

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 21-020

EVERSOURCE ENERGY AND CONSOLIDATED COMMUNICATIONS

Joint Petition to Approve Pole Asset Transfer

Order on Motions for Rehearing of Order No. 26,609

O R D E R N O. 26,631

May 24, 2022

I. BACKGROUND AND PROCEDURAL HISTORY

In Order No. 26,609 (April 13, 2022), the Commission denied in part and granted in part a motion for protective order and confidential treatment filed by the joint petitioners in this matter, relating to the proposed purchase price of pole assets and the settlement of disputes (including disputes relating to vegetation management costs) between the companies arising under a joint use agreement.

On April 28, 2022, Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications (Consolidated) filed a motion seeking partial rehearing or reconsideration of Order 26,609.

On May 4, 2022, the Office of the Consumer Advocate (OCA) filed a motion seeking partial rehearing of Order 26,609, and also opposing Consolidated's April 28 motion for rehearing of Order 26,609. The OCA's opposition (construed by the Commission as an objection to a motion for rehearing) was timely filed pursuant to NH Code Admin. R. Puc 202.03(c).

On May 6, 2022, the Department of Energy (DOE) filed a letter partially supporting the OCA's motion for rehearing.

On May 9, 2022, Consolidated filed an objection to the OCA's May 4 motion for rehearing.

Order 26,609, the motions for rehearing of Order 26,609, objections to those motions, and related docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted at:

<https://www.puc.nh.gov/Regulatory/Docketbk/2021/21-020.html>.

II. POSITIONS OF THE PARTIES

a. Consolidated's Motion

In its April 28 motion, Consolidated requested partial rehearing of a determination in Section III.B.i of Order 26,609, which is part of the Commission analysis section of Order 26,609 denying confidential treatment to information relating to the overall purchase price (and calculation thereof) of the proposed pole asset transfer under consideration in this docket.

Consolidated argued that the Commission erroneously determined that disclosure of that information would not substantially harm Consolidated's competitive position. Consolidated further argued that this determination resulted in the misapplication of a three-part balancing test used by the Commission to determine whether the privacy interest of the party resisting disclosure overcomes the public's interest in disclosure of the information.

In support of its position, Consolidated argued that it has engaged in discussions with several electric distribution utilities relating to the potential sale of other Consolidated-owned pole assets, and that disclosure of the information would set a pseudo sale price cap on such other pole assets. Consolidated referenced several dictionaries' definitions of the word "competitive" for the proposition that the disclosure would hinder its efforts to attain the best terms possible in other potential pole asset transactions. Consolidated acknowledged that purchase price is one of

several elements in a purchase and sale agreement but argued that it is one of the most important elements.

Consolidated went on to argue that the public's interest in disclosure of the information is presently outweighed by its competitive interests. In making this argument, Consolidated accepts that if the Commission grants its petition (and the purchase and sale agreement is executed) the public's interest in terms affecting rates would outweigh its interests. However, according to Consolidated, if the purchase and sale agreement is not executed, then its interests outweigh the public interest.

b. Office of the Consumer Advocate's Motion and Objection

In its May 4 motion, the OCA sought rehearing of a determination in Section III.B.ii of Order 26,609, which is part of the Commission analysis section of Order 26,609 granting confidential treatment of information relating to the settlement of disputes, including disputes related to vegetation management, which is a discreet figure resulting in the proposed pole asset buyer's payment price. The OCA requested that unredacted documents setting the terms for the resolution of the tree-trimming dispute be made public.

The OCA argued that the Commission erroneously determined that the public's interest in disclosure was negligible based on findings that settled disputes are tangentially related to public utilities and were purely private disputes between the parties. In support of its position that the public interest is not negligible, the OCA argued that a direct link exists between Eversource's rates and vegetation management expenses. The OCA noted that terms of the Settlement Agreement on Permanent Rates in Docket No. DE 19-057 treat vegetation management as a variable expense, and that Eversource can and will seek recovery of these expenses from ratepayers.

The OCA went on to argue that Commission erroneously invoked a three-part balancing test to decide whether the public interest in disclosure is outweighed by any privacy interest in non-disclosure. In support of its position, the OCA cited to *Provenza v. Town of Canaan*,¹ a recent opinion released by the New Hampshire Supreme Court on April 22, 2022, for a several arguments, including that: 1) the three-part test is applicable to the judiciary's review of agency decisions, not to an agency's decision-making; 2) tests used by the judiciary are not the barometer the legislature directs agencies make disclosures under; 3) that *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), as cited by *Provenza*, supports conclusions that statutory interpretation of exemptions to disclosure are not designed to be mandatory bars to disclosure, and that "reverse-right-to-know" claims may be precluded RSA 91-A.

