STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Investigation into Grid Modernization

Docket No. IR 15-296

Motion of the Office of the Consumer Advocate, Acadia Center, Clean Energy New Hampshire, Conservation Law Foundation, City of Lebanon, and Patricia Martin for Rehearing or Clarification of Order No. 26,254

NOW COME the Office of the Consumer Advocate (OCA), Acadia Center, Clean Energy New Hampshire, Conservation Law Foundation, the City of Lebanon, and activist Patricia Martin of Rindge (collectively, "Movants"), and move pursuant to RSA 541:3 and N.H. Code Admin. Rules Puc 203.07 for rehearing and/or clarification of Order No. 26,254, entered in this docket on May 29, 2019 and titled "Order on Procedural Issues for Developing Requirements for Integrated Distribution System Plans" (Procedural Order). The Movants were all members of the Commission's Grid Modernization Working Group and have participated actively in this docket thereafter. In support of this Motion, the Movants state as follows:

I. Introduction and Background

The Commission opened this docket via an Order of Notice dated July 15, 2015, in response to a direct command of the General Court. *See* 2015 N.H. Laws Ch. 219:1 ("Consistent with the goals outlined in the state 10-year energy strategy

prepared by the office of energy and planning in accordance with RSA 4-E:1 . . . [t]he public utilities commission shall open a docket on electric grid modernization on or before August 1, 2015"). It has remained pending through (a) the issuance of Order No. 25,877 (April 1, 2016), announcing the formation of a Grid Modernization Working Group under the aegis of a Commission-hired outside facilitator, (b) ten months of facilitated meetings of the Working Group, (c) the issuance on March 20, 2017 of the Report of the Grid Modernization Working Group (Working Group Report), which included a series of recommended next steps, (d) 23 months of quiescence, followed by the issuance on February 12, 2019 of a 139-page white paper entitled "Staff Recommendation on Grid Modernization" (Staff Report), which *inter alia* did not adopt the next-step recommendations of the Working Group, and (e) a March 25, 2019 technical session, the submission of written stakeholder comments on April 8, 2019, a public comment hearing on April 12, 2019, a second technical session on May 15, 2019, and a subsequent report from Hearing Officer Ross of the Commission Staff describing the results of the technical session. The Movants have participated actively throughout, as have the state's three investor-owned electric utilities and certain other non-utility stakeholders.

Although the Report of the Grid Modernization Working Group memorialized areas of agreement and disagreement among the participants, a consensus recommendation was that "[e]ach utility should periodically develop, file, and gain PUC approval of GMPs [Grid Modernization Plans], with a stakeholder engagement

process." Working Group Report at 9. The Working Group proposed that each utility file an initial GMP in lieu of its next RSA 378:38 Least-Cost Integrated Resource Plan (LCIRP) and that the Commission "should consider" waiving future LCIRP filings "[t]o the extent that the purposes of RSA 378:38 are satisfied by the GMP." Working Group Report at 10. The Staff Report took this recommendation one step further by simply suggesting that the Commission require utilities to file Integrated Distribution Plans ("IDPs") that would both lay out each company's plans for grid modernization and satisfy the requirement of RSA 378:38, a step that would essentially function as a permanent waiver of certain specific LCIRP components. *See* Staff Report at 21-22 ("Combining the LCIRP and Grid Mod into the Integrated Distribution Plan") and RSA 378:38-a (authorizing Commission waiver of "any requirement under RSA 378:38" upon "written request by a utility" if there is "good cause" for such waiver). Although the May 29, 2019 Procedural Order appears to assume that such metamorphosis of the LCIRP process will take place and is permissible under RSA 378, *this fundamental question has never been litigated*.

Consistent with the "next steps" recommendations in the Working Group Report, *see* Working Group Report at 32, the OCA has consistently urged the Commission to open an adjudicative proceeding to consider whether such a transformation of statutorily required least-cost integrated resource planning is lawful and appropriate, along with the related questions of how the contemplated new era of integrated distribution planning should proceed. The Commission has

consistently rejected this suggestion, most recently in the May 29 Procedural Order.

