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February 25, 2019

Ms. Debra A. Howland
Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301

Re: Docket No. IR 15-296
Investigation into Grid Modernization

Dear Ms. Howland:

As you know, on February 12, 2018 the Public Utilities Commission broke nearly two years of silence on the subject of grid modernization when Commission Staff issued a 139-page document entitled "Staff Recommendation on Grid Modernization" (Staff Report) and filed it in the above-referenced docket. The document was appended to a cover letter requesting that the Commission "grant leave for all interested persons to file written comments regarding the Staff Report by April 6, 2019."

The Commission opened this investigative proceeding by issuing an Order of Notice on July 30, 2015 in response to an explicit legislative directive to take such action. Eight months later, on April 1, 2016, the Commission issued Order No. 25,877, announcing the formation of a Grid Modernization Working Group. The Working Group was duly constituted, held a series of facilitated meetings over the course of ten months, and issued its report on March 20, 2017.

Page 32 of the Working Group's report outlined a series of recommended next steps. The Working Group suggested that the Commission "[a]llow 30-60 days for any public comment on the report" followed immediately thereafter by an adjudicative proceeding to address "the non-consensus and other relevant items." As proposed, this would have resulted in adjudicative proceedings beginning in (roughly) September of 2017 and would have culminated in a Commission order, likely some time in mid-2018, that would have provided a framework for the submission of individual utility "Grid Modernization Plans" (GMPs). The Working Group proposed that each utility file an initial GMP setting forth a ten-year grid modernization vision for the company, "with a more detailed 5-year plan updated every three years" thereafter. Working Group Report at 10. The Working Group proposed that the Commission consider waiving the requirement that electric utilities file least-cost integrated resource plans pursuant to RSA 378:38 "[t]o the extent that the purposes of RSA 378:38 are satisfied by the GMP." *Id.*

After mulling these procedural recommendations for 23 months Staff rejected them without comment.

Page 77 of the Staff Report contains Staff’s “Proposed Next Steps,” which begin with the comment period referenced in Staff’s cover letter. After the initial comments would come an opportunity for utilities and stakeholders to file “detailed proposals” on certain enumerated “key aspects” of grid modernization (e.g., cost effectiveness frameworks, cost recovery, data access, hosting capacity analysis, rate design), followed by the creation of yet more “working groups” established should the Commission deem them necessary, followed by the initiation of studies of certain subjects (e.g., hosting capacity analysis), coordination with “other related dockets,” and, critically, the submission of IDPs (integrated distribution plans) by the utilities.

These IDPs are similar to the GMPs referenced in the 2017 Working Group Report but, significantly, Staff proposes that the Commission essentially determine now – or, at least, prior to any adjudicative decisionmaking – that submission of IDPs replace the submission of RSA 378:38 least-cost integrated resource plans (LCIRPs). *See* Staff Report at 22 (“the grid mod concept is already an element of the overall LCIRP” and therefore “[p]lanning for grid mod should not be separate from the LCIRP”).

Proceeding as proposed by Staff is problematic for two reasons.

First and foremost, there are statutory and due process concerns with the adoption of a proposal to replace LCIRPs for electric utilities with IDPs based only on informal processes. RSA 378:40 precludes the Commission from approving a rate change for a utility that “does not have on file with the commission a plan that has been filed and approved in accordance with the provisions of RSA 378:38 and RSA 378:39.” Although RSA 378:40 allows rate changes when a utility has a plan on file that is still under review, and although RSA 378:38-a allows the Commission to “waive for good cause any requirement under RSA 378:38, upon written request by a utility,” the LCIRP statute remains the bedrock on which the rate regulation of electric (and natural gas) utilities in New Hampshire is built.

While utility customers do not have a “vested property interest in the setting of utility rates” sufficient to trigger the due process protections of the Fourteenth Amendment of the U.S. Constitution and the analogous provisions of the New Hampshire Constitution, *Appeal of the Office of the Consumer Advocate*, 148 N.H. 134, 138 (2002) (citations omitted), a sweeping change in the way the Commission applies the LCIRP statute is not a rate proceeding. Rather, it raises fundamental questions of utility regulation that are not limited to rates and, indeed, implicates the “rights, duties, privileges, immunities or other substantial interests” of a variety of parties (e.g., the entities represented on the Grid Mod Working Group, including the utilities) sufficient to qualify them under RSA 541-A:32 for intervenor status in an adjudicative proceeding.

The Commission has previously recognized that the U.S. Supreme Court’s decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976), provides the appropriate framework with which to consider the due process rights of parties with business before the Commission. *See* City of Nashua, Order

No. 24,667 (Docket No. DW 04-048, 2006) at 5. The key insight from *Mathews* is that in the administrative context, due process is “flexible and calls for such procedural protections as the particular situation demands.” *Mathews*, 424 U.S. at 335 (citations omitted). This particular situation, in which the Commission will likely invoke its pre-restructuring least-cost integrated resource planning authority to create a new framework for electric utility investments and operations in the 21st Century, is a situation that demands contested case proceedings within the meaning of the relevant section of the Administrative Procedure Act, RSA 541-A:31 *et seq.*¹

