STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Electric Distribution Utilities

Investigation into Grid Modernization

Docket No. IR 15-296

OBJECTION TO MOTION FOR RECONSIDERATION AND/OR CLARIFICATION AND MOTION TO STRIKE OF THE OFFICE OF THE CONSUMER ADVOCATE AND THE CITY OF LEBANON

NOW COMES the Office of the Consumer Advocate ("OCA") and the City of Lebanon ("City"), participants in this investigative docket, and (1) object to the Motion for Reconsideration and/or Clarification filed on June 22, 2020 by Public Service Company of New Hampshire ("PSNH"), and (2) move to strike a pleading submitted in this docket by Unitil Energy Systems, Inc. ("Unitil") on June 22, 2020. In support of this Objection and Motion, the OCA and City state as follows:

I. Introduction

On May 22, 2020, exactly 1,758 days after the Public Utilities Commission opened this docket to explore the future of the state's electricity grid, the Commission issued Order No. 26,358, entitled "Guidance on Utility Distribution System Planning And Order Requiring Continued Investigation." This comprehensive order of 83 pages in length, while certainly not perfect, committed the Commission in laudable fashion to a new approach to the Least-Cost Integrated Resource Planning process mandated by RSA 378:37 *et seq.* This new approach

would make least-cost planning more collaborative, more accountable, and more conducive to assuring that New Hampshire's electric customers will have access to emerging grid technologies without relieving utilities of their traditional obligation to provide safe and reliable service at the lowest possible cost.

One of the state's three investor-owned electric utilities, Granite State Electric Company d/b/a Liberty Utilities ("Liberty"), has interposed no objection to this guidance from its regulator. Another, Unitil, has waived its opportunity to raise concerns, for the reasons articulated *infra*. The third and biggest of those utilities, Public Service Company of New Hampshire, has filed a timely motion for rehearing and/or clarification pursuant to RSA 541:3. Thus PSNH parts company with at least one of its New Hampshire counterparts and complains for 44 pages that unlike that counterpart it cannot abide what the company characterizes as an "incursion" upon its business prerogatives. PSNH Motion at 6. For the reasons that follow, PSNH arguments are devoid of merit and its motion should be denied.

II. The Applicable Standard

The applicable legal standard is as stated at page 1 of the PSNH Motion. RSA 541:3 provides that the Commission may grant rehearing upon a showing by the movant of "good reason" for such action. The Commission has recently and helpfully elaborated on this standard in *Lakes Region Water Company*, Order No. 26,360 (Docket No. DW 18-058, May 27, 2020) at 4. "Good reason may be shown by identifying new evidence that could not have been presented in the underlying proceeding." *Id*. (citing *O'Loughlin v. N.H. Personnel Comm'n,* 117 N.H. 999, 1004

(1977)). Good reason can also be shown "by identifying specific matters that were 'overlooked or mistakenly conceived' by the Commission." *Id.* (quoting *Dumais v. State*, 118 N.H. 309, 311 (1978)). "A successful motion for rehearing does not merely reassert prior arguments and request a different outcome." *Id.*

Because the PSNH motion does not refer to any new evidence that was previously unavailable, the Company is presumably relying here on a claim that specific matters were overlooked or mistakenly conceived. Although the Motion meanders through the history of this docket and various claims about what transpired, and although the prose on occasion is evocative, *see, e.g.*, PSNH Motion at 4 ("it is the utility that must operate the system in the dark of night"), in essence PSNH does four things: (1) It argues as a matter of law that the Commission should have conducted adjudicative proceedings, (2) it argues as a matter of law that the notice afforded by the Commission was flawed on due process grounds, (3) it argues as a matter of law that the Commission is violating the Least Cost Integrated Resource Planning ("LCIRP")[1] statute, RSA 378:37 *et seq.*, and (4) it makes a series of policy arguments that rely on the Commission's limited, discretionary authority to change its mind on rehearing. This memorandum in opposition to the PSNH Motion takes up these questions in that order.

[1] The abbreviation "LCIRP" is sometimes used for "Least Cost Integrated Resource Plan" and sometimes for "Least Cost Integrated Resource Planning," as appropriate in context, both referring to the statutory scheme contained in RSA 378:37 *et seq.*

III. Eversource has waived its argument on any need for contested case proceedings.

The most significant legal argument advanced by PSNH to justify its demand for rehearing is its claim that the Commission was obliged to conduct adjudicative proceedings before overhauling its approach to Least-Cost Integrated Resource Planning in the manner described in Order No. 26,358. PSNH has long since waived this argument.

