STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Northern Utilities, Inc. d/b/a Unitil

2019-2024 Least Cost Integrated Resource Plan

Docket No. DG 19-126

Motion for Rehearing or Clarification

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to this docket, and moves pursuant to RSA 541:3 for rehearing of Order No. 26,664, entered by the Commission in this docket on August 8, 2022. In the alternative, the OCA moves for clarification of order No. 26,664. In support of these requests, the OCA states as follows:

I. Introduction

The Commission commenced this proceeding more than three years ago, in July of 2019, to consider a Least Cost Integrated Resource Plan ("LCIRP") filed pursuant to RSA 378:38 by Northern Utilities, Inc. d/b/a Unitil ("Unitil"), a gas utility serving portions of the seacoast region. The Commission approved the Unitil LCIRP via Order No. 26,382 (July 23, 2020) along with a Settlement Agreement entered into among the parties to the docket – the subject utility, the OCA, and what was then the Commission Staff and is now the Department of Energy ("Department"). In the settlement, the Department and the OCA essentially agreed

not to contest anything about the Unitil LCIRP (as submitted in revised form on February 24, 2020) in exchange for a commitment by Unitil to participate in a working group whose purpose would be "to discuss potential approaches and recommendations regarding the assessment of environmental, economic, and health-related impacts in future LCIRPs" as required by the LCIRP statute, sections 37 through 40 of RSA 378. Order No. 26,382 at 4.

All of the settlement signatories kept faith with their commitments and, accordingly, Unitil filed the working group's report in this docket on March 31, 2022 (tab 47). Thereafter, on August 8, the Commission issued the order that is the subject of this motion, declaring that it was modifying the working group's recommendations and providing "guidance on the contents of future Least Cost Integrated Resource Plans." Order No. 26,664 at 1. The Commission had no authority to issue such a decision and the interpretations of the LCIRP statute provided in the Order are erroneous. Thus, for the reasons explained below, there is good cause for rehearing pursuant to RSA 541:3.

II. Lack of Subject Matter Jurisdiction

"The 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 Co. of New Hampshire*, 122 N.H. 1062, 1066 (1982) (citation omitted). In New Hampshire, this or any other administrative agency "cannot confer jurisdiction upon itself." *Appeal of Brown*, 171 N.H. 468, 473 (2018); see also *In re Campaign for Ratepayers' Rights*, 162 N.H. 245, 250 (2011) (noting, as

to the PUC, that "a tribunal that exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation") (citation and internal quotation marks omitted); and *Appeal of Concord Natural Gas Corp.*, 121 N.H. 685, 690 (1981) ("[a]n administrative agency must act within its delegated powers") (citation omitted). In Order No. 26,664, the Commission has contravened this bedrock principle of New Hampshire administrative law.

This transgression is apparent from the very first sentence of the Order, which states that the Commission via its decision "modifies the Working Group recommendations [and] gives guidance on the contents of future Least Cost Integrated Resource Plans." Order No. 26,664 at 1; see also *id.* at 11 ("[w]e consider whether the Working Group recommendations are consistent with RSA 378:37-40" and "whether those recommendations will enhance our review of Northern's next LCIRP"); *id.* at 13 ("we find that many of these recommendations lack appropriate focus on the need to reduce gas supply costs and distribution system costs"); *id.* at 13-14 ("we do not expect the LCIRP process . . . to explor[e] additional ratepayer funding sources for [energy efficiency initiatives]:' *id.* at 14 ("a natural gas utility should remain focused on providing natural gas at the lowest possible cost"); *id.* at 14 (an analysis of the emissions caused by Northern's customers' combustion of the natural gas they receive is a broad inquiry beyond the purpose of the LCIRP"). The Commission has no authority to "modify" the Working Group's recommendations along these or any other lines.

The Commission's authority in this proceeding is as stated in RSA 378:39: "The commission shall review integrated least-cost resource plans in order to evaluate the consistency of each utility's plan with this subdivision," i.e., the LCIRP statute codified as sections 37 through 40 of RSA 378. Therefore, the Commission completed its statutorily assigned task in this docket on July 23, 2020, when the agency issued Order No. 26,382 approving the LCIRP tendered by the utility in this docket along with the accompanying settlement agreement.

