

STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Electric Distribution Utilities

Investigation into Grid Modernization

Docket No. IR 15-296

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE
ENERGY'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION**

NOW COMES Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource” or the “Company”) and, pursuant to Puc 203.07 and RSA 541:3, hereby moves for reconsideration of the Commission’s May 22, 2020 Order No. 26,358 (the “Order”) in the instant docket. Pursuant to RSA 541:3, the Commission may grant reconsideration when a party states good reason for such relief. *Public Service Company of New Hampshire*, Order No. 25,361 (May 11, 2012) at 4. Good reason may be shown by identifying new evidence that could not have been presented in the underlying proceeding or by identifying specific matters that were overlooked or mistakenly conceived by the deciding tribunal. *Id.* at 4-5. A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *Id.* at 5

For the reasons set forth herein, Eversource respectfully requests that the Commission reconsider and/or clarify certain outcomes arising from the Order that appear to subject the Company’s core distribution planning function to the purview of a vaguely defined Grid Modernization Stakeholder Group (“GMSG”) and “independent” engineer answering to and directed by the Commission Staff. To the extent the Order intends to supplant the Company’s “business as usual” distribution planning process for safety and reliability projects with the GMSG

process and oversight of an independent engineer, there is an improper intrusion into the Company's management prerogative under New Hampshire law. In particular, the Commission concludes that "[w]e view stakeholder involvement in distribution planning as a key driver of a more transparent, efficient, and less-costly distribution system." Order at 58. However, with respect to the planning process for core distribution assets, this is a premise that has no factual foundation and that was reached without consensus, adequate process, or sufficient deliberation on numerous considerations pertaining to the way in which the GMSG process could ever function without impairment to the day-to-day operation of the system.

By this Motion, Eversource is appealing to the Commission's clear predisposition to deal with grid modernization policies thoughtfully, carefully, and temperately on behalf of New Hampshire customers, and is requesting further deliberation, discussion or other process to clarify the Commission's policy direction in relation to core distribution planning. Specifically, Eversource is requesting that the Commission reconsider or clarify its findings in the Order so as to confirm that "business as usual," core distribution planning activities are **excluded** from the GMSG process and oversight of the independent engineer. Eversource also requests that the Commission clarify and further define the procedural elements of the stakeholder process prior to implementation.

I. Introduction

At the outset, Eversource acknowledges the lengthy history of this docket; the volumes of information shared and disseminated thus far; and the hard work of numerous parties to participate in this proceeding. Also, to the extent the Order has defined the policies, processes and expectations for the implementation of "grid modernization" investments, including the establishment of a stakeholder review process to evaluate advanced technology investments,

Eversource is appreciative of the path delineated by the Commission as it strikes an appropriate balance for New Hampshire. Advanced technology investments typically viewed as “grid modernization” initiatives hold promise for enhanced grid reliability, resilience, and efficiency; improved customer service; and, opportunities for closer interaction between customers and their utilities.¹ However, these investments also have the potential to be costly and to create negative implications for the smooth and reliable operation of the distribution system, if not implemented carefully. This is the reason that an agreed upon method for “net benefits” analysis and an “integrated planning” approach is vital in transitioning toward an operating model that incorporates these types of complex or novel investments. Therefore, with respect to “grid modernization,” the Commission has crafted a workable process to enable the integration of advanced technologies in furtherance of grid modernization policy, but at a pace and approach properly befitting New Hampshire. Eversource supports and appreciates this effort and outcome.

At the same time, however, the Order creates significant concern for Eversource regarding certain factual, policy, and legal issues involved with the scope of the Company’s responsibility for core distribution system planning and operation, *aside from grid modernization*. This concern arises from the fact that the Order embodies a subtle, but very significant shift encapsulated in the very title of the Order, *i.e.*, shifting the “Investigation into Grid Modernization” into a proceeding setting “Guidance on Utility System Planning.” The Order ostensibly establishes a comprehensive framework to integrate grid modernization planning into ongoing utility distribution planning, which is – in fact – a concept espoused by Eversource and the other electric distribution companies as a proper approach for New Hampshire. However, a closer read indicates that this concept is effectively flipped on its head with core utility distribution planning subjected to a monthly

¹ The September 17, 2015 Comments of Eversource in Docket No. IR 15-296 at 7-11, discuss the Company’s view of the characteristics of a modernized grid.

stakeholder process managed by Staff and regulated by an independent engineer, and “grid modernization” occurring only as an occasional, potential byproduct.

This outcome is very concerning for Eversource, particularly where the Order makes it clear in several places that the utilities retain the “obligation to provide safe and reliable service” and that “shareholders of regulated utilities to remain accountable for investment decisions.” Order at 2, 77. The Order further states, “while it is likely that utility decisionmakers will benefit from the stakeholder input provided through the enhanced planning process, we recognize that ultimately the decision to take action on a given investment must remain with the regulated entity.” Order at 55. The process envisioned by the Order is noticeably vague on the degree to which the utility will be allowed to plan for core distribution investments using its own, seasoned expertise and informed judgment, particularly in light of the fact that it is the utility that must operate the system in the dark of night and during major weather events when neither a stakeholder group nor independent engineer are behind the controls. *Id.*

Conversely, the Commission states in the Order that “[w]e expect, however, that barring changed circumstances, or imprudent project management or deployment, the stakeholder involved process used to inform and prioritize investment decisions *will help reduce the risk that investment decisions are later found to be imprudent.*” Order at 22 (emphasis added). Project review and pre-authorization through a stakeholder process is an important concept, if the point in question is the “go ahead” decision on advanced grid modernization technologies having substantial cost implications and requiring broad acceptance and participation to realize the benefits relied on to justify the projects. Under those circumstances, robust debate of the project merits prior to implementation and with the involvement of a range of stakeholder interests is necessary, warranted, and appropriate.

However, in relation to the planning of core distribution investments necessary to maintain the safety and reliability of the system, project review and pre-authorization by the GMSG and independent engineer would introduce counter-productive interference and delay into the utility's operation of the system, ultimately substituting the judgment of external constituencies for the operator's judgment without any relief of the legal obligations utilities bear. Meaning, a stakeholder process that would "help reduce the risk that investment decisions are later found to be imprudent" is a process that is likely improperly impinging upon the utility's management discretion when applied to core distribution investments.

At bottom, the Order *may* delve too far into the utility's obligation and prerogative to design and manage the system to meet the core obligation to customers of providing safe and reliable service. Whether the Order goes too far is a matter of how the Commission intends to execute on the stakeholder process and to what degree the utilities will have to struggle in the stakeholder process to protect the functionality, operability, and integrity of the core operating system. Without further, up-front definition, it appears that the stakeholder process has a strong potential to delay and detract from utility decision-making on core investments, which is not an acceptable outcome unless the utilities are to be *relieved* of their fundamental responsibility for the system. Reconsideration and/or clarification is necessary because, in Eversource's estimation, the Order conflates grid modernization with traditional core utility planning in a manner that is not only a substantial departure from past practice, but that is unwarranted and ill-advised even in the context of crafting a path toward enabling grid modernization.

Moreover, from a legal perspective, Eversource's assessment is that applying this new stakeholder process to the core utility planning process as contemplated in the Order is legally flawed because: (1) the topic of modifying the core utility planning process was not noticed in the

Commission's notice for this proceeding; (2) there is no substantial record evidence to support a decision that impinges upon the legal rights and obligations of Eversource as the entity with the obligation to operate the system; and (3) there is a substantial question as to whether the Commission has the authority under New Hampshire state law to usurp the utilities' planning prerogative in the manner that appears to be encompassed in the Order and to delegate that authority to a stakeholder group that has no legal responsibility or liability for the safe and reliable operation of the distribution system.

Eversource explained throughout this proceeding that its willingness to use a stakeholder process pertained to grid modernization and the integration of grid modernization investments into the distribution planning process. The debate in this docket has **not** involved a discussion regarding the use of a stakeholder process to conduct the core utility planning process as a primary focus and goal, with grid modernization relegated to a side consideration. Thus, the crux of Eversource's concern in this filing is the Commission's (apparent) incursion into the core distribution planning function through a vaguely structured stakeholder process that seems destined to encroach on the Company's ability to protect the fundamental dependability of the system, without altering the utility's liability for the integrity of that same system.

Accordingly, by this Motion, Eversource respectfully requests that the Commission take the opportunity to reconsider and/or clarify the scope of the decisions that were purportedly made in the Order in relation to core distribution planning and exclude "business as usual" planning for core distribution projects from the GMSG process. Eversource also requests that the Commission clarify and further define the procedural elements of the stakeholder process prior to its implementation.