The OCA also objected to Consolidated's April 28 motion. In its objection, the OCA rebutted Consolidated's argument that disclosure of the purchase price will affect future negotiations or establish a purchase price cap for pole assets in other instances. In support of its position, the OCA argued that Consolidated conceded that the proposed Eversource transaction is unique, and any halt in negotiations with other utilities would be at Consolidated's election. The OCA also noted the Commission's plenary authority to access utility books and records.

c. Department of Energy

The DOE supported the arguments made in Section II of the OCA's Motion, namely that the Commission erred in determining that the settled claims are of negligible public interest because they are only tangentially related to public utilities and involve purely private disputes between private parties. According to the DOE,

¹ Accessible at: <https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2022-04/2022028provenza.pdf>

that characterization is inaccurate because Eversource may seek ratepayer recovery of vegetation management expenses that were billed or billable to Consolidated.

d. Consolidated Objection

Consolidated objected to the OCA's May 4 motion. Consolidated rebutted the OCA's argument that the Commission erroneously determined that the public interest in disclosure was negligible. According to Consolidated, the OCA's argument is based on presumptions and potential rate impacts that have not—and may not—occur. Consolidated rebutted the OCA's arguments relating to the three-part balancing test and *Provenza* by differentiating the facts in this matter from *Provenza* and noting that the joint petitioners in this matter are acting as private business entities, not as government agents. Consolidated also provided additional factual details about its other ownership interests in pole assets in northern New England, listening 26 other electric utilities' service areas where it owns pole assets. Consolidated reiterated its position that any final terms impacting electric rates can be disclosed at an appropriate time.

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 Co. of N.H. 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)).

With respect to the underlying standards applied by the Commission in Order 26,609, the Commission's authority to rule on the Joint Petitioner's motion was clearly identified at page 6 of Order 26,609, namely that NH Code Admin R. Puc 203.08(a) directs that "[t]he commission shall upon motion issue a protective order providing for the confidential treatment of one or more documents upon a finding that the document or documents are entitled to such treatment pursuant to RSA 91-A:5, or other applicable law...." The Commission, in issuing orders on such requests, has referenced state and federal caselaw as a guide in interpreting the statutory exemptions to disclosure pursuant to RSA 91-A:5 or other applicable law. *See, e.g., Public Service Co. of N.H. d/b/a Eversource Energy*, Order No. 26,063 at 8 (October 11, 2017). Absent a finding that such an exemption applies, citizenry undoubtedly possesses a "right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies ... and to copy ... the records ... so inspected." RSA 91-A:4, I.

The OCA challenges this practice under several theories, concluding that the Commission has "unfettered discretion" to treat the adjudicative casefile in this matter as publicly available information. We do not agree that the Commission's discretion is unfettered under the text of Puc 203.08(a), or that the Commission is in any way prohibited from referencing case law in determining whether or not a lawful exemption to disclosure applies. Moreover, the OCA's argument leads to the illogical result of demanding an agency apply a different standard to right-to-know requests than

reviewing courts. We also note two factors not identified by the OCA: 1) Puc 201.07(i) analogously requires the Commission to use the three-part balancing test to evaluate whether a privacy interest exists and, if so, whether the public interest in disclosure outweighs any interests in non-disclosure for routinely filed information marked as confidential that a citizen requests to inspect or copy; and 2) with respect to any protective orders issued in this matter, Puc 203.08(k) affords the Commission ongoing authority, on its own motion, or on the motion of staff, any party, or member of the public, to reconsider its determination at any time. As such, we disagree that the OCA demonstrated that the Commission's determination was unlawful or unreasonable on those grounds. We also note that, to the extent that interests in disclosure or non-disclosure of adjudicative case files are temporal, the appropriate mechanism to reconsider a determination of this Commission based on changing circumstances is a motion filed pursuant to Puc 203.08(k).

We next turn to the two specific findings that Consolidated and the OCA seek rehearing of. By way of background, this proceeding seeks multiple approvals by the Commission, first the approval of a purchase and sales agreement between the joint petitioners authorizing Eversource to purchase pole assets (poles, licenses, easements, interests in attachment fees, etc.), and second the approval of rate adjustments applicable to Eversource's customers, representing incremental expenses Eversource expects to incur as a result of the transaction. Although the purchase and sales agreement contains various terms and figures, at a high level the parties negotiated a "gross purchase price" that is offset by a negotiated figure to derive a "net purchase price." The net purchase price is then further offset by another negotiated figure to resolve any and all outstanding disputes between the parties to arrive at a final "net payment figure." Eversource proposed to impute the "net purchase price" as the net

book value of the asset for future ratemaking purposes. The difference between the “net purchase price” and the “net payment price” is a negotiated figure that represents, among other things, the resolution of unresolved claims Eversource maintains against Consolidated relating to vegetation management expenses. Eversource’s rate recovery proposal includes incremental vegetation management expenses.