Certain tasks completed by the Commission in this docket since July 23, 2020 are reasonable because they involve authority that *is* fairly implied by the LCIRP statute. For example, Order No. 26,510 (August 20, 2021) extended the deadline for completion of the Working Group report, the timely submission of which was a key term of the settlement approved in Order No. 26,382. Another example is the determination in the instant order that the deadline for Northern to file its next LCIRP is March 31, 2023. See Order No. 26,664 at 18. With the assent of the Department and the OCA, Northern requested the deadline extension, invoking the language in RSA 378:38-a explicitly authorizing the agency to waive for good cause any of the LCIRP filing requirements in RSA 378:38. Letter of Senior Counsel Matthew Fossum to the Commission dated July 20, 2022 (tab 49).

In contrast, no statute explicitly or implicitly authorizes the Commission to review, to reject, or to modify recommendations of the sort tendered by the Working Group on March 31, 2022. The working group's recommendations are, first and foremost, suggestions to the utility itself and to the Department and the OCA about

how a responsible gas utility should conduct least-cost integrated resource planning. Although the cover letter accompanying the report states that "[t]he Working Group requests that the Commission accept this report and, as might be needed, approve its recommendations for inclusion in Northern's next LCIRP," see Letter of Senior Counsel Matthew Fossum dated March 31, 2022 accompanying the Working Group Report, that group, as such, is not a party to this or any other proceeding and has no legal authority to request anything. More to the point, a cover letter to the Commission cannot confer subject matter jurisdiction on the PUC – only a statute can do that.

III. Disregard of Due Process and Fairness

Even assuming *arguendo* that the Commission had the authority to "modify" the recommendations of the Northern Utilities LCIRP Working group, doing so in this manner is a stark violation of due process and fundamental fairness. The Commission failed to give notice that it would use Docket No. DE 19-126 to make sweeping and binding determinations of how it will interpret the LCIRP statute henceforth, both as to natural gas utilities in particular and all utilities subject to the statute in general. Had the Commission provided such notice, it is a near certainty that every utility subject to the LCIRP statute would have appeared and participated vigorously. This is the reason that the relevant provision of the Administrative Procedure Act, RSA 541-A:31, III, requires this and every other administrative agency conducting adjudications in New Hampshire provide at the outset of the proceeding "a short and plain statement of the issues involved" so that,

pursuant to paragraph IV of the statute, "all parties" have an opportunity "to respond and present evidence and argument on all issues involved."

As reflected in the Commission's Order of Notice entered on August 2, 2019 (tab 4), the *only* issue noticed for determination in this docket concerned the adequacy of the LCIRP that was ultimately approved by the Commission on July 23, 2020. Due process in the context of administrative adjudication is a flexible concept in New Hampshire, but "[at] its most basic level, the requirement . . . forbids the government from denying or thwarting claims of statutory entitlement by a procedure that is fundamentally unfair." *Appeal of Mullen*, 169 N.H. 392, 397 (2016) (citation omitted). Order No. 26,664 is a real contender for election to the fundamental unfairness Hall of Fame, by thwarting claims of statutory entitlement that utilities and other parties have to *specific* LCIRPs that meet the approval standards of the LCIRP statute. The "guidance" offered here, *see* Order No. 26,664 at 1, by its plain terms would constrain every proceeding in the future involving every utility LCIRP – indeed, arguably several that are currently pending and at least one that is reached the final hearing stage after five years of pendency. See, e.g, Docket No. DG 17-152 (Liberty Utilities (Energy North Natural Gas Co.) LCIRP proceeding).

IV. Grievous Misconstruction of the LCIRP Statute

Even assuming, *arguendo*, that the Commission has authority to reject the Working Group report and that the Commission would not be transgressing upon the due process rights of essentially every party that litigates regularly before the

agency via its rejection of the Working Group report and the provision of binding "guidance" about the meaning of the LCIRP statute, Order No. 26,664 cannot stand as a matter of substantive law. The Commission has misconstrued the LCIRP statute beyond recognition.

The error is, again, patent in Order No. 26,664 – this time, in the opening section of the Commission's analysis on page 11 of the Order. The Commission boldfaces and emphasizes the phrase "at the lowest reasonable cost" as it occurs in RSA 378:37 and then the agency then states that the Commission is therefore "focused on minimizing the costs of natural gas supply and distribution infrastructure through the LCIRP planning process." In effect, the Commission reduces *every other aspect of the LCIRP statute* – i.e., every other word in the state energy policy as enumerated in RSA 378:37, every plan requirement enumerated in RSA 378:38, and every other relevant consideration as enumerated in RSA 378:39 (e.g., "potential environmental, economic, and health related impacts") to a complete nullity.