As PSNH points out on every available occasion in its motion, the OCA has at several previous junctures in this docket urged the Commission to commence adjudicative proceedings. The OCA first raised this issue by letter addressed to the Executive Director on February 25, 2019, in the immediate aftermath of the Staff Report described by PSNH at page 12 of its motion as the key juncture at which the docket allegedly "pivoted away" from focusing on grid modernization to a broader inquiry into Least-Cost Integrated Resource Planning. *See* OCA Letter, Tab 66 at 3 ("This . . . is a situation that demands contested case proceedings within the meaning of the relevant section of the Administrative Procedure Act, RSA 541-A:31 *et seq.*"). PSNH said nothing in response to this contention. Neither did the Commission, in its March 13, 2019 secretarial letter (Tab 67) scheduling more informal proceedings to receive responses to the Staff Report. It was at this point, which PSNH identifies as the moment when this docket veered off course, that PSNH should have invoked any right it might have enjoyed to require the Commission to undertake contested case proceedings.

The OCA reprised this concern in its written comments about the Staff Report filed on April 8, 2019 (Tab 73) at pages 2-5, discussing this issue at length and urging the Commission not to continue to rely on informal proceedings. Again, PSNH was silent on this significant question. In fact, via its comments filed on April 9, 2019, PSNH actually argued at this point in the investigation that *no* additional proceedings were required, much less formal ones. *See* PSNH Comments of April 8, 2019 at 7 ("To advance the process, [PSNH] would prefer to receive an order in the near term setting the requirements of an IDP filing") and 8 ("[PSNH] does not intend to curtail reasonable stakeholder processes and working groups, but [PSNH] also does not believe that extended regulatory processes[2] are needed here").

Now PSNH is demanding exactly what it stated was unnecessary on April 9, 2019, making an unabashed attempt to complain about the rules of the game retrospectively because the game did not turn out as PSNH had hoped. But even if April 9, 2019 was not the date on which (to paraphrase Sir Arthur Conan Doyle) this dog should have but did not bark, the lack of any objection from PSNH to the Commission's Order of May 29, 2019 ran over the dog altogether.

Order No. 26,254, captioned "Order on Procedural Issues for Developing Requirements for Integrated Distribution System Plans," the Commission rejected arguments, tendered by OCA and supported by the City and several other parties

[2] While it is probably unreasonable to expect PSNH in comments filed on April 9, 2019 to have addressed issues raised by the OCA in a document filed and served the previous day, when PSNH submitted these comments the utility had been on notice for almost two months that the Consumer Advocate was pressing for contested case proceedings. The reference here to "extended regulatory processes" can only be interpreted as a response to this argument of the OCA.

(but no utilities), that the Commission should proceed with this investigation as an adjudicated proceeding as Eversource is now arguing, holding 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. Order No. 26,254 at 5 (citing RSA 541-A:1, I and III). The Commission noted that "concepts regarding the substantive requirements of utility least cost planning are at issue" in the progress of this proceeding. *Id* at 6. So, now, even though the Commission made absolutely clear it was embracing the "Integrated Distribution System Plan" framework then posited by PSNH but now characterized as an impermissible "pivot," the Commission also clearly stated that it was not going to conduct contested case proceedings in this matter, PSNH did not seek rehearing pursuant to RSA 541:3.

Others did, though – on June 27, 2019 when the OCA, Acadia Center, Clean Energy New Hampshire, Conservation Law Foundation, City of Lebanon, and Patricia Martin filed a Motion for Rehearing or Clarification of Order No. 26,254 pursuant to RSA 541:3. In Order No. 26,275, issued on July 26, 2019, the Commission denied the motion for rehearing or clarification. None of the movants appealed that decision and, thus, Order No. 26,254 is final and unappealable and PSNH may not resurrect issues now that were determined by the Commission then. *Cf. Appeal of Northern New England Telephone Operations LLC*, 165 N.H. 267, 271-72 (2013) (holding that party aggrieved by Commission order had not waived

issues determined in prior Commission orders because the party had "timely moved for reconsideration of the orders at issue"). In other words, because the Commission decided this precise issue in 2019, the issue was resolved finally on the merits in 2019, PSNH was most assuredly a party to the proceedings that led to the 2019 order, and PSNH had a full and fair opportunity to litigate this issue in 2019, the company is now estopped from relitigating this question now. *See Appeal of Silva*, 172 N.H. 183, 191-92 (setting forth these requirements for application of collateral estoppel doctrine in administrative proceedings) (citations omitted).

Moreover, even if the Commission were to consider the merits of this argument, rehearing should still be denied for failure to demonstrate the "good cause" specified by RSA 541:3. PSNH has not identified what evidence it would introduce, or even seek to adduce in discovery, and has not discussed what legal arguments it has been unable to raise, so as to justify vacating Order No. 26,358 and forcing the Commission and all of the stakeholders to subject themselves to the time and resource demands of adjudicative proceedings. In its present posture, PSNH is in a much different position than the OCA was in arguing for adjudicative proceedings at junctures when the Commission's opinions and policy preferences (as distinct from those of the Commission's Staff) were unknown.

