STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Liberty Utilities (Granite State Electric) Corp.

Investigation of Vegetation Management Practices

Docket No. DE 24-073

Reply Brief of the Office of the Consumer Advocate

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to this docket, and pursuant to the briefing schedule adopted by the Commission in its procedural order of November 18, 2024 (tab 22) submits the following reply brief. The foremost question that the Commission must decide is whether Liberty is in contempt of the settlement agreement ("Settlement Agreement"), as approved by Commission Order No. 26,376 in Docket No. DE 19-064, as well as the Commission's applicable rule, N.H. Code Admin. Rules Puc 307.10. These questions can be resolved immediately as yes. Liberty's own counsel has already conceded noncompliance with N.H. Code Admin. Rules Puc 307.10. Transcript in Docket No. DE 24-073 (tab 13) at 22. And as discussed at length in the OCA's initial brief, Liberty's past performance, testimony, and statements made by counsel evidence Liberty having reneged on its legally binding obligations with respect to the Settlement Agreement and Rule 307.10.

Despite this, counsel for Liberty urges the Commission to reject the plain meaning of the Settlement Agreement and instead adopt Liberty's alternative interpretation — an interpretation that is contrary to the plain terms of the Settlement Agreement, impermissible under New Hampshire law, and is directly undermined both by Liberty's testimony and statements made by its counsel. Therefore, the OCA maintains its position that because Liberty is in contempt of the Settlement Agreement and Rule 307.10, the Commission should issue an order consistent with the remedies outlined in the OCA's initial brief. OCA's Initial Brief in Docket No. DE 24-073 (tab 16) at 18.

The OCA states the following in support of its response:

I. The Settlement Agreement terms are unambiguous.

In relevant part, the Settlement Agreement terms are unambiguous. The Settlement Agreement clearly states that Liberty agreed to a four-year trim cycle and that Liberty shall not recover any VMP expense in excess of $2,420,000 through the annual reconciliation filing or otherwise. Settlement Agreement in Docket No. DE 19-064 (Exhibit 37), at 11. Liberty has testified agreement with the plain terms of the Settlement Agreement across numerous dockets, as addressed at length in the OCA's initial brief and petition. Liberty's own counsel has conceded that the Settlement Agreement does call for a four-year trim cycle and Liberty failed to negotiate for more favorable terms that would support its alternative interpretation. Transcript in Docket No. DE 24-073 (tab 13) at 22.

Despite the above, Liberty misrepresents the OCA's argument as flawed by saying the OCA has "cherry-picked" language in the Settlement Agreement to suggest that 'Liberty shall maintain a four-year cycle" does not actually mean Liberty must trim one fourth of its system each year over a period of four years. Liberty's Initial Brief in Docket No. DE 24-073 (tab 15) at 3. But Liberty directly undermines itself by ignoring its own testimony in DE 21-138 where it testified the opposite:

> **[Counsel for Liberty]**: And is it fair to say the Company's currently on a four-year cycle, meaning it intends to trim one fourth of its lines each year?
>
> **[Liberty Witness Steele]**: No, they are not.
>
> **[Counsel for Liberty]:** But we're supposed to be.
>
> **[Liberty Witness Steele]:** We are supposed to be. That is correct.
>
> **[Counsel for Liberty]**: And that was part of the Settlement Agreement in the last rate case, was that we would continue a four-year-cycle that had started some years prior.
>
> **[Liberty Witness Steele]:** That is correct.

Transcript in Docket No. DE 21-138 (tab 17) at 16. Meaning, Liberty has testified it is supposed to trim one fourth of its lines each year pursuant to the Settlement Agreement — directly undermining Liberty's current argument that the Settlement Agreement cannot be read as Liberty having to clear one-fourth of its lines each year. Liberty's Initial Brief in Docket No. DE 24-073 (tab 15) at 3. Further, in stark contrast to Liberty's initial position in this docket, Liberty's latest testimony now states Liberty is required to maintain a four-year trim cycle pursuant to the Settlement Agreement. Liberty's Testimony in Docket No. DE 24-073 (tab 24) at 3.