This is a violation of nearly every canon of statutory construction endorsed by the New Hampshire Supreme Court as well as authorities beyond the jurisdiction. In New Hampshire, "we"' – i.e., the Court, and every other tribunal tasked with applying and interpreting enactments of the General Court, "give effect to every word of a statute whenever possible" and "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." *St. Onge v. Oberten, LLC*, 174 N.H. 393, 395 (2021) (citations omitted); see also Scalia and

Garner, *Reading Law: The Interpretation of Legal Texts* (2012) ("Scalia & Garner") at 167 ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts"). "The legislature is not presumed to waste words . . . and, whenever possible, every word of a statute should be given effect." *Doe v. Attorney General*, 2022 WL 2839234 (N.H. Supreme Ct., July 21, 2022) at *2 (citation omitted); see also Scalia & Garner at 174 ("If possible, every word and every provision is to be given effect . . . None should be ignored" and "[n]one should needlessly be given an interpretation that cases it to duplicate another provision or to have no consequence") and Eskridge and Nourse, "Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism," 96 N.Y.U. Law Rev. 1718, 1718 (2022) ("textual gerrymandering – suppressing some relevant texts while picking apart others, as well as cherry picking context – has [become] pervasive" because of "the new textualism advanced by Justice Scalia and his heirs").

To the extent that the Commission believes that the primary purpose of the LCIRP statute is to assure that electric and natural gas utilities provide their service to customers at the lowest reasonable costs, it is an unassailable proposition. "But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's

primary objective must be the law." *Rodriquez v. U.S.*, 480 U.S. 522, 525-26 (1987) (emphasis in original, citations omitted).

The LCIRP statute is not, as the commission implies, an instruction to the utilities to pursue low-cost service in singular fashion. The statute is, rather, a requirement that the Commission see to it that the utilities pursue the *New Hampshire Energy Policy* at the lowest reasonable cost, as unmistakably stated in section 37 of the statute. That section requires "providing for the reliability and diversity of energy sources," protecting "the safety and health of the citizens, the physical environment of the state, and the future supplies of resources," attentiveness to "the financial stability of the state's utilities," and – however much the Commission may especially dislike this requirement – "*maximiz[ing]* the use of cost-effective energy efficiency and other demand-side resources." (Emphasis added).

Not only does the gloss on the LCIRP statute offered by Order No. 26,664 reduce the statutory New Hampshire Energy Policy to a near-total nullity – it also communicates an unmistakable intention on the part of a regulator to disregard the explicit and clear statutory directives contained in RSA 378:39. That section requires not a rote evaluation for "lowest reasonable cost" but, rather, consideration of "potential environmental, economic, and health related impacts of each proposed option," i.e., each element of the capital deployment and operational plans described in a utility LCIRP. This section even contains a tie-breaker provision, should the record reflect that options have "equivalent financial costs, equivalent reliability,

and equivalent environmental, economic and health related impacts," in which case the top priority is "[e]nergy efficiency and other demand side management resources" followed by "[r]enewable energy sources" and, only then, everything else. These requirements cannot be squared with the Commission's singular focus, as stated in the Order, on "the need to reduce gas supply costs and distribution system costs." Order No. 26,664 at 13. To be blunt, "least cost" does not inevitably mean "reduce costs," however much the Commission (or even the OCA) might wish it to be so.

V. The Commission *Must* Reconsider its Persistent Aversion to Ratepayer-Funded Energy Efficiency

For those in our state who are committed to ratepayer-funded energy efficiency because it is the cheapest way to meet the next unit of demand for electricity, natural gas, or any other fuel to the point (for all practical purposes) of infinity, November 12, 2021 is a day which will live in infamy. On that date, the Commission issued Order No. 26,553 in Docket No. DE 20-092. Not only did Order No. 26,553 reject the proposed Triennial Energy Efficiency Plan for 2021-2023. Order No. 26,553 marked the demise of New Hampshire's Energy Efficiency Resource Standard, a previously approved paradigm in which the administrators of ratepayer-funded energy efficiency programs pursued all cost-effective energy efficiency and set energy efficiency charges on electric and natural gas bills accordingly. The Commission announced a phase-out of ratepayer-funded energy efficiency programs over three years so as to "transition toward market-based programs," Order No. 26,553 at 36, supposedly because such a transition reflected

"long held tenets" embraced by previous iterations of the PUC, *id.* at 27 (citing prior PUC orders from 1998, 2000, and 2009 while ignoring every order issued by the PUC on the subject of energy efficiency issued from 2010 through 2020).