IV. Notice to PSNH was fully consistent with Due Process.

Another legal argument on which PSNH bases its rehearing request is the claim that the Commission "did not provide adequate notice that this proceeding

was for the purpose of adjudging changes to utility planning and the LCIRP." PSNH Motion at 34. This argument is both factually and legally flawed.

Docket No. IR 15-296 has its roots in a directive from the General Court that is notable for its terseness and vagueness: "The public utilities commission shall open a docket on electric grid modernization on or before August 1, 2015." 2015 N.H. Laws ch. 219:1. The General Court deserves no criticism for embedding this brief instruction in what has been commonly referred to in this proceeding as House Bill 614, since the bill was actually multi-pronged effort by the Legislature (also directing the Commission to adopt a peak-time reduction goal, making major structural changes to the Site Evaluation Committee that reviews requests to construct new energy facilities pursuant to RSA 162-H, and instructing a group of state agencies to collaborate on a report on the development of charging corridors for electric vehicles). In so doing, the General Court specified that the purpose of HB 614 was to address the "goals outlined in the state 10-year energy strategy." *Id.*

Nevertheless, a review of this language demonstrates how flawed the first PSNH premise is, that all the General Court told the Commission to do was "gather[] information on the extent to which workable advancements for grid modernization could be implemented in New Hampshire in the future." PSNH Motion at 9. When the Legislature told the Commission to "open a docket," PSNH had no reason to assume the proceeding would be limited to information gathering or even be limited to the Company's subjective definition, offered five years later, of "grid modernization." This is particularly true given the excerpt from the 2014

edition of the State Energy Strategy that PSNH quotes at page 8 of its Motion. Although that excerpt states that "an investigation or information gathering proceeding may be an appropriate first step," in the *very same sentence* (via words *not* highlighted by PSNH), the State Energy Strategy invokes the possibility of "rethinking the role of utilities" altogether. The issue now is not whether the Commission misinterpreted the words in House Bill 614 (in which case, given the vagueness of the relevant statutory language, the Commission or a court might well look to the words of the State Energy Strategy for contextual guidance). Rather, the issue is whether PSNH could credibly claim, as its lobbyist left the State House in 2015 after House Bill 614 gained final passage, that the Company could have reasonably expected Docket No. IR 15-296 to be as narrow an inquiry as PSNH now wishes it had been.

Equally flawed as a matter of fact, law, and logic is PSNH claim that "the Commission's powers in this docket . . . come from the directive of HB 614" and thus were limited to to "implement[ing] the elements of the 2014 Strategy relative to grid modernization." PSNH Motion at 33-34. This is nonsense. Construed according to established principles of statutory construction, *see*, *e.g., Clay v. City of Dover*, 169 N.H. 681, 685 (2017) ("ordinary rules of statutory construction" include interpreting a statute "in the context of the overall statutory scheme and not in isolation"), the Commission should have assumed and, in fact, *did* assume the directive was to be followed in the context of the agency's long-established and broad statutory powers to exert "general supervision of all public utilities" pursuant to RSA 374:3, to assure

that rates and "regulations or practices" of utilities are just and reasonable pursuant to RSA 378:7, *see also* RSA 374:2 (explicitly prohibiting "unjust and unreasonable" charges by utilities), to keep informed as to how utilities are "managed and operated" pursuant to RSA 374:4, "to order all reasonable and just improvements and extensions in service or methods" pursuant to RSA 374:7,[3] and to follow the state energy policy enumerated at RSA 378:37 (which contains no reference to "grid modernization" but does refer to "meet[ing] the energy needs of the citizens and businesses at the lowest reasonable cost"). Common sense suggests the entire reason a legislature directs an administrative agency to discharge a particular task, rather than exercise its own broad powers of investigation and reform, is to take advantage of the agency's expertise in the subject area and its pre-existing powers. All House Bill 614 did was to direct the agency to focus its attention and regulatory oversight to a particular (though vaguely defined) subject. As such, if anything House Bill 614 expanded the Commission's authority and certainly did not constrain it as claimed by PSNH.

It is also worth considering the plain meaning of the words "grid modernization," another basic rule of statutory construction. *See, e.g., Union Leader Corp. v. Town of Salem*, 2020 WL 2791852 at *2 (N.H. Supreme Ct., May 29, 2020). "Grid" clearly refers to the electric grid, of which the distribution grid, as opposed to the interstate high voltage transmission system, is under state jurisdiction. A very simple definition of "modernization" is "the process of adapting something to

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[3] The Commission's exercise of RSA 374:7 powers requires "notice and hearing." As discussed, *supra*, PSNH waived any right it enjoyed to a hearing.

modern needs"[4] with modern meaning contemporary, current, or up to date. Hence, in terms of the Commission's jurisdiction, this matter is broadly about considering the process of adapting the New Hampshire electric distribution grid to modern or current needs using up to date methods and technologies. This suggests the Commission correctly interpreted the General Court's directive in House Bill 614 as an expansive one and, thus, that PSNH was duly on notice not to expect otherwise.

