

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 20-019

Pennichuck East Utility, Inc.

2020 Qualified Capital Project Adjustment Charge

**Order *Nisi* Granting in Part and Denying in Part Motion for Rehearing,
Reconsideration or Modification of Order 26,525**

O R D E R N O. 26,546

November 9, 2021

In this order, the Commission grants in part and denies in part the Motion for Rehearing, Reconsideration or Modification of Order 26,525 filed by Pennichuck East Utility, Inc. (“PEU”) on October 20, 2021.

I. PROCEDURAL HISTORY

PEU is a regulated public utility that provides water service to customers in several communities throughout New Hampshire. On February 13, 2020, PEU submitted a petition for approval of recovery of its 2019 capital improvement projects through the QCPAC mechanism and for preliminary approval its 2020 capital improvement projects for the QCPAC mechanism. PEU’s filing also included estimated QCPAC capital budgets for 2021 and 2022. On February 26, the Office of Consumer Advocate (“OCA”) submitted a notification that it would be participating in this docket. On March 11, 2021, Commission Staff Advocates (Staff Advocates) submitted a recommendation that the petition be granted. The Commission received no other requests to intervene or otherwise participate in this Docket.¹

¹ On July 9, 2021, the newly created New Hampshire Department of Energy notified the Commission that it would succeed Public Utilities Commission Staff Advocates pursuant to RSA 12-P:9.

On a parallel track, PEU filed, on September 23, 2020, a request for change in rates. This initiated a separate docket dedicated to that subject, Docket DW 20-156. On December 11, 2020, the OCA submitted a notification that it would be participating in Docket DW 20-156. The Commission received and granted numerous requests for intervention in Docket DW 20-156. On April 26, 2021, PEU, the OCA, PUC staff, and six intervenors reached a settlement agreement in Docket DW 20-156. Under the terms of this settlement, PEU agreed to forgo the 2019 and 2020 QCPAC surcharges, zero out the QCPAC, and establish a temporary rate based upon the books and records on file with the Commission. Settlement Agreement on Temporary Rates (“Settlement”) at 4–5.

The Commission considered the Settlement at a hearing held on May 10, 2021. On August 16, 2021, the Commission issued Order No. 26,508 in Docket DW 20-156 approving the Settlement. The order further directed PEU to file an amended petition in Docket No. DW 20-019 eliminating its request for a rate surcharge. On August 17, 2021, PEU filed an amended petition (“Am. Pet.”).

On September 23, the Commission issued Order No. 26,525 dismissing PEU’s amended petition as moot. In reaching that conclusion, the Commission reasoned that, because PEU sought to use the rate case mechanism, rather than the QCPAC mechanism to recover the costs of its capital projects, the QCPAC docket was no longer the appropriate docket to consider whether the relevant capital projects were prudent, used, and useful.

PEU then filed the present motion for rehearing, reconsideration, or modification of Order No. 26,525 (“Mot. for Reh’g”).

II. SUMMARY OF THE PETITION

A. Pennichuck East Utility, Inc.

PEU raises six arguments in support of its request for rehearing, reconsideration, or modification. First, PEU contends that the Settlement it reached in Docket DW 20-156 did nothing to alter the normal process by which it seeks findings that its capital projects are prudent, used, and useful as part of the QCPAC process. Mot. for Reh'g at 7–8. The Commission should, in PEU's telling, issue a prudent, used, and useful finding on these projects in the ordinary course. *Id.* at 8.

Second, PEU argues that Order No. 26,525 should be reconsidered because it is “inconsistent” with the recommendation of PUC/Energy Staff. The Staff recommendation urged the Commission to find that PEU's 2019 capital projects were prudent, used, and useful, and to find that PEU's 2020 capital projects were eligible for recoupment under the QCPAC mechanism. *Id.* at 8–9.

Third, PEU contends that the Commission misunderstood the testimony of Attorney Brown at the hearing on the Settlement reached in Docket DW 20-156. In its motion, PEU explains that, under the Settlement, PEU agreed to forego collection of the 2019 QCPAC surcharge (to recover costs associated with 2018 capital projects) and of the 2020 QCPAC surcharge (to recover costs associated with 2019 capital projects). *Id.* at 9–10. PEU does not intend to forego collection of 2021 QCPAC surcharge (to recover costs associated with 2020 capital projects). *Id.* at 10.