The Commission's refusal to grant rehearing of Order No. 26,553 triggered the submission of no fewer than four notices of appeal to the New Hampshire Supreme Court, the first of which came from the OCA. We withdrew our appeal, and we believe the other appellants withdrew theirs, because of what occurred on February 24, 2022. On that date, at a very public ceremony hosted by an energy efficiency contractor in Loudon and attended by a large and bipartisan group of lawmakers and stakeholders, Governor Sununu signed into law Chapter 5 of the 2022 New Hampshire Laws, adopted by the General Court as House Bill 549.

House Bill 549 added to RSA 374-F:3: VI-a – the section of the Electric Industry Restructuring Act covering the System Benefits Charge – provisions that had the unambiguous effect of instructing the PUC to reverse course on its announced transition to market-based energy efficiency programs. *See, e.g.*, RSA 374-F:3, VI-a (d)(1) "The budget for joint energy efficiency planning *shall* be funded through the system benefits charge, [gas utility] local distribution adjustment charges" and other available utility revenues); *id.* at (d)(2) ("the energy efficiency portion of the system benefits charge shall be set at the level for 2020, subject as of January 1, 2023 to an inflation adjustment plus an increase of 0.25 percentage points); *id.* at (d)(4) (requiring benefit-cost approach ridiculed in Order No. 26,553),

and *id.* at (d)(5) (establishing schedule for submission of future triennial energy efficiency plans).

The Commission appears not to have taken this 'hint.' We know this, in part, because of the Order of Notice the Commission issued in Docket No. IR 22-042 on August 10, 2022. The surprising and startling extent to which that Order of Notice appears to resurrect certain determinations from the November 12, 2021 order notwithstanding the General Court's clear directive to change regulatory course will be dealt with elsewhere. Here it suffices to say that what the Commission recently had to say about energy efficiency in this docket cannot be squared with *either* the LCIRP statute or the Commission's 2021 repudiation of the Energy Efficiency Resource Standard.

The Working Group recommended that future LCIRPs "[e]valuate incremental Energy Efficiency as a potential resource alternative and look for opportunities for C&I [i.e., commercial and industrial customer] fuel switching." Order No. 26,664 at 9. The Commission gave this recommendation the back of its hand, ruling: "Energy efficiency is currently subsumed within the Energy Efficiency Resource Plans for both electric and natural gas utilities operating in New Hampshire, with maximum ratepayer funding set legislatively. As a result, we do not expect the LCIRP process to conflict with that policy decision by exploring additional ratepayer funding sources for [energy efficiency]." *Id.* at 13-14 (also inexplicably concluding that exploration of C&I fuel switching is not "within the scope of the LCIRP").

The Commission has blatantly misinterpreted the purpose and effect of House Bill 549. The legislatively imposed cap on energy efficiency charges, used by the utilities to fund their NHSaves programs, has literally the opposite effect on the LCIRP process than the one found by the Commission. Nothing in House Bill 549 changed a word of the LCIRP statute, which still directs the utilities to "*maximize* cost-effective energy efficiency" on route to providing service at the lowest reasonable cost, RSA 378:37, and still requires the Commission to prioritize energy efficiency in the event resource options have equivalent costs and impacts, RSA 378:39. Because the General Court has now imposed an arbitrary limitation on energy efficiency charges and thus ratepayer-funded (as opposed to utility-funded) energy efficiency programs, as opposed to allowing or instructing utilities to pursue all cost-effective energy efficiency (and adjust those charges without putting a dime of utility capital at risk), the possibility that *additional* energy efficiency investment relying on utility capital (what is referred to in the Working Group report as "incremental" energy efficiency) would be least-cost in relation to supply-side options must now receive consideration by both the utilities and the Commission in the LCIRP. To conclude otherwise is to reduce the energy efficiency language in the LCIRP statute to a nullity. That is an impermissible act of statutory construction in New Hampshire and everywhere else. See *State v. Beattie*, 173 N.H. 716, 724-25 (2020) ("whenever possible, every word of a statute should be given effect" and tribunals should "not construe a statute in a way that would render it a virtual nullity") (citations omitted); *Professional Fire Fighters of Wolfeboro, IAFF Local*

3708 v. Town of Wolfeboro, 164 N.H. 18, 22 (2021) (implied repeal of preexisting statute is "disfavored" unless "it is clear that the later act conflicts with the earlier act" or "the later act clearly is intended to occupy the entire field covered by the prior enactment") (citations omitted); Scalia & Garner at 327 ("Repeals by implication are disfavored – very much disfavored" unless the newer statute "flatly contradicts" the earlier one) (citation omitted).