Next PSNH claims that it was unfairly and illegally sandbagged by the Order of Notice (Tab 1) with which the Commission commenced Docket No. IR 15-296. This claim is likewise devoid of merit. If anything, this issuance of July 30, 2015 served as a warning to PSNH (and every other person who received the document) that the docket could be a wide-ranging inquiry indeed. The Commission explicitly stated that grid modernization is "a *broad topic* that encompasses many elements, including replacement of aging infrastructure, outage management, the integration of distributed generation, and education of customers on how to manage their energy use for the benefit of the electric delivery system and to minimize energy costs." The question now is not whether the Order of Notice correctly defined grid modernization (which, in any event, it did – as noted, *supra*).. Rather, the issue, at least according to PSNH, is whether there was "adequate notice that this proceeding was for the purpose of adjudging changes to utility planning and the LCIRP." PSNH Motion at 34. Assuming such a concern was legitimate, it is noteworthy that the Order of Notice actually invited comment on the scope of the

[4] *See* https://www.lexico.com/en/definition/modernization.

proceeding – surely fair warning to PSNH that the investigation could be expansive indeed. Even assuming some inadequacy in Order of Notice in light of its vagueness, PSNH should have raised such concerns then as opposed to allowing five years of proceedings to ensue, consuming countless hours of stakeholder and Commission Staff time, only to complain when the Company decided it disliked the ultimate substantive outcome.

According to PSNH, the last significant juncture for purposes of determining the adequacy of the Commission's notice is Order No. 26,254, issued on May 29, 2019. To claim that Order No. 26,254 was inadequate for notice purposes borders on the ludicrous. By May 29, 2019, Staff had issued its recommendation to address grid modernization by moving to so-called "Integrated Distribution Plans" (as a holistic replacement for Least-Cost Integrated Resource Plans). Order No. 26,254 explicitly references this key Staff recommendation, *see* Order No. 26,254 at 2 (stating that, according to Staff, that such a change in approach to least-cost planning would "accommodate grid modernization"). The Commission enumerated eleven specific issues on which it required utility comment, the last of which was "LCIRP Integration." *Id.* at 11. The Commission could not have done more to put PSNH on *actual notice* that the future of Least-Cost Integrated Resource Planning was under review without dispatching a singing telegram to that effect. Indeed, the joint comments made by PSNH and the other utilities in response to the Commission's directive states that the companies "support the transition from the older model of the LCIRP to a more comprehensive and holistic IDP." Joint Utility

Comments (Tab 91) at 18. How can this utility seriously contend it was not adequately notified of an issue it explicitly addressed in writing on September 6, 2019?

The Office of the Consumer Advocate and the City share the conviction of PSNH that the proceedings conducted by the Commission must remain scrupulously attentive to the requirements of due process enumerated in the state and federal constitutions. We agree with PSNH that the relevant guidance from the New Hampshire Supreme Court is *In re School Administrative Unit #44*, 162 N.H. 79 (2011). As PSNH notes, *see* PSNH Motion at 33, the Court on that occasion stated that to satisfy the requirements of due process, "the notice must be of such nature as reasonably to convey the required information and must be more than a mere gesture." *Id.* at 87. "Due process, however, does not require perfect notice, but only notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* In this instance, the Commission was much closer to "perfect notice" than it was to "mere gesture" and PSNH's feigned surprise about the scope of Order No. 26,358 should be disbelieved and its complaints about notice should be swiftly and crisply rejected.[5]

[5] In support of its 'inadequate notice' argument, PSNH also invokes RSA 365:19, which requires that in any case for which the Commission "may hold a hearing . . . any party whose rights may be affected shall be afforded a reasonable opportunity to be heard with reference [to facts in dispute] or in denial thereof." However, PSNH does not contend that RSA 365:19 provides any additional protections with respect to notice, beyond the Due Process standard of the New Hampshire Supreme Court as stated via *In Re School Administrative Unit #44*. Therefore, the Commission need not separately analyze the applicability of RSA 365:19.

V. The Commission has not violated the LCIRP statute.

PSNH's third and final legal argument barely even qualifies as a legal argument. Without troubling the Commission with citations to legal authorities concerning the interpretation of statutes or the extent to which agencies enjoy discretion when applying their enabling statutes, PSNH claims that Order No. 26,358 "attempts to improperly amend the requirements of the LCIRP statute and improperly delegate the Commission's authority and obligations to a new entity," by which PSNH means the Grid Modernization Stakeholder Group ("GMSG").