Thus, as the Department of Energy rightly states in its initial brief, there is no reasonable disagreement as to what the words in the DE 19-064 Settlement Agreement mean. Department's Initial Brief in Docket No. DE 24-073 (tab 17) at 2.

Therefore, the Commission must be weary of Liberty's attempt to create ambiguity where there is none so that Liberty can unilaterally redefine the plain terms of the Settlement Agreement it has otherwise failed to uphold. Liberty has testified agreement with the plain meaning of the Settlement Agreement terms and must not be allowed to change its position when facing the consequences of its many years of underperformance. OCA Initial Brief in Docket No. DE 24-073 (tab 16) at 6 (showing Liberty having failed to meet the requisite number of miles under the Settlement Agreement or Rule 307.10 since the Settlement Agreement was approved).

1. **The plain meaning of the Settlement Agreement terms govern.**

The OCA agrees with the Department of Energy's initial brief that the plain meaning of the Settlement Agreement's terms are what govern, not some unstated understanding. Department of Energy's Initial Brief in Docket No. DE 24-073 (tab 17) at 3. While the Settlement Agreement is not a contract, the terms therein are given the force and effect of law — having been approved via Order No. 26,376 — and are interpreted using the principles of contract law. Department's Brief at 3; Order No. 27,057 in Docket No. DE 24-094 (tab 15) at 9-10. The Department also correctly relies upon the N.H. Supreme Court, which held in *Pembroke,* that absent ambiguity, the plain meaning of a contract's terms are what govern, not some

alleged and unexpressed intention that contradicts the clearly expressed language of the contract. Department's Brief at 3; *Town of Pembroke v. Town of Allenstown*, 171 N.H. 65, 71-72 (2018). Order No. 26,376 expressly states that Liberty would maintain a four-year trim cycle, and approved the Settlement Agreement, incorporating it by reference and granting the terms the force and effect of law. Order No. 26,376 in Docket No. DE 19-064 (tab 80) at 9-15. And as discussed at length, the Settlement Agreement expressly states Liberty shall maintain a four-year trim cycle. Settlement Agreement (Exhibit 37) at 11.

Here, there is no reasonable disagreement on what the Settlement Agreement terms mean. Liberty has testified it is obligated to a four-year trim cycle. Liberty's Testimony in Docket No. DE 22-014 (tab 1) at 007; Liberty's Testimony in Docket No. DE 24-073 (tab 24) at 3. Liberty has testified it is supposed to trim one-fourth of its lines in each year over a four-year period but hasn't been. Transcript in Docket No. DE 21-138 (tab 17) at 16. Liberty has even testified that *any* cost over $2,420,000 should be collected from Liberty's shareholders, not its customers. *Id.* at 62-66. Order No. 26,624 confirmed this by stating Liberty had confirmed any expenditures over the Commission-approved amount ($2,420,000) would be borne by its shareholders. Order No. 26,624 (May 10,2022) in Docket No. DE 21-138 (tab 15) at 4. Liberty's own counsel has even conceded that the Settlement Agreement does call for a four-year trim cycle and Liberty had failed to negotiate for language to support its unexpressed intention:

> We have a Settlement Agreement that does say the Company will complete a four-year cycle, and in all honesty, we should have had more language in there that said we will do our best with the dollars allowed to us under the Settlement Agreement.

Transcript in DE 24-073 (tab 13) at 22. Meaning, just as the Court in *Pembroke* prohibits, the Commission must reject Liberty's attempt to unilaterally modify the Settlement Agreement's terms because Liberty's alternative interpretation contradicts the express terms of the Settlement Agreement, contradicts its prior testimony, and is undermined by statements made by counsel.