Section I of this motion provides this introduction while Section II provides a chronology of the discourse in this proceeding, indicating where the shift occurred to pivot the proceeding from an “Investigation into Grid Modernization” into “Guidance on Utility Distribution Planning.” Section III discusses the issues and concerns raised by the Order in relation to the core distribution planning function, including areas of ambiguity in the Order that heighten the Company’s concerns regarding the Commission’s “guidance.” Section IV discusses the legal deficiencies associated with the Order’s apparent substitution of the GMSG process and independent engineer for utility management of core distribution investments. Lastly, Section V sets forth Eversource’s conclusion and requests for relief.

In support of this submission, Eversource says the following:

II. Chronology

This proceeding was opened in July 2015 in response to the passage, and signing, of House Bill 614.² In relevant part, that law states the following:

Consistent with the goals **outlined in the state 10-year energy strategy** prepared by the office of energy and planning in accordance with RSA 4-E:1, the public utilities commission and the office of energy and planning shall implement the following:

- I. The public utilities commission shall open a docket on **electric grid modernization** on or before August 1, 2015.
- II. The office of energy and planning, with input from the departments of transportation, environmental services, and resources and economic development shall develop and submit to the speaker of the house of representatives and the senate president a report on the status of and the preferred strategy to prioritize further development of public charging corridors, including Interstate 93, Interstate 89, and Interstate 95. The report shall be submitted on or before December 31, 2015.
- III. The public utilities commission shall establish an “electricity peak time reduction goal” on or before July 1, 2016.

² The full text of HB 614 is located here: <http://www.gencourt.state.nh.us/legislation/2015/HB0614.html>.

HB 614, Chapter 219:1 (2015) (emphasis added).

Accordingly, the Commission was directed by statute to open a docket to review grid modernization “consistent with the goals outlined in the state 10-year energy strategy.” At the time this legislation was enacted, the relevant 10-year energy strategy was the one issued by the New Hampshire Office of Energy and Planning (now the Office of Strategic Initiatives) in September 2014 (the “2014 Strategy”).³ Thus, the law envisioned a docket aligned with the grid modernization policies and directions of the 2014 Strategy. In the Order, the Commission explicitly acknowledged the directive for this proceeding and the relevance of the 2014 Strategy to the scope of the proceeding. Order at 11.

On the topic of grid modernization, and the docket the Commission was directed to convene, the 2014 Strategy stated, in relevant part:

The New Hampshire Public Utilities Commission should open a docket to determine how to advance grid modernization in the state. In light of the potential breadth of the topic, which could include dynamic pricing, better consumer access to technology, and even rethinking the role of utilities, *an investigation or information-gathering proceeding may be an appropriate first step. This less formal proceeding* would give all stakeholders a chance to learn about grid modernization and *could inform the specific areas that should be pursued within future dockets.* This would allow the PUC and stakeholders to determine which approaches will benefit New Hampshire consumers, and when and how they should be implemented.

2014 Strategy at i (emphasis added).

The Commission reiterated this investigatory and “information gathering” purpose and scope in its Order of Notice in this docket by stating:

Given the breadth of the topic, *the strategy document suggests that the Commission conduct an investigation or information-gathering proceeding* as a first step, to give stakeholders a chance to learn about grid modernization and to explore to what extent that grid modernization is workable in New Hampshire. *The Commission has decided to follow the suggestion.*

³ The 2014 Strategy is located here: <https://www.nh.gov/osi/energy/programs/documents/energy-strategy.pdf>.

July 30, 2015 Order of Notice in Docket No. IR 15-296 at 2 (emphasis added).

Thus, taken in the context of the statutory provision; the 2014 Strategy; and, the notice issued by the Commission, the scope of this proceeding was an investigation for the purpose of gathering information on the extent to which workable advancements for grid modernization could be implemented in New Hampshire in the future.

Following the receipt of initial comments, on April 1, 2016, the Commission issued Order No. 25,877, its “Order on Scope and Process.” In that order, the Commission identified various areas of inquiry it would undertake through a working group process. Regarding the Least Cost Integrated Resource Plan (“LCIRP”) process relating to core utility investments, the Commission stated that it expected “grid modernization planning will *build off* of the electric utilities’ existing practices for making investment decisions regarding the maintenance, operations and upgrades to their distribution systems.” Order No. 25,877 at 4 (emphasis added). This perspective was appropriate and indicated that the Commission did not intend to fundamentally modify the utilities’ existing processes for “core utility investments,” but rather would leverage, extend, or otherwise “build off” those processes to plan for grid modernization investments.

Similarly, the Commission stated that it expected “grid modernization planning will fit naturally *within* the utilities’ *existing* integrated resource planning (IRP) *framework*, which requires the utilities to file plans with the Commission for periodic review and approval.” *Id.* (emphasis added). Thus, grid modernization was envisioned as a complement to traditional utility planning, and something that could be done within the existing “framework” for plan filing and review. The Commission concluded that there could be “some challenges that might warrant modifications to existing utility planning practices,” and therefore, it directed the working group to review those potential issues. Thereafter, Eversource and numerous other parties engaged in a

series of meetings with a grid modernization working group lasting nearly a year and culminating in a report issued on March 20, 2017 (the “Working Group Report”).

The Working Group Report described the outcome of the group’s review and a potential for a new grid modernization plan along with the inputs to such a plan. That report described a set of intended goals and outcomes to be supported by grid modernization investments. March 20, 2019 Working Group Report at 6-8. The report also described aspects for, and the contents of, a new, forward-looking Grid Modernization Plan (“GMP”) that would “assist the state, the Public Utilities Commission, electric utilities and private industry innovators in identifying and evaluating the necessary transformations and investments to achieve the goals and outcomes described above.” *Id.* at 9.

Accordingly, the GMP was intended as a plan that would match grid modernizing investments with specific, defined grid modernizing goals. Notably, the Working Group Report stated that GMP filings would be separate from, but “coordinated and consistent with,” the utilities’ internal distribution planning processes.⁴ *Id.* at 10. That report also noted that the GMP **would not** be an LCIRP, but rather would be a document filed “in lieu of” a utility’s LCIRP. The report further specified that, to the extent the issues covered by the GMP did not align with what had been covered in an LCIRP, the Commission should waive any inconsistent provisions of the LCIRP. *Id.* Should the Commission not waive those provisions, the utility would be obligated to file a GMP and, in addition, submit a traditional LCIRP. Eventually, this new GMP might replace

⁴ Eversource did not file comments in response to the Working Group Report; however, Unitil did. In those comments, Unitil clarified its perspective on the distinction between traditional utility planning and grid modernization, stating that “a fundamental premise in the development of this reliable system is that one entity, the utility, is responsible for its planning” and, therefore, “[w]hile traditional utility planning will evolve to incorporate new technologies, new services and the input and needs of new stakeholders, Unitil submits that the essential planning function of the distribution system must remain in the control of the utilities.” May 22, 2017 Comments of Unitil in Docket No. IR 15-296 at 1.

the LCIRP, but retain, to the extent appropriate, some of the existing LCIRP's assessment requirements.

Following the issuance of the Working Group Report and comments from various parties, nothing substantive occurred in the docket for nearly two full years. Then, on February 12, 2019, the Commission Staff issued its own grid modernization report and recommendation (the "Staff Report"). The Staff Report was developed by Staff without any formal stakeholder input and outside any established or defined Commission process -- adopting certain elements of the prior Working Group Report while rejecting others. The Staff Report also supplemented the Working Group Report with further suggestions and recommendations.⁵ In particular, the Staff Report rejected the idea of separate LCIRP and grid modernization filings, and recommended the creation of a new filing, the Integrated Distribution Plan or IDP.

According to the Staff Report, the IDP would be a substantial filing on a wide variety of issues including: load and distributed energy resource ("DER") forecasting, hosting capacity analysis, locational value analysis, DER interconnection process, strategic electrification, and architectural strategies and considerations that would allow for "adaptability, scalability, efficiencies, and resilience." Staff Report at 15. It would also include: a deployment plan for advanced meter functionality, proposed rate designs, discussions of cyber security and privacy issues for customer facing and distribution system investments, and performance metrics along with a methodology for cost recovery. *Id.* Moreover, similar to the Working Group Report, the Staff Report proposed that the LCIRP would eventually be replaced by this IDP filing.

⁵ The Staff Report noted that the Staff relied on the 2018 State Energy Strategy in formulating the report. As the Staff acknowledged, however, the 2018 Strategy "did not specifically mention grid mod." Staff Report at 17. Thus, it appears that in attempting to set the parameters for grid modernization the Staff Report not only relied on a document that did not exist at the time HB 614 was enacted (and the Commission's Order of Notice was issued), but also on one that did not even discuss grid modernization.

