

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DG 06-107

and

Docket No. DE 21-073

LIBERTY UTILITIES (GRANITE STATE ELECTRIC) CORP. d/b/a LIBERTY

2019 and 2020 Annual Storm Fund Reports

Liberty's Closing Argument

Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty, through counsel, respectfully submits the following argument to close the July 21, 2022, hearing in the above dockets.

Issue

The issue before the Commission in these dockets is whether Liberty properly determined that four storm events described in the 2019 and 2020 storm reports were qualifying Major Storms, eligible for recovery from the Storm Fund.¹

Facts

The relevant facts are not in dispute and are stated as follows:

1. The Settlement Agreement in Docket DG 06-107 established the Storm Fund and defined a "Major Storm" eligible for recovery from the Storm Fund. Specifically, the Settlement Agreement states that "[a] major storm is defined as a severe weather event or events causing 30 concurrent troubles (i.e., interruption events

¹ The 2019 Storm Report described three qualifying major storms: the winter storm on January 9, 2019; the rain and windstorm on October 17, 2019; and the rain and windstorm on October 31, 2019. The 2020 Storm Report described a single qualifying storm, which was Storm Isaias, August 5, 2020. *See* Exhibit 14 at Bates 004, 007, and 010; Exhibit 21 at Bates 009.

occurring on either primary or secondary lines) and 15 percent of customers interrupted or 45 concurrent troubles.”² Exhibit 10, at 5.

2. Liberty has consistently used the same definition of “concurrent troubles” and “secondary lines” in its Storm Reports since filing the first Storm Report in 2008. In the 2019 and 2020 Storm Reports at issue here, the Company used the terms “concurrent troubles” and “secondary lines” in exactly the same way as the terms have been used since 2008. No party has ever disputed the use of these terms, as included in the Storm Reports filed since 2008, prior to Staff’s March 2021 recommendation regarding the 2019 Storm Report, Exhibit 12.
3. The definition Liberty has consistently applied to the phrase “concurrent troubles” is to include all customer outages caused by -- and occurring *concurrently* with -- the storm event. Customer outages caused by storm conditions are overlapping and coincidentally occurring with the storm conditions causing the outages. As described during the hearing, the Company therefore counts the outages from the beginning of the first customer outage caused by the storm conditions until the beginning of the last outage caused by the storm conditions to determine whether the threshold of 30 or 45 “troubles” have occurred “concurrent” with the storm conditions, thereby constituting “concurrent troubles.”
4. Liberty has also consistently applied a uniform definition of “secondary line” when determining whether a particular outage counts toward the number of “troubles” occurring concurrently with the storm conditions causing those outages.

² The parties do not dispute that the terms “trouble” and “outage” are interchangeable.

5. The term “secondary line” has always included to the service line extended to individual customer premises. This is a phrase that is used throughout the industry to include a customer service line.
6. The Staff Audit Division has reviewed Liberty’s Storm Reports and consistently affirmed Liberty’s use of the terms “concurrent” and “secondary.” This is demonstrated by the Audit Division’s own findings in audit reports issued on the 2015, 2016, 2017, 2018, and 2019 storm reports, stating for example:

Audit reviewed docket DG 06-107, Order #24,777, pages 13-14, to determine if the storm events in the report qualified as a “Major Storm”. The docket defines a “Major Storm” as a severe weather event or events causing 30 concurrent troubles and 15 percent of customers interrupted or 45 concurrent troubles. *Audit concurs that all of the storms charged to the Storm Fund qualify.*

Exhibit 24 at Bates 005 (audit of the 2015 and 2016 Storm Reports) (emphasis added); at Bates 017 (similar language in the 2017 audit report); at Bates 042 (stating, “[t]he 2018 Storm Fund Report complies with the filing terms of the Settlement Agreement”); and Exhibit 20 at Bates 005 (stating, “Audit reviewed the storms’ EEI levels and number of troubles and acknowledges that all of the [2019] storms charged to the storm fund qualify as a major storm or pre-staging event”).

7. Commission Staff also had the opportunity to review all of Liberty’s Storm Reports. With respect to the 2016 Storm Report, Commission Staff affirmed Liberty’s use of the terms “concurrent” and “secondary,” approving Liberty’s request to obtain recovery from the Storm Fund for the incremental costs associated with the single Major Storm that occurred in 2016. See, Exhibit 11 at

Bates 002 (stating, “[t]he 2016 Report details the estimated costs of one storm event which meets the Commission's criteria for recovery”).³