Fourth, PEU argues that Commission misconstrued PEU's request in its Amended Petition as no longer seeking findings that the 2019 capital projects were prudent, used, and useful, and as no longer seeking preliminary approval of the 2020 capital projects for recovery through the QCPAC mechanism.

Fifth, PEU argues that Order No. 26,525 “contravenes” prior Commission orders establishing and affirming the QCPAC process. *Id.* at 11–12.

Finally, PEU argues that PEU’s lenders rely on the regular, consistent, and annual QCPAC process to provide loan financing, and that any disruption in the regular process threatens to undermine the purpose and intent of the QCPAC process. This uncertainty threatens PEU’s ability to access debt, finance current and future obligations, and recover future surcharges utilizing the QCPAC mechanism. *Id.* at 13.

III. COMMISSION ANALYSIS

The Commission may grant rehearing or reconsideration for “good reason” if the moving party shows that an order is unlawful or unreasonable. RSA 541:3; RSA 541:4; *Rural Telephone Companies*, Order No. 25,291 (November 21, 2011); *see also Public Service Company of New Hampshire d/b/a Eversource Energy*, Order No. 25,970 at 4-5 (December 7, 2016). A successful motion must establish “good reason” by showing that there are matters that the Commission “overlooked or mistakenly conceived in the original decision,” *Dumais v. State*, 118 N.H. 309, 311 (1978) (quotation and citations omitted), or by presenting new evidence that was “unavailable prior to the issuance of the underlying decision,” *Hollis Telephone Inc.*, Order No. 25,088 at 14 (April 2, 2010). A successful motion for rehearing must do more than merely restate prior arguments and ask for a different outcome. *Public Service Co. of N.H.*, Order No. 25,970, at 4-5 (citing *Public Service Co. of N.H.*, Order No. 25,676 at 3 (June 12, 2014); *Freedom Energy Logistics*, Order No. 25,810 at 4 (September 8, 2015)).

A. Effect of the Settlement

PEU’s first argument neither identifies matters that the Commission overlooked or mistakenly conceived in its original decision, nor presents new evidence that was unavailable prior to the issuance of the original decision. Although PEU contends that

the Settlement terms “preserve the normal process of obtaining findings that the 2019 projects are prudent, used[,] and useful,” Mot. for Reh’g at 8, the Commission does not agree. It is true that the Settlement does not expressly discuss eliminating the prudent, used, and useful determination for 2019 capital projects from this docket. The Settlement does, however, propose a waiver of collection of the QCPAC surcharge with respect to the 2019 projects. Settlement at 4; *accord* Mot. for Reh’g at 8.

Any capital project prudent, used, and useful finding by the Commission is inextricably and necessarily linked to the recoupment of the costs of that capital project through some rate mechanism. *See* RSA 378:27–28. PEU no longer seeks to recoup the costs of its 2019 capital projects through the QCPAC. Settlement at 4; *accord* Mot. for Reh’g at 8. Rather, it seeks, pursuant to the Settlement, to recoup these costs as part of PEU’s base rate. Settlement at 4. A prudent, used, and useful finding in this docket would amount to a determination by the Commission that the 2019 capital projects are recoupable through a rate mechanism that PEU no longer seeks to use. Such a determination would be better made in the context of the rate mechanism that is proposed to be used for recovery, as well as allay any concerns that the Commission’s determination would amount to an advisory opinion, which, except in limited circumstances as provided for in the state constitution, are not permissible under New Hampshire law. *See Carrigan v. N.H. Dep’t of Health and Human Servs.*, 2021 WL 3044342, at *2 (Jul. 20, 2021) (citing N.H. CONST. pt. II, art. 74). PEU’s first argument, therefore, does not provide a basis for the Commission to reconsider or modify its order.

B. Staff Advocate Recommendations

PEU’s argument that the Commission’s order is inconsistent with Staff Advocate recommendations is, similarly, unpersuasive. As an initial matter, the

Commission is aware of no source of law requiring its orders to be consistent with Staff Advocate recommendations. Staff Advocates appeared as parties before the Commission² and now Energy performs that function and their recommendations are afforded no greater deference than that afforded to any other party. In each docket, the Commission must undertake its own review of the matter before it and reach a conclusion under the applicable standard.

Even if the Commission were in some way required to adopt Staff Advocate recommendations, the particular recommendations at issue here were issued on March 11, 2021, more than one month prior to the Settlement and at a time when PEU still sought approval of the 2019 capital projects for recovery through the QCPAC. Indeed, the recommendations themselves state, “Staff recommends that the Commission find that the capital projects completed in 2019 *and proposed as eligible for recovery through the QCPAC*, are prudent, used, and useful.” Staff Recommendation for Approval of 2020 Qualified Capital Project Annual Adjustment Charge (Mar. 11, 2021) (“Recommendations”) at 14 (emphasis added). To the extent the Staff Advocate recommendation is persuasive in this case, it supports the Commission’s determination that the appropriate place to make a prudent, used, and useful finding on capital projects is in the docket through which a utility intends to recover the cost of those projects. PEU’s second argument, therefore, provides no basis to reconsider or modify its earlier order.

C. Statements by Attorney Brown

In PEU’s third argument, it identifies a fact misconstrued in the order. At hearing, Attorney Brown demurred as to whether the Commission should make its

² Energy now performs that function.

prudent, used, and useful finding as to the 2019 capital projects in this docket or in the rate case. Tr. at 106–07. She further explained that PEU intended to recover the costs of its 2019 capital projects through “the rate case mechanism, rather than the QCPAC surcharge rate mechanism.” Tr. at 107. Attorney Brown did not explicitly state that the 2020 capital projects would also be treated in this way. The Commission incorrectly inferred Attorney Brown’s reference to the 2020 QCPAC surcharge as pertaining to 2020 capital projects and not to 2019 capital projects. Based upon this, reconsideration the Commission’s treatment of the 2020 capital projects in its order is warranted.

Staff Advocates thoroughly reviewed PEU’s 2020 capital budget and determined that PEU’s proposed 2020 capital projects “appear to fulfill the objectives of the QCPAC program by enabling PEU to effectively maintain its capital improvements program and sustain the necessary cash flows to pay the debt service and property tax obligations associated with these projects.” Recommendations at 12. The Staff Advocates recommended “that the Commission approve the proposed 2020 capital improvement budget of \$4,951,552 . . . on a preliminary basis, but withhold any prudence determination of those projects, pursuant to RSA 378:28. No filing in this docket, nor in Docket DW 20-156 calls into question the advocate’s recommendation.³

As has been the Commission’s practice in past QCPAC dockets, the Commission, therefore, grants preliminary approval on a *nisi* basis of the 2020 capital projects. The Commission makes no prudent, used, and useful determination as to the

³ The Commission observes that a “preliminary” finding of QCPAC eligibility for 2020 capital projects may be of limited utility and relevance now that PEU has long since undertaken those projects and progressed to the point at which it seeks recovery through the QCPAC mechanism in Docket 21-022.

2020 capital projects in this docket and defers that determination to Docket DW 21-022.

D. Request in the Amended Petition

PEU next argues that the Commission's order "erroneously concludes that [PEU's] Amended Petition requested the deferral of the regular and customary treatment and findings that the 2019 capital projects are prudent, used and useful and that the 2020 capital projects are eligible for treatment under the QCPAC process." Mot. for Reh'g at 10-11. This argument provides no basis for reconsidering or modifying the Commission's order because the Commission reached no such conclusion. Quite to the contrary, the Commission was fully aware that PEU requested in its amended petition a finding that PEU's 2019 projects were prudent, used, and useful. The Commission denied that request when it dismissed the Amended Petition as moot. The Commission did not mistakenly conceive this aspect of the Amended Petition.

Because the Commission has already reconsidered the 2020 capital projects and granted PEU the relief it seeks on other grounds, the Commission declines to address those projects again here.

