STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Retail Energy Supply Association

Motion for Rehearing of Order No. 26,344

Docket No. DE 20-060

Objection of the Office of the Consumer Advocate to Motion for Rehearing

NOW COMES the Office of the Consumer Advocate ("OCA") and objects to the motion filed on April 24, 2020 by the Retail Energy Supply Association for rehearing of the Commission's Order No. 26,344. In support of this objection, the OCA states as follows:

I. INTRODUCTION

New Hampshire has officially been in a state of emergency, as the result of the COVID-19 pandemic, since March 13, 2020. On that date, Governor Sununu declared the state of emergency via Executive Order 2020-04. Subsequent to this declaration, the Governor has issued a series of additional directives, all in furtherance of his authority under Part II, Article 41 of the New Hampshire Constitution as well as sections 45 and 47 of Chapter 4 of the New Hampshire Revised Statutes Annotated. As the statutorily designated representative of the state's residential utility customers pursuant to RSA 363:28, the Office of the Consumer Advocate ("OCA") was grateful to learn that one of those additional directives, Emergency Order No. 3 issued on March 17, 2020, prohibited the disconnection of essential services, including but not limited to electricity and other services regulated by the Public Utilities Commission, for the duration of the state of emergency.

To our dismay, and in apparent disregard of the widespread suffering and economic dislocation the pandemic has engendered in New Hampshire and elsewhere, on April 24, 2020[1] an out-of-state trade association – the Pennsylvania-based Retail Energy Supply Association, appearing through counsel based in Connecticut – launched an effort to expose thousands of New Hampshire electric and natural gas customers to disconnection at the very time they can least afford such a harsh turn of events. The Retail Energy Supply Association did so not by objecting directly to Governor Sununu's humanitarian use of his executive authority but, rather, by seeking rehearing of Order No. 26,244 as entered by the Commission on March 31, 2020.

Order No. 26,344 has a sole purpose: to confirm that the disconnection moratorium applies to all electric and natural gas customers in New Hampshire, including those who are served by competitive (i.e., non-utility) suppliers of these essential commodities. The Retail Electric Supply Association claims that the Commission erred in Order No. 26,344 by failing to seek and consider "stakeholder input," *see* Motion at 3 and 6, by overlooking "dire financial consequences" to the Association's membership arising of the order, *see id*. at 6, by improperly asserting authority over unregulated firms that are not public utilities, by potentially violating the contracts clauses of the federal and state constitutions, and by potentially violating the takings clauses of the Fifth and Fourteenth Amendments of the U.S. Constitutions.

[1] The Retail Energy Supply Association submitted its motion to the Commission electronically at 8:43 p.m. on April 23, 2020 and, as required by RSA 363:28, the Association served an electronic copy on the OCA at the same time. Although the Commission has waived its requirement for paper filings in light of the state of emergency, see Secretarial Letter of March 17, 2020 captioned "Temporary Change in Filing Requirements," it simply cannot be the law in New Hampshire, even (or especially) in a state of emergency, that a pleading tendered more than four hours after the close of official business can thereby claim it made the filing on that date for purposes of the response deadlines in the Commission's rules or, as here, RSA 541:3. In these circumstances, the Commission can and should deem this filing to have been made on April 24, 2020.

For the reasons that follow, the Commission should spurn this Dickensian request for relief and reject the motion for rehearing submitted by the Retail Energy Supply Association.

II. THE RETAIL ENERGY SUPPLY ASSOCIATION LACKS STANDING

The applicable black-letter law in New Hampshire could not be more clear. RSA 541:3 states**:**

> Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person *directly affected thereby*, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

(Emphasis added.) Although, in this era of corporate personhood, the Retail Energy Supply Association is presumably a "person" within the meaning of RSA 541:3, the Association is not "directly affected" by Order No. 26,344 and therefore lacks standing to pursue rehearing of the Commission's determination.

The litany of alleged harms and consequences recited by the Retail Energy Supply Association obviously do not directly impact the Association itself; the Association is a trade group that does not participate in New Hampshire's electric industry. Although the Association claims that "[s]everal" of its members are licensed as competitive providers of electricity and/or natural gas and are "presently providing energy supply to customers in the State," *see* Motion at 2, none of these suppliers are identified. Significantly, the Association states that the positions it lays out so forcefully in its motion "may not represent the views of any particular member of the Association." *Id*. at 1 n.1.