Thus, when Liberty mistakenly claims, "The DE 19-064 [Settlement Agreement] contains no language supporting the OCA's position that the four-year cycle was a mandatory metric," all the above demonstrates Liberty's assertion as patently untrue. Liberty has violated Order No. 26,376, and the Commission must hold Liberty accountable.

II. Liberty's counsel concedes noncompliance with Rule 307.10

Liberty contradicts itself by alleging in its initial brief that the circumstances leading up to this docket do not support a Commission-finding of noncompliance with respect to Rule 307.10. Liberty's Initial Brief at 2. But Liberty fails to adequately address statements made by its counsel conceding that Liberty has been noncompliant with Rule 307.10 since the requirement was put into effect. Transcript in Docket No. De 24-073 (tab 13) at 18. Liberty does attempt to bridge this disconnect by going so far as to falsely claim it was granted a rule waiver without citing any authority or record in support of its claim. Liberty's Initial Brief at 15. Or in the alternative, that if Liberty has violated Rule 307.10, only

Consolidated Communications and ClearWay is to blame. Liberty's Initial Brief at 14-17. However, as stated above, Liberty mistakenly ignores New Hampshire Supreme Court precedent and prior Commission Orders that render Liberty's rejection of the plain terms of the Settlement Agreement irrelevant — the plain meaning of the Settlement Agreement terms control, not some unspoken intention or alleged surrounding circumstance. *Town of Pembroke v. Town of Allenstown*, 171 N.H. 65, 71-72 (2018); Order No. 27,057 in Docket No. DE 24-094 (tab 15) at 9-10.

But even if the Commission were to review the context surrounding the DE 19-064 Settlement Agreement, the Commission would quickly see Liberty having glossed over significant fact and circumstance that render Liberty's explanation incorrect, as addressed below.

a. The Commission has not granted Liberty a Rule 307.10 waiver, or a waiver in effect.

Consistent with N.H. Code Admin. Rule 201.05 (entitled: "Waiver of Rules"), Liberty cannot demonstrate it has been granted a waiver of Rule 307.10. In fact, Liberty can cite no authority or record that the Commission has granted it a waiver of Rule 307.10. Simply because Liberty declares it has an "implied waiver" does not make it so. Liberty's Initial Brief at 15. In fact, Liberty does not and cannot claim *when* the rule waiver it alleges to have received actually came into effect. *Id.* Liberty also makes no claim as to whether the waiver it received is temporary or indefinite. *Id.* The Commission must exercise caution and reject Liberty's baseless assertion because Liberty's claim cannot withstand scrutiny.

For instance: If Liberty had a rule waiver before the DE 19-064 Settlement Agreement, why would it legally bind itself to stricter criteria pursuant to the Settlement Agreement rendering said waiver moot going forward? If Liberty received the rule waiver after the Settlement Agreement, then why does Liberty reference irrelevant circumstances prior to the Settlement Agreement without reference to when, where, or under what conditions was the waiver granted? The answer is because Liberty does not have an actual or implied rule waiver. Liberty's narrative falls apart because it fails to explain how despite the challenges it faced since Rule 307.10's inception, it *intentionally* and *freely* committed itself to legally binding and stricter criteria under the Settlement Agreement than what is required under Rule 307.10.

Additionally, the Department correctly distinguishes between the DE 16-383 settlement agreement and the DE 19-064 Settlement Agreement in its initial brief, demonstrating increasing protections for residential customers against concerns for imprudent spending and cost overruns by Liberty. Department's Initial Brief at 5-6. These protective clauses did not occur inadvertently, but rather to address the issue of cost control and accountability as outlined in the Commission's Staff's testimony in DE 19-064.[1] *Id.* Were the Commission to scrutinize the history surrounding the DE 19-064 Settlement Agreement, the Commission would agree with the Department and the OCA that Liberty has grossly misstated the past.