The OCA and City concede that the Commission cannot ignore the procedural and substantive requirements of the LCIRP statute. We assume, *arguendo*, that a New Hampshire administrative agency cannot delegate its responsibilities, at least without explicit statutory authority. But Order No. 26,358 does neither of these things.

PSNH concedes that under Order No. 26,358, the Commission "nominally retains the LCIRP process," an implicit concession that no statutory violation is occurring, but claims that the order "interjects a new and unauthorized entity" into the process of distribution planning and renders the utility answerable to this new entity." PSNH Motion at 40. This is an unabashed attempt to misconstrue the Commission's decision. The utility will not be "answerable" to the GMSC; the Commission retains all of the authority and responsibility conferred by the LCIRP statute and other enactments.

If anything, Order No. 26,358 actually *enhances* the Commission's compliance with the LCIRP statute. RSA 378:39, covering Commission evaluation of least-cost plans, explicitly encourages the Commission to "consult with appropriate state and federal agencies, alternative and renewable fuel industries, and other organizations" as the agency considers utility capital deployment decisions. To the knowledge of the OCA and City, such consultation does not presently occur; the Grid Modernization Study Committee would become a vehicle for it.

The rehearing motion also asserts that "the Commission *appears* to intend to rely upon the GMSG's judgment in determining the prudence of investments" and plans to turn each LCIRP into "a report of the utility on the review of a proposal made to the GMSG." *Id.* at 41 (emphasis added). PSNH's use of the word "appears" here is an implicit concession that it does not know how the Commission will rely on GMSG proceedings; in that sense, the argument it advances here is premature. More generally, PSNH should parse Order No. 26,358 anew because its congenital hostility to any evolution of its 1950s business model, particularly in the realm of meaningful stakeholder engagement, appears to have affected its collective institutional reading comprehension.

References to the GMSG appear throughout Order No. 26,358 but Appendix A to the order is a comprehensive list of the group's assigned tasks. This list refers to the provision of "guidance," "research," and "input." Much like the EERS (Energy Efficiency Resource Standard) Committee of the Energy Efficiency and Sustainable

Energy Board, a committee on which PSNH holds a vote, the GMSG is neither an "entity" as PSNH claims nor does it exercise a shred of authority. It is simply a forum and no statute or principle of New Hampshire law prohibits the GMSG from conducting its work under the aegis of the Commission.

VI. PSNH's policy pitches are unpersuasive.

The remainder of PSNH's arguments are rendered scattershot-style and overlap confusingly. But they reduce, in the aggregate, to a contention that the Commission made some bad policy choices in Order No. 28,358 that really ought to be clarified or rescinded. The specific arguments advanced by PSNH are (1) that the Grid Modernization Stakeholder Group is vaguely defined and would be an "improper intrusion into the Company's management prerogative,"[6] PSNH Motion at 2, (2) likewise, that such an improper intrusion occurs via the Commission's authorization of an Independent Professional Engineer to assist Staff and the GMSG, (3) that so-called "'business as usual' core distribution planning activities" have no place in the work of the GMSC or the Independent Professional Engineer, *id.*, (4) that the work of the GMSC and Independent Professional Engineer will cause unhelpful delays to the Company's effort to operate its distribution system, which PSNH characterizes as unfair "unless the utilities are to be relieved of their fundamental responsibility for the system," *id.* at 5, (5) that, to the extent the

[6] More precisely, PSNH claims that the "incursion" violates New Hampshire law but the utility does not develop such a legal argument. We therefore ignore this legal contention and the Commission should as well. *See Fothergill v. Seabreeze Condominiums at Hampton Ass'n*, 141 N.H. 115, 116 (1996) (arguments made in cursory fashion are deemed waived). Likewise, PSNH makes at least one other legal argument in an undeveloped, cursory fashion at page 6 of its Motion, about an alleged lack of "substantial record evidence." This contention should also not be taken seriously.

determinations characterized as "guidance" are, in fact, binding on utilities, the Commission should have considered "the actual lack of consensus around the 'pivot' from a grid modernization stakeholder process to a reconfiguration of the utility planning process for core distribution investments," *id.* at 16, (6) that the GMSC will increase the risk of outages and other operational problems while driving up costs, (7) that the GMSC process could actually prohibit PSNH to address "emergent" (i.e., time-sensitive) needs, *id.* at 20, (8) that Order No. 28,358 proceeds from a "faulty premise" that there is something wrong with the way PSNH currently plans its system, *id.* at 23, (9) that there is no evidence an Independent Professional Engineer is "necessary or advisable," *id.*, (10) that there are too many ambiguities in the Commission's description of the GMSG,[7] (11) that there is a "mismatch" between the "analytical framework" applicable to the GMSC process and the one that should apply to decisions about "'business as usual' core distribution projects," *id.* at 29, (12) that in light of the "layers of review and inevitable delay" imposed by the Commission on utility planning, "it is not clear what cause the utility would have to make any investments beyond those absolutely essential to meet explicit mandates or requirements," *id.* at 30, and (13) that nothing about the GMSC process gives utilities any greater assurance that an

