

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

DOCKET NO. DE 20-002

Unitil Energy Systems, Inc.

2020 Least Cost Integrated Resource Plan

MOTION FOR REHEARING

NOW COMES Unitil Energy Systems, Inc. (“Unitil” or the “Company”) and, pursuant to N.H. Admin. Rule Puc 203.07 and 203.33 and RSA 541:3, respectfully moves the New Hampshire Public Utilities Commission (the “Commission”) to grant rehearing of Order No. 26,666 (the “Order”) issued on August 15, 2022 in the above-captioned docket pertaining to Unitil’s 2020 Least Cost Integrated Resource Plan (“LCIRP”).

In support of this Motion, Unitil states as follows:

I. BACKGROUND AND INTRODUCTION

1. On April 3, 2020, Unitil submitted its 2020 LCIRP pursuant to RSA 378:38. As explained in the LCIRP, Unitil (through its affiliate Unitil Service Corp.) performs ongoing planning activities to assess the short term and long term requirements and capabilities of its electric distribution system. DE 20-002 Hearing Exhibit 1 at 4. Such activities include distribution system planning to evaluate primary distribution circuits and substations, electric system planning to evaluate Unitil subtransmission facilities and system supply points, joint system planning to evaluate the external delivery system which provides Unitil access to regional transmission and generation resources, and participation in statewide and regional transmission planning efforts. Id. at 5-6. The Company’s planning efforts also include the review of non-wires alternative projects to alleviate system constraints, as well as a review of the impacts of existing

and proposed distributed energy resources on the system. Id. at 6.

2. Unitil's distribution system planning process, the objective of which is to provide safe, economical, and reliable service at a reasonable cost to the Company's customers, consists of radial circuit analysis planning on the Company's distribution circuits. Id. at 12, 13.

Distribution system planning is conducted annually and covers a five year time frame. The distribution system planning process evaluates distribution substations and distribution circuits based upon a five year load forecast to identify individual equipment loading and voltage performance concerns, and propose specific system modification recommendations. Id. at 13.

The process also updates the master plan for the development of a robust and efficient distribution system to accommodate long-term system upgrades and expansions throughout and beyond the study years. Id. Recommendations based on safety, system adequacy, reliability and economy among available alternatives are included as Appendices L and M to the LCIRP. Id. at 15, 417-427, 457-462.

3. The Company's subtransmission system consists of 34.5 kV lines which serve distribution substations. Id. at 8. Subtransmission planning, the main objective of which is to provide safe, economical, and reliable service of the subtransmission system at a reasonable cost, is conducted on an annual basis and covers a ten year time frame. Id. The Company's study process examines a ten year forecast of system conditions to identify when individual equipment loading and voltage performance concerns will occur, and propose specific system modifications to meet Unitil's system planning guidelines. Id. Specific project recommendations resulting from the subtransmission planning process were included as Appendices F and G to the Company's LCIRP. Id. at 12, 106, 239.

4. Until and the Staff of the Public Utilities Commission¹ filed a comprehensive Settlement Agreement concerning Until's 2020 LCIRP on January 15, 2021. See Hearing Exhibit 6. The Settlement Agreement stipulated that the Company's LCIRP is consistent with the provisions of RSA 378:38, and included certain commitments by the Company relative to its planning criteria, the purchase of power monitoring equipment, the estimation of utilization rates for a new Market Basket development project, and the consideration of non-wire solutions in the Company's planning analysis. *Id.* at 3-4. The Company also agreed to submit its annual planning study in the first quarter of each year. *Id.* at 4. The Office of the Consumer Advocate did not join in the Settlement Agreement. The Commission held a hearing on the Settlement Agreement on January 22, 2021.

II. LEGAL STANDARD

5. Pursuant to RSA 541:3, the Commission may grant reconsideration or rehearing when a party states good reason for such relief. *Public Service Company of New Hampshire*, Order No. 25,361 (May 11, 2012) at 4. "The Commission may grant rehearing or reconsideration for 'good reason' if the moving party shows that an order is unlawful or unreasonable." *Liberty Utilities (EnergyNorth Natural Gas) Corp.*, Order No. 26,087 at 3-4 (Dec. 18, 2017) (citations omitted). "A successful motion must establish 'good reason' by showing that there are matters that the Commission 'overlooked or mistakenly conceived in the original decision,' or by presenting new evidence that was 'unavailable prior to the issuance of the underlying decision.'" *Id.* "A successful motion for rehearing must do more than merely restate prior arguments and ask for a different outcome." *Id.*

¹ Effective July 1, 2021, the Staff of the New Hampshire Public Utilities Commission became, in significant part, employees of the New Hampshire Department of Energy.