Indeed, this was the central issue addressed in the Procedural Order. The Commission concluded that "the parties [sic] 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 opportunity for hearing' in an 'adjudicative proceeding,' under the Administrative Procedure Act." Procedural Order at 5, quoting RSA 541-A:1, I and III.

The Commission stressed that the purpose of this docket when opened was not adjudication but, rather, to "create an open dialogue on key grid modernization topics, and to reach as much agreement as possible on regulatory opportunities for advancing grid modernization in New Hampshire." *Id.* at 5 (quoting the July 15, 2015 Order of Notice at 2). Although the Commission agreed that "concepts regarding the substantive requirements of utility least cost planning are at issue," the Commission appeared to conclude that the contested case requirements of the Administrative Procedure Act do not apply because "[t]his proceeding is not a review of any particular least cost plan or a determination of what specific capital investments will be placed in utility rate base." *Id.* at 6.

Nevertheless, the rubric adopted in the Procedural Order contemplates that the next phase of the docket will have binding effect. The Commission *ordered* the utilities to file comments on eleven enumerated issues on or before September 6,

2019 (while inviting other stakeholders to do the same) and stated an intention "to resolve as many issues as possible before utilities file their individual IDPs." *Id.* At the same time, the Commission expressed an interest in "using both traditional and non-traditional litigation procedures to develop a record," while holding out the possibility that "additional processes" for resolving "disputed issues" might be adopted after Staff files a report and recommendation on or before October 17, 2019 but (presumably) before any utility files an IDP. *Id.*

Subsequent to issuing the Procedural Order, the Commission has made two determinations that clarify further the extent to which the next phase of the grid modernization investigation will transform the LCIRP process and thus will involve binding determinations that affect the interests of ratepayers, utility shareholders, and other stakeholders. In Order No. 26,261 (Docket No. DE 16-097) and Order No. 26,262 (Docket No. DE 15-248), both issued on June 14, 2019, the Commission granted the requests, respectively, of Liberty Utilities and Public Service Company of New Hampshire d/b/a Eversource Energy for good-cause waivers under RSA 378:38-a of the otherwise applicable requirement for each company to file an LCIRP this summer. In each order, the Commission cited the pendency of this proceeding as the basis of the good cause determination. *See* Order No. 26,261 at 5 and Order No. 26,262 at 5. Thus the Commission implicitly assumed that a new, different and presumably better LCIRP rubric is about to come into existence even though, as already noted *supra*, neither the suitability of such a transformation nor its consistency with applicable law have yet been litigated.

II. The Commission Must Commence Adjudicative Proceedings Now

The approach adopted by the Commission in the Procedural Order is fatally inconsistent with the Administrative Procedure Act ("APA"). The APA allows an agency to commence an adjudicative proceeding "at any time with respect to a matter within the agency's jurisdiction," RSA 541-A:32, II, but it requires adjudication "if a matter has reached a stage at which it is considered a contested case," *id.* at I.[1] "Contested case" is defined in the APA as "a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing." RSA 541-A:1, IV.

By statute, each electric and natural gas utility in New Hampshire must file an LCIRP with the Commission "within 2 years of the commission's final order regarding the utility's prior plan, and in all cases within 5 years of the filing date of the prior plan." RSA 378:38 (also prescribing the contents of LCIRPs – a forecast of future demand and six separate "assessment[s]" of various options and strategies). The Commission must conduct an adjudicative proceeding "in order to evaluate the consistency of each utility's plan" with the requirements of the LCIRP statute. RSA 378:39.

[1] RSA 541-A:31, I also requires an agency to commence an adjudicative proceeding "if the matter is one for which a provision of law requires a hearing only upon the request of a party, upon the request of a party." This is not such a situation.

In the Procedural Order, the Commission concluded nevertheless that this proceeding need not be an adjudicative one because it is "not a review of any particular least cost plan or a determination of what specific capital investments will be placed in utility rate base." Order No. 26,254 at 6. But the Procedural Order *requires* the utilities to file "proposals" for addressing specific LCIRP issues that will, in turn, drive in significant respects the next round of utility-specific LCIRP proceedings.