E. Consistency with Prior QCPAC Orders

PEU next argues that the Commission should reconsider its Order because the Order "contravenes prior Commission orders establishing and affirming the QCPAC process." Mot. for Reh'g at 11. PEU correctly points out that the Commission has approved QCPAC surcharges in each prior year of the QCPAC program. This history of approval, however, cannot be construed as requiring the Commission to mechanically make prudent, used, and useful findings even in cases where PEU does not seek recovery through the QCPAC mechanism. To the extent there has been any disruption

of the regular process, it originated with the Settlement and the settling parties' agreement to seek recovery of the 2019 capital project costs through the base rate in lieu of seeking recovery through the QCPAC mechanism. In the future, the Commission will continue to make appropriate determinations as to the prudence of capital projects in QCPAC dockets when recovery of the costs of those projects is sought through the QCPAC mechanism. When recovery through QCPAC is not sought, there is no basis for making a prudence determination in the QCPAC docket. The Commission sees no inconsistency with nor "contravention" of prior orders in this approach. This argument cannot be a ground for reconsidering or modifying the Commission's Order.

F. Purpose and intent of the QCPAC Process

Finally, PEU argues that, by declining to make a prudent, used, and useful finding in the QCPAC docket, the Commission "will undermine the entire purpose and intent for the QCPAC process, which in turn will undermine the ability of PEU . . . to access debt capital to finance necessary capital improvements." Mot. for Reh'g at 13. PEU asserts that the "regular, consistent, and annual QCPAC process" is an important part of reassuring PEU's lenders and ensuring PEU's access to debt. *Id.* Here again, the Commission reasserts that, to the extent there has been a shift from the routine approval process, that shift was introduced by the Settlement and the establishment of temporary rates based on the books and records of PEU, and not by the Commission. Moreover, it is not evident at all that any uncertainty results from the Commission's decision to make its prudence determination in the rate case document. As acknowledged by PEU in its Motion for Rehearing, "the underlying purpose of the QCPAC process is to allow the Company to establish rates sufficient to recover [capital expenses] on an annual basis, rather than to wait for recovery of such expenses as

part of a general rate case conducted every three years.” Mot. for Reh’g at 13 (brackets in original). In this instance PEU need not wait three years for approval of its expenses in a rate case. There is an active rate case currently open in which PEU may obtain that approval, namely, DW 20-156. Moreover, because PEU does not seek recovery of the costs of the 2019 capital projects through the QCPAC mechanism, a prudence finding in the present docket will bring PEU no closer to recovering those costs. This argument provides no basis for the Commission to reconsider or modify its order.

IV. CONCLUSION

Based upon the foregoing, it is hereby

ORDERED, that Order No. 26,525 is reconsidered and modified to GRANT, on a *NISI* basis, PEU’s petition for preliminary approval of its 2020 capital projects as eligible for recovery through the QCPAC mechanism, subject to further review in PEU’s pending QCPAC case DW 21-022; and it is

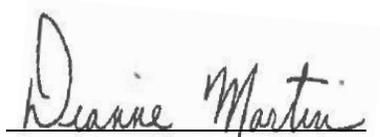
FURTHER ORDERED, that PEU shall cause a summary of this order to be published once in a statewide newspaper of general circulation or of circulation in those portions of the state where operations are conducted, such publication to be no later than November 19, 2021 and to be documented by an affidavit filed with the Commission on or before December 6, 2021; and it is

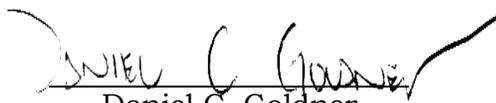
FURTHER ORDERED, that all persons interested in responding to this Order be notified that they may submit their comments or file a written request for a hearing that states the reason and basis for a hearing no later than November 29, 2021 for the Commission’s consideration; and it is

FURTHER ORDERED, that any person interested in responding to such comments or request for hearing shall do so no later than December 6, 2021; and it is

FURTHER ORDERED, that PEU's motion for reconsideration, rehearing, or modification is otherwise **DENIED**.

By order of the Public Utilities Commission of New Hampshire this ninth day of November, 2021.


Dianne Martin
Chairwoman


Daniel C. Goldner
Commissioner

A. Service List - Docket Related

Docket# : 20-019

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