8. Importantly, Liberty’s use of the terms “concurrent troubles” and “secondary line” factored into the setting of base distribution rates in the Company’s 2013, 2016, and 2019 base distribution rate cases. In each of these cases, a determination was made as to the portion of Liberty’s prudently incurred storm costs that should be embedded in base distribution rates and the portion that should be allocated to the Storm Fund for recovery. The portions allocated to the Storm Fund for recovery are, by definition, costs associated with qualifying Major Storms. Given that the Commission has already allowed recovery of costs associated with storms that were deemed to be qualifying “Major Storms” *using the same definitions* as used in the 2019 and 2020 Storm Reports, there is no reasonable basis to find that the terms “concurrent troubles” and “secondary” in the 2019 and 2020 Storm Reports have a different definition, never used or applied in the past.
9. Through the many audits of the Company’s annually filed Storm Reports (2008-2018), Audit Staff raised *no objection whatsoever* to Liberty’s use and definition of the terms “concurrent troubles” and “secondary line” until the audit of the 2020 storm report, completed in January 2022, which was after the March 2021 Staff recommendation that gave rise to this dispute (Exhibit 12), arbitrarily shifting the definition to an interpretation that (respectfully) makes no sense from a major storm response perspective.
10. Applying the new definitions of “concurrent troubles” and “secondary line” to the 2019 and 2020 Storm Reports would disqualify all three Major Storms described

³ Note that there have been only two Staff recommendations filed in Docket No. DG 06-107 regarding storm reports -- the recommendation on the 2016 storm report cited here, and the March 2021 recommendation on the 2019 storm report that first applied the new definitions, Exhibit 12.

in the 2019 Storm Report, and the single Major Storm described in the 2020 Storm Report, even though those storm conditions were significant events, requiring Liberty to return those storm expenses to the storm fund account and, in turn, to expense the storm costs and thus not recover a total of \$706,838 previously recovered through the Storm Fund in relation to the 2019 Major Storms and a total of \$340,881 previously recovered through the Storm Fund in relation to the 2020 Major Storm. This is a substantial penalty to the Company with no substantiation or alignment with any filing reviewed by Commission Staff since 2008.

In this proceeding, Liberty presented evidence to substantiate the proper, historical use of the term “concurrent troubles” to include all outages that were caused by, and occurred concurrently with, a discrete storm event. The Company deploys crews to start restoring outages as soon as those outages occur. The Company does not sit and wait for a specified number of outages to accumulate before beginning to restore outages caused by a major weather event, nor would such a response ever be accepted as reasonable. To determine whether a “major” storm has occurred, thereby triggering recovery through a storm fund, good utility practice looks at the level of cost incurred and/or the number of customer outages that: (1) were caused by the weather system; and (2) required repair both during the course of the storm and immediately following the storm.

The concept that a “major” storm event has occurred only on the basis of *affected customers all experiencing an outage simultaneously* would vastly underestimate the impact of “major” storm conditions. Larger storm events will always have the potential to cause outages over an extended time period and geographic region, as the storm approaches and enters the service territory from one geographic location and then exits or diminishes in another geographic

location.⁴ The damage caused by such a damaging event does *not* necessarily occur all at the same time or all in the same location.

Instead, storm conditions constituting a “major” storm event will cause customer outages across an extended span of time and geographic impact. The cost of restoring power to customers arises from the level of damage caused by the storm conditions comprising the weather event. Yet, the definition put forward by Commission Staff would *ignore* outages caused by the *same storm conditions* that have caused the bulk of customer outages to occur simultaneously. There is no basis for such a definition and common sense dictates that – if the storm conditions causing outages at one time and place are the same storm conditions causing outages at another time and place – then all outages caused by the same storm conditions are an impact of the storm, thereby qualifying a “major” storm event, even if the outages did not all occur “simultaneously,” but rather occurred “concurrently” with the storm conditions to reach the threshold.

Liberty also presented evidence to support the fact that customer service lines are “secondary lines.” A service line is, in all physical aspects, a “secondary” line, except that it runs from the pole to a customer’s building. The loss of a service generally requires the same repair as the loss of a secondary line. The number of customers affected by a single outage is not a factor in determining whether a storm is “major,” it is only the number of outages, thus the number of repairs that need to be made, that is important.

Analysis

The issue in the two dockets implicated here involves the interpretation of terms used in the DG 06-107 Settlement Agreement of “concurrent troubles” and “secondary lines.” The Settlement Agreement is a contract. Therefore, from a legal perspective, case law indicates that the Commission should use the rules governing interpretation of a contract when resolving the

⁴ Recall that Liberty has two distinct service areas, one located in the Lebanon/Hanover area and another further east and south in the Pelham/Salem area.

issues presented here. For example, the New Hampshire Supreme Court (the “Court”) has found that “[s]ettlement agreements are contractual in nature and, therefore, are generally governed by principles of contract law.” *Poland v. Twomey*, 156 N.H. 412, 414 (2007) (citation omitted).