However, rather than adopting the Working Group Report's recommendation that the integration occur over a period of time based upon the Commission's evaluation of the relationship of the GMP to the requirements of the LCIRP, the Staff Report recommended that the integration occur more promptly with the initial plan submitted following an Order "addressing the grid mod initiative." *Id.* at 22. Thus, in the Staff Report, Staff pivoted away from the GMP format envisioned in the Working Group Report, which was focused on grid modernization planning aligned with grid modernization goals and that would be "eventually" integrated with the LCIRP. This "pivot" from a gradual process focused on grid modernization and integration of grid modernization investments into the planning process to the immediate takeover of the entire planning process has significant ramifications for the electric companies not appropriately considered in this proceeding.

Following its issuance, numerous parties filed comments on various aspects of the Staff Report. With respect to core utility planning, Eversource's April 9, 2019 comments stated:

Although Eversource supports the holistic approach to planning contemplated by the IDP, the Company also recognizes that traditional investments in asset management and aging infrastructure will continue to be critical components of the Company's investment plan. Deploying new technology without addressing the reliability concerns associated with aging infrastructure ignores the fact that investments are required to ensure all utility assets are fundamentally safe and reliable as well as intelligent. To that end, Eversource proposes that **"business as usual investments,"** defined as expenditures that are needed primarily to ensure reliable operations or to comply with service quality and safety standards, **should continue to be evaluated as they have in the past.** In that these investments are of the type the utilities have traditionally done for the benefit of customers and the protection of the system, continuing that evaluation method makes sense. Moreover, these investments should not be subjected to the kind of traceability analysis noted by the Staff. In that they are not tied to, or specifically supportive of, a particular objective of grid modernization, exempting them from that analysis is reasonable.

April 9, 2019 Comments of Eversource in Docket No. IR 15-296 at 5 (emphasis added).⁶

⁶ Accordingly, it has been Eversource's position that core, "business as usual investments" are distinct from those pertaining to grid modernization; that such investments should continue to remain within the control of the utilities

In other comments responsive to the Staff Report, parties including the Office of the Consumer Advocate (“OCA”) noted the informal nature of the proceeding that had led to both the Working Group Report and the Staff Report. In recognition of this fact, the OCA argued that before any of the recommendations of the Staff Report could be implemented, it was necessary to move from an investigation proceeding to an adjudicated one and that there were “statutory and due process concerns with the adoption of a proposal to replace LCIRPs for electric utilities with IDPs based only on informal processes.” February 25, 2019 Comments of OCA in Docket No. IR 15-296 at 2. As the OCA pointed out, making the changes advocated by the Staff Report “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.” *Id.*

In response to the comments on the Staff Report, on May 29, 2019 the Commission issued Order No. 26,254. That order addressed various procedural issues in the docket in light of the Staff Report and the comments received. With respect to the issue of adjudication, that order found, in relevant part, that:

This docket was opened as an investigation in order to “create an open dialog **on key grid modernization topics**, and to reach as much agreement as possible on regulatory opportunities for advancing grid modernization in New Hampshire.” Order of Notice at 2. Notwithstanding various parties’ arguments to the contrary, we find that the parties **are not engaged in a “contested case”** in which any party’s “rights, duties or privileges ... are required by law to be determined ... after notice and an opportunity for hearing” in an “adjudicative proceeding,” under the Administrative Procedure Act. RSA 541-A:1, I and III.

Order No. 26,254 at 5 (emphasis added).

subject to evaluation and prudence review by the Commission as in the past; and that such investments should be excluded from the proposed grid modernization stakeholder process.

Moreover, in relation to the issues raised on the investments falling within the Commission's review in this docket, the Commission confirmed that "[a]lthough concepts regarding the substantive requirements of utility least cost planning are at issue, *this proceeding remains an investigation to develop a workable framework for grid modernization in New Hampshire.*" *Id.* at 6 (emphasis added). Thus, following the Staff Report, the Commission confirmed what had been in its initial order of notice, *i.e.*, this docket was for the purpose of gathering information on a framework for grid modernization, as distinguished from utility least cost planning, and was not a docket in which parties' rights, duties or privileges were to be determined.

Following the issuance of Order No. 26,254, additional technical sessions were convened and additional comments received. In Joint Comments filed in September 2019, Eversource, along with the state's other regulated utilities, described their support for a transition, over time, from the legacy LCIRP to something more like the IDP. September 9, 2019 Joint Comments at 18. Those comments also laid out a proposed form for the IDP, which would include the provision of information on a traditional capital plan focused on running the business to provide safe and reliable service with descriptions of certain proposed investments. *Id.* at 19. Importantly, the Joint Comments did not address the ramifications of applying a stakeholder process to review and pre-authorize individual projects in the core capital plan, nor did the Joint Comments envision the participation of an independent engineer to preview core distribution investments. These concepts were not debated or evaluated as part of the discourse associated with the Commission's "Investigation into Grid Modernization."

After these and other comments were received in September 2019, no substantive activity occurred for another eight months until the Order was issued on May 22, 2020.

III. Discussion

In the Order, the Commission states, for the first time, that it “opened this investigation to explore whether the services offered by New Hampshire’s electric distribution utilities require modification to accommodate recent technological advancements and shifting customer expectations while also maintaining safety and reliability at least cost.” Order at 9. Contrary to the characterization of the proceeding in the order of notice, as confirmed in mid-2019 in Order No. 26,254, the Order radically redefines the policies and processes surrounding the LCIRP in New Hampshire as they relate to core distribution planning. For all intents and purposes, the Order implemented a new stakeholder process surrounding the development of an LCIRP that mapped the IDP as proposed in the Staff Report as a process by which grid modernization would be integrated over the long term into distribution planning – but now fully engrossing the separate core capital distribution planning processes of the utilities; thereby constituting an abrupt departure from the stated focus and publicly noticed scope of the proceeding. Though the Order discusses various items that relate to grid modernization, the primary intent and clear effect of the Order is to fundamentally redesign core utility distribution system planning in New Hampshire.

Further, although the Order is couched as a “guidance document” and takes pains to state that it is only intended to be used for “outlining a process of stakeholder input and engagement” (Order at 1), it is, in point of fact, a directive and order of the Commission. The Order does not provide suggestions or recommendations. Rather, the Order demands that certain processes be used and implemented on specific timelines by all regulated utilities in New Hampshire for all planning, whether for grid modernization investments or otherwise, and subjects the utilities to oversight and risk that did not previously exist. As a result, using the nomenclature of “guidance” does not cure the underlying procedural infirmities.

Accordingly, without adequate notice and authority, the Commission has determined and fundamentally altered important rights and duties of utilities in New Hampshire and has improperly interjected unauthorized, unnecessary, and cumbersome new entities into the core utility planning process. Specifically, if the Commission intended its “guidance” to apply to the “business as usual” core distribution planning function appropriately, it would have had to address two major areas of concern (which it did not). Specifically: (1) the actual lack of consensus around the “pivot” from a grid modernization stakeholder process to the reconfiguration of the utility planning process for core distribution investments, and the reasons therefor; and (2) the need for a much greater depth of analysis and detail on the stakeholder process to mitigate the potential for undue and improper delay and interference in the planning process for “business as usual” core distribution projects.

A. Lack of Consensus and Reasons Therefor

The GMSG process is not a proper vehicle for review of core distribution projects; nor is there consensus that GMSG process and the use of an independent engineer would be appropriate for review of core distribution projects that are planned and developed by utility engineers with substantial experience, knowledge and responsibility for system operation. As stated throughout this Motion, Eversource’s concern is that the Order creates an unworkable process for “business as usual” investments that will result in delays and controversy over core distribution projects that are necessary to address the safety and reliability of the system, creating a situation that is detrimental to the interests of New Hampshire customers over the long term. From Eversource’s perspective, there was neither consensus reached for this approach, nor does it serve the interests of customers when viewed through the lens of practical operations.

As to the lack of consensus, the Commission cites to agreement of the utilities to a process including stakeholder input in rendering its decisions in the Order. Order at 34-35. However, the Order passes over the nuance that the discussion of the value of a stakeholder process pertained to grid modernization, not “business as usual” investment planning.⁷ The Joint Comments filed on September 9, 2019, and referenced in the Order, refer to a stakeholder process that the utilities viewed might be useful. Joint Utility Comments at 17. Of note, however, is that those comments were not structured around traditional core utility investments, but around grid modernization investments as those were described in the underlying referenced materials. For example, in reference to the issue of cost effectiveness, the Joint Comments distinguish between “business as usual” investments that would rely on the traditional just and reasonable review standard, and grid modernization investments that would be evaluated under the Hawaii framework the Commission references in the Order. Joint Utility Comments at 2-4. In the Order, the Commission applies this framework to the evaluation of “business as usual” core distribution investments, which is not the accurate application of the framework as presented by the utilities. Order at 45-52.