[7] Specifically, PSNH complains that the Commission failed to specify who may be a member of the GMSC, that the GMSC could be dominated by people with agendas inimical to the public interest, that the GMSC is apparently endowed with "rights of its own to seek resolution of non-consensus issues," PSNH Motion at 25, and that the GMSC "would function without any charter, authority, or governing structure," *id.*, and that the Commission failed to define in meaningful fashion the process for seeking review of non-consensus items.

approved investment would ultimately be deemed prudent by the Commission and that the process might even increase the possibility of prudence disallowances.

A. Three General Observations

Three general observations are in order. First, in these circumstances, it is completely appropriate for the Commission to consider that Liberty is apparently willing to live with all of the determinations in Order No. 26,358 that PSNH regards as onerous, too ambiguous, and flawed. This tends to undermine any claim by PSNH that it has met the "good reason" threshold in RSA 541:3.

Second, PSNH has either misunderstood or is deliberately misconstruing a key aspect of the Order. That key aspect is the extent to which the advent of the Grid Modernization Stakeholder Group and the Independent Professional Engineer would deprive PSNH or its management of their autonomy and right to make business judgments. In reality, not one iota of PSNH's corporate prerogatives is compromised. The stakeholder group exists simply to provide *input* to PSNH's management as the Company's leaders develop their successive Least-Cost Integrated Resource Plans; all of the *authority* remains with the Company, subject to oversight by the Commission.

Third, the Commission was exactly right in opting not to draw a false distinction between so-called "business as usual" investments and investments made for purposes of grid modernization. According to PSNH, "business as usual" investments are "expenditures that are needed primarily to ensure reliable operations or to comply with service quality and safety standards." PSNH Motion

at 17 n.7. Even if one accepts this as an appropriate formulation, an electric distribution utility that failed to adopt new technologies when cost-effective and customer-empowering would not be complying with service quality standards. Or, as the Commission explained, such a failure, as to both operations and investments, would mean imprudence and thus cost disallowances. *See* Order No. 26,358 at 28.

The OCA and City agree with Eversource that "business as usual" planning should not ordinarily be a significant focus of the GMSG process. But the devil is in the details. For example, an investor-owned utility could decide to replace older assets by modeling of asset failure risk. In contrast to the standard practice of objective testing to identify assets in need of replacement, this type of modeling could dramatically increase the rate of asset replacement with no discernable increase in reliability. Yet, it is easy to imagine how a utility could define asset replacement as a 'business as usual' activity, thereby excluding it from GMSG purview.

Similarly, at page 48 of Order No. 26,358 the Commission specifically addresses another example – so-called "compliance" activities. While some compliance activities (e.g., facility relocation due to roadway expansion) qualify as business as usual, others (such investments to facilitate the integration of distributed energy resources) could easily be abused through excess investment.

Still another example is metering – a classic "business as usual" expenditure. But what happens when a utility conducts this "business as usual" activity by deliberately investing in AMR (automatic meter reading) devices after the

Commission concluded that "it is appropriate to implement some form of smart metering [AMI] and time-based rates as set forth in the federal standards"[8] so as to thwart deployment of AMI (advanced metering infrastructure) that could enable new customer-empowering services that undermine the utility's hegemony?

The point is not to argue here about specific examples of imprudence. Rather, the point is that the Commission was wise to avoid a rigid distinction between "business as usual" and grid modernization investments. In practical terms, the GMSC could as part of its process identify and exclude from additional consideration certain investments that are not related to modernization. Conversely, any investment whose cost is significantly in excess of the inflation rate could and should warrant focused GMSC scrutiny. Upon reasonable justification – e.g., to accommodate load growth and/or high distributed energy resource capacity, to relocate facilities in accordance with a public works project, or to provide operations and maintenance savings in excess of costs to customers – no further GMSG involvement would be required or appropriate. PSNH might fear such analysis, but that is not good cause to grant rehearing.