First, Consolidated seeks rehearing of the Commission’s determination that disclosure of the gross and net purchase price would not substantially harm Consolidated’s competitive position. This finding was used in the three-part balancing test, resulting the denial of the Joint Petitioner’s request for a protective order applicable to that information. Consolidated presents no new information that was not available to it at the time the joint motion was filed. Rather, Consolidated concedes that any final terms impacting electric rates should be disclosed at an appropriate time, but puts forward a new argument that the public’s interest in the information would spring upon the approval and successful execution of the proposed pole asset transfer.

Consolidated’s filing does not convince us that Order 26,609 was unreasonable. As noted by the Court in *Provenza*, citing *Lamy v. N.H. Pub. Utils. Comm’n.*, 152 N.H. 106, 111 (2005), the “public has a substantial interest in information about what its government is up to.” The gross and net purchase prices are key terms in evaluating the value (and thereby the cost) of this transaction to Eversource’s ratepayers, as well considering the alternative of maintaining the status quo, in determining whether the transaction meets the public good standard under RSA 374:30. The dollar figure of that value is directly challenged by the testimonies presented by the DOE and NECTA. Accordingly, Consolidated’s motion for partial rehearing is denied.

Second, the OCA seeks rehearing of the Commission's determination that the public's interest in disclosure of vegetation management costs are negligible. This finding was used in the balancing test, resulting the Joint Petitioner's request for a protective order applicable to "net payment price" being granted. The OCA argued that the public's interest is greater than negligible because Eversource may seek recovery of vegetation management expenses through variable rate mechanisms, therefore Eversource's settlement of its claims against Consolidated for those costs directly impacts the costs it may seek ratepayer recovery of.

Since Eversource may seek recovery of the vegetation management costs and the dollar amount is a significant portion of the transaction, we are persuaded that the ratepayer's interest is more than negligible, and grant rehearing to modify that finding. We continue to find that the joint petitioners have a notable privacy interest in their settlement terms because they negotiated and settled private legal disputes between them with an objectively reasonable expectation that they would remain private, and disclosure could negatively impact their ability to fairly and effectively negotiate settlements going forward, including on these same issues if the proposed transaction is not executed.

We also note that the record in this matter already contains a substantial amount of detail on the vegetation management dispute between Eversource and Consolidated that is not confidential. A complete record of costs that were or would have been billed to Consolidated for vegetation management and storm recovery between 2018 and present day, and for which Consolidated has not paid, is located in Exh. 68. Additionally, the amount of new vegetation management costs, separate from those already included in rates, which Eversource seeks ratepayer recovery of in this matter can be found in Exh. 70 at pages 1, 3, and 13.

On balance, we conclude that the joint petitioners' interest in nondisclosure of the terms upon which they settled various disputes between themselves, which is the difference between the "net purchase price" and the "net payment price" (and the resulting net payment amount), outweigh the public's interest in knowing the terms of the settlement at this time. As such, protective treatment is granted to the identified information in exhibit 3 located in Article II, section 2.1 and Article VI, sections 6.1, 6.2, and 6.3 of the Settlement and Pole Asset Purchase Agreement, and its derivative uses in this matter, unless the purchase is consummated, at which point the protective order as to Article 2, section 2.1 shall lift. We make this determination on the condition that confidential treatment is not extended to amounts specifically related to vegetation management expenses within the transaction that have not yet been provided publicly. As noted above, this decision is subject to our ongoing authority, on our own motion or on the motion of Staff, any party, or member of the public, to reconsider our determination. Puc 203.08(k). Accordingly, the OCA's motion for partial rehearing is granted in part and denied in part.

a. Summary


In conclusion, the proposed cash price paid by Eversource to Consolidated, called "net payment price", shall remain confidential unless and until the transaction is approved and consummated, at which point the protective order for that figure shall lift. The terms of the agreement which discuss the difference between the "net purchase" and "net payment price" shall continue to be covered under this protective order if the asset transfer is approved and consummated.


Based upon the foregoing, it is hereby

ORDERED, that the motion for partial rehearing of Order No. 26,609 filed by Consolidated Communications of Northern New England Company, LLC is DENIED; and it is

FURTHER ORDERED, that the motion for partial rehearing of Order No. 26,609 filed by the Office of the Consumer Advocate is GRANTED IN PART and DENIED IN PART as discussed herein.

By order of the Public Utilities Commission of New Hampshire this twenty-fourth day of May, 2022.


Daniel C. Goldner
Chairman


Carleton B. Simpson
Commissioner

Service List - Docket Related

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