



The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

MEMORANDUM

TO: Electronic Distribution List in D.P.U. 20-75

FROM: Katie Zilgme, Hearing Officer

RE: Prohibited Communication

DATE: April 22, 2022

CC: Mark D. Marini, Department Secretary

I. SUMMARY

By this Hearing Officer Memorandum, I identify three recent written communications received by staff of the Department of Public Utilities (“Department”) as prohibited ex parte communication. Two of these communications also contain extra-record information. As such, I exclude these communications/information from the administrative record in this docket.

II. BACKGROUND

On October 22, 2020, the Department opened this inquiry to investigate (1) distributed energy resource planning and (2) the associated assignment and recovery of costs related to the distributed generation (“DG”) and infrastructure modifications needed to interconnect DG to a Distribution Company’s¹ electric power system (“EPS”). Distributed Energy Resource

¹ The Distribution Companies are Fitchburg Gas and Electric Light Company d/b/a Unitil (“Unitil”), NSTAR Electric Company d/b/a Eversource Energy

Planning and Cost Assignment, D.P.U. 20-75, Vote and Order Opening Investigation (2020) (“Vote and Order”). The Department opened this inquiry pursuant to the Department’s ratemaking authority under G.L. c. 164, § 94 and its superintendence authority under G.L. c. 164, § 76. On November 24, 2021, the Department issued an Order establishing a new, provisional framework for Distribution Companies’ planning and for the funding of essential upgrades to the EPS to foster timely and cost-effective development and interconnection of DG. D.P.U. 20-75-B (2021). The Department established the provisional framework while it examines possible long-term planning solutions for the interconnection of DG while ensuring a safe and reliable electric distribution system. D.P.U. 20-75-B at 1.

Between February and March 2022, several participants in this docket have sent improper communications outside of regular order in response to issued decisions. On February 8, 2022, Hearing Officer Stock received an email from participant Pope Energy in response to Order on Attorney General Notice of Retention of Experts and Consultants. D.P.U. 20-75 (February 8, 2022). This communication questioned the Department’s treatment of Pope Energy’s comments in that Order, and presented substantive information related to a financing proposal that it had raised in its comments on the Attorney General Notice and in earlier comments in this docket (e.g., Pope Energy comments on February 5, 2021, April 13, 2021, May 8, 2021, and May 21, 2021).² The February 8th email also copied Elizabeth Mahony and Rebecca Tepper of the Attorney General’s Office, the Department’s e-filing address, and me.

On March 3, 2022, DG and Clean Energy Ombudsperson Tohme and I received an email from participant Erica Buster of SunConnect Corporation (“SunConnect”) offering substantive comments on the Distribution Companies’ February 4, 2022 responses to the Department’s January 28, 2022 Request for Information from the Distribution Companies. Noting that she was unsure if this communication was the correct forum, Ms. Buster offered specific, substantive criticism of the Distribution Company’s Responses 1 and 2, as well as a

(“Eversource”), and Massachusetts Electric Company and Nantucket Electric Company each d/b/a National Grid (“National Grid”).

² These Pope Energy earlier comments were timely filed and were made in response to requests from the Department to stakeholders.

more general comment on utility transparency. Ms. Buster also sent this communication to Gary Kassem and Nicolette Karakos of SunConnect.

On March 9, 2022, I received an email from participant Aaron Culig of NextGrid Inc. (“NextGrid”) in response to my February 24, 2022 Hearing Officer Memorandum regarding Distribution Company Projected Timelines. Among other things, this informational Memorandum encouraged Distribution Companies to engage stakeholders in advance of a Distribution Company’s filing a capital investment project (“CIP”) proposal with the Department. The February 24th Memorandum did not provide for comments. Mr. Culig’s communication characterized the Department as having little regard for enforcing its own rules before demanding a defense of the February 24th Memorandum’s contents. I was the sole recipient of this communication.

III. PROHIBITED COMMUNICATIONS

A. Ex Parte Communication

Generally, ex parte communications are communications outside of official procedure. By its Procedural Rules, the Department prohibits such ex parte communications:³

From the initial filing in an adjudicatory proceeding until the rendering of a final decision, a Commissioner, presiding officer, or staff member of the Department may not communicate with a party or interested person about any substantive issue of fact, law, or policy except upon reasonable notice and opportunity for all parties to participate.