Similarly, the stakeholder process discussed in the Joint Comments contemplated that the process would involve a review of traditional utility capital planning methods and the presentation of a list of investments. However, the contemplated stakeholder process did not include stakeholder review and pre-authorization of “business as usual” utility investments. The Joint Comments, at page 19, describe the section of a proposed IDP filing pertaining to the utilities’

⁷ For example, in response to the Staff Report, Eversource stated that “[a]lthough Eversource supports the holistic approach to planning contemplated by the IDP, the Company also recognizes that **traditional investments in asset management and aging infrastructure will continue to be critical components of the Company’s investment plan**. . . [and] “business as usual investments,” defined as expenditures that are needed primarily to ensure reliable operations or to comply with service quality and safety standards, **should continue to be evaluated as they have in the past**.” April 9, 2019 Comments of Eversource at 5 (emphasis added). In its April 9, 2019 comments, Unitil made essentially the same argument, stating “[m]ost importantly, distribution system planning must remain under the control of the utilities.” April 9, 2019 Comments of Unitil Energy Systems, Inc., at 2.

planning *processes* and note that this section would be where a utility would “describe the current distribution system planning *process* used” as well as “the current capital budgeting *process*.” That is, the utilities agreed that they would provide process-focused information to a stakeholder group demonstrating the manner in which they plan for core investments for informational purposes, along with the outputs of that planning, and that the utilities would consider input from that group relative to those *processes*. The utilities did not agree to a stakeholder process that would involve review and pre-authorization of individual “business as usual” core distribution *projects*, under the instruction of an independent engineer.

Nor were the utilities aware that the Commission was contemplating the possibility of making such a fundamental change to the traditional core capital planning process because, among other things, the order of notice did not inform parties that changes were being evaluated to the core capital process. The Joint Comments were provided in the context of explaining how the utilities envisioned changes over time to integrate any grid modernization approved in the stakeholder process into the separate utility-planned and managed core utility work. Stakeholder review and judgment of the full scope of core utility investments is not workable or appropriate given the timeframes and processes involved in the utilities’ core capital distribution planning process to provide safe and reliable service to all customers, including the need to promptly respond to emergent conditions and reorder priorities in light of emergent conditions.

The reasons that the “business as usual” core distribution investments should not be subjected to the GMSG and independent engineer review process are not apparent without consideration of practical implementation in the field and in day-to-day operations, which are considerations not raised or discussed in this proceeding. This is the reason the Commission’s “Investigation into Grid Modernization” cannot properly morph into “Guidance on Utility System

Planning,” subjecting the entire distribution planning function to the GSMG and independent engineering review with grid modernization a sub-text in the process.

Some examples of the detrimental impact of applying the GSMG construct to “business as usual” core distribution investments include the following:

- The GSMG Process Will Increase Risks for Customer Outages

For “business as usual” core distribution projects, Eversource follows a prescribed process progressing projects from annual planning assessments to engineering to procurement and to construction. This process end-to-end takes approximately two years. This means that once Eversource identifies the need for a planned upgrade it works diligently to have the project in-service no more than two years later to address the identified need. Therefore, from the point the need is identified, a project of this type must move efficiently from the planning phase to detailed engineering and further stages to avoid operational risk and loss of load.

Review and pre-authorization of individual projects through the GSMG after the point of identification but within the two-year project completion timeline will prevent the Company from conducting its internal project development processes on a timeline that maintains the safety and integrity of the system. Similarly, in New Hampshire, because of the lack of investment historically, most of the upgrade needs are already in the past – *i.e.*, Eversource is already operating the system at higher risk of loss with a corresponding impact on loss of load (customers).⁸ Delay introduced through the GSMG process would further increase operational risk exposure.

- The GSMG Process Will Increase Cost and Operational Risk

Eversource conducts a rigorous internal process involving sequenced stages at which funds are released to complete detailed engineering, retain external project management, and address

⁸ Refer to the May 28, 2019 Testimony of Joseph Purington and Lee Lajoie in Docket No. DE 19-057 for a description of the age and condition of numerous essential components of the Company’s system.

siting, permitting, procurement and other development milestones.⁹ After the initial funding authorization, project managers perform preliminary engineering on multiple alternatives to assure that appropriate and relevant information is gathered to make an informed judgment on the optimal solution. Once that solution is identified, additional funding is granted to advance the project to the final development stage. Full funding is not granted until it is time to install that project.

Any uncertainty introduced within this process will have the potential to cause costs to be incurred for projects that need to move forward with planning, pending resolution through the stakeholder process. This will increase the cost of operation for customers and disrupt the sequencing and planning of all other projects in the queue. Eversource carefully plans the sequencing of projects, which means that derailing a project at one point in the queue may derail all subsequent projects. These ripple effects would significantly increase cost and operational risk exposure across the entire project queue.

- The GMSG Process May Prohibit Resolution of Emergent Needs

Eversource also conducts a process to look at “basic business” projects (including items such as emergent equipment failures and corrective replacements), as well as reliability projects, new customer work and any other necessary distribution investments – prioritizing these projects within the annual capital budget.¹⁰ This prioritization process is a critical tool for focusing on more urgent needs and balancing the impact of cost and time on other projects. Emergent projects are projects that are time sensitive, particularly load relief projects associated with distribution line facilities. The need for the upgrade is identified after system peak and the project must be

⁹ See the May 28, 2019 Testimony of Erica Menard in Docket No. DE 19-057 for a description of the Company’s capital planning and approval process.

¹⁰ See the May 28, 2019 Testimony of Erica Menard in Docket No. DE 19-057 at 15, 20-22 for a description of the different types of projects, and see Sections V and VI of the June 15, 2015 Least Cost Integrated Resource Plan filing of Eversource in Docket No. DE 15-248 (Bates pages 31-34) for a description of how the different types of projects are accounted for in the Company’s capital budgeting process.

implemented before the next system peak. Introducing the MSG stakeholder process into this process would provide no additional value, while creating cost and uncertainty for the entire work plan.

Similarly, distribution reliability projects are proposed as a result of outages that have occurred. Although a solution is not as critically time sensitive, the longer it is delayed through the MSG process, the longer that customers are suffering unnecessarily with poor reliability.

- The MSG Process Will Not Align with System Conditions that Must be Addressed by the Utility on a Timely and Cost-Conscious Basis

Load growth is not a smooth curve that allows for easy prediction of future loading for distribution equipment. Future load growth can be dramatically impacted by a number of factors, leading to significant step changes. For example, Eversource is aware that a large financial institution recently purchased a vacant building in the Company's service territory that had previously been a light manufacturing operation with moderate demand, but has now been vacant for some time. Should this facility be used by its new owner as intended, its anticipated demand would go from essentially zero to an amount greater than the nameplate rating of half of the distribution substations existing in New Hampshire in 2020. This is not a situation that can be predicted five to ten years ahead and reviewed by the MSG to get 'buy-in' to the proposed expenditures required to serve this greatly expanded load. Instead, Eversource must initiate an efficient, expeditious process to develop and implement project plans to serve customers. Delays and interference in that process will create cost and operational risk.

Another significant driver of summer load is the extremity of heat waves and the growth of affordable air conditioning. In a year with no significant protracted summer heat wave there could be acceptable levels of loading, but if the following summer is substantially different the load may well prove excessive to the point of failure. Thus, a five- to ten-year timeline for

reviewing projects with stakeholders will not be feasible and modifying the Company's existing process to align with the GMSG timelines will add cost, complexity, and delay to no benefit of the customer.¹¹

In fact, to the extent there is clarity with respect to the inputs to distribution planning and the applicable distribution planning criteria, the only potential value added by the GMSG process would be a review of alternatives. However, Eversource has committed to share the detailed Distribution Planning Guide including Planning Criteria with Staff through the LCIRP process, and that process is the appropriate place for Staff and other stakeholders to review the distribution planning *process* and criteria that would be applicable to projects (and alternatives) identified, planned, and undertaken under the Company's management.¹²

Concerns such as those listed above are among the reasons why, within the realm of traditional utility investments, the argument for a level of stakeholder involvement comparable to grid modernization initiatives does not hold. Moreover, the Order does not acknowledge that the perspectives of stakeholders on these types of decisions are highly likely to differ substantially from the utility and from each other. Yet, it is only the utility that bears the risk of imprudence for all investments and, more fundamentally, of operating the system on a safe and reliable basis. Accordingly, the GMSG is not a proper vehicle for review of core investments; nor is there consensus that this process would be appropriate for this purpose.