When determining the purpose of a settlement agreement, we focus on the intent of the contracting parties at the time of the agreement. To determine the parties’ intent, we consider the situation of the parties at the time of their agreement and the object that was intended thereby, together with all the provisions of their agreement taken as a whole.

City of Berlin v. County of Coos, 146 N.H. 90, 96 (2001) (citations and quotations omitted).

The “intent of the contracting parties at the time of the agreement” and the “situation of the parties at the time of their agreement” is demonstrated by the fact that, since 2008, the use of the terms “concurrent troubles” and “secondary lines” has been the same, with no contest or debate arising in relation to the usage of the terms until March 2021. In these circumstances, the Court has consistently found that “[t]he course of conduct of the parties ... is further evidence ‘of their common understanding of the meaning of their contract and the result they expected to accomplish thereby.’” *Bogosian v. Fine*, 99 N. H. 340, 342 (1967) (quotation omitted). The Court has further stated that:

The practical construction of a contract adopted by the parties thereto and the course of business followed by them is evidence of their common understanding of the meaning of their contract and the result they expected to accomplish thereby. *Horton v. Company*, 86 N. H. 472. While a practical construction of a contract is not binding on strangers, it is binding on the immediate parties. ***There is no surer way to find out what the parties meant, than to see what they have done.***

Bogosian v. Fine, 99 N.H. at 342-43 (emphasis added), citing, *Boston & Maine Railroad v. Railroad*, 86 N. H. 217, 224; *Berke Company v. Bridge Company*, 98 N. H. 261, 265; See Restatement (Second) of Contracts § 223, at 157-58 (1981) (“A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct”).

As demonstrated at hearing (and by undisputed fact), what has been “done” in every year in the past up to March 2021 is to use a definition of “concurrent troubles” that includes outages occurring “concurrently” with storm conditions and that includes customer service lines as “secondary lines.” Moreover, both definitions comport with industry use of the terms.

Consequently, DOE’s reliance on dictionary definitions instead of the actual history of how the term has been understood and reasonably relied upon is not the appropriate framework for making a decision here. The terms used in the Settlement Agreement were selected by sophisticated parties engaged in electric distribution activities with a common understanding of how the terms were used in practice in relation to electric distribution operations, not as used by the general public pursuant to a dictionary definition. There is no doubt that use of these terms had specific meaning to the parties when they executed the Settlement Agreement in 2007 because the parties to the Settlement Agreement collectively administered the Settlement Agreement consistent with that usage *over the next decade*. This confirmation of intent is clearly demonstrated by the Audit Division’s unequivocal statement on September 30, 2020, that “Audit reviewed the ... number of troubles and acknowledges that all of the [2019] storms charged to the storm fund qualify as a major storm or pre-staging event.” Exhibit 20 at Bates 005.

Accordingly, the Commission should reject DOE’s attempt to impose *retroactively* a different definition than was used, commonly understood, and confirmed by Commission Staff in the past.⁵

Finally, Liberty is compelled to comment on the repeated statements by DOE counsel and testimony from the DOE witness that Commission Staff failed to do its job when reviewing the prior Storm Reports; that Commission Staff did not pay proper attention to those filings; that Commission Staff had more pressing business; and that Liberty’s Storm Reports fell through the

⁵ It is also important to recognize that Liberty reasonably relied on Commission Staff’s express and implied approval of how Liberty defined “concurrent” and “secondary” over the years in filing the annual reports and in proposing allocation of storm costs in the three rate cases referenced above. As stated at hearing, Liberty is willing to work with DOE, the OCA, and other stakeholders to take a fresh look at the storm fund and make changes that the parties find to be necessary, but any such changes should only apply on a going forward basis.

cracks because there were no associated requests for a rate change.⁶ Aside from the fact that these statements concede that Commission Staff has arbitrarily *changed* the usage of the terms “concurrent troubles” and “secondary lines” from past practice, there is an expectation under the law that administrative agencies are fulfilling the responsibilities that are delegated to them. The defense that, for over a decade, the agency did not take action because it had not taken the time to review Company filings is not compelling.

The Commission should reject DOE’s recommendation, apply the meaning of the definitions that have been understood and in place since 2008, and find that 2019 and 2020 Storm Reports accurately describe the prudent storm costs Liberty incurred to restore service to customers, and rule that Liberty may thus recover those costs from the Storm Fund.

Respectfully submitted,
Liberty Utilities (Granite State Electric) Corp., d/b/a
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By its Attorney,



Date: August 5, 2022

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Certificate of Service

I hereby certify that on August 5, 2022, a copy of this brief has been forwarded to the service list.



Michael J. Sheehan

⁶ The hearing transcript is not currently available. As a result, counsel has paraphrased the argument of DOE counsel and the testimony of DOE witnesses.