VI. Greenhouse Gas Emissions: Not to be Ignored

Finally, we address the discussion of Working Group recommendation no. 3 at page 14 of Order No. 26,664. The Commission concluded on page 14 that "an analysis of the emissions caused by Northern's customers' combustion of the natural gas they receive is a broad inquiry beyond the purpose of the LCIRP." The Commission acknowledged that "environmental factors" are an "important part of the LCIRP process" but ruled that such considerations "must be grounded in the direct operation of the Northern system in our State and not second or third-order impacts which are beyond the scope of the LCIRP."

Unlike the Lorax conjured by Dr. Seuss, the Office of the Consumer Advocate does not purport to "speak for the trees;" environmentalism is not part of our mission. Our task, upon which we are laser-focused, is furthering the interests of residential utility customers. Others can parse the extent to which a dismissive reference to "second or third-order impacts" in the face of climate change is an ill-advised or even impermissible abdication of the Commission's responsibility to

regulate for the public good. Our concern about this language from Order No. 26,664 is that it cannot be squared with the plain language of the LCIRP statute.

The New Hampshire Energy Policy enumerated in RSA 378:37 directs utilities and the Commission to pursue electric and natural gas service at the lowest reasonable cost while *inter alia* "protect[ing] the physical environment of the state" as well as "the safety and health of its citizens." RSA 378:38:VI explicitly requires utilities to include in their LCIRPs an "assessment of the plan's long--and short-term environmental . . . impact *on the state*." (Emphasis added.) RA 378:39 explicitly requires the Commission to consider the "environmental, economic, and health related impacts" of "each proposed option" for investment or programmatic prioritization. This amounts to *three separate directives* to bring environmental concerns to bear on the LCIRP process and *in not a single one of them* did the General Court limit the scope of that inquiry in the manner adopted by the Commission in Order No. 26,664.

By no means does the OCA unequivocally contend that the environmental impacts of continued use of gas (or anything else gas utilities might supply via their distribution networks) should be outcome-determinative. To the contrary, the letter and spirit of the LCIRP statute is to the effect that these considerations deserve to be explored *in the context of other potentially competing imperatives*. In other words, the Commission cannot simply rule these impacts out of bounds for LCIRP purposes without transgressing all of the principles of statutory construction that have been laid out in detail *supra*. If the Commission truly believes that only the

"direct operation" of a natural gas utility's system is germane to the environmental impacts analysis in an LCIRP, the agency should ask the General Court to amend the LCIRP statute accordingly.

VII. Clarification is the Way Out Here

It is, of course, always useful for parties to PUC proceedings and the public generally to have the benefit of insight into the way regulators approach their statutory obligations and the manner in which they intend to exercise their considerable policy discretion. One might well read Order No. 26,664 as an effort by the Commission to be helpful in that regard as utilities work on future LCIRPs and stakeholders (including the OCA) engage with the utilities along the way. In this instance, the degree of helpfulness is attenuated by the fact that Order No. 26,664 bears the signature of only one of the PUC's three official members (i.e., regulators not designated as a "special commissioner" to allow for a quorum in the face of disqualifications).

The OCA therefore respectfully suggests that the Commission clarify Order No. 26,664 to the effect that none of the determinations reflected therein are binding. To the extent that Order No. 26,664 is deemed to be merely advisory in nature, the concerns articulated in this motion do not by any means disappear. But they can thereby be deferred to a future LCIRP proceeding, involving this or potentially other utilities, where their consideration would be based on a full and fairly developed record after notice to all concerned that such consequential policy issues are under review.

VIII. Conclusion

For the reasons stated above, the Commission should reconsider Order No. 26,664 and either withdraw it or modify it accordingly.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Clarify Order No. 26,664 to the effect that the legal analysis and policy determinations reflected therein are purely advisory in nature and are without prejudice to their being raised in future proceedings, or, in the alternative,

B. Grant rehearing pursuant to RSA 541:3 and reverse the errors of law described by the Office of the Consumer Advocate via this pleading.

Sincerely,

Donald M. Kreis
Consumer Advocate
Office of the Consumer Advocate
21 South Fruit Street, Suite 18
Concord, NH 03301
(603) 271-1174
donald.m.kreis@oca.nh.gov

August 17, 2022

Certificate of Service

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

Donald M. Kreis