B. Vagueness and Ambiguity: Not a problem

PSNH's vagueness complaints likewise do not amount to a reason for rehearing. It is true that much of the processes through which stakeholders will

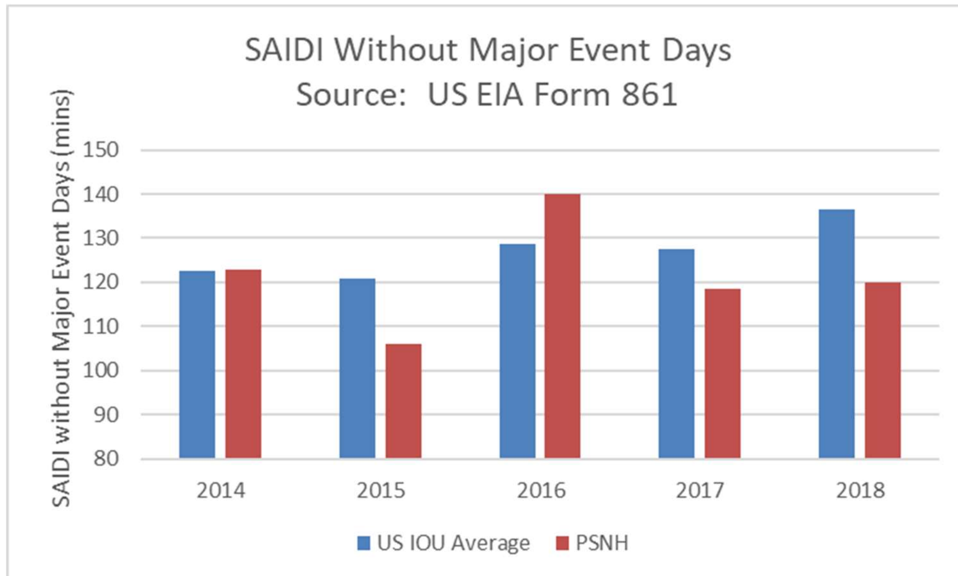
[8] *See* Order No. 24,819, issued on January 22, 2008 in Docket No. DE 06-061, at 15. That docket was captioned "Investigation into Implementation of the Energy Policy Act Of 2005," and was resolved after prefiled written testimony, full adjudication, and hearing.. In the first paragraph of that Order the Commission equates the federal time-based metering standard with "'smart metering' and 'advanced metering infrastructure' or 'AMI.'"

participate in distribution planning and capital budgeting have yet to be defined. But page 78 of Order No. 26,358 specifically instructs the GMSG to meet "at least monthly to meet at least monthly for the next two years to satisfy the guidance and directives contained herein." During these two years the utilities, including PSNH, will have every opportunity to identify and raise the process issues they believe must be resolved. Should the GMSC be inadequately responsive to such concerns, nothing would prevent one or more utilities from seeking redress from the Commission itself.

C. The Reliability Red Herring

The Commission should reject PSNH's arguments to the effect that the GSMG process will increase the risk of service outages. PSNH is concerned that new reliability-related planning priorities and needs will emerge once a particular LCIRP has completed the GMSC process. No part of the GSMG process relieves a utility of its obligation to provide safe, reliable, affordable service in exchange for its regulated monopoly and profit opportunity. Should PSNH or another utility determine it must meet this obligation in a manner not contemplated by the LCIRP, nothing about the GMSC process prohibits the investment. As with any other investment, the burden of proof with respect to the prudence of any such investment remains with the utility, to be met in a future rate case.

PSNH claims that it should not suffer the GSMG process because, historically, there has been a lack of investment by the Company in New Hampshire. *See* PSNH Motion at 19 (noting that PSNH "is already operating the system at a higher risk of loss with a corresponding impact on loss of load (customers)") (citing testimony on file in DE 19-157, the pending PSNH rate case). If so, the Commission should be extremely concerned; the Commission rightly expects that PSNH has been making, and will continue to make, the investments needed to provide safe, reliable service in New Hampshire. Moreover, available data (see graph, *infra*) indicates that PSNH reliability has met or out-performed the average investor-owned utility in four of the most recent five years. This undermines the claim that a need to catch up, in terms of reliability-related investments, means PSNH should not be required to participate in the GMSC process.



Similar logic applies to PSNH's argument about so-called "emergent" needs. Nothing about the GSMG process adopted by the Commission precludes PSNH from

making such investments on an emergent basis, replacing equipment that has failed or has been damaged by weather or accident. It is ludicrous to suppose the GSMG would scrutinize, or the Commission would ultimately reject, cost recovery for grid investments to accommodate approved, permitted, and securely funded property development projects of whatever kind. This herring glows crimson.

D. Record Support for an Independent Professional Engineer

PSNH complains that the Commission authorized the retention of a so-called Independent Professional Engineer (to advise the GMSG) without "providing or citing any evidence" that such a step is "necessary or advisable." PSNH Motion at 23; *see* Order No. 26,358 at 59-60. PSNH is well aware – indeed, it concedes at footnote 13 on pages 23 and 24 of its Motion – that OCA consultants Paul Alvarez and Dennis Stephens introduced this concept into the investigation via the written testimony they filed on September 6, 2019 (Tab 89). In that footnote, PSNH complains that Messrs. Alvarez and Stevens failed to identify any other jurisdictions that have taken such a step, do not explain the scope of the responsibilities of such an professional, and do not describe how an Independent Professional Engineer "resulted in any positive outcomes as measured by any commissions or utilities." *Id.*

In other words, PSNH did not like, nor did it agree with, the OCA testimony. But the Commission was entitled to conclude otherwise. *See, e.g., Appeal of Northern Pass Transmission, LLC*, 172 N.H. 385, 416 (2019) (sustaining administrative determinations "supported by competent evidence in the record").