In these circumstances, if parties to the ensuing utility-specific LCIRP proceedings await those adjudicative cases to raise key issues, it will be too late. By then, the Commission may well have decided, for example, on a cost-effectiveness method that places millions if not billions of dollars of new capital investments into rate base upon application of a rubric that unfairly favors shareholders over ratepayers, allows utilities to recover certain costs for the first time via a 'tracker' mechanism that is likely to shift business risk from shareholders to ratepayers, significantly constrains the extent to which customers (and innovative third-party service providers) have access to their usage data, unreasonably limits the extent to which the utilities must assess and publicize their hosting capacity so that third party providers of key consumer services may meaningfully offer those services into the marketplace, and, perhaps most critically, adopts a different and less ratepayer-favorable standard for deeming certain investments – arbitrarily designated as "grid modernization" investments – to be least cost within the meaning of the LCIRP statute.

As the OCA pointed out in its April 8, 2019 letter in this docket, the Staff Report "encourages (1) capital spending in preparation for far-off risks, (2) distinguishing between 'modern' and 'business as usual' investment despite no real need to do so, and (3) using a highly questionable 'least cost/best fit' approach to evaluate grid modernization investments." OCA Letter of April 8, 2019 at 7. There is the very real possibility that "investor needs for earnings-per-share growth" will be "prioritized over customer's needs for just and reasonable rates." *Id.* at 7-8. Conversely, there is a dire need for reforms to the LCIRP process so that stakeholders "play a role in determining *how* projects are evaluated" for inclusion in the utilities' capital plans, as well as the process of setting overall capital budgets. *Id.* at 9 (emphasis in original). These substantive views may or may not ultimately prevail, but the point here is that in confronting these questions the Commission will be determining "the legal rights, duties, or privileges" of parties within the meaning of the APA. These parties include the utilities themselves, third-party service providers, nonprofit organizations whose missions are implicated by the LCIRP statute, a municipality striving to provide sustainable and affordable energy systems to itself and its residents, and, of course, the captive customers of the utilities who depend on the utilities for the provision of critical services.

In *Appeal of the Office of the Consumer Advocate*, 148 N.H. 134 (2002), the New Hampshire Supreme Court rejected the OCA's contention that the APA required the Commission to conduct a hearing before amending a previously approved RSA 378:18 special contract between a utility and a large commercial

customer. The Court made two rulings that are germane to the present controversy. First, with respect to RSA 378:18 (which authorizes utilities to depart, with Commission approval, from their "schedules of general application" when "special circumstances" render such a departure "consistent with the public interest"), "nothing in the plain language of the statute require[d] the PUC determine 'special circumstances' after a hearing," and thus RSA 378:18 did not itself render the dispute an APA "contested case." *Appeal of OCA*, 148 N.H. at 137. Second, the Court rejected the OCA's argument that the Due Process requirements of the U.S. and New Hampshire constitutions separately provided a basis for concluding that the "rights, duties, or privileges" of residential utility customers were at issue such that the APA required the case to be treated as contested. *Id.* at 138-39.

The instant situation is distinguishable on both counts.

As already noted, unlike RSA 378:18, RSA 378:39 explicitly requires adjudication. The Commission cannot circumvent the Legislature's explicit command, that the adequacy of LCIRPs be assessed in an adjudicative context, by allowing the utilities to propose fundamental changes to LCIRP contents on a joint basis and then rule on such proposals as a generic matter without formal adjudication. The principle here is that *everything* about the way in which utilities plan their capital investments should be subject to the rigor and accountability that formal adjudication provides. Undermining that principle here, in the manner apparently contemplated by the Commission, would deviate from the judicial

command to "apply statutes in light of the legislature's intent in enacting them and in light of the policy sought to be advanced by the entire statutory scheme." *Bedford School District v. State*, 171 N.H. 246, 250 (2018) (citations omitted).