¹¹ Annually, Eversource prepares a five-year capital budget forecast, but projections beyond Year 2 are estimated on a general basis, and not tied to specific projects that will be executed in the exact year planned. Instead, forecasted expenditure is grouped in broad categories (with some likely candidates to evaluate) to provide the five-year outlook and then individual projects are evaluated against each other to determine the best use of limited funds as the 2-year time frame approaches. Projects may both materialize and fall to a lower prioritization within that three- to five-year time frame.

¹² Refer to the March 11, 2020 Settlement Agreement in Docket No. DE 19-139.

B. The Unworkably Vague Proposition

Beyond the issue of the inappropriate scope of GMSG review of core utility investments, the Order establishes and empowers the GMSG, but leaves the process so undefined that it creates ambiguities and an unworkable system for utilities, stakeholders and the Commission.

1. The GMSG Is Based on a Faulty Premise

As to the premise supporting the participation of the GMSG in core utility planning, the Commission finds, without any basis, that “stakeholder involvement in distribution planning [is] a key driver of a more transparent, efficient, and less-costly distribution system.” Order at 59. This is a premise that has no factual foundation. There is no evidence that the current process is not sufficiently transparent, efficient, or likely to lead to a less-costly distribution system. Conversely, there is no evidence, and the Commission provides none, that such a group would function as a driver, much less a “key driver,” of a more transparent, efficient and less-costly system in the core capital distribution planning process. There is no evidence of a process or group like the GMSG being implemented by a public utility commission anywhere in the country with a planning statute similar to New Hampshire’s to review core utility distribution investments. The Commission has not “gathered information” or otherwise created a record establishing the validity of this premise in relation to the planning of core distribution assets needed to assure the safety and reliability of the system.

Similarly, the Order requires the retention of an independent engineer for review of utility investments without providing or citing any evidence that an engineer is necessary or advisable.¹³

¹³ The only mention of an independent engineer appears to be in the OCA’s September 6, 2019 testimony where it states “Some Commissions have employed an Independent Professional Engineer to serve as an unbiased evaluator of technical issues as they arise in distribution planning, and we believe such a role is important for New Hampshire stakeholders to have available.” September 6, 2019 Testimony of Alvarez and Stephens at 57. Notably, however, the testimony does not specify which states or commissions have done so, nor does it provide any details regarding the scope of responsibilities of that engineer, and it does not describe whether retaining an engineer resulted in any positive

The Commission's conclusions on the GMSG and the engineer are without any foundation and there is no theory or justification in the Order for endowing these entities with oversight over the utility planning function for core distribution assets. The travel of the proceeding – and the discourse that occurred throughout – do not support the Commission's conclusion.

In fact, the Commission's lack of explanation regarding its reasoning for the creation of the GMSG invites several obvious questions the Commission has not answered, *i.e.*, in what way is the current planning process for “business as usual” investments deficient in terms of transparency, efficiency, and the creation of a less costly distribution system?; will the GMSG actually address any perceived deficiencies and deliver a “more transparent, efficient, and less-costly distribution system,” and how will that change be gauged?; what entity is responsible if the GMSG process does not actually deliver on the outcomes the Commission presumes it will?; and, what will the potential impact be for customers of undertaking a process that could negatively interfere with the utility planning process on core distribution investments?

The failure of an undefined process that the Commission has created without adequate justification will have a negative impact on customers. As envisioned by the Commission, there is a strong potential for added risk and uncertainty in the planning process that the utilities conduct to fulfill their public-service obligation, resulting in delay and added cost for customers. Improper and misdirected involvement in the utility planning process for core distribution investments should not occur without a compelling justification and without meaningful assurance of better results for New Hampshire's utility customers.

outcomes as measured by any commissions or utilities. The unsubstantiated statement of the OCA's witnesses is not “evidence” that an engineer is necessary or that it would be helpful and productive for New Hampshire.

2. Specific Ambiguities in the GMSG Process

There are many ambiguities in the GMSG Process that prevent an understanding as to how the GMSG process could ever function without impairing the day-to-day operation of the system. For example, the Commission does not define or delimit who may be a member of the GMSG. Thus, membership would appear to be open to any person or entity who might wish to appear as fits its whims or interests. Persons or entities may appear at all meetings, at some, or at one. The GMSG as a whole, or individual meetings of it, may be dominated by persons or entities seeking certain specific outcomes to benefit a particular idea, preference, business model, or proposed future state. At the same time that they might be advocating for those particular agendas and might claim some share of any successes, none of those entities, including any professional engineer the Staff may retain, would bear any responsibility for the failure of the GMSG, or any of the specific projects proposed by any utility. Also, no member of the GMSG appears to have any obligation to actually support or defend any decisions of the GMSG once those decisions are delivered. Through it all, while the utility's discretion would be limited and its judgments discounted, it would still retain all of the risks associated with its obligation to provide service to all customers. Such a system when applied to all manner of utility investments is ripe for abuse, delay, confusion, and discord.

Moreover, the Order leaves so much unclear about the functions of the GMSG that complying with the Commission's directive may be essentially impossible. As one example, the Commission states that "The GMSG should strive for consensus on project categorization, but if no consensus can be reached, the GMSG may request that the Commission resolve non-consensus issues." Order at 46. Thus, it appears that the GMSG is not a group of stakeholders, but an entity with rights of its own to seek resolution of non-consensus issues. This single characteristic of the

GMSG process has the potential to hamstring any number of utility planning decisions where decisions cannot move ahead without consensus, unless addressed by the Commission, and where it may not even be possible to decide to invoke the participation of the Commission. Instead, as envisioned by the Commission, the GMSG would exist to make crucial distribution system planning decisions on a consensus basis, but would function without any charter, authority, or governing structure.

Therefore, without reconsideration or clarification from the Commission, the actual functioning of the GMSG raises many additional questions, such as:

1. If the GMSG is acting on its own, what person or party actually represents the GMSG before the Commission in a proceeding to seek resolution of a non-consensus item?
2. Are members of the GMSG permitted to participate in a non-consensus resolution proceeding on their own behalf, in addition to participating as members of the GMSG, and what happens if the GMSG and a member have differing opinions?
3. Can a person who has not participated in the GMSG process participate in the resolution of the non-consensus item?
4. If all GMSG participants with the exception of a single entity agree on an investment proposed by a utility, does that make the investment a “non-consensus” item requiring the Commission’s involvement?
5. If a single hold-out can create a non-consensus item, does that mean that one person or entity could force Commission review of each and every core distribution investment proposed, regardless of the merits of that entity’s positions?

6. If the utility determines that a decision on a non-consensus item needs to be made promptly to address emergent conditions, how is that factored into a resolution?
7. If the GMSG refers a non-consensus item to the Commission for a specific disagreement, for example a disagreement on the timeline for the investment, is the resolution limited to addressing that issue, or are all aspects of that non-consensus item – the nature of the need and the analysis underlying the need, the type or scale of investment, whether other investments should be added to or removed from the one proposed, the budget, the timeline, the priority – up for debate before the Commission?
8. Given that GMSG review of “project lists” is to be done through utility-specific dockets (Order at 46), does that mean that all of the normal adjudicated docket processes attach (testimony, discovery, etc.) to this review, even without non-consensus items?
9. If review occurs through a docketed process, will the GMSG or individual members intervene and act as parties to an adjudication, and if so, what makes the GMSG process any different from any other formal docket of the Commission?

There are additional complexities that are not addressed in the Order that need to be addressed to mitigate the very real potential for delays and disputes, as follows:

First, the Commission has determined that the GMSG and engineer would have a measure of supervisory oversight over all manner of capital investments by the utility, including those that are, by any measure, necessary to maintain and provide safe and reliable service consistent with traditional distribution planning by utilities. It takes only the most minor extension of logic to envision a scenario where a utility has deemed an investment to be necessary to fulfill its obligations, but where one or more members of the GMSG disagree with the utility’s assessment. Although the Order states that the GMSG may refer such “non-consensus” items to the

Commission for review, the Commission does not meaningfully define the process for such review.

The Commission has said that review would happen in utility-specific dockets. Order at 46. However, if Commission resolution would require the filing of a petition under the Commission's Puc 200 rules, an order of notice and opportunity for intervention, the filing of testimony, a period of discovery, a hearing, an order, and an opportunity for rehearing, it could mean that for a single investment the utility understands to be necessary to meet its obligations to serve all customers there would be a process that takes substantial time, during which time a defined need is not being met. For multiple investment proposals, this period could take longer.