Messrs. Alvarez and Stephens advised the Commission that an Independent Professional Engineer should be someone with "electric distribution grid planning and operations experience" so as to provide stakeholders lacking technical expertise (i.e., here, the non-utility members of the GMSG) "an unbiased evaluator of technical issues as they arise in distribution planning." Alvarez/Stephens Testimony at 56-57. Without such assistance, the risk is too great that non-engineer members of the GMSG will not be able to critique the distribution system planning decisions of a utility that is led by an engineer and employs an army of them. The Commission implicitly agreed, as was permissible under New Hampshire law.

E. Miscellany

Most of the remainder of PSNH's contentions have either been fairly covered by the previous discussion and/or reduce to an expression of utility impatience given that, admittedly, Order No. 26,358 leaves some questions unresolved. The Office of the Consumer Advocate stands prepared to work with other stakeholders to launch the GMSG, to determine how it will conduct its work, and to create a culture of collaboration that is suitably respectful of utility expertise and utility legal responsibility.

In that regard, the OCA was disappointed by the implicit threat in the PSNH motion to eschew "investments beyond those absolutely essential to meet explicit mandates or requirements" should the reforms described in Order No. 26,358 move forward. PSNH Motion at 30. Regrettably, it appears necessary for the Commission to admonish PSNH that what the Company is required to do as the

holder of a monopoly electric distribution franchise, covering a vast swath the Granite State, is not just that which is absolutely essential to meet explicit mandates or requirements but rather that which is necessary to "furnish such service and facilities as shall be reasonably safe and adequate and *in all other respects just* and reasonable." RSA 374:1 (emphasis added).

VII. Motion to Strike Unitil Pleading

One small but significant matter remains to be addressed. RSA 541:3 provides in relevant part that "[w]ithin 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing." On June 26, 2020, well after the requisite 30 days had elapsed, Unitil filed a pleading, notable for its brevity, offering a simple and unelaborated "statement of support" for the PSNH rehearing motion.

The OCA and City respectfully move that the Commission strike this pleading because it is untimely. Ordinarily, the OCA and City do not favor uncompromising adherence to deadlines in Commission pleadings; we have forgiven such transgressions in others (including the Commission Staff) and occasionally even committed such a breach ourselves – but, in every instance, the delay in question was neither statutory nor consequential.

This missed deadline is both. The Commission cannot waive the 30-day deadline in RSA 541:3. Pursuant to RSA 541:4, a party may not appeal any determination of the Commission without having first asserted every ground it intends to pursue on appeal via an RSA 541:3 rehearing motion. The Commission should therefore strike the Unitil pleading and thereby make clear that Unitil has lost any opportunity to challenge Order No. 26,358 before the New Hampshire Supreme Court.

VIII. Conclusion

It took nearly five long years, countless meetings of working groups and informal assemblages, and protracted rumination within the agency, all occurring against the backdrop of a Least Cost Integrated Resource Planning process that was clearly inadequate to meet the challenges of the evolving electricity grid, for the Commission to take the bold and decisive steps described in the Guidance on Utility Distribution System Planning And Order Requiring Continued Investigation, Order No. 26,358. The result is calculated to secure, at long last, the benefits of new technologies and industry restructuring for all customers, including the residential customers whose interests are represented by the Office of the Consumer Advocate.

Therefore, perhaps inevitably, Public Service Company of New Hampshire is unhappy with what the Commission decided. PSNH is entitled to its antediluvian view of how to run an electric distribution company. But what the Company cannot do is what it seeks to do here – to complain about the rules of a game after playing and losing, boiling up a cauldron of fanciful arguments along the way that are the

rhetorical equivalent of overcooked pasta, and hurling them against the wall of RSA 541:3 to see if anything sticks. The PSNH motion for rehearing must be denied.

WHEREFORE, the Office of the Consumer Advocate and City of Lebanon respectfully request that this honorable Commission:

A. Strike the June 26, 2020 "statement of support" filed in this docket by Unitil Energy Systems, Inc.,

B. Deny the Motion of Public Service Company of New Hampshire for Reconsideration and/or Clarification of Order No. 26,358, and

C. Grant any other such relief as it deems appropriate.

Sincerely,

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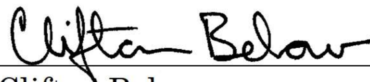

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June 29, 2020

Certificate of Service

I hereby certify that a copy of this Objection was provided via electronic mail to the individuals included on the Commission's service list for this docket.

D. Maurice Kreis