Likewise, the due process implications of the instant situation are not comparable to those discussed in *Appeal of OCA*. While utility customers do not have a "vested property interest" sufficient to trigger due process protections in the very narrow context of a special contract proceeding, *Appeal of OCA*, 148 N.H. at 139 (citations omitted), the scope of what is being determined here is an order of magnitude more consequential than one special contract or even one set of general rate schedules.[2] The Commission can and should conclude that customers *do* have a vested property interest in the outcome here. The same conclusion is appropriate as to nonprofit organizations (whose missions include the achievement of environmental and other public policy objectives that are either impeded or advanced by the Commission's grid modernization directives) and municipalities

[2] Special contracts – i.e., deviations from a utility's Commission-approved rates and terms of service of general application – are permissible when "special circumstances" render such a departure "consistent with the public interest. RSA 378:18. The situation in *Appeal of OCA* was the classic, pre-restructuring special contract scenario in which a vertically integrated electric utility agreed to discount its regular rates in an effort to increase load and thus promote economic development while spreading fixed costs over a wider customer base. *See Appeal of OCA*, 148 N.H. at 135 (summarizing underlying facts). In concluding that no vested property interest of other ratepayers was at issue for due process purposes, the Court cited a 1936 decision of the U.S. Supreme Court, three subsequent decisions of federal district courts, a 1998 decision of the Kentucky Supreme Court (involving the inclusion of scrubber costs for coal plants in electric rates), and a 1990 decision of an intermediate appellate court in Pennsylvania, all for the general proposition that "utility customers do not have a vested property interest in the setting of utility rates sufficient to invoke the procedural protections of the Fourteenth Amendment." *Id.* at 139. Notably, however, the New Hampshire Supreme Court stopped short of adopting such a blanket holding itself. Thus, *Appeal of OCA* should be read for the much narrower proposition that when a utility submits a special contract with a customer for Commission approval, the members of the remaining customer base have no property interest in the outcome.

committed to using their corporate authority to advance sustainable energy objectives for themselves and their citizens.

The New Hampshire Supreme Court observed in 1992 that "[n]ot all agency actions that affect legal rights, duties, or privileges are contested cases." *Appeal of Toczko*, 136 N.H. 480, 485 (1992) (noting that "[l]egislative-style rulemaking decisions or declaratory rulings, while affecting legal rights, duties, or privileges, are not required by law to be determined by adjudication"). But what the Commission is purporting to do here is none of the above – i.e., neither an adjudication, a rulemaking, nor a declaratory judgment proceeding (which would, in any event, also be an adjudicative proceeding pursuant to N.H. Code Admin. Rules Puc 207.01(d)).

As Unitil recently pointed out in Docket No. DE 18-038,[3] the Commission's procedural rules contemplate only two types of proceedings: adjudications and rulemakings. Unitil Motion for Rehearing and for Implementation of Adjudicatory Procedures (Docket No. DE 18-038, April 8, 2019) at 7-8 (citing N.H. Code Admin. Rules Puc 201.01) ("This chapter shall apply to *all* matters that come before the commission") (emphasis added). As Unitil also noted, although due process in the administrative context is more flexible than it is in civil judicial proceedings, the New Hampshire Supreme Court insists on "meticulous compliance" with due process standards because the agency is acting as a judicial decisionmaker when issuing orders that "affect[]" "private rights." *Id.* at 8, quoting *Appeal of Public*

[3] DE 18-038 is unrelated to the instant proceeding; it concerns Unitil's request for recovery of certain storm-related costs.

Service Co. of N.H., 122 N.H. 1062, 1073-74 (1982). The Commission implicitly agreed with these arguments, having granted the Unitil rehearing motion by secretarial letter in DE 18-038 on May 9, 2019.

Rulemaking is not a permissible technique here for avoiding the strictures of adjudicative decisionmaking. The LCIRP statutes, codified as sections 37 through 40, do not authorize the Commission to promulgate rules of general applicability in connection with least-cost integrated resource planning. It is well-established that the Commission "must act within its delegated powers" and, thus, may only promulgate rules "[w]hen the legislature so authorizes." *Appeal of Concord Natural Gas Corp.* 121 N.H. 685, 689 (1981) (citations omitted). Thus, the only avenue available to the Commission if its intention is to transform least-cost integrated resource planning into integrated distribution planning, and thereby alter the rights and obligations of the users and owners of the distribution grid, is to invoke the contested case procedures of the APA.

