

THE STATE OF NEW HAMPSHIRE BEFORE THE  
PUBLIC UTILITIES COMMISSION

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE d/b/a EVERSOURCE ENERGY

Docket No. DE 17-075

ANNUAL RECONCILIATION OF ENERGY SERVICE  
AND STRANDED COSTS FOR 2016

**OPPOSITION OF THE OFFICE OF CONSUMER ADVOCATE TO EVERSOURCE'S  
MOTION FOR PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT**

NOW COMES the Office of the Consumer Advocate (“OCA”), a party in this docket, and opposes the Motion for Protective Order and Confidential Treatment submitted by Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource) seeking to withhold certain document segments from the Commission and OCA.<sup>1</sup> In support of this objection, the OCA states as follows:

1. On May 1, 2017, Eversource filed a petition for reconciliation of its Energy Service and Stranded Cost for 2016. *Inter alia*, the petition requested recovery of \$3,421,424.88 stemming from a Settlement and Release Agreement entered into by Eversource in December 2016. The Settlement and Release Agreement resolved any outstanding claims against Eversource for failure to perform on a contract for shipment of 22 cargoes of coal from South America. Pursuant to the petition, the Commission issued an Order of Notice on July 7, 2017 opening a proceeding to review the petition and established a procedural schedule by Secretarial Letter on August 7, 2017.

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<sup>1</sup> The OCA takes no position on whether or not Eversource’s opinion of counsel should be retained as confidential from public disclosure under RSA 91:A:5

2. During the Technical Session held on October 24, 2017, Eversource suggested their decision to enter into the Settlement and Release Agreement was informed by the opinion of outside counsel. In response to this claim, the parties requested a copy of their outside counsel's opinion. Eversource provided a redacted copy of the opinion to Staff and the Office of the Consumer Advocate, filing a Motion for Protective Order and Confidential Treatment with the Commission on November 8, 2017. The Motion requests that the Commission "retain portions of an opinion of counsel provided to Eversource as confidential from the Commission Staff and the OCA, and to keep the entirety of the same opinion from public disclosure." *Motion at 1.*
3. In requesting that the redacted portions of the opinion be withheld from Staff and the OCA, Eversource relies on Puc 203.23(e), which reflects RSA 541-A:33, II, and provides that "The Commission shall give effect to the rules of privilege recognized by law." The Commission has previously recognized both the attorney-client privilege and attorney work-product privilege as applicable to the Commission's general counsel and staff members. *In Re Small Energy Producers and Cogenerators*, 74 N.H. P.U.C., Order No. 19,465 (July 11, 1989). While Eversource's instant motion relies heavily on the above-mentioned decision, it neglects to examine the importance of a key distinction between the instant petition and the facts and circumstances previously considered by the Commission within *In Re Small Energy Producers and Cogenerators*. The above-mentioned order clearly shows that communications between Commission Staff and Commission Counsel should be protected from public disclosure. However, this is very different from Eversource's current motion, which seeks to protect disclosure of information communicated to a regulated entity by its

counsel for the explicit purpose of informing regulated actions, for which Eversource is seeking full cost recovery from New Hampshire ratepayers.

4. As a matter of public policy, the opinion of counsel communicated to a publicly regulated entity should not be shielded from review by that entity's regulator. For example, regulators of the United States financial industry recently revised their rules to compel regulated financial institutions to provide un-redacted copies of counsel opinions. *See 12 CFR 1070.48* (Stating: "The Consumer Financial Protection Bureau believes, based on the historical experience of the prudential regulators and state banking supervisors, and its experience to date, that effective supervision may often require review of supervised entities' privileged information.") Following in the regulatory footsteps of the federal government and their efforts to oversee the financial industry, we suggest the Commission could compel Eversource to provide Commission Staff an un-redacted version of the document in question.
5. Furthermore, RSA 363:28 VI explicitly states that in the context of documents received by the Commission that would otherwise be held as confidential, "the filing party shall provide the consumer advocate with copies of all confidential information filed with the public utilities commission in adjudicative proceedings in which the consumer advocate is a participating party and the consumer advocate shall maintain confidentiality of such information." Therefore, to the extent that Eversource files documents or information with the Commission which it deems confidential, including information held confidential pursuant to a claimed privilege, the OCA is entitled to access that information.
6. Finally, Eversource claims that the redacted portion of the opinion concerns "a different matter which has since been resolved." *Motion at 2*. However, a cursory review of the

opinion itself shows that the two matters are intimately related. For example, in the concluding section of the opinion's legal analysis, counsel states:



The excerpt above shows that what is described by Eversource as a "different matter" and by their counsel as [REDACTED] is their counsel's main basis for recommending that Eversource will not be successful in litigating the claim on the merits. *Opinion at 16.*

7. Although Eversource may have chosen to describe the redacted materials as a "different matter," the opinion itself shows that the two matters are directly related, with the question of the settlement's prudence turning directly on what Eversource's counsel has described as [REDACTED]. In fact, knowledge of the redacted materials' substance is absolutely necessary for the Commission Staff and OCA to judge whether Eversource's decision to settle the case was actually a prudent decision. In cases such as this where the privilege holder (Eversource) "injects the privileged material itself into the case, such that the information is actually required for resolution

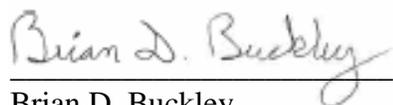
of the issue,” New Hampshire courts have historically applied the “at issue” waiver to the doctrines of attorney-client and attorney work-product privilege. *Aranson v. Schroeder*, 140 N.H. 359, 370, 671 A.2d 1023 (1995). In the present case, Eversource has injected these privileged materials directly into the heart of the case itself, and neither the OCA nor the Commission Staff will be able to determine why [REDACTED] [REDACTED] should justify Eversource having settled any claims without knowledge of the privileged information’s substance. As such, the “at issue” waiver applies to the claimed privilege, and the Commission should direct Eversource to provide the Commission Staff and OCA with the entire opinion.

8. In the event that the Commission declines to rule on the OCA’s objection to the motion for protective order and confidential treatment filed by Eversource, we suggest the Commission could instead suspend and subsequently amend the procedural schedule to allow for another round of discovery prior to filing of testimony. This would allow the parties an opportunity—without the advice of counsel being divulged to the non-counseled—to inquire further about: (1) the prudence of the settlement; (2) whether Eversource has ever previously recovered costs relating to [REDACTED] [REDACTED] from ratepayers in New Hampshire, or elsewhere in ISO-New England; and (3) whether any other dockets may have been affected by the “different matter.” Such an action by the Commission might encourage the just resolution of the proceeding by avoiding contentions regarding privileged information, and would not cause undue delay because the procedural schedule allows ample room for the suggested revision.
9. Commission Staff has indicated that it agrees with the sentiments expressed in this pleading and authorized the OCA to state this in its pleading.

For the foregoing reasons, the OCA respectfully requests that the Commission deny the

Eversource Motion for Protective Order and Confidential Treatment, or grant any other redress as they may deem satisfactory for the matter at hand.

Respectfully submitted,



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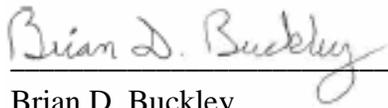
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I hereby certify that I have served the foregoing document on all persons listed in the Commission's service list in this docket.



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Brian D. Buckley