Second, to complicate matters further, the Commission finds that “[w]e do not expect the GMSG to elevate non-consensus issues related to project prioritization to the Commission for resolution. We instead expect that the appropriate venue for the resolution of issues relating to project prioritization will be the adjudication of the LCIRP itself.” Order at 55. Thus, on some issues, it appears the GMSG may seek resolution when it deems a resolution necessary, but when it comes to project prioritization, it appears the GMSG must wait for an LCIRP adjudication to address non-consensus issues. In addition to the above questions, this differentiation of resolutions appears to mean that the GMSG could refer a non-consensus investment to the Commission for one purpose, but the GMSG might raise the issue again in the LCIRP process if there is non-consensus on the prioritization of that same item.

Third, if the dealings with the GMSG, either before or after the filing of an LCIRP are beset by non-consensus items, the Commission provides no timeframe for the resolution of such issues. If a disagreement is not resolved by the Commission prior to filing an LCIRP, it will not be clear to the utility what to include in a filing; nor what the Commission would do with a non-consensus

item that is filed. If it is a disagreement that requires resolution during the LCIRP proceeding itself, it is not clear how long an LCIRP proceeding would be delayed while the matter is resolved. It could be that the utility is at risk of having the Commission reject an LCIRP filing for failure to resolve a matter with a few members, or even a single member, of the GMSG.

Fourth, in what may have been an attempt to address the issue of delays relating to necessary investments as distinguished from discretionary ones, the Order describes four categories of potential investments and assigns a “cost-effectiveness” screen to each. These are categories Eversource has discussed in relation to the review and consideration of advanced technology and grid modernization investments. However, by the Order these screens are applied to all kinds of core utility projects in a manner that is inconsistent with planning principles for core distribution investments. As a result, there is a mismatch between the analytical framework that will apply in the GMSG process and the analytical framework that should apply to decision making for “business as usual” core distribution projects.

For example, the Commission references a “least cost, best fit” category for investments “supporting standard and safety compliance as well as policy compliance,” but places substantial caveats around those investments.¹⁴ Moreover, the Order requires for the first time that “*any* proposed investments,” Order at 49 (emphasis added) in this category be identified in advance to the GMSG, which will review whether those investments are “narrowly tailored in scope and timeline to address a specific distribution system objective and associated grid need.” *Id.*

¹⁴ Eversource notes that the Commission appears to rely on the “least cost, best fit” construct for “any” investments when there is no such construct in law. The law provides that the State’s goal is that utilities meet customer needs at the “lowest reasonable cost.” RSA 378:37. Under the Commission’s formulation, it appears that an investment representing the best option for furthering the State’s goals may be rejected if it is not the least cost option. However, implementing least cost options is not the goal of the State as expressed in RSA 378:37. Instead, attaining the lowest reasonable cost for activities intended to satisfy the State’s goals is the objective. A myopic view of the need to find least-cost options will likely undermine meaningful advancement of the State’s goals and may result in the needless rejection of beneficial investments.

If the GMSG does not find these necessary investments to be “narrowly tailored” (a standard the Commission does not define), the GMSG may still approve the investment if the incremental costs and benefits are “considered within one of the discretionary investment categories for the purpose of cost-effectiveness screening.” *Id.* In other words, specific “business as usual” investments designed to meet public utility obligations under law or policy may be rejected by the GMSG, the Commission, or both, prior to an LCIRP being filed, or after it is filed, or again at the time cost recovery is sought in a rate case, if those investments are not “narrowly tailored” and/or if their incremental benefits do not pass a cost-effectiveness screen pertaining to only some features of that investment.

Fifth, given the layers of review and inevitable delay, and the potential impacts on utility planning using a process and standards that are insufficiently defined, it is not clear what cause the utility would have to make any investments beyond those absolutely essential to meet explicit mandates or requirements. Moreover, the Order makes clear that any finding resolving a lack of consensus within the GMSG would represent only a finding that the proposed investment is reasonable “on its face.” It would not be a finding that the investment is prudent or that the utility is entitled to cost recovery. As a result, there may well be instances where the Commission is required to adjudicate the need for a specific “non-consensus” investment, and where it finds an investment necessary to meet for the utility to provide safe and reliable service. Yet, the utility receiving a ruling still would not know whether the Commission would allow the utility to recover its investment to fulfill its mandate -- although it would be clear that at least some parties would have pre-judged the issue and may contest cost recovery, perhaps exclusively on the basis that they had disagreed with it during the GMSG process.

A utility may enter a rate proceeding having gone through a GMSG and Commission process that yields a decision of the Commission upholding a planning process, as well as the need for specific project proposals, and still have no greater assurance of a prudence finding than it does today for investments in its core system. In fact, the prudence exposure could be greater if – in implementation – the Company was required to vary from the original design for an operating reason, which happens frequently. Therefore, it is manifestly unclear how such a process is reasonably designed to result in “a more transparent, efficient, and less-costly distribution system,” nor would otherwise benefit any party.

There are many other permutations of the disputes, challenges, and obstacles that could arise in relation to the core distribution planning function, to the detriment of New Hampshire customers and quite separate from any consideration of grid modernization. Given that the GMSG process may be repeated for many individual projects, this process has a strong potential to needlessly divert the time and resources of the utilities, the Commission, and others. And, at the end of the day, New Hampshire’s utility customers have no assurance that they will have any better outcomes than they do now.

Accordingly, the Order establishes a new stakeholder process that would apparently govern the core distribution planning functions of all New Hampshire electric utilities, but the rules are unclear; the participants are unknown; and the procedural steps are not sufficiently conceived. As a result, there is nothing about the process that appears designed to result in a “more transparent, efficient, and less-costly distribution system.”

IV. Legal Analysis

A. The Commission Failed to Provide Adequate Notice and Failed to Adhere to the Requirements of Relevant State Law.

Beyond the problems noted above, the Order suffers from various legal infirmities. While it could be that clarification of the above items, particularly regarding the scope of the stakeholder process and its focus on grid modernization initiatives may resolve the matter, in the interest of preserving its rights, Eversource also addresses the legal issues.

At various points in the instant docket, parties – chiefly the OCA – argued to the Commission that given the procedural posture of this matter as an investigation, the Commission was prohibited from enacting substantive changes to the LCIRP processes and procedures covering core utility planning without an adjudicative proceeding. The Commission summarily dismissed those arguments by stating that it was not actually judging any parties’ rights. However, as issued, the Order is a *de facto* adjudication of the rights of the utilities because the effect of the Order extends far beyond grid modernization, and thus the underlying arguments on the scope of the proceeding remain both accurate and relevant. The bases upon which the Commission relied to dismiss the notice and scoping arguments, even if those bases were once valid, are no longer valid in light of the Order’s requirements and directives. Accordingly, the Order must be reconsidered and/or clarified.

“Where governmental action would affect a legally protected interest, the due process clause of the New Hampshire Constitution guarantees to the holder of the interest the right to be heard at a meaningful time and in a meaningful manner.” *Appeal of Northern New England Telephone Operations, LLC*, 165, N.H. 267, 273-74 (2013) (quoting *Appeal of Pennichuck Water Works*, 160 N.H. 18, 36 (2010)). Moreover:

For more than a century, the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order

that they may enjoy that right they must first be notified. The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending “hearing.” To satisfy due process, the notice must be of such nature as reasonably to convey the required information and must be more than a mere gesture. Due process, however, does not require perfect notice, but only notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

In re School Administrative Unit #44, 162 N.H. 79, 87 (2011) (internal quotations and citations omitted).

Similarly:

In any case in which the commission may hold a hearing it may, before or after such hearing, make such independent investigation as in its judgment the public good may require; provided, that, whenever such investigation shall disclose any facts which the commission shall intend to consider in making any decision or order, such facts shall be stated and made a part of the record, and any party whose rights may be affected shall be afforded a reasonable opportunity to be heard with reference thereto or in denial thereof.

RSA 365:19.

It has long been the law of this State that, “[t]he PUC is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute.” *Appeal of Public Service Company of New Hampshire*, 122 N.H. 1062, 1066 (1982)(citing *Petition of Boston & Maine Railroad*, 82 N.H. 116, 116, 129 A. 880, 880 (1925)) . Further, New Hampshire “has long recognized as public policy that the owners of a utility do not surrender to the PUC their rights to manage their own affairs merely by devoting their private business to a public use.” *Appeal of PSNH* 122 N.H. at 1066-67.