III. The Commission Cannot Force Parties to Submit to Alternative Dispute Resolution

In the Procedural Order, the Commission stated that it is "interested in using both traditional and non-traditional litigation procedures to develop a record for our decision-making if those procedures will be effective and efficient for that purpose." Order No. 26,254 at 6. Although the Movants likewise believe that alternative dispute resolution ("ADR") techniques can often be effective and efficient, particularly in complex situations where the very future of the electric grid is at stake, the Commission's expressed interest in applying ADR here runs directly

counter to the explicit commands of the APA. The existence of a "record" developed by the agency is one of the defining characteristics of an adjudicative proceeding, and section 31 of the APA requires the consent of the parties before replacing the formal adjudicative hearing process with anything of an informal nature. *See* RSA 541-A:31, V(c)(5) (authorizing "[c]hanges to standard procedures" but only "by consent of the parties").

Even if the Commission believes that it will eventually have to resort to formal adjudication at a later stage in the proceeding, should some or all issues remain contested after ADR efforts have run their course, a process in which stakeholders are forced to participate in ADR lest their substantive rights be sacrificed is still directly contrary to the APA. As a practical matter, such an approach is fundamentally unfair, with attendant due process implications, to the non-utility parties which have fewer resources than the utilities and thus are likely to lose a war of attrition with entities whose shareholders have every incentive to support maximum efforts.[4]

[4] This dynamic will be familiar to anyone who participated in the proceedings of the Grid Modernization Working Group, when it was not unusual for each utility to show up for meetings with delegations of five or more people whereas other Working Group members lacked resources of that magnitude. In its recent report on regulatory reforms to promote grid modernization, the Rocky Mountain Institute urged utility commissions to "[r]educe resource requirements to enable nonutility participation" by scheduling fewer and shorter meetings, by holding "town hall sessions to allow groups that are not formal parties to the proceeding to comment on issues," and even "financing stakeholders who cannot afford to participate." Dan Cross-Call *et alii*, "Process for Purpose: Reimagining Regulatory Approaches for Power Sector Transformation" (Rocky Mountain Institute, 2019) at 25, available at https://rmi.org/insight/process-for-purpose/. Notably, the Rocky Mountain Institute concluded that "[p]roceedings with a decisional intent need to take place within a docket [i.e., in adjudicative proceedings] for commissions to adopt new rules or approve new programs" and, although informal investigative proceedings are "sometimes preferred" because they "could be more accessible to stakeholders who are less familiar with utility commission dockets," formal proceedings "offer their own advantages, such as *transparency and direction*." *Id.* at 26 (emphasis added).

Finally, the Commission's decisions on June 14 to relieve both Liberty Utilities and Public Service Company of New Hampshire of their obligations to file LCIRPs this summer raise the due process stakes here.[5] Each utility justified its waiver request by telling the Commission it expects to file an Integrated Distribution Plan soon, as contemplated by the Staff Report. *See* Order No. 26,261 at 2 (referencing the value of "eliminating unnecessary work") and Order No. 26,262 at 1-2 (noting that Commission Staff recommended such waivers "in order to enable the utilities to submit the more robust, integrated, and transparent IDPs"). The Commission noted it requires a "compelling demonstration" of good cause when granting a waiver under RSA 378:38-a. *See* Order No. 26,261 at 5 and Order No. 26,262 at 5. If, as is implicit in these orders, impending reforms to the LCIRP process are a compelling demonstration of good cause for waiving currently applicable LCIRP requirements, it is only logical to conclude that decisions with due process implications are being made now, in some respects by implication and between the cracks as informal discussions continue, when New Hampshire law requires adjudication.

