between the Settlement Agreement and the next rate case.[18]

The Company agreed to absorb reasonable fluctuations of costs above the annual cost recovery cap and – in fact -- it has done so, where warranted and advisable in the interests of customers (DE 23-031, Exh. 1, at 7, reporting an estimated spending over the cap of $480,000; see also DE 23-031, Apr. 19, 2023 Tr. at 14, 34-35, 36, confirming that the Company was not seeking recovery of the additional $480,000).

The initial briefs of OCA and DOE gloss over this fact and appear to be implying that the Company has purposefully trimmed fewer miles on an annual basis to save money and to shift any cost recovery risk back to customers (OCA In. Br. at 4, arguing that the Company is reneging on its legally binding obligation). However, this allegation that the Company has undermined the Settlement Agreement terms is not supported by the record detailed above (i.e., the detailed description of the challenges faced by the Company including its efforts to mitigate the resulting costs and to appropriately prioritize work based on the cost pressures it has faced). The Company's annual vegetation management filings provide a transparent record that directly contradicts a finding that the Company is reneging on its obligations and tells an entirely different story. Accordingly, Liberty respectfully requests the opportunity to present an updated proposal to address its vegetation management program and associated cost recovery on a going forward basis. The Company commits to working collaboratively with the parties to this proceeding and incorporating reasonable feedback.

[18] It is informative that the Settlement Agreement allows the Company to seek recovery of an additional ten percent on an annual basis to account for a variance in costs. Based on inclusion of this ten percent variance it is difficult to argue that it was foreseeable that the Company would incur and fund an additional 37% increase in costs.

D. Conclusion

As detailed above and in the Company's Initial Brief, the Commission should determine that, consistent with its prior orders issued in dockets DE 21-049, DE 22-014, DE 23-031, and DE 24-044, the Company's VMP activities since 2020 have been consistent with the program goals and the parameters of the Settlement Agreement approved by the Commission in Docket DE 19-064. Any revisions to the Company's vegetation management program and associated cost recovery should be addressed following an opportunity for the Company to present a proposal and evidentiary support for such proposal. The remedies recommended by DOE and OCA fail to address the extenuating circumstances that materially changed since the approval of the Settlement Agreement. The Company has demonstrated that it acted reasonably in light of the circumstances that arose subsequent to the Settlement Agreement and that no penalties are warranted.

Accordingly, the Commission should allow the Company to move forward with implementation of a restructured VMP that recognizes the challenges and costs that now exist in the industry and that continues to contribute to the excellent reliability of service the Liberty's customers are experiencing.

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Respectfully submitted,

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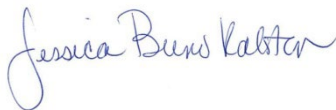
Certificate of Service

I hereby certify that on December 27, 2024, a copy of this Reply Brief has been forwarded to the service list for docket DE 24-073.



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