Secondly, the procedural rubric proposed by Staff will only further slow down a process that, in light of its importance, has already been subject to unconscionable delays. As reflected in the Order of Notice issued in the instant docket, the Commission began its grid modernization investigation at the explicit direction of the General Court, which even set a deadline – August 1, 2015 – for the Commission to get to work on this matter. Almost four years later, no real progress has been achieved – i.e., no actual decisions have been made nor have any changes to electric utility business as usual been implemented. The approach suggested in the Staff Report contemplates yet more report generation, yet more working group meetings, and no real action – in the form of submission of IDPs by individual utilities – until 12 months after the unspecified date on which the Commission acts on Staff’s recommendations. *See* Staff Report at 79. Only then will there be adjudicative proceedings, which typically take *at least* six months to resolve. Translation: Under Staff’s proposed plan of action, New Hampshire will be well into the 2020s before any of the electric utilities have an approved plan in place for grid modernization.

Delay of this sort favors the utilities and their legacy rate base at the expense of ratepayers, who need the benefits of new technologies, rate designs and regulatory paradigms to take full advantage of available grid technologies. In the meantime, the next conventional LCIRP is due from Liberty on July 1, 2019, *see* Order No. 26,039 (Docket No. DE 16,097, July 1, 2017) at 7; from Eversource on August 25, 2019, *see* Order No. 26,050 (Docket No. DE 15-248, Aug. 25, 2017) at 9; and from Unitil January 29, 2020, *see* Order No. 26,098 (Docket No. DE 16-463, Jan. 29, 2018) at 9. In other words, we are already destined to go through yet another round of LCIRP plan review using an approach that was designed for the vertically integrated era. Or, worse, perhaps the Commission will waive the LCIRP requirement altogether while discussions about grid modernization grind on, a non-action approach that totally and unreasonably favors the status quo in a manner that benefits utility shareholders and nobody else.

Along similar lines, the Staff Report quite laudably advocates the use of revenue decoupling as a rate design technique that would “remove potential disincentives in grid modernization investments.” Staff Report at 63. However, the Staff Report incorrectly states that “[t]he utilities have agreed to revenue decoupling in the next rate case as part of the most recent Energy Efficiency Resource Standard (EERS), Docket DE 17-136.” *Id.* In reality, the utilities agreed, in a different docket (DE 15-137), that each would “seek approval of a new decoupling mechanism, or another mechanism as an alternative to the [currently extant Lost Revenue Adjustment

¹ The need for rigorous due process protections is all the more acute here because the cover letter to the Staff Report makes clear that the document itself is incomplete and that Staff reserves the right to file an “addendum” at some unspecified time of its choosing. In these circumstances, the deadlines associated with contested case proceedings will be especially useful in assuring that the parties with an interest in grid modernization are treated fairly by the agency.

Mechanism] LRAM, in its next distribution rate case following the first triennium of the EERS, 2018-2020.” Settlement Agreement of April 26, 2016, filed in Docket No. DE 15-137, at 6;² *see also* Order No. 25,932 (Aug. 2, 2016) at 60 (approving this provision). The point is not to quibble with how the Staff Report characterizes Commission-approved utility commitments with respect to revenue decoupling but, rather, to make clear that absent near-term action on the Staff Report, including its support of revenue decoupling, there are no assurances that electric utilities will seek such rate design improvements in the foreseeable future. For example, we expect the state’s largest electric utility to file a distribution rate case within the next two months, there is no requirement that the rate case contain a decoupling proposal, and if history is any guide this particular utility will not file another rate case for nearly another decade. These circumstances will make Staff’s suggested annual targeted cost recovery mechanism, *see* Staff Report at 64, (described by some states as a “tracker”) far more contentious given that the state’s largest electric utility will continue collecting lost revenues that are cumulative between rate cases, and the tracker would diminish the impact of any earnings attrition on shareholder returns, allowing it to avoid rate cases for an even longer period.

In these circumstances, the Office of the Consumer Advocate (OCA) wishes to impart a sense of urgency about moving forward and is committed to doing all it can to hasten progress on this critical question of energy-related public policy. Therefore, the OCA is not waiting for the Commission’s official response to Staff’s submission to urge the Commission to eschew the approach recommended by Staff.

Instead, the OCA respectfully requests that the Commission issue an Order of Notice that allows for additional intervention requests by a date certain and schedules a prehearing conference. The purpose of the prehearing conference would be to establish a procedural schedule, and other parameters, for an adjudicative proceeding that would lead to a Commission order establishing an appropriate framework for grid modernization that is likely, but not necessarily, a replacement for the traditional LCIRPs described in RSA 378:38 in light of the waiver authority granted in RSA 378:38-a. Should the Commission adopt Staff’s recommendation, the OCA will promptly file a rehearing motion the reprises the positions articulated above.

Please feel free to contact me if there are any concerns or questions about the foregoing.

Sincerely,



D. Maurice Kreis
Consumer Advocate

cc: Service List

² The DE 15-137 Settlement is available at http://www.puc.nh.gov/Regulatory/Docketbk/2015/15-137/LETTERS-MEMOS-TARIFFS/15-137_2016-04-27_STAFF_PARTIES_SETTLEMENT_AGREEMENT.PDF.