To establish the requisite standing to pursue rehearing under RSA 541:3 (and ultimately standing to appeal an adverse determination on rehearing), a party must show that it "has suffered or will suffer an injury in fact." *Appeal of New Hampshire Right to Life*, 166 N.H. 308,

314 (2014) (quoting *Appeal of Stonyfield Farm, Inc.*, 159 N.H. 227, 231 (2009); other citations omitted). The injury cannot be "speculative," nor can the injury be a "mere potential harm." *Id*. (citing *Stonyfield Farm*, 159 N.H. at 231-32, other citations omitted).[2]

Given that a party may not pursue rehearing under RSA 541:3 based on speculative or potential harms, the Commission should take particular note of the manner in which the Retail Energy Supply Association has characterized its two constitutional arguments. According to the Association, Order No. 26,244 "could" violate the contracts clauses of the federal and state constitutions, Motion at 10, and "could" constitute a regulatory taking." Motion at 14. This unabashed concession of speculative harms is fatal to the Association's bid for rehearing here. All of the other arguments in the Association's motion have no basis in law and simply reduce to a complaint that the Association dislikes the outcome adopted by the Commission.

"[A]n association has no standing to challenge an administrative agency's action based upon a mere interest in a problem." *Appeal of Richards*, 134 N.H. 148, 156 (1991) (citation and internal quotation marks omitted). Though an association does indeed have standing to "represent its members if they have been injured," *id*., a careful reading of the Association's pleading reveals nothing more than a litany of speculation about potential constitutional harms (depending on how the Commission and/or the state's utilities handle scenarios involving unpaid claims of competitive energy suppliers) buttressed by an elaborate whine to the effect that competitive energy suppliers should be held uniquely harmless in the midst of an economic and

[2] The *Stonyfield Farm* case demonstrates just how inexorably and formidably this standing requirement operates. In that case, three commercial and industrial customers of the state's biggest electric utility challenged an order of the Commission that cleared the way for the utility to make an improvident investment in mercury scrubber technology at the utility's since-divested coal-fired generation plant in Bow. The captive customers of that utility are now paying off more than $400 million in costs associated with that investment. *See* Order No. 25,920 (July 1, 2016) in Docket Nos. DE 11-250 and DE 14-238 (approving settlement agreement providing for such cost recovery). Nevertheless, the New Hampshire Supreme Court in 2009 rejected the claim that as ratepayers, the *Stonyfield Farm* appellants had suffered the requisite direct effects of the Commission's decision. *Stonyfield Farm*, 159 N.H. at 231-32.

social crisis that represents a profound challenge to everyone else, customer and provider alike, that uses or provides energy. Given that the Association apparently cannot even represent that any of its members actually share the views expressed in the Motion, this is a classic example of a rehearing request that should be rejected summarily.

III. THE RETAIL ENERGY SUPPLY ASSOCIATION IS IN THE WRONG FORUM

Even if the Association were able to assert standing under RSA 541:3, the motion lacks merit because a careful review of the Association's pleading reveals that the organization is in the wrong forum. Its grievance, if a cognizable one exists, is actually with the Governor and the terms of his executive orders declaring a state of emergency and exercising his emergency powers.

RSA 4:45, III(e) explicitly authorizes the Governor upon declaring a state of emergency "[t]o perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population." In exercising those responsibilities, he clearly determined that assuring no interruptions in the provision of essential public services was of a very high priority. Emergency Order No. 3,[3] imposing a disconnection moratorium, was issued just four days into the State of Emergency, preceded only by the Governor having addressed the hyper-urgent questions of closing public schools (Emergency Order No. 1) and banning large public gatherings (Emergency Order No. 2).

The text of Emergency Order No. 3 is clear and unambiguous. Emergency Order No. 3 states in relevant part that "*[a]ll* providers of electric, gas, water, telephone, cable, VOIP, internet, and deliverable fuels service in the State of New Hampshire are hereby prohibited from

[3] Emergency Order No. 3 is available at https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-3.pdf.

disconnecting or discontinuing service for non-payment for the duration of the State of Emergency declared in Executive Order 2020-04." Emergency Order No. 3 at ¶ 2 (emphasis added). The Retail Energy Supply Association does not contend that its members fall outside the universe of "providers" subject to Emergency Order No. 3. The Association's complaint is, rather, that the Commission exceeded its authority under Emergency Order No. 3 because the Governor directed the agency to provide "assistance and guidance to the public utilities" with respect to implementing the Order, *id*. at ¶ 4 – not assistance and guidance to competitive energy suppliers. This is sophistry. The Commission's authority in this instance derives from paragraph 5 of the Executive Order, in which the Governor vested the Commission with explicit authority to "enforce" the Governor's emergency directive. *Id*. at ¶ 5.