As described above, the Commission’s powers in this docket, as the Commission itself acknowledged, come from the directive of HB 614 which, in turn, required the Commission to

implement the elements of the 2014 Strategy relative to grid modernization.¹⁵ As stated in the 2014 Strategy, as well as in various writings of the Commission in this docket, the scope and purpose of this proceeding was an informal process intended to gather information about grid modernization for potential future action on grid modernization. At no point could it be said that the Commission was empowered by HB 614 to use this proceeding to reinvent or remake the core utility planning process; nor to order anything other than the provision and distillation of information for supporting some future act.

In short, the Commission did not provide adequate notice that this proceeding was for the purpose of adjudging changes to utility planning and the LCIRP. Due process requires notice, reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The Commission's notice was defined in HB 614, the order of notice in this proceeding, and most recently in Order No. 26,254, and each of those referenced an investigation to gather information on grid modernization as opposed to revisions to core utility distribution planning. Accordingly, the Order's overly broad application to the core utility planning process is without basis.

Furthermore, though the Staff Report may have recommended combining elements of traditional utility planning and the LCIRP with grid modernization planning, this recommendation does not serve as "notice" of the nature and scope of the Commission's proceeding, beyond grid modernization. Order No. 26,254 was issued after the Working Group Report and Staff Report, and there was no intervening event that transformed this docket into something other than what it

¹⁵ Similar to the Staff Report, at some points in the Order, the Commission references aspects of the 2018 State Energy Strategy, a document that did not exist at the time HB 614 was enacted and the Commission's Order of Notice was issued. *See, e.g.* Order at 11. It is thus unclear to what extent the Commission incorporated the provisions of this document into its analysis, particularly since no notice was provided that the Commission would be relying upon anything other than the 2014 Strategy that was in place at the time this proceeding began, and which was the operative document underlying the legislation enabling this docket.

was at the time Order No. 26,254 was issued. When given the opportunity to define the proceeding in its decision, the Commission made clear in Order No. 26,254 that it would not be addressing broader issues of utility least cost planning, and that it was not using this proceeding to judge the rights or duties of parties.

As noted by the OCA, though the Commission may rely upon its general supervisory authority to gather information (such as through an investigation), in deciding upon the rights or obligations of those within its purview, the Commission is limited to doing so either through adjudication of a contested case under RSA Chapter 541-A, or through a rulemaking proceeding. RSA 541-A:31, in pertinent part, requires adjudicative proceedings when a matter is considered a “contested case” and a “contested case” is, in turn, defined as “a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing.” RSA 541-A:1, IV. What was required by law in this matter was that the Commission engage in the informal gathering of information for purposes of informing future action relative to grid modernization. Instead of fulfilling that requirement, the Commission devised and set a new process for utility distribution planning and a novel method for compliance with the LCIRP statutes, without proper notice or a proper evidentiary record. The Commission is not empowered to conjure into existence new rights and obligations outside the processes that are required of it by law.

The Order also implies that the Commission is empowered to shift between procedural approaches to reach specific outcomes, stating:

The Commission has discretion to adopt different procedural approaches or combinations of approaches in balancing ratepayer and investor interests. *Re Statewide Electric Utility Restructuring Plan*, Order No. 22,244, 81 NHPUC 564, 566 (1996) (stating “it is clear that not all administrative agency proceedings must be rigidly and categorically classified as either rulemaking or adjudication for the duration of the proceeding”)... .

Order at 10.

The precedent upon which the Commission relies for the premise that it can vary between procedural approaches, however, undermines the very argument it appears the Commission is attempting to make. Specifically, Order No. 22,244 contrasts adjudication and rulemaking, stating:

Adjudication generally involves a determination of individual rights or duties and is often conducted through an adversarial “trial-type” process. Rulemaking, on the other hand, involves a finding of general applicability which is prospective in nature and which is determined as a result of comments to a document initiated either by the agency or a petitioner. Although the line is sometimes not clear, adjudicative procedures are typically required to resolve factual issues while rulemaking procedures are appropriate for establishing policies or standards of general applicability.

81 NHPUC at 566.

The Commission concluded that it was not bound by those distinctions in the specific circumstances of that case and could make decisions that blurred the lines between adjudication and rulemaking because it had been explicitly directed by the Legislature to undertake a “generic proceeding” where it would conduct public hearings and issue a final order. 81 NH PUC at 568. Based upon the express statutory requirements underpinning that proceeding, the Commission found that it could “conduct a portion of our proceedings in essentially the same manner as rulemaking hearings, without the need to formally adopt a rule.” *Id.* No such Legislative mandate exists here. As noted, HB 614 empowered the Commission to implement the 2014 Strategy which called for an investigation and information-gathering proceeding where the information might be used in some future undertaking. Order No. 22,244 does not support the Commission’s desire to adopt or reject the approach that it chooses to fundamentally redefine utilities’ rights, particularly without notice that it will be doing so.

As quoted previously, in the Order it states, for the first time, that this docket was opened “to explore whether the services offered by New Hampshire’s electric distribution utilities require

modification to accommodate recent technological advancements and shifting customer expectations while also maintaining safety and reliability at least cost.” Order at 9. That revisionist statement of the docket’s purpose reflects neither what HB 614 required, nor what the Commission defined as the scope of this proceeding in its order of notice opening the proceeding. Furthermore, the Order states that:

The principles set forth in this statutory framework have been the bedrock of least-cost distribution system planning in New Hampshire for decades, and absent statutory changes, will continue to be for the foreseeable future. *The least-cost planning framework we adopt* does not distinguish between grid modernization investments or business as usual investments.

Order at 10 (emphasis added).

Accordingly, contrary to its prior notice as well as its explicit finding in Order No. 26,254, the Commission now states that it is using the Order not to address a workable framework for grid modernization, but to adopt a new least-cost planning framework that happens to include grid modernization issues. The Commission has failed to provide adequate notice for addressing the issues it reaches in the Order.

B. The Order is Entitled “Guidance,” But Renders Determinations on Rights and Duties of the Utilities

The Commission describes its Order as a “guidance document” but it is not clear what the issuance of a “guidance document” actually means. It appears, perhaps, that structuring the Order as a “guidance document” may have been intended to avoid the issue of the Commission reaching beyond the authority it had to address utility planning by giving the Commission the ability to claim it was not judging outcomes, but only providing general direction. Despite the attempt of the Commission to use “guidance” to avoid the very real concerns of proper notice not being provided, and of adjudicating issues when the required process of RSA Chapter 541-A has not

been followed, the Order is, in fact, adjudicating issues and deciding the rights and duties of the State's utilities.

As the most obvious example of deciding relevant rights and obligations, the Commission creates and implements the GMSG. As noted, this new, permanent fixture of the Commission has no defined roster, no standards for participation, and no regulatory authority. Nonetheless, the Commission requires that the utilities develop and submit information to the GMSG and that the GMSG use that information to establish the boundaries of, and requirements for, the LCIRP filings made by utilities. *See* Order at 78. The Commission acknowledges that its “approach” as established in the Order “anticipates stakeholder involvement, including the input of an independent professional engineer, into the utility-driven process of distribution system planning.” Order at 6. The Commission has, therefore, not provided guidance, but has adjudicated a new process interjecting stakeholder involvement in utility planning as well as new substantive requirements surrounding all manner of utility investments. This, the Commission is not authorized to do.

Alternatively, to the extent the Commission, or others, might contend that as a guidance document the Order is only offering advice for which the requirements of adjudication or rulemaking do not attach, then a related truth must also be acknowledged – if this is only “guidance” then parties are free to adopt or reject the Order or portions of it as they deem necessary or appropriate. The Commission does have general supervisory authority over utilities and may order or direct that certain activities be taken or avoided. *See* RSA 365:23 (requiring utilities to “observe and obey” the requirements of Commission orders). However, if the Order is not establishing directives, but is only offering guidance, then utilities – and all parties for that matter – need not be bound by the Order. In short, “guidance” is not an order of the Commission.

In the end, the Commission had two available paths, and the Commission appears to have attempted to avoid following either. On one path, the Commission may establish directives and adjudge rights and duties, in which case adequate notice and an opportunity to be heard must be provided. On the other path, it may provide guidance and express preferences, and parties may, but are not required, to follow them. The Commission cannot have it both ways and in attempting to do so the Order must be reconsidered.

C. The Order Unlawfully Attempts to Amend the LCIRP Statutes and Imperils Other Legal Obligations

Assuming, *arguendo*, that the Commission has proper statutory authority; did provide proper notice; did follow an adequate process; and, that the Order is something other than mere guidance, then the effect is that the Order attempts to improperly amend the requirements of the LCIRP statute and improperly delegate the Commission's authority and obligations to a new entity. Thus, the Order should be reconsidered.

