

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

OFFICE OF THE CONSUMER ADVOCATE  
Show Cause Proceeding

**Docket No. DE 24-073**

**NEW HAMPSHIRE DEPARTMENT OF ENERGY REPLY BRIEF**

The New Hampshire Department of Energy (DOE or Department) files this reply brief pursuant to a procedural order issued by the Public Utilities Commission (Commission or PUC) on November 18, 2024, scheduling reply briefs on or before December 27, 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,” or “Company”) 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 adjudicative 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?

On October 22, 2024, the Department submitted its Initial Brief addressing the questions set forth in the Commission’s August 28, 2024, Order. On November 18, 2024, the Commission issued a Procedural Order pertaining to a Motion for Revised Process (Motion) filed by Liberty.

In its Order the Commission denied the Company's Motion and established the following schedule: (1) Submission of testimony needed to support either its initial brief or anticipated reply brief shall be filed by December 13, 2024; and (2) Reply briefs to the initial briefs shall be filed by December 27, 2024. On December 13, 2024, the Department filed a letter with the Commission indicating that the Department would rely on its Initial Brief where the Department had cited extensively to facts that were taken from previous Liberty vegetation management plan dockets and declining to submit additional testimony.<sup>1</sup>

## II. ANALYSIS

### 1. **The Company's claim that nothing has changed in terms of recovery for overspending for vegetation management since the vegetation management plan was established in 2006, DG 06-107 is incorrect.**

Liberty focuses on the historical context of the vegetation management plan and reconciliation for overspending but not the language of DE 19-064 which imposes a cost recovery cap. Liberty's Initial Brief dated October 22, 2024, argues that the DE 19-064 settlement language is governed by and should be considered in the context of prior settlements starting with DG 06-107 when the Liberty's vegetation management plan (VMP) was established. Liberty argues that the process for review of VMP and treatment of costs for VMP for over-budget spending that occurred during the periods covered by DG 06-107 and subsequent Settlement Agreements (DE 13-063, DE 16-383) should be followed in the same way when reviewing VMP over-budget spending under the DE 19-064 settlement.<sup>2</sup> Liberty relies on language in prior settlements such as DG 06-107 which required the Company to "provide a description of the activities along with targeted expenditures ... of the Proposed Plans," and then

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<sup>1</sup> See Docket Tab 23, Department's letter dated December 13, 2024.

<sup>2</sup> See Liberty Initial Brief dated October 22, 2024, Page 5 and 10-13.

for the review at the Commission level to “reconcile actual expenditures and investments with the Plans’ targeted spending levels at the conclusion of the Plans’ period.”<sup>3</sup> In essence, relying on prior Settlements, Liberty maintains that the VMP spending budget agreed to in the DE 19-064 Settlement Agreement is a *target* for prudent spending – and not a true ceiling, or a spending or recovery cap. This has been Liberty’s consistent position in this docket. See Department’s Initial Brief citing Liberty’s statement at the Pre-Hearing Conference that “vegetation management costs have always been understood as a pass through and that inclusion of a base amount in base rates was rate setting/rate smoothing technique – not a cap on vegetation management spending.”<sup>4</sup>

However, Liberty’s position repeatedly glosses over the plain DE 19-064 Settlement Agreement language which prohibits recovery for VMP spending over the cap of \$2.2 million (plus 10% if needed). This specific provision (which has been cited in each of the Department’s prior filings in this docket) states that “[t]he Company shall not recover any VMP expenses that exceed 10% of [\$2,200,000], or in excess of \$2,420,000, through the annual reconciliation filing, or otherwise.”<sup>5</sup> By repeatedly claiming that nothing significant changed in DE 19-064 as compared to prior VMP settlements, Liberty is essentially urging the Commission to ignore the plain language of the DE 19-064 Settlement, or to assign less weight to the express language in favor of an unexpressed and unagreed to intention that reconciliation of over-budgeted spending for VMP under the DE 19-064 Settlement Agreement be addressed in the same fashion as it was prior to DE 19-064. The Department is not persuaded by this approach and urges the Commission to not adopt it either. As discussed in its Initial Brief dated October 22, 2024, and

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<sup>3</sup> See Liberty Initial Brief dated October 22, 2024, Pages 4.

<sup>4</sup> See Department’s Initial Brief dated October 22, 2024, Page 5 citing to DE 24-073 Pre-Hearing Conference August 27, 2024, Tr. at 15-16.