[1] 1 By virtue of the creation of the Department of Energy on July 1, 2021, what was in 2020 the Staff of the Commission became the Regulatory Support Division of the Department.

b. Order No. 26,620: Consolidated Communications

Liberty states that whether and to what extent the Commission finds Liberty in violation of Rule 307.10, it should be excused due to Consolidated Communication's legally exercising its contractual right of withdrawal to pay Liberty its portion of vegetation management expenses. Liberty's Initial Brief at 17-18. Liberty asserts this "defense" despite having actual knowledge of Consolidated's contractual right of withdrawal but still freely entering and legally committing itself to the Settlement Agreement's terms. *Id.* Liberty also fails to address Order No. 26,620 in its initial brief, which provided that Liberty's current status as the sole regulated owner of the joint poles does not justify the shifting of all associated costs to Liberty's customers. Order No. 26,620 in Docket No. DE 22-014 (tab 12) at 7. The OCA already addresses this in its initial brief. OCA's Initial Brief at 11-12.

Therefore, however unfortunate Consolidated's withdrawal was to Liberty, Liberty still freely chose to take that risk when it legally committed itself to a four-year trim cycle with specific compensation to be recovered, regardless of how unlikely Liberty thought it would be for Consolidated to exercise its right of withdrawal. Liberty's Initial Brief at 17-18. Liberty's failure to negotiate a better deal for itself via the Settlement Agreement does not excuse Liberty reneging on its legally binding obligations.

c. Order No. 26,620: ClearWay

Liberty claims that any finding of failure to meet Rule 307.10 can be attributed to ClearWay Industries, LLC's (ClearWay) breach of contract and the

loss of contributions towards vegetation management. Liberty's Initial Brief at 2. The Commission should reject Liberty's argument for several equally dispositive reasons. First, Liberty's counsel has conceded noncompliance with Rule 307.10 since its inception. Transcript in Docket No. De 24-073 (tab 13) at 18. Therefore, Liberty's noncompliance with Rule 307.10 had already occurred before ClearWay's breach. Liberty's Initial Brief at 16-18. Second, Liberty has already filed suit against ClearWay as of late 2021, expecting to prevail against ClearWay's *force majeure* defense. Transcript in Docket No. DE 22-014 (tab 14) at 118. Liberty fails to specify a remedy to be recovered, if any, that it is seeking. Liberty's Initial Brief at 16. And it was unclear back in DE 22-014 what contractual remedies would be available to Liberty. Order No. 26,620 in Docket No. DE 22-014 (tab 12) at 7. And as already addressed in the OCA's initial brief, this is a contract dispute between Liberty and ClearWay, and residential customers have no duty to pay Liberty ClearWay's non-payment of its share of vegetation management work, especially when Liberty is pursuing remedies it feels entitled to from ClearWay via its suit. OCA's Initial Brief at 12-13. Thus, however unfortunate ClearWay's breach was, any revenue shortfall Liberty faces should be sought from ClearWay, not Liberty's customers.

d. Order No. 26,009: FairPoint

The OCA has already addressed this issue in its initial brief. OCA Initial Brief at 13. Succinctly, Order No. 26,009 held residential ratepayers harmless for the FairPoint debt. Order 26,009 in Docket No. DE 17-043 (tab 8) at 3.

III. Liberty does not suffer an uncompensated taking because it freely agreed to both specific compensation and cost-recovery constraints via the Settlement Agreement.

Liberty fundamentally misrepresents the specific compensation and cost recovery constraints it freely agreed to as insufficient funding approved by the Commission to complete a four-year trim cycle. Liberty's Initial Brief at 19. As already addressed in the OCA's initial brief at length, Liberty is neither being denied due process nor just compensation as required by the Fifth Amendment to the U.S. Constitution (as made applicable to the states via the Fourteenth Amendment) because Liberty freely agreed to legally binding settlement terms that specified what compensation it could collect subject to cost recovery constraints that protect residential customers. OCA's Initial Brief at 9. The Department was also mystified by Liberty's baseless assertion that Liberty would suffer a taking:

> The Department was struck by Liberty's statement in DE 24-044 (Review of Liberty's 2023 Vegetation Management Program, Reconciliation and Rate Adjustment) that if the Commission were to enforce the terms of the rate case settlement agreement from DE 19-064 that such enforcement would amount to a "taking" – presumably referring to an unconstitutional taking of property without due process and just compensation in violation of the Fifth and Fourteenth Amendments of the US Constitution. DE 24-044, Tr. 4/25/24 at 110-111. **The Department rejects that position and does understand how Liberty could or would have been deprived of due process or just compensation in a case where it agreed to and signed the very settlement terms (including specifying compensation to be recovered) it now contests**.

Department of Energy's Position Statement in Docket No. DE 24-073 (tab 9) at 2.

The Commission should reject Liberty's taking argument as baseless and enforce the plain meaning of the Settlement Agreement's terms.

IV. Liberty's noncompliance is likely causing customers to pay higher than necessary costs.

The OCA rejects Liberty's assertion that Liberty has caused no harm to customers. Liberty's Initial Brief at 21. Liberty distorts the harm it has caused customers by alleging it has only failed to provide its customers the benefits of the *planned* VMP activities but fails to address the harm resulting from Liberty failing to perform its legally binding vegetation management activities. *Id.*

Liberty's assertion of no harm to customers is directly undermined by its past testimony, where it has identified the cost of that very same noncompliance — $6,023,957 or $3,603,957 in excess of the $2,420,000 overage cap. *See* Table 3 — Summary of VMP 2023 Costs in Liberty's Testimony Attachments in Docket No. DE 24-044 (tab 1). Liberty has testified it is supposed to trim one-fourth of its lines each year in a four-year period following the approval of the Settlement Agreement but testified it hasn't been. Transcript in Docket No. DE 21-138 (tab 17) at 16. Therefore, Liberty cannot simultaneously claim that it has caused no harm to customers while claiming it will cost the company $3,603,957 to correct the increasing inventory of deferred vegetation management work resulting from its noncompliance with the Settlement Agreement and Rule 307.10 — a cost Liberty expects to pass through and collect from its customers. Liberty freely agreed to specific compensation and cost recovery constraints to meet a four-year trim cycle and simply put; customers are not receiving the benefit of the Settlement Agreement — whether planned or performed.

The OCA has also addressed its other concerns about higher than necessary costs Liberty's customers likely face at length in its initial brief, such as with otherwise avoidable costs entering rates resulting from Liberty treating planned vegetation management activity during storms. OCA's Initial Brief at 15-16.

V. Conclusion

Considering all the above, the OCA maintains its position that Liberty is in contempt of the Settlement Agreement, as approved by Order No. 26,376 in DE 19-064, and has violated the Commission's applicable rule, Rule 307.10. Because Liberty is in contempt, the Commission should issue an order bringing Liberty back into compliance while clarifying that Liberty's shareholders are accountable for the costs resulting from Liberty's noncompliance. And since Liberty has continuously failed to meet its statutory burden under RSA 365:41 and :42, both Liberty and Algonquin CEO Christopher Huskilson should be subject to civil penalties of $250,000 and $10,000 respectively.

WHEREFORE, the OCA respectfully requests that this honorable Commission:

A) Hold Liberty in contempt of Order No. 26,376, which approved the Settlement Agreement in DE 19-064, and

B) Issue an order clarifying that Liberty's shareholders are accountable for the costs resulting from Liberty's noncompliance, and

C) Issue a $250,000 civil penalty against Liberty pursuant to RSA 365:41, and

D) Issue a $10,000 civil penalty against Algonquin CEO Christopher Huskilson pursuant to RSA 365:42, and

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

Dated: December 27, 2024

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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 on the Commission's service list for this docket.

Michael J. Crouse, Esq.