220 CMR 1.02(9)(a).

The Department applies this prohibition both (i) to communications by a Commissioner, presiding officer, or staff member of the Department to a party or interested person and (ii) to communications by a party or interested person to a Commissioner, presiding officer, or staff member of the Department.⁴

³ There are exceptions to the prohibition against ex parte communications that are not applicable in this instance. 220 CMR 1.02(9)(b).

⁴ “An ex parte communication or contact in an adjudicatory proceeding is any oral or written communication or contact with administrative agency officials who are

B. Extra-Record Information

Extra-record information is information that is submitted after the close of the record or that is submitted outside the established procedure. The Department has found that submission of extra-record information is an unacceptable tactic that is potentially prejudicial to the rights of other participants even when the information is excluded from the record. Boston Gas Company, D.P.U. 88-67 (Phase II) at 7 (1989). In finding submission of extra-record information unacceptable, the Department recited the analogy that you cannot un-ring a bell (stating the difficulty of forgetting information once it is known). D.P.U. 88-67 (Phase II) at 6-7.⁵

IV. ANALYSIS

As an initial matter, it is appropriate to apply the Department's ex parte rules to the above-referenced communications even though this matter is not an adjudicatory proceeding at this time. By the issuance of the Order in D.P.U. 20-75-B, the first stage of this investigation is completed with the establishment of the provisional planning program. In conducting this stage of the investigation, the Department followed practices and procedures consistent with those applied to an adjudicatory proceeding. The administrative record was developed by (i) soliciting written comments based on notices with deadlines for submissions and (ii) issuing questions to specific participants or categories of participants, again with

participating in or ultimately making the agency's decision which is not a part of the record of the agency's proceeding." 38 Mass. Prac., Administrative Law & Practices, § 10.60.

⁵ See also, State v. Rader, 62 Ore. 37, 40 (1912) ("It is not an easy task to unring a bell, not to remove from the mind an impression once firmly imprinted there..."); U.S. v. Lowis, 174 F.3d 881, 885 (7th Cir. 1999) (despite curative jury instructions, as a practical matter, it can be impossible to "unring the bell"); Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962) ("one cannot unring a bell"); Sandez v. United States, 239 F.2d 239, 248 (9th Cir. 1956), reh. denied, 245 F.2d 712 (9th Cir. 1956) (stating doubt that a subsequent jury instruction could "unring the bell" regarding the admission of evidence). Other pertinent analogies recited by the court in Dunn include: "After the thrust of the saber it is difficult to forget the wound." and "If you throw a skunk in the jury box, you can't instruct the jury not to smell it." 307 F.2d 883, 886.

deadlines for submissions.⁶ The Department did not develop the administrative record by means of informal engagement with participants (discussions or communications). The formal practices and procedures employed in this proceeding are designed to support impartial decision making by the Department.

Based on these factors, I apply the Department's ex parte rules to all three communications. Pope Energy sent its February 8th email to two Department staff: Hearing Officer Stock and me. The email contained discussion of substantive matters, i.e., discussion of a debt-issuance concept previously raised by Pope Energy. On March 3rd, SunConnect sent substantive comments on the Distribution Company's responses to the Request for Information to Distribution Companies directly to me in my capacity as Hearing Officer. NextGrid communicated its displeasure with my findings in the Hearing Officer Memorandum regarding Distribution Company Projected Timelines in its March 8th message.⁷

These email communications do not constitute "not prohibited" communications. That is, these communications did not involve "scheduling, administrative, and other procedural matters." 220 CMR 1.02(9)(b)1. Further, these communications were not (i) "between a party and assigned settlement intervention staff for the purpose of producing a settlement" or (ii) "between a party and staff assigned to conduct alternative dispute resolution or mediation proceedings." 220 CMR 1.02(9)(b)2. Therefore, I find that Pope Energy's February 8th email, SunConnect's March 3rd email, and NextGrid's March 9th email are all prohibited ex parte communications.

In addition, Pope Energy's February 8th and SunConnect's March 3rd emails constitute submissions of extra-record information. Both Pope Energy and SunConnect submitted these

⁶ Consistent with Department practice, participants requested some extensions of deadlines by written motions or equivalent requests; the Department granted the requests.

⁷ As a reminder, each Distribution Company's performance in meeting interconnection timeframes is adjudicated annually through the timeline enforcement mechanism and general timeline processing is a policy issue that will be investigated through Distributed Generation Interconnection, D.P.U. 19-55 (February 24, 2022 Hearing Officer Memorandum at 3).

communications, containing substantive information, after the close of the administrative record. The administrative record for the initial stage of this proceeding closed on October 1, 2021, with the Department's receipt of the Distribution Company's supplemental discovery response. Pope Energy's and SunConnect's communications were not requested by the Department, were submitted after the Department's issuance of D.P.U. 20-75-B, and did not contain essential, new information. Therefore, I find that the Pope Energy's February 8th and SunConnect's March 3rd emails are prohibited extra-record submissions.

As stated above, Pope Energy's February 8th email is connected to its comments submitted in response to the Department notice on the Attorney General Notice. The Department addressed that submission in Order on Attorney General Notice of Retention of Experts and Consultants. In this Memorandum, I do not make any findings regarding the Pope Energy January 25, 2022 comments on the Attorney General Notice. However, it is instructive to look to those comments considering the treatment of Pope Energy's February 8th email by this Memorandum. Pope Energy's January 25th comments reasonably could be treated as extra-record. In those comments, Pope Energy presented substantive information regarding a debt-financing proposition that it had raised in prior comments. Those January 25th comments were not submitted in response to a Department notice seeking substantive comments on matters at issue in this docket. Thus, Pope Energy's comments were submitted outside of the established procedure.

Moreover, SunConnect's March 3rd email contains substantive comments on the Distribution Company's February 4th responses to the Department's January 28th Request for Information from the Distribution Companies. In the January 28th Hearing Officer Memorandum, the Department requested certain, limited scope information from the Distribution Companies concerning the timeline for CIP proposal submissions set forth in D.P.U. 20-75-B.⁸ SunConnect sent its email commenting on information filed in this docket rather than in response to a Department notice seeking comments. Thus, SunConnect submitted its comments outside of the established procedure.

Participants must develop their substantive arguments through the notice and comment process. In this proceeding, 344 participants are included on the Electronic Distribution List,

⁸ When filed, the CIP proposals will be adjudicated in separate dockets and any party to those dockets will have an opportunity to participate in the discovery process.

including Pope Energy, SunConnect, and Next Grid. Those participants on the List were provided the express opportunity to provide written comments and specific information in response to issued notices. Pope Energy, SunConnect, and other participants, submitted written comments to the Department in this docket on December 23, 2020, February 5, 2021, April 13, 2021, May 8, 21, and 28, 2021, and June 8, 2021. NextGrid submitted written responsive information on April 13, 2021 and May 21, 2021. Also, pursuant to the Vote and Order, at n.7, Pope Energy's proposal submitted in Distributed Generation Interconnection, D.P.U. 19-55, along with the proposals of other participants, was incorporated into the administrative record in D.P.U. 20-75. Thus, Pope Energy, SunConnect, and NextGrid were not denied process to contribute to the development of the administrative record in the initial stage of D.P.U. 20-75.⁹ Finally, Pope Energy's January 25th comments seem to be framed as a message to the Attorney General for issues for her to pursue in this case. Pope Energy is free to communicate directly with the Attorney General. Using the Department as an intermediary to convey the messaging is not appropriate. The Department does not have authority to instruct the Attorney General in these matters. Additionally, participants are free to communicate with a Distribution Company to discuss relevant issues and to obtain pertinent information.

V. CONCLUSION

Consistent with the provisions of 220 CMR 1.02(9)(d), this Hearing Officer Memorandum is sent to the Electronic Distribution List in D.P.U. 20-75 along with a copy of the emails to Department Staff by Pope Energy on February 8, 2022, SunConnect on March 3, 2022, and NextGrid on March 9, 2022. Further, Pope Energy's February 8, 2022, email, SunConnect's March 3, 2022 email, and NextGrid's March 9, 2022 will be placed in the D.P.U. 20-75 docket file; however, those communications will not be part of the administrative record in D.P.U. 20-75.

⁹ The Department appreciates Pope Energy, SunConnect, and NextGrid's participation in and contributions to this and other related Department proceedings. The Department encourages these participants to continue involvement in these matters consistent with the Department's practices and procedures. To be clear, any participant is not prohibited from communicating with the Hearing Officer on purely procedural matters, and it is appropriate to contact the Hearing Officer with procedural questions about a proceeding. 220 CMR 1.02(9)(b)1.