[5] The Commission ruled in each of these orders that RSA 378:38-a, which authorizes the Commission to "waive for good cause any requirement under RSA 378:38, upon written request by a utility," permits the agency to waive not just the specific LCIRP content requirements enumerated in section 38 but the filing requirement in its totality. Although the OCA does not intend to seek rehearing of these orders, we note here that the Commission has incorrectly interpreted RSA 378:38-a. As originally enacted in 1997, RSA 378:38-a read: "The commission may waive any requirement to file least cost integrated resource *plans* by an electric utility under RSA 378:38, except for plans relating to transmission and distribution." 1997 N.H. Laws Ch. 298:14 (emphasis added). When section 38-a assumed its present form, via 2014 N.H. Laws Ch. 129:1, the General Court eliminated the reference to waiving requirements to file "plans." The Commission has not given effect to the plain meaning of the deletion of this word from the waiver statute.

IV. In the Alternative, the Commission Should Clarify the Procedural Order

Alternatively, it is possible to read the Procedural Order as imposing no procedural requirements whatsoever on stakeholders but, rather, as merely requesting the participation of those interested in yet another round of informal efforts prior to the institution of adjudicative proceedings that will determine in binding fashion the extent to which the LCIRP process will be adapted to new and emerging realities. *See, e.g.*, Order No. 26,254 at 6 (referencing "stakeholder discussions" to occur at scheduled technical sessions after the filing of utility proposals, followed by a written Staff report and then a Commission determination of "whether and what additional process is necessary for our decision-making"). If this is the Commission's intention, the Movants respectfully request clarification of Order No. 26,254 so that we (and other stakeholders) can make a reasoned determination concerning whether and how to participate in yet more stakeholder discussions.

The Movants strongly urge the Commission not to adopt this approach. As noted, *supra*, it is unfair to those parties who lack the resources of the investor-owned utilities. The Working Group Report left significant issues unresolved and there is no reason to suppose that in the intervening two years and three months the potential for consensus has increased. This is why the members of the Working Group asked (without any dissenting statements) that the Commission commence an adjudicative proceeding – one that would have been held during the second half of 2017 – "to fully adjudicate the non-consensus and other relevant items" prior to

the submission of individual utility grid modernization plans. *See* Working Group Report at 32 (calling for the Commission order following this adjudication to "address subsequent [LCIRP] filing requirements in relation to the grid modernization filings"). It is time for the "transparency and direction" deemed helpful by the Rocky Mountain Institute in quest of power sector transformation. *See* "Process for Purpose," *supra* note 4.

Although the Movants do not believe there is urgent need for prompt Commission action on grid modernization, *see* OCA April 8, 2019 letter at 11 ("Staff seems to perceive [distributed energy resource] accommodation as an approaching emergency," something that "would be an appropriate perspective for Hawaii or California – but not New Hampshire"), we are concerned about administrative efficiency both as it relates to the agency itself and to stakeholders. In these circumstances, formal adjudication is actually more efficient than its alternatives, particularly given that nothing precludes settlement discussions while an adjudication is pending. After four years of working group meetings, research and report drafting, it is time to try something different – in the form of an approach that will yield a well-bounded evidentiary record that can form the basis for the sound exercise of the Commission's statutory authority to order the modernization of the grid.

V. Conclusion

In its Procedural Order, the Commission has characterized the instant proceeding as having been opened to create an "open dialogue on key grid

modernization topics." Order No. 26,254 at 5. There has been four years of such dialogue. Now, according to the Commission, the intent is to use this docket "to develop a workable framework for grid modernization in New Hampshire." *Id.* at 6. As explained *supra*, the only avenue available to the Commission for developing such a framework, in a manner that is both binding and compliant with the least-cost integrated resource planning statute, is adjudication pursuant to RSA 541-A:31. Accordingly, the Commission should grant rehearing of its determination to the contrary in Order No. 26,254 or, in the alternative, the Commission should clarify that it is simply deferring any binding determinations about grid modernization to a future adjudication of generic grid modernization issues.

WHEREFORE, the Office of the Consumer Advocate, Acadia Center, Clean Energy New Hampshire, Conservation Law Foundation, City of Lebanon, and Patricia Martin respectfully request that this honorable Commission:

A. Issue an order granting rehearing or clarification of Order No. 26,254 and

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

Sincerely,

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Certificate of Service

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

D. Maurice Kreis

June 27, 2019