III. ARGUMENT

a. NH RSA 378:37 Must Be Read In Its Entirety

6. Throughout the Order, the Commission appears to have elevated concerns about direct costs above all other factors in the LCIRP analysis, effectively devaluing or eliminating consideration of other relevant factors. For example, the Commission cites to RSA 378:37 as the statute guiding its evaluation of electric utility LCIRPs, specifically highlighting the “lowest reasonable cost” standard. The Commission thereafter declares it “is focused on minimizing costs through the LCIRP planning process.” Order at 6; see also Order at 11 (stating the “core purpose of an LCIRP” is “to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost.”).

7. The minimum direct cost is not always the “lowest reasonable cost” and by conflating the two, the Commission has read out of the law certain requirements that are specifically, and explicitly, required to be reviewed. As the New Hampshire Supreme Court has often stated:

The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect. We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover, we do not consider words and phrases in isolation, but rather within the context of the statute as a whole. This enables us to better discern the legislature’s intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme.

State v. Beattie, 173 N.H. 716, 720 (2020) (internal citations and quotations omitted).

8. The LCIRP law requires that environmental, health, safety, and economic impacts (not only direct costs) be assessed and considered by both the utility and the Commission. The Commission’s near exclusive focus on direct cost does not effectuate the overall purpose of the law, and hampers the pursuit of the purpose sought by the statutory scheme. This is particularly

evident with regard to the guidance set forth in the Order because the Legislature has specifically defined that policy in RSA 378:37, where it states:

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 (emphasis added); *see also* RSA 378:39 (requiring that the Commission consider “potential environmental, economic, and health-related impacts of each proposed option” and providing an order of energy priorities “[w]here the commission determines the options have equivalent financial costs, equivalent reliability, and equivalent environmental, economic, and health-related impacts.”). The legislature recognized that cost cannot be the exclusive focus of energy resource planning but, rather, one of several factors that must be considered in balance with each other. Notably, reliability and diversity of energy sources cannot, under the plain language of the statute, be compromised by an out-of-balance focus on minimizing cost.

9. In that newly created requirements set forth in the Order, which are discussed in greater detail below, are premised on a reading of RSA 378:37 that elevates cost considerations above considerations of equivalent importance, most notably reliability, rehearing is proper.

b. The Conversion of the LCIRP Process Into a Capital Planning Process is Inconsistent with the LCIRP Statute and Due Process

i. The Order Imposes Substantive New Obligations and Transforms the LCIRP Process Into a Commission-Directed Capital Planning Process

10. The Commission states, as a general matter, that it is “concerned by the large growth in utilities’ rate bases, despite little change in the number of customers served,” and notes “trends of increasing investment in distribution system facilities.” Order at 6; *see also* Order at

11 (“The recent trend of the rapid growth of utility rate bases is a concern.”). Based on these observations, which appear to be general in nature and not specific to Unitil, the Commission “intend[s] to examine utility capital expenditures more closely as part of the LCIRP process.” *Id.*² This statement of intent appears to be applicable to all utilities, not just Unitil, and thus implicates the rights of entities that are not parties to this docket. The Order further indicates that the Commission, on a going forward basis, “will hold Unitil to the capital plans developed through the LCIRPs” and “consider how [the Company’s] capital investments align with its approved LCIRP” in future rate cases. *Id.* at 11.

11. To effectuate its intent to transform the LCIRP process into a capital planning review process, the Commission imposes, without having provided prior notice or given the Company an opportunity to present evidence and argument at a hearing, numerous substantive new requirements³ for future LCIRPs, including:

- Two capital planning “views’ for the coming ten years⁴ including (1) a “functional view” showing “planned investments in maintenance, system improvements . . . , system expansion, and any other major category the company believes would be useful to the Commission,” and (2) a “project view” including “descriptions of any planned projects costing \$250,000 or more and aggregated project listings by asset type for smaller investments.” Order at 13.

² The Commission provides a Unitil-specific illustrative table that selectively references information derived from the evidentiary records in other dockets and certain public filings. Order at 7. The Commission’s conclusions and mandates in the Order are not based on a fully developed record in Docket No. DE 20-002. Moreover, the table contains a mathematical error: the change in operating revenue from 2010 to 2020, using the numbers provided in the table, is 37.1%, not 56.7%.

³ Though the Commission frames these requirements as “Guidance of Future LCIRPs,” they are plainly intended as new obligations to which the Company must adhere.

⁴ The Company does not prepare a distribution system capital plan extending for ten years. See Hearing Exhibit 1 at 13 (explaining that the Company’s distribution planning process covers a five year time frame). It is not clear to Unitil how to construct a reasonable capital plan extending for a ten year period that would accurately account for changes in labor costs, material costs, inflation, technological advancements, customer needs or other factors. Had the Commission properly noticed this issue in Docket No. DE 20-002, the Company would have had the opportunity to present evidence demonstrating its practices and abilities, industry best practices, the relative prudence and usefulness (or lack thereof) of attempting to project out a ten year capital plan, the strain on resources that such a task would create, and other material information that the Commission should have considered prior to imposing major new substantive obligations upon the Company.

- Summaries that include a “capital planning time horizon looking out 10 years and history for the previous five years.”
- Capital plans that “resemble those reviewed by executive management . . . which include clear justifications for each major capital addition (costing in excess of \$250,000) and retirement as well as for aggregated smaller investments by category.” Order at 11.⁵
- A “list of proposed projects and the associated capital investments for the 10-year planning horizon, a 10-year capital forecast, and a discussion of the reasons for the investments, updated annually.” Order at 11.

Consistent with its previously articulated concern regarding “trends of increasing investment in distribution system facilities,” the Commission notes that it is “particularly interested in areas where capital investments are not driven by customers added or incremental kWh served.” Order at 11. The Commission does not explain how it determined the necessity of these newly imposed obligations, which are likely to require a significant allocation and expenditure of Company resources, nor does it provide any analysis demonstrating that meeting such obligations is required to demonstrate adequacy under the LCIRP statute.

12. Building on Until’s agreement in settlement to file its annual planning study in Docket No. DE 20-002 by the end of the first quarter of each year, Hearing Exhibit 6 at 4, the Commission also imposes substantive new annual reporting obligations, including:

- Planned distribution capital investments over a 10-year planning horizon,⁶ as well as a summary of the prior five years’ capital investments; Order at 14
- Annual capital investment summaries including the status of major investments and a “discussion of the functional and project view as compared with Unutil’s prior approved LCIRP plan.” Id.
- Annual reporting on small, customer owned behind-the-meter distributed generation and larger interconnected distributed generation.

⁵ The Commission also requires that “all necessary supporting documents” be provided “in the format used for [the Company’s] internal process” and “represent the same documentation and format that Unutil’s Board of Directors, and / or relevant subcommittees review.” Id. at 13. The Commission provides no rationale for requiring that information be provided in such a manner, nor does it explain how compliance with the LCIRP statute would necessitate such a requirement.

⁶ As noted above, Company’s distribution system planning process does not cover a ten-year time frame. Hearing Exhibit 1 at 13.

As with the LCIRP requirements described in the preceding paragraph, the Commission has imposed these substantive new annual reporting obligations without having provided notice or a hearing. As noted above, these new obligations are likely to require a significant allocation and expenditure of Company resources. The Order does not set forth any justification for these new substantive annual reporting obligations, and provides no analysis or explanation demonstrating that the Commission has the authority under the LCIRP statute to impose such annual reporting requirements after approving the Company's LCIRP.

13. The Order also establishes, without notice or hearing, new requirements and restrictions in connection with any evaluation of environmental or economic impacts that the Company may need to conduct pursuant to RSA 378:39. The Commission's directives are prescriptive and stray beyond what is required under the statute. For example, when assessing emissions or environmental impacts, the Company is limited to relying on "peer reviewed scientific articles and other public or governmental information." Order at 12. The Commission does not explain, by way of reference to the record or any legal authority, why it selected such resources, how they would relate to the Company's operations, or why the Company must be limited to using them. With respect to economic impacts, the Commission requires that Unitil "estimate the direct jobs attributable to its distribution system in New Hampshire over the last 20 years, and the economic impact of those jobs." *Id.*⁷ The Commission does not explain the relevance of or the rationale behind the prescribed backward-looking analysis. The LCIRP is inherently forward-looking, and it is not clear to Unitil what value a study encompassing the past 20 years, during which time energy markets and the Company's operations have continually

⁷ The LCIRP statute does not require that the Company add "direct jobs," and it is unclear why the required historical analysis is relevant to the Commission's review of the Company's forward-looking LCIRP.

evolved, would have on developing or evaluating Unitil's plan. Moreover, the Commission prohibits the Company from applying "complex economic models or economic studies" to conduct the analysis, and instead limits the Company to using "US Department of Labor or other governmental data and publications . . . whenever possible." Id. It is not clear to Unitil how to conduct the analysis the Commission has described; indeed, it may be ineffective or even impossible. Had this issue been properly noticed, the Company could have been heard on the feasibility and practicality of conducting the economic analysis as envisioned by the Commission.

ii. The Commission's Concerns Regarding Utility Investment are Based on a Flawed Premise

14. The Commission's concern regarding the "rapid growth of utility rate base" is based on a flawed premise. The Order, and other orders raising similar concerns, *see e.g., Northern Utilities, Inc.*, Order No. 26,650 (July 20, 2022), appear to presume that there is, or should be, a direct, perhaps one-to-one, relationship between the change in utility rate base and the change in customer numbers, and that because the Commission has not observed such a direct relationship, reviews of capital planning must change. Contrary to the concern expressed by the Commission, there is no such correlation, nor should one be expected. Irrespective of the number of customers or the amount of load added to Unitil's system, the Company's equipment and facilities would continue to age and require maintenance and replacement to assure the delivery of safe and reliable service. See, e.g., DG 21-104, Tr. at 54-58 (explaining why capital investment and customer growth are not correlated). Investments in the utility system will result in increases to rate base without any relation to the number of customers served. See DE 21-030 Record Requests 1-3 and 1-6 and Attachments (March 14, 2022) (explaining project priority and demonstrating that the Company's capital investments for the years 2022 – 2025 are expected to

exceed 80%). Though the Commission may reasonably be concerned with avoiding imprudent and unnecessary investment that improperly raises costs to customers, it is incorrect to conclude that growth in customer numbers or load, or lack thereof, bears a direct, causal relation to growth in rate base.

iii. The Commission Did Not Provide Adequate Notice of its Intent to Impose New Substantive Obligations and Change the LCIRP and Capital Planning Process.

15. The Order improperly interjects the Commission into the Company's capital planning process without adequate notice, and in contravention to the LCIRP statute. 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. Thus, while public utilities are subject to regulation, that regulation has limits, and utility companies retain the right and obligation to plan, build, and operate their systems in the regular conduct of their business. The Commission has, with the Order, inserted itself into the Company's capital planning process without notice and without legal justification.

16. "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). "A fundamental

requirement of the constitutional right to be heard is notice of the impending action that affords the party an opportunity to protect the interest through the presentation of objections and evidence.” *Appeal of Concord Steam Corp.*, 130 N.H. 422, 427-28 (1988); *see also In re School Administrative Unit #44*, 162 NH 79, 87 (2011) ([T]he 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.”). “While due process in administrative proceedings is a flexible standard, [the New Hampshire Supreme Court] long has recognized that the PUC has important quasi-judicial duties, and we therefore require the PUC’s ‘meticulous compliance’ with the constitutional mandate where the agency acts in its adjudicative capacity, implicating private rights.” *Id.* at 428.

17. The Commission provided no notice that it would be interpreting and applying the LCIRP law to disrupt the utility’s rights and obligations to plan and construct its system and impose new substantive obligations upon Unitil (and, presumably, other utility companies operating in the State). The Commission has thus fallen short of the meticulous compliance to due process requirements required by the Court.

18. Pursuant to RSA Chapter 541-A, New Hampshire’s Administrative Procedure Act, notice in an adjudicative proceeding must include, *inter alia*, “[a] short and plain statement of the issues involved,” such that “all parties” shall be afforded “[o]ppportunity . . . to respond and present evidence and argument on all issues involved.” RSA 541-A:31, III(d), IV. The Order of Notice in this Docket, issued April 22, 2020, the Commission stated that the Company’s filing raised “issues related to whether Unitil’s planning process is adequate, in light of the requirements set forth in RSA 378:38 and RSA 378:39, as amended; and whether Unitil’s filing

adequately addresses the Commission’s requirements set forth in Order No. 26,098.”⁸ DE 20-002 Order of Notice at 1 (April 22, 2020) (emphasis added). The Order of Notice did not: indicate the “concern” regarding utility rate bases articulated by the Commission in the Order; state that the Commission intended to make new and binding determinations as to how it will interpret the LCIRP statute going forward; indicate that the Commission intended to use the LCIRP process to examine utility capital planning and expenditures on a going forward basis, and impose substantial new obligations upon the Company to effectuate that intent; or state its intention to “hold” Unitil, and presumably other utilities, to LCIRP capital plans in future rate cases. The Commission did not expand upon the noticed scope of the Docket in the Prehearing Conference held on May 14, 2020.

19. The Commission did not, in the Order, find that the Company’s planning process was inadequate under the LCIRP statute. Quite the opposite; the Commission approved the Settlement Agreement among Unitil and the Commission Staff that expressly states “Unitil’s LCIRP filing is consistent with the provisions of RSA 378:38.” Order at 16; Hearing Exhibit 6 at 3. Moreover, the Commission did not conclude in the Order that the Company failed to adequately address the Commission’s requirements set forth in Order No. 26,098. What the Commission did do, however, was go beyond the noticed scope of the Docket to announce its concerns regarding utility investment in distribution system facilities, its intent to use the LCIRP process going forward to examine utility capital expenditures, and substantive new LCIRP obligations and annual reporting obligations to effectuate the Commission’s intent.

20. Without adequate notice or hearing on these new issues and determinations, the

⁸ “We direct Unitil to address all of the statutory elements of RSA 378:38 in its next LCIRP in sufficient detail and with supporting analysis, so that reviewing parties may evaluate the plan against the relevant statutory standards. In addition to cost comparisons of the various alternatives considered, we will require more detailed evidence of reliability, environmental, economic, and health related impacts.” DE 16-463, Order No. 26,098 at 8 (Jan. 9, 2018).

Company was deprived of the opportunity to present evidence and argument on them to the Commission. With notice and a hearing, the Company could have provided testimony, documentation, and argument regarding, *inter alia*, the legality or appropriateness of transforming the LCIRP process in the manner prescribed by the Order, the ability of the Company to satisfy the obligations imposed by the Order, the usefulness of the obligations and information now required by the Commission, and the inefficiencies and unfairness inherent in perpetually subjecting the Company's capital planning to ongoing Commission review. For these reasons, and others set forth in this motion, rehearing is appropriate.

21. The Order indicates that the Commission, on a going forward basis, “will hold Unitil to the capital plans developed through the LCIRPs” and “consider how [the Company’s] capital investments align with its approved LCIRP” in future rate cases. Order at 11. The Commission further states that it “will expect sufficient notice and justification for any material deviations from those plans.” *Id.* To the extent that the Commission is suggesting that capital investments that depart from information provided in the LCIRP process will be presumptively deemed imprudent or subject to disallowance, such a process would invert the traditional and well-established regulatory paradigm in which the Company is entrusted to make prudent investments and thereafter demonstrate the prudence of such investments in a rate case. Arbitrarily “holding” the Company (or any other utility) to forward-looking capital plans will, as noted above, put at risk the Company’s ability to nimbly act in the interests of its customers,⁹ and likely raise the prospect of an unconstitutional deprivation of the Company’s right to earn a reasonable return on its investments. Just as the Commission’s approval of an LCIRP “shall not

⁹ The Company also notes that in the last two and a half years New Hampshire and the world has been substantially affected by volatile energy prices coupled with significant and widely-reported disruptions to labor markets and supply chains. It is unclear whether, or how, the Commission would account for such issues if it intends to “hold” companies to their prior plans.

be deemed a pre-approval of any actions taken or proposed by the utility in implementing the plan,” RSA 378:39, the LCIRP process should not be used to preclude critical capital projects solely for cost concerns, nor should an approved LCIRP be treated as an inflexible plan from which the Company cannot depart without risking a penalty.

22. Further to the issue of the “notice and justification” requirement imposed by the Commission, and beyond the concerns regarding Commission’s role in the Company’s planning processes, the Order invites a series of procedural and process questions that are unanswered in the Order or elsewhere:

- What criteria or timeframe will determine when a deviation is material such that it must be filed with the Commission, and what level of detail is required?¹⁰
- Assuming a notice and justification is filed, does the Commission intend to rule upon the notice and justification, and if so by what standards will it evaluate the deviations identified and determine whether, in its judgment, the deviations are material or justified?
- What is the timeframe for the Commission to act on the notice since the utility will not proceed with an investment in the face of an unknown risk of the Commission rejecting the justification?
- What is the effect of the Commission accepting or rejecting a justification? If a justification is accepted, does that function as a “pre-approval” for some or all of an investment?¹¹
- Will any Commission action on a deviation for a pending project occur in a contested proceeding with all of the rights and obligations that attach to such a proceeding, and subject to the timing requirements of such a proceeding?
- If the Commission does not intend to act upon the information in the notice and justification until the time of a rate case, is there some other interim purpose to be served by the notice?

¹⁰ The Order only requires “sufficient” notice, but does not define sufficiency.

¹¹ Until notes that the LCIRP law explicitly provides that approving a utility’s LCIRP filing does not act as pre-approval for any proposal within that plan. RSA 378:39. Accordingly, it is not clear what purpose a Commission ruling on any particular project or deviation would serve.

23. Unitil notes that the requirement to continually identify projects and justify adjustments to them is beset by the same risks to utility management identified by Eversource in its June 22, 2020 Motion for Reconsideration in Docket No. IR 15-296, where the Commission similarly sought to remake utility planning processes. In ruling upon the substantive challenges to the Commission’s decision in that proceeding, the Commission ultimately stated that its determinations were “guidance” and that it would “instruct the utilities and stakeholders in all pending and future LCIRP dockets of the goals and expectations for those dockets.” *Electric Distribution Utilities*, IR 15-296, Order No. 26,575 at 5-6 (February 3, 2022). The Commission stated that in those future LCIRP dockets “utilities and stakeholders will have the due process afforded in all Commission adjudications.” *Id.* at 6. According to the Commission, the “data presented and process for stakeholder involvement in those utility-specific LCIRP adjudications will be subject to evidence and argument by utilities and all other parties.” *Id.* Rather than abide by these intentions to assure due process in LCIRP proceedings to “test and refine” its guidance, however, the Commission has simply imposed new oversight and obligations on the Company without notice in this proceeding

24. As the Commission did not provide notice or an opportunity for Unitil to be heard on this new paradigm under which the Commission will “hold” the Company to LCIRP capital plans in future rate cases, and require “sufficient notice and justification for any material deviations from those plans,” rehearing is appropriate.

25. As noted above, the Order states, as a matter of general applicability, that the Commission “intend[s] to examine utility capital expenditures more closely as part of the LCIRP process.” Order at 6. When an administrative agency is implementing requirements of general applicability, those requirements are “rules” as the term is defined in the Administrative

Procedures Act (“APA”). *See* RSA 541-A:1, XV (defining “rule” as “each regulation, standard, form as defined in paragraph VII-a, or other *statement of general applicability adopted by an agency to (a) implement, interpret, or make specific a statute enforced or administered by such agency or (b) prescribe or interpret an agency policy, procedure or practice requirement binding on persons outside the agency*, whether members of the general public or personnel in other agencies.”) (emphasis added). In that the Commission has established the same new filing and reporting requirements on at least two of the utilities it regulates, and that it has indicated its general intent to impose those requirements more broadly, the Commission is not merely issuing orders affecting individual persons or entities, it is implementing rules. The APA requires that specific processes and procedures be followed for implementing rules, including notice to all potentially affected parties. *See, e.g.*, RSA 541-A:3, :3-a, :6, :9. The Commission has not provided such notice here. As pointed out by the OCA in its Motion for Rehearing or Clarification in Docket No. DG 19-126 (in which the Commission similarly broadened its interpretation of the LCIRP statute and imposed substantive new requirements upon Northern Utilities, Inc.):

The Commission failed to give notice that it would use [Docket No. DG 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.

DG 19-126, OCA Motion for Rehearing at 5 (August 17, 2022). The OCA’s argument is equally applicable in this case. The Commission’s lack of notice and failure to follow the required protocols imperils its directives in the Order. Accordingly, for this reason and others set forth in this motion, rehearing is proper.

iv. The New LCIRP Requirements and Annual Reporting Requirements are Not Consistent with the LCIRP Statute

26. Even assuming, *arguendo*, that the Commission provided adequate notice of, and a hearing on, the matters described above, the new direction for the LCIRP process announced by the Commission, and the associated new obligations imposed by the Order, are not consistent with the LCIRP statute. Rehearing is therefore appropriate.

27. In the Order, the Commission does not establish any direct nexus between the new substantive capital planning requirements that it imposes upon Unitil and the LCIRP statute, or any other law for that matter. The Commission appears to want to review all aspects of the Company's capital planning due to concerns related to "trends of increasing investment in distribution system facilities." Order at 6, 13 (noting that the Commission intends to review, among other things, investments in maintenance, system improvements such as meters and customer information systems, and system expansion). The policy underlying the LCIRP law, however, relates specifically to the energy needs of a utility's customers and planning to meet those energy needs. RSA 378:37. To that end, the RSA 378:38 requires, among other components, a forecast of future demand for the utility's service area and an "assessment" of distribution and transmission requirements.

28. Consistent with the directives in RSA 378:38, the Company conducts a distribution planning process guided by the following objectives:

The main objective of Unitil's distribution planning process is to provide safe, economical, and reliable service to our customers. System enhancements are planned with consideration for normal and reasonably foreseeable contingency situations, load levels, and generation in order to optimize existing distribution system capacity and optimize capital expenditures all while maintaining acceptable standards of service. The capability and reliability of the system is analyzed each year to identify planned investments required for the electric system.

Hearing Exhibit 1 at 13. The LCIRP filed by the Company, which has been found in multiple successive LCIRP processes to be adequate,¹² is consistent with these objectives and the requirements of RSA 378:38.

29. RSA 378:37 is a statement of policy; it does not prescribe any specific legal requirement or mandate, nor does it grant to the Commission any specific authority. RSA 378:38 sets the required components of an LCIRP, including an “assessment of distribution and transmission requirements.” RSA 378:39 directs the Commission to review LCIRPs for consistency with the law, and sets forth certain factors that the Commission must consider when doing so. Nothing in these statutes, individually or in combination with each other, invites or empowers the Commission to broadly utilize the LCIRP process to examine all utility capital expenditures on historical, ongoing, and prospective bases.

30. As noted above, RSA 378:38 requires that a utility provide an “assessment” of transmission and distribution requirements in conjunction with a demand forecast. The statute does not require that the Company submit to any of the substantial new obligations imposed by the Commission, including: two capital planning “views’ for the coming ten years including a “functional view” and a “project view”; summaries that include a “capital planning time horizon looking out 10 years and history for the previous five years”; capital plans that “resemble those reviewed by executive management” which include “clear justifications” for major capital additions and retirements and aggregated smaller investments; or a “list of proposed projects and the associated capital investments for the 10-year planning horizon, a 10-year capital forecast, and a discussion of the reasons for the investments, updated annually.” The Order does not

¹² See DE 16-463, Order No. 26,098; DE 13-195, Order No. 25,651; see also IR 15-296, Order No. 26,358 at 22-23 (May 22, 2020) (finding that Unital’s 2016 LCIRP and associated appendices “is the minimum template and substance for what utilities should provide in future LCIRPs.”).

provide any justification in the LCIRP statute for imposing these requirements, which extend beyond the requirements and purpose of the statute.

31. Similarly, there is nothing in RSA 378:38 requiring that a utility provide annual reporting after an LCIRP has been approved. Though the Company agreed by Settlement to file its annual planning study, the Commission has gone far beyond that settlement provision and mandated significant, and in some cases onerous, impractical, or potentially impossible,¹³ new annual reporting requirements. Order at 14-15. Effectively, the Commission has required that the Company file a new LCIRP on an annual basis. Nothing in the LCIRP statute requires, or even allows for, such substantive annual reporting requirements after an LCIRP has been approved.

32. Further, the LCIRP statute cannot be read, either expressly or by implication, to establish the LCIRP process as one in which forward-looking capital investment plans are developed for all aspects of a Company's business, and thereafter used as benchmarks against which utilities are to be "held" in future rate cases. Utilities must be able to conduct and their businesses without undue interference by governmental entities or third parties. Certainly, the Company's investments will be subject to the well-established standard of prudence when the Company seeks return of and on its investment. However, in this instance, the Commission seeks to improperly insert itself into the management process without a clearly established legal justification.

33. The Order suggests that holding utilities to capital plans developed in the LCIRP process, and requiring "sufficient notice and justification for any material deviation from those plans" is consistent with RSA 378:40.¹⁴ Order at 11. Nothing in the plain language of this statute

¹³ The Commission has required distribution system investments over a ten year period, which the Company does not do.

¹⁴ "No rate change shall be approved or ordered with respect to any utility that does not have on file with the commission a plan that has been filed and approved in accordance with the provisions of RSA 378:38 and RSA

states or suggests that approved LCIRPs are intended to be treated as presumptive capital investment plans that utilities are to be “held” to and from which they cannot “materially deviate” without notice to the Commission. The Commission’s conclusion is further belied by the plain language in the statute permitting the Commission to approve a rate change as long as a plan is filed and pending before the Commission.

34. The Commission’s determination to utilize the LCIRP process to subject utility capital investment, particularly distribution system capital investment, to ongoing scrutiny strays beyond the LCIRP statute, as do the many new substantive obligations imposed by the Commission in the Order. Rehearing is therefore appropriate.

c. The Requirement of a Project-By-Project Evaluation Is Not Consistent With the LCIRP Statute

35. The Commission reads RSA 378:39 to require a “review of specific investment options in a capital investment plan as opposed to a more limited review of planning criteria.” Order at 12. Further, the Commission “agree[d] with the OCA’s argument at hearing that the statute requires a project-by-project evaluation and not just a discussion of the planning process.” Order at 12. Though not cited by the Commission, the OCA’s argument on this issue may generally be found in the Transcript of the January 22, 2021 hearing at pages 34-44. The OCA also raised substantively the same issue at the May 14, 2020 prehearing conference.

36. As Unutil pointed out at hearing, the Company’s LCIRP does include an assessment of specific projects, the considerations made in selecting these projects, and the justification for the projects. DE 20-002, Tr. at 58-59 (Jan. 22, 2021). For example, the Company’s LCIRP includes a 2020-2024 Distribution Planning Study that sets forth detailed

378:39. However, nothing contained in this subdivision shall prevent the commission from approving a change, otherwise permitted by statute or agreement, where the utility has made the required plan filing in compliance with RSA 378:38 and the process of review is proceeding in the ordinary course but has not been completed.”

recommendations for system improvement projects, including estimated costs and evaluations of alternatives. Hearing Exhibit 1 at 417-423, 457-460. The Company notes that these evaluations are incorporated as components of a much larger, substantive and informative Plan, with Appendices, that is almost 600 pages in length. Regardless of whether the LCIRP statute can be read to mandate a “project-by-project evaluation,” the Company has provided such an evaluation and its LCIRP is compliant with the LCIRP statute.

37. Notwithstanding the substance of the Company’s LCIRP, the Commission’s interpretation of the LCIRP statute, as described in the Order, is inconsistent with the plain language of the statute itself. RSA 378:38 requires a utility to submit a plan that includes “assessments” of, among other things, demand side energy management “programs,” supply options, and distribution and transmission “requirements.” The components enumerated in RSA 378:38 do not contemplate an evaluation of each individual project or investment.

38. The Commission is tasked with reviewing LCIRPs in order to evaluate the consistency of each utility’s plan (as opposed to individual projects or investments) with the LCIRP statute. RSA 378:39. While RSA 378:39 does indicate that the Commission will consider potential environmental, economic, and health-related impacts of each proposed “option.” RSA 378:38 requires only an assessment of one category of “options” – supply options. RSA 378:38. Contrary to the finding of the Commission, RSA 378:38 and :39 cannot be read in conjunction with each other to require a “project by project” review of all planned capital investments. The plain language of the statute simply does not support this interpretation, and rehearing is therefore appropriate.

39. Furthermore, if the Commission’s requirement of a “project by project” review is to be taken in connection with the Commission’s intended expansion of the LCIRP process to

review all aspects of the Company's capital investments on a going forward basis, providing a "project by project" review will almost certainly prove to be an impossible task. As discussed at length above, this expansion by the Commission has been directed without notice or hearing by the Commission, and the Company has had no meaningful opportunity to present evidence or argument on the feasibility or usefulness of the review now required by the Commission. Again, for this reason, rehearing is proper.

IV. CONCLUSION

40. In view of the above, Unitil contends that it has shown good cause for rehearing of the Order. Given this good cause for rehearing, Unitil requests that the Commission reconsider and rescind the numerous substantive new obligations imposed upon the Company by the Order. Alternatively, Unitil requests that the Commission declare that its pronouncements in the Order are advisory or informational and not binding on Unitil for purposes of preparing its next LCIRP.

41. In the longer-term it is apparent that there may be a need for further discussion and evaluation of the requirements of an LCIRP filing, not only to guide Unitil in its planning process but to guide all utilities subject to the law. Unitil would, of course, fully and meaningfully participate in such discussions and would seek to find a common understanding for the requirements of the LCIRP, including through statutory amendments as may be appropriate. For now, however, Unitil proposes that the Commission grant rehearing as specified above.

WHEREFORE, Unitil respectfully requests that the Commission:

- A. Grant rehearing as described above; and
- B. Grant such additional relief as is just and appropriate.

Dated this 14th day of September, 2022.

Respectfully submitted,

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By Its Attorney,



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CERTIFICATE OF SERVICE

I certify that I have caused copies of the above to be served on the service list in Docket No. DE 20-002.

Dated: September 14, 2022.



Patrick H. Taylor