<sup>5</sup> DE 19-064 at Tab 59, Page 11

again reiterated in its letter dated December 13, 2024, the Department has provided case law authority and legal analysis regarding the required interpretation of intent of contractual terms when language is not ambiguous as in DE 19-064.<sup>6</sup>

Further, there is an underlying reason for the explicit language in DE 19-064 that the Liberty shall not charge ratepayers for spending above the base rate amount of \$2.2 million plus 10% and that reason must not be ignored or swept aside. As the Department stated in its Initial Brief, the DE 19-064 Settlement Agreement is markedly different from the DE 16-383 Settlement (2016 Settlement) which it replaced in that it contains an additional ratepayer protection that was not in the 2016 Settlement, and that protective clause was not included by accident.<sup>7</sup> Where pre-DE 19-064 Settlement language arguably contemplated a pass through to rate payers for prudent overspending in VMP, PUC Staff departed from this approach in structuring the Settlement Agreement of DE 19-064 due to concerns over the variance between actual and budgeted VMP expenses. In DE 19-064, the Commission Staff<sup>8</sup> 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 filing).

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

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<sup>6</sup> See Department Initial Brief dated October 22, 2024, Page 2-3; See Department's letter dated December 13, 2024, Page 2.

<sup>7</sup> See Department Initial Brief dated October 22, 2024, Page 6.

<sup>8</sup> Commission Staff is a predecessor to the Department of Energy

In the DE 19-064 Settlement, PUC Staff agreed to a higher amount in base rate 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 for the notion that this amount was meant to be a cap, not a target.<sup>9</sup>

The Department's concern about Liberty's lack of budget discipline and cost control for VMP expenses (and other items) continue. In the current Liberty rate case, DE 23-039, the Department's testimony states:

[D]uring the course of PUC Staff's review in Liberty's prior rate cases, Dockets DE 16-383 and DE 19-064, Staff found disparities between budgeted amounts and actual expenditures reported by the Company to be both numerous and significant in size, raising questions as to whether the Company was sufficiently diligent in its budgeting, project management, and cost control. Given the increasing number of variances observed in both rate cases, which in some instances increased originally budgeted costs several times over, and given that Liberty provided little in the way of specific information as to root causes or how the Company decided that those overages were economic, PUC Staff was unable to determine that Liberty took appropriate measures to control costs or that Liberty's decision-making process was prudent and reasonable or in the interest of ratepayers.

DE 23-039 (Docket Tab 91) Testimony of Dudley/Willoughby/DeVirgilio at 21

In that same section of the DE 23-039 testimony, Department witnesses Dudley/Willoughby/DeVirgilio discuss a Liberty company-wide audit authorized by the Commission in the Docket No. DG 14-180 Liberty Utilities (EnergyNorth Natural Gas). As the Dudley/Willoughby/DeVirgilio testimony states, the results of that audit (which was performed by Liberty Consulting Group and issued on August 12, 2016) "underscored and confirmed many of the same issues and concerns encountered by PUC Staff during discovery in DE 16-383, and later re-emerged in DE 19-064, including but not limited to: (a) Extremely large variances between budgeted and actual capital expenditures in 2014, (b) Capital budget variances that

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<sup>9</sup> See Department Initial Brief dated October 22, 2024, Page 6.

continued into 2015 and 2016. (c) Lack of detailed explanations supporting and justifying those variances. (f) Lack of effective control or monitoring of project budgets.”<sup>10</sup> Mr. Demmer’s testimony in DE 19-064 insightfully stated that “[u]nlike a capital project that Staff can review, site visit, and correlate project objectives to the cost of the project, vegetation management activities are not readily quantifiable. Still, (*sic*) as with any capital or expense project, Liberty’s VMP should be required to work within an established budget.”<sup>11</sup>

To reiterate, the change in the language of DE 19-064 to cap VMP spending recovery at \$2.2M plus 10% was intentionally included as a budget/spending control, and it changed the VMP paradigm as compared to the pre-DE 19-064 history back to 2006 (DG 06-107).

**2. Liberty’s underperformance of its cycle trimming obligations under the DE 19-064 Settlement has led to a backlog of work, which the Department highlighted in 2022 as an issue to be dealt with in future dockets**

Liberty has underperformed its cycle trimming obligations for the past 3 (and likely) 4 years and that has led to a backlog of work that, in the Department’s view, should have been addressed by Liberty using the funding allowed under the DE 19-064 Settlement Agreement. In its Initial Brief Liberty argues that “the DE 19-064 Settlement continued the target of a 4-mile trimming cycle, knowing – and accepting - that the funding provided would certainly fall short of what was required to meet that cycle.”<sup>12</sup> The Department disputes this assertion that the Department knew and accepted underperformance. DOE points to the hearing relative to Liberty’s Reconciliation and Rate Adjustment Filing in DE 22-014 where, in answer to Commissioner questions, the Department discussed that “one of the key components of the 19-

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<sup>10</sup> DE 23-039 (Docket at Tab 91) Testimony of Dudley/Willoughby/DeVirgilio at 22-23

<sup>11</sup> DE 19-064, Exhibit 22 (Demmer Testimony) at 30-31

<sup>12</sup> See Liberty Initial Brief dated October 22, 2024, Page 13-14 (DOE believes Liberty meant to reference a 4-year cycle, not a 4-mile cycle).

064 rate case, from Staff's perspective, when we were Staff, was that we get away from that annual discussion of overages, and that we agreed on a cycle and an amount ... [the Department] feels very strongly that abiding by the terms of the 19-064 rate case agreement is important....Yes, we expected that the full system would be trimmed in the four years." DE 22-014, Tr. 4/19/22 at 105-106. At the conclusion of that hearing the Department expressed that "the \$2.4 million was supposed to cover a certain amount of work ... and ... that work was not accomplished." DE 22-014, Tr. 4/19/22 at 129-130.

The Department highlighted for the Commission that Liberty had underperformed in 2021 and requested the opportunity to address the issues of underperformance and backlog in future rate proceedings. DE 22-014, Tr. 4/19/22 at 129-130.

**3. The Department views the issue of quantifying the cost of the cycle trimming and hazard trees backlog, and related recovery from customers, to be fundamentally a rate issue.**

In its August 13, 2024 Position Statement in the early stages in this case, the Department stated that "if/how Liberty should be allowed to charge customers for backlogged vegetation management work...is essentially a rate issue." As noted in the Department's Initial Brief at 4-5, to date, Liberty customers have not paid more than what was allowed under the DE 19-064 Settlement for VMP (although Liberty has underperformed in terms of miles trimmed each year).

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). Due to issues not related to VMP, Liberty did not have the opportunity to submit rebuttal testimony on the Department's proposal.

The comprehensive rate case settlement in DE 23-039 presently pending before the Commission increases Liberty's VMP budget for 2025 and 2026 by over \$.5 million per year, establishes a commitment of 117 miles of cycle trimming, and requires Liberty to dedicate one crew to work exclusively on backlogged hazard trees removal. The DE 23-039 pending Settlement expressly does not cover the issues raised in this docket, and the Department expects that the issue of VMP spending, and collections will be thoroughly examined again in the 2026 rate case that is contemplated by the DE 23-039 Settlement. The Department projects that it will maintain the same in position in 2026 (*i.e.*, that Liberty shareholders, not Liberty customers, should pay for any backlogged VMP work from the DE 19-064 four-year period (2020-2024). The Department believes that this ratemaking issue can be adequately dealt with in the 2026 rate case.

Alternatively, as stated in the Department's Initial Brief at 7-8, the parties to this docket could evaluate the cost of addressing the backlog from the DE 19-064 four-year period and the Commission could require Liberty shareholders to contribute that amount to whatever VMP amount is approved in DE 23-039 or in a future rate case, as a ratemaking decision under RSA 378:7.

### **III. CONCLUSION**

**WHEREFORE**, for the reasons set forth above, the Department of Energy respectfully recommends that the Public Utilities Commission take the following actions in this docket:

1. Find that Liberty is in contempt of the DE 19-064 Settlement Agreement due to underperformance in violation of the plain terms in that Settlement related to vegetation management practices; and
2. Establish that the questions of quantifying the cost of that underperformance, and deciding who bears the cost of that underperformance will be addressed in the next Liberty rate case following DE 23-039; or alternatively
3. In this docket, quantify the cost of that underperformance and require that shareholders contribute the cost of that underperformance towards current or future VMP costs; and



4. Grant such further relief as is just and required.

Dated: December 27, 2024

Respectfully submitted,

**New Hampshire Department of Energy**  
By its Attorneys,

*/s/ Paul B. Dexter*

*/s/ Marie Helene Bailinson*

Paul B. Dexter, Esq.  
Marie Helene Bailinson, Esq.  
21 South Fruit Street, Suite 10  
Concord, NH 03301  
603-271-3670

**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, December 27, 2024.

*/s/ Paul B. Dexter*

Paul B. Dexter, Esq.