The essence of the Association's claim is not really a matter of the Commission's fidelity to gubernatorial instructions – and, if that were truly the Association's point it is doubtful it would have standing to pursue what would ultimately be deemed a political and bureaucratic disagreement between the state's chief executive and an executive branch agencies. Rather, the Association now wants the Commission to determine that competitive suppliers of electricity and natural gas do not fall within the "all providers" directive of Emergency Order No. 3.

This the Public Utilities Commission cannot do. The Commission "is a creation of the legislature and as such it 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) (citing *Petition of Boston & Maine R.R*., 82 N.H. 116, 116 (1925)). The Association cites no statutory authority, or anything that can be fairly implied from such authority, that would vest the Commission with the power to interpret, to constrain, to modify, or to countermand an order issued by the Governor pursuant to his RSA 4:45 emergency powers.

Presumably, any recourse would require a petition to be presented to a court of competent jurisdiction.

IV. THE RETAIL ENERGY SUPPLY ASSOCIATION CLAIMS FAIL ON THEIR MERITS

Finally, even if the procedural infirmities could be ignored and the Commission were in a position to consider the merits of the arguments made by the Retail Energy Supply Association in its motion for rehearing, the Commission would still be obliged to deny the requested relief. The Association has manifestly failed to state good reason for rehearing as required by RSA 541:3.

A. Competitive Energy Suppliers are not entitled to special treatment as the state struggles through its State of Emergency.

According to the Association, the Commission erred in deeming Emergency Order No. 3 applicable to competitive energy suppliers because such firms are "incapable of denying customers access to essential services." Motion at 4. The Association contends that in the scenario in which a competitive energy supplier cuts off a retail customer, that customer would simply revert to utility-supplied default energy service. Thus, the Association reasons, "competitive suppliers are unlike every other entity subject to Emergency Order #3." *Id*. at 5. Even assuming this is true, the Association offers no legal principle or doctrine that precludes either the Commission or the Governor from treating competitive energy suppliers as all other suppliers of essential commodities are treated. This argument is devoid of merit.

B. The Commission was not obliged to seek "stakeholder input."

Next the Association complains that the Commission should not have issued Order No. 26,344 "without the benefit of stakeholder input," particularly in light of the "dire financial consequences" that the order "could have" for Association members. Motion at 6. What this

argument lacks in terms of legal authority it makes up for by relying on faulty logic. Notably, the Association does not claim its due process right have been infringed, nor does it argue that the Administrative Procedure Act, the Commission's enabling statutes, or any of the Commission's rules require an outcome other than the one adopted in Order No. 26,344. The Association is simply unhappy with the outcome of the Order, much as every economic actor in New Hampshire is suffering in one way or another from the deeply unwelcome consequences of the pandemic. The OCA does not doubt the legitimacy of the business concerns described in the Association's motion – but the concerns do not rise to the level of "good reason for rehearing" as required by RSA 541:3.

In this section of its pleading, the Retail Energy Supply Association repeatedly draws an unfavorable comparison between the plight of its members and that of regulated utilities, claiming that the latter will inevitably be made whole by recovering unpaid balances from non-paying, un-disconnected customers from the utilities' remaining customers in good standing. *See, e.g*., Motion at 7 ("If customers ultimately are unable to pay the utility charges, the utilities have mechanisms available to recoup those uncollectible amounts from all ratepayers") and 8 ("competitive suppliers do not have a captive rate base from whom they can recover . . . financing costs" incurred because "competitive suppliers *may* have to enter into additional credit facilities") (emphasis added). But the Association simply assumes the regulated utilities would be made whole in such circumstances while competitive suppliers would be consigned to a death spiral. *See id*. at 9 (claiming that Order No. 26,344 "*may* make it impossible for some competitive suppliers to be able to satisfy their financial obligations," and thus competitive

suppliers "*may* no longer be able to serve their customers") (emphasis added). This is pure speculation.[4] The Commission should ignore it.

C. There have been no unconstitutional impairments of contract.

The Retail Energy Supply Association next contends that "application of Emergency Order #3 to competitive suppliers will operate as a substantial and therefore unconstitutional" impairment of supplier contractual relationships by "prohibiting competitive suppliers from exercising contractual rights to transfer customers to default service who do not choose another competitive supplier or impose late fees if payments are not made timely." Motion at 11-12. As noted, *supra*, the main problem with this argument, as made to the Commission, is that the Association's problem, if any, is plainly with the Governor and his Emergency Order rather than with the Commission. But if this scenario were ever analyzed under the relevant Contracts Clause jurisprudence, the claim would fail for the simple reason that neither the Commission nor the Governor have repudiated any contracts between suppliers and customers by forbidding the suppliers to collect sