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

MOTION FOR RECONSIDERATION

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to this docket, and pursuant to RSA 541:3, hereby moves the New Hampshire Public Utilities Commission for reconsideration of its Procedural Order (the "November Order") issued on November 18, 2024 (tab 22) in this docket, relating to the "Motion to Revise Process" filed by Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty on November 4, 2024.

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when a party states good reason for such relief. *Public Service Company of New Hampshire*, Order No. 25,361 (May 11, 2012) at 4. Good reason may be shown by identifying new evidence that could not have been presented in the underlying proceeding or by identifying specific matters that were overlooked or mistakenly conceived by the deciding tribunal. *Id.* at 4-5. A successful motion for

rehearing does not merely reassert prior arguments and request a different outcome. *Id.*

For the reasons stated below, the OCA submits that the Commission, while correctly denying Liberty's motion for revised process, overlooked or mistakenly conceived factual matters when it ordered relief (i.e., permitting the filing of testimony) that is inconsistent with the Administrative Procedure Act, specifically RSA 541-A:33, IV (entitled: "Evidence"). The November Order also cannot achieve its stated purpose of developing a complete record. The briefing schedule in the November Order reinstitutes the Commission's August Procedural Order ("August Order") (tab 11), which excluded opportunities for factual exploration (i.e., discovery, submission of written testimony, and cross examination) since all the parties, including Liberty, had agreed to resolve this docket via legal briefing, without an evidentiary hearing. Therefore, as addressed below, the legal briefing schedule was designed to resolve a legal dispute but not to develop the record.

Further, in the Motion for Revised Process, Liberty claimed to have unexplained "foundational facts and circumstances" that the company asserted were "necessary" for the Commission to be able to render a lawful decision. Motion for Revised Process (tab 18) at 2. Yet the testimony of Mr. Faber and Ms. Green submitted on December 13 (tab 24)'s is nothing more than a rehash of information already available across various dockets, failing to explain how the Commission would be unable to render a lawful decision without the "necessary" information uniquely

available via its testimony. Additionally, Liberty has failed to explain why it had not previously provided this "necessary" information.

Therefore, the OCA further recommends that the Commission find the substance of Liberty's testimony to be immaterial and therefore exclude the testimony from evidence as explicitly authorized by the Administrative Procedure Act. *See* RSA 541-A:33, II (authorizing the presiding officer to exclude irrelevant, immaterial, or unduly repetitious evidence).

I. Background

This docket began with the OCA filing a petition to initiate an investigation on May 10, 2024, pursuant to RSA 374:7. The OCA noted that Liberty had reneged on its legally binding obligations with respect to both N.H. Admin Code Puc 307.10 (entitled "Tree Trimming") and the DE 19-064 Settlement Agreement (Exhibit 37 in that proceeding) regarding Liberty's compliance with its vegetation management obligations.

As directed by the Commission, the Department of Energy filed a position statement on August 13, 2024, expressing general support for the OCA petition. The Commission conducted a duly noticed prehearing conference on August 27, 2024.

At the prehearing conference, the OCA asked the Commission to convert what had been captioned as an investigatory docket into a show cause proceeding, mirroring what occurred 13 years ago in Docket No. DG 11-196, involving a

different utility. Liberty rejected the procedural schedule proposed by the OCA, which contemplated opportunities for discovery and the submission of written testimony, taking the position that briefing alone would be sufficient. All the parties agreed to resolve the issues in this docket via legal briefing, without an evidentiary hearing. With the agreement of all parties, the Commission ruled at the prehearing conference that it would convert the investigatory docket into a Show Cause proceeding, indicating that the Commission would issue an order capturing this agreement and setting forth a legal briefing schedule.

The Commission did so via its Procedural Order Re: Post-Hearing Briefing issued on August 28, 2024, establishing initial deadlines for the parties to submit briefs on October 22, 2024, and reply briefs on November 5, 2024. Liberty, the Department of Energy, and the OCA all filed initial briefs as scheduled.

On November 1, 2024, just four days before the due date for reply briefs, Liberty filed its motion for revised process — which asked the Commission to "reset" the docket procedurally so that it would again mirror what took place in Docket No. DG 11-196. This was a stark reversal of Liberty's position as expressed at the August 27 prehearing conference. Liberty alleged the Commission could not render a lawful decision without the necessary information only Liberty could provide.

On November 4, the Commission issued a Procedural Order staying the deadline for reply briefs to allow the parties time to respond to Liberty's motion.

On November 6, the OCA objected to Liberty's motion, pointing out that Liberty failed to cite any authority in support of its motion and had failed to explain what "necessary" information it had, why it had failed to provide it previously, and why the Commission needed this information to render a lawful decision this late into the proceeding.

On November 12, the Department of Energy filed its response, stating the Department did not support Liberty's motion unless the utility could offer proof of the "necessary" facts and circumstances that Liberty alleged would be essential if the Commission were to render a lawful decision.

On November 18, the Commission denied Liberty's motion for revised process. The Commission ruled that Liberty had not adequately explained what information was missing. The November Order established a new briefing schedule that also permitted the submission of testimony on December 13, with reply briefs due December 27.

On December 13, Liberty filed its testimony in support of its Initial Brief. The Department of Energy filed a letter explaining it was not submitting testimony since, from its perspective, all relevant facts were well documented in the pertinent dockets and cited in the Department's Initial Brief. The OCA did not file testimony in support of its initial or reply brief.

II. The November Order Violates the Administrative Procedure Act.

The November Order violates section 33 of the Administrative Procedure Act. Specifically, RSA 541-A:33, IV states: "A party may conduct cross-examinations required for a full and true disclosure of the facts." However, the November Order does not permit this opportunity for cross examination pursuant to the legal briefing schedule therein. November Order at 2. The Commission may have inadvertently based the briefing schedule it established in November on the one adopted in August, at the point where all parties were still agreeing that developing an evidentiary record was unnecessary. But the August Order intentionally excluded the opportunity for factual exploration because *all* parties, including Liberty, agreed to resolve this Show Cause proceeding via legal briefs when Counsel for Liberty rejected its opportunity to develop the record, taking the position that briefing alone would be sufficient. *See* Transcript of August 27, 2024, prehearing conference (tab 13) at 24-25 (stating the core issue is legal, and to the extent the Commission agrees with the OCA's interpretation, the Commission can either assign remedies or close the docket). Meaning, the November Order's stated purpose of "completely developing the record" cannot be achieved because the Commission has ordered a legal briefing schedule that does not contemplate developing the record consistent with the New Hampshire Administrative Procedure Act — much less completely developing it via testimony, discovery, and cross-examination. *See* November Order (tab 22) at 2 (stating the purpose is to develop a complete record and reinstitute the August 28, 2024, legal briefing schedule).

But the Commission should not allow the docket to be further derailed by Liberty's procedural gambit— the record does not need to be developed, and the case can be resolved via legal briefs alone. The Commission has already rightfully denied Liberty's motion for revised process because Liberty failed to explain what information was missing from the record. November Order (tab 22) at 1. And as addressed in the OCA's objection, Liberty cites no authority in support of its motion for revised process. OCA's Objection (tab 20) at 1-2. Further, as addressed below, Liberty's testimony filed on December 13 can hardly be considered "necessary" such that the Commission could not have made a lawful decision without it. *See* Liberty's Motion for Revised Process (tab 18) at 2 (stating only Liberty had "necessary" information for the Commission to resolve the issues in this docket).

III. The Commission Should Exclude Liberty's Testimony Pursuant to RSA 541-A:33, II.

It is well established that in a proceeding such as this one, initiated via a complaint against a public utility, the complainant has the burden of making out a *prima facie* case but, once that initial burden is satisfied, "the ultimate burden of persuasion on the subject matter of the complaint or investigation is on the public utility." Order No. 25,296 (2011) in DG 11-196 at 2. Liberty concedes that the OCA has reasonably called into question Liberty's performance commitments with colorable arguments. Liberty's motion (tab 18) at 2. Meaning, Liberty bears the ultimate burden to demonstrate to this Commission its compliance, and it has failed to meet its burden, as addressed below.

Specifically, Liberty alleged in its motion that only it had foundational facts and information about circumstances "necessary" for the Commission to lawfully resolve the issues in this case. *Id.* Yet Liberty offered no explanation as to why this information was necessary, or why Liberty had failed to provide this "necessary" information up to and until this point, such that the Commission could not render a lawful decision without it. Notably, Liberty failed to provide an offer of proof as to its claim in its motion for revised process, instead simply asking the Commission to "indulge" its request *Id.* at 3.

Now, Liberty has filed its testimony, dated December 13, 2024, and this submission amounts to little more than a rehashing of information already available across a variety of dockets. Similarly to its motion, Liberty fails to identify what the "necessary" information is within its testimony, much less how the Commission could not render a lawful decision without Liberty's testimony, or why Liberty failed to provide this "necessary information" up to and until this point. Pursuant to RSA 541-A:33, II, the Commission is authorized to exclude irrelevant and immaterial evidence. As to its substance, the Commission should recognize Liberty's testimony as immaterial or irrelevant and exclude it as addressed below.

Germane to this point, Liberty's testimony now boldly argues that irrespective of the legally binding obligations of the Settlement Agreement (i.e., four-year trim cycle, $2,420,000 cost-recovery constraint), Liberty is not in contempt of the Settlement Agreement because it has allegedly met an independent and unrelated reliability metric. Liberty's Testimony at 35. The Commission should not allow

Liberty to cherry pick which legally binding commitments the utility gets to honor — the Settlement Agreement was approved by Commission Order No. 26,376, meaning the terms therein have the force and effect of law. Thus, the extent to which Liberty is meeting a reliability metric exogenous to the settlement agreement has no relevance to the question of whether Liberty has complied with the legally binding terms of the Settlement Agreement it freely committed itself to when it entered that agreement — Liberty's claim amounts to nothing more than a red herring fallacy (i.e., irrelevant).

All-the-while, Liberty's customers continue to face higher than necessary costs while Liberty has derailed this docket. For example, Liberty concedes that the Settlement Agreement requires Liberty to maintain a four-year trim cycle. Liberty's Testimony (tab 24) at 3. And since Order No. 26,376 approved the Settlement Agreement, the terms therein have the force and effect of law, meaning customers are legally entitled to the reliability benefits of compliance with a four-year trim cycle. But as a result of Liberty reneging on its legally binding obligations, Liberty has accumulated approximately 214 miles of deferred vegetation management work. Liberty's Testimony Attachments in Docket No. DE 24-044 (tab 1) at 30. The cost of addressing that backlog, in addition to its expected trim cycle obligations, only continues to significantly increase as evidenced by Liberty's claim that its greatest challenge for 2025 and 2026 is mitigating significantly increasing vegetation management costs. Liberty Testimony (tab 24) at 36. However, the Settlement Agreement contains a cost recovery constraint that protects Liberty's

customers from those rising costs regarding Liberty's backlog. Settlement Agreement in Docket No. DE 19-064 (Exhibit 37) at 11 (stating Liberty shall not recover any VMP expense that exceeds 10 percent of that amount, or in excess of $2,420,000 through the annual reconciliation or otherwise). Liberty freely and legally committed itself to the Settlement Agreement, including that cost-recovery constraint — whether and to what extent Liberty is now experiencing buyer's remorse from making that decision is irrelevant. *See* Liberty's Testimony at 37, and 42 (opining about wanting to recover costs contrary to the Settlement Agreement's terms). Thus, the Commission's question is answered in the affirmative — Liberty is in contempt of the Settlement Agreement.

Nevertheless, Liberty still boldly claims that not one of its customers have been harmed by its inability to meet a four-year trim cycle. Liberty's Testimony at 6 and 41 (no customer harm has resulted from Liberty's inability meet a four-year trim cycle), and 42 (Liberty has ensured customers have not been harmed by circumstances beyond the Company's control). Such a claim cannot withstand scrutiny. Using storm costs as just one example, Liberty alleges it is "nearly impossible" to conclude specific storm restoration costs could be avoided by cycle trimming, alleging it is not accurate to conclude additional cycle trimming can mitigate the impacts of an early snowstorm. *Id.* at 40. But such a response is a strawman fallacy (i.e., immaterial). In its response to the OCA's concerns, Liberty is conflating discretionary trimming with mandatory routine circuit trimming that Liberty is otherwise legally required to perform pursuant to the Settlement

Agreement. The actual issue is that because Liberty has allowed approximately 214 miles of deferred vegetation management work to build up, or nearly a year's worth of work, storm costs will generally be higher than necessary for the reasons identified in the OCA's initial brief. OCA Brief (tab 16) at 15. Thus, to whatever extent discretionary trimming has a mitigating impact on specific storms or costs is irrelevant. Liberty cannot claim that its storm costs would be the same or lower with its expansive vegetation backlog than it would be without that backlog — such a claim would stretch credulity to its breaking point.

Last, Liberty advances contradictory positions by simultaneously claiming the company has "ensured no customer harm" while also claiming it is "nearly impossible" to prove harm with respect to storm costs. Such competing claims amounts to an argument from ignorance — another logical fallacy. The Commission must not forget that Liberty bears the burden of proof. Order 25,296, *supra*. And Liberty conceded that the OCA has raised colorable arguments and reasonably questioned its performance obligations. Liberty's motion (tab 18) at 2. By failing to engage the OCA's concerns, Liberty has not met its burden.

Thus, the Commission should summarily reject Liberty's testimony, excluding it pursuant to RSA 541-A:33, II and proceed to resolve these issues via legal briefs as originally agreed by all parties.

IV. Conclusion

Considering all the above, the Commission's Procedural Order dated November 18, 2024, violates the Administrative Procedure Act, specifically, RSA 541-A:33, IV. While the OCA does not take exception to the Commission denying Liberty's motion for revised process, the OCA recommends that the Commission strike the testimony from the docket and exclude the document from becoming part of the record pursuant to RSA 541-A:33, II.

WHEREFORE, for the reasons set forth above, the OCA respectfully recommends that the Public Utilities Commission:

1. Pursuant to RSA 541:3, grant reconsideration of its Procedural Order dated November 18, 2024, so as not to violate RSA 541-A:33, IV; and
2. Resolve the issues in this docket via legal briefs alone as originally agreed by all parties; and
3. Deny the admittance of testimony into evidence in this docket; and
4. Grant such further relief as is just and required.

Dated: December 18, 2024

Michael J. Crouse, Esq

Michael J. Crouse
Staff Attorney
Office of the Consumer Advocate
21 South Fruit Street, Suite 18
Concord, NH 03301
(603) 271-1173
Michael.J.Crouse@oca.nh.gov

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.