Pursuant to RSA 378:37, the declared policy of the State of New Hampshire is:

The general court declares that it shall be the energy policy of this state to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost while providing for the reliability and diversity of energy sources; to maximize the use of cost effective energy efficiency and other demand side resources; and to protect the safety and health of the citizens, the physical environment of the state, and the future supplies of resources, with consideration of the financial stability of the state's utilities.

RSA 378:37.

To fulfill this purpose, RSA 378:38 requires that “[p]ursuant to the policy established under RSA 378:37, *each electric and natural gas utility, under RSA 362:2, shall file* a least cost integrated resource plan with the commission,” RSA 378:38 (emphasis added). The statute then specifies the timing and various requirements of such a filing, which includes the utility's analyses

and assessments of a series of enumerated factors.¹⁶ Notably, those factors include assessments of things like “programs,” “supply options,” and the “benefits and costs” of certain technologies. The factors do not contemplate assessments of individual projects or investments.

After filing, RSA 378:39 requires that “*The commission shall review* integrated least-cost resource plans in order to evaluate the consistency of each *utility’s plan* with this subdivision, in an adjudicative proceeding. In deciding whether or not to approve the *utility’s plan*, the commission shall consider potential environmental, economic, and health-related impacts of each proposed option.” RSA 378:39 (emphasis added). Thus, the law explicitly requires that a utility file with the Commission an LCIRP that contains the utility’s assessments and analyses of the various defined factors, and it requires that the Commission review and evaluate the utility’s plan filing (as opposed to individual projects) for consistency with the State policy.

Through the Order the Commission has unlawfully attempted to amend the statutorily required process. Although the Commission nominally retains the LCIRP process in the paradigm conceived in the Order, it interjects a new and unauthorized entity, the GMSG, into the process of distribution planning and renders the utility answerable to this new entity. This entity, in addition to being empowered to seek resolution from the Commission in its own right, will, among other things, evaluate cost-effectiveness and performance metrics, define new interconnection processes, and review utility capital projects and project prioritization, and the utility is then required to account for the outputs of the GMSG in making LCIRP filings.

¹⁶ RSA 378:38 states that the plan factors “shall include, but not be limited to” the defined items and the New Hampshire Supreme Court has repeatedly made clear that when such words are used in a statute “[t]he principle of *ejusdem generis* provides that, when specific words in a statute follow general ones, the general words are construed to embrace only objects similar in nature to those enumerated by the specific words.” *Kurowski v. Town of Chester*, 170 N.H. 307, 311 (2017). Thus, while an LCIRP may be expanded beyond the specific enumerated factors, this expansion may only be to the extent that it includes items similar in nature to those specified.

To the extent the utility does not follow the will of the GMSG, it is required to document, justify, and explain every deviation from the GMSG's desires. To the extent the utility does follow the GMSG, the Commission appears to intend to rely upon the GMSG's judgment in determining the prudence of investments. Order at 22. These new requirements and powers surrounding the GMSG exist despite the facts that the GMSG has no regulatory or supervisory authority over utilities, and that the utilities have not agreed to be subject to the input of such a group for core distribution planning. Accordingly, the LCIRP filing would no longer be a demonstration of the plans of a utility as envisioned by RSA 378:37 and :38. Instead, the LCIRP would be a report of the utility on the review of a proposal made to the GMSG. Such a document is not the type of "plan" envisioned by the law.

Further, as noted, it is the obligation of *the Commission* to evaluate an LCIRP filing for its consistency with State policy. In the Order, the Commission acknowledges that obligation but then effectively amends it, stating "[a]lthough RSA 378:39 requires the Commission to review individual utility LCIRPs in an adjudicative proceeding, we believe there is benefit in undertaking a clearly defined stakeholder process that allows meaningful opportunities for input on decisions affecting utility planning and related investments before adjudication commences." Order at 24. In other words, the Commission acknowledges that New Hampshire law authorizes *the Commission* to adjudicate these filings; but the Commission has elected to have the GMSG take priority in that exercise of authority. Although, the Commission may ultimately pass judgment on whatever comes out of the GMSG process, the LCIRP statutes do not contemplate a two-step review process that effectively subjects the utility planning process to a third-party review that would obviate the Commission's adjudication of the issues. The law requires utilities to file plans and the Commission is required to review them.

RSA 378:39 does allow the Commission to consult with outside parties to conduct its evaluation. That consultation, however, is a choice of the Commission to involve others in its review of a utility plan. Yet, the Order contemplates the retention of an independent professional engineer to review, at least “whether non-discretionary projects are necessary to maintain safe and reliable service,¹⁷ reviewing the reasonableness and accuracy of capital project cost and benefit projections, reviewing alternatives to proposed projects, and reviewing whether identified grid needs may be avoided or deferred through cost-effective deployment of non-wire solutions.” Order at 60. Thus, beyond “consultation” with the engineer, the Order empowers the engineer to preview every investment by the utility and, explicitly, to second-guess the judgment of the utility’s professional planners and engineers on whether utility investments are necessary for providing safe and reliable service.¹⁸

Moreover, this outside engineer is not being retained by the Commission to assist the Commission with its review as contemplated by RSA 378:39. Rather, the engineer is proposed to serve the GMSG through the Commission Staff.¹⁹ The engineer will be retained by the Staff pursuant to a scope of work the Staff develops, and will work under the Staff’s control. Order at 60. The Staff will decide which reports of the engineer are sufficiently “material” to provide to the GMSG, and the Staff retains discretion to decide when it “may offer the expertise” of the engineer to the GMSG. *Id.* In all material respects, this engineer is an employee of the Staff.

¹⁷ By its terms, empowering an engineer to determine “whether non-discretionary projects are necessary to maintain safe and reliable service” does not make sense to Eversource. If a project is “non-discretionary,” then it is unclear under what possible analysis it would not also be “necessary.” If the utility has no discretion to make an investment, it should not be second-guessed about the necessity of that same investment.

¹⁸ For its part, Eversource employs approximately 20 professional engineers and planners to plan its distribution system in New Hampshire. Rather than rely upon their training and expertise, the GMSG would be looking to the input of a single engineer retained and directed by the Commission Staff.

¹⁹ Order at footnote 27, stating “[t]he IPE should be a contractor of the Commission **and work at Staff’s direction.**” (emphasis added).

Under these circumstances, it is not clear that such a person is, in fact, independent. What is clear is that such a review is not contemplated by the LCIRP statutes.

Beyond the LCIRP statutes, the Order undermines the purpose and goals of other laws and injects uncertainty into how utilities would comply with those laws. Most importantly, pursuant to RSA 374:1 “Every public utility shall furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable.” Further, under RSA 374-F:3, V(a) “A utility providing distribution services must have an obligation to connect all customers in its service territory to the distribution system.” Accordingly, it is an explicit requirement of state law that utilities, and utilities alone, are obligated to provide safe and adequate service to every customer. The creation of the GMSG and retention of an engineer in the manner described undermines this obligation.

Thus, in establishing the new process set out in the Order, the Commission has fundamentally altered the statutorily required LCIRP process and undermined the explicit statutory obligations of the utilities to assure safe and reliable service to New Hampshire customers. For this reason, the Order should be reconsidered and/or clarified.

V. Conclusion

Eversource reiterates its position that that the Order appears to describe a workable and appropriate framework for the assessment and integration of grid modernization planning into distribution planning efforts, subject to obtaining additional clarity around the GMSG process. However, Eversource has substantial, and justified, concern about the incursion of this vaguely structured stakeholder process into the core distribution planning function and its encroachment on the Company’s ability to protect the safe and reliable operation of the system, without altering the utility’s liability for the integrity of its system.

Accordingly, Eversource requests that the Commission reconsider the Order to the extent it creates such an incursion into core distribution planning process, and find that this new process does not extend to “business as usual” investments, at least not until some future date when a complete and adequate process has been followed. Additionally, to the extent the GMSG is retained for review of any investments, Eversource is requesting that the Commission clarify the Order as it pertains to the GMSG process to address the issues identified in this motion.

WHEREFORE, Eversource respectfully requests that the Commission:

- A. Grant this Motion;
- B. To the extent the Commission does not Grant this motion, that it suspend the Order and provide for further process up to and including a hearing; and
- C. Grant such further relief as is reasonable and appropriate.

Respectfully submitted this 22nd day of June 2020.

Public Service Company of New Hampshire d/b/a Eversource Energy

By its Attorney,



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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

Dated: June 22, 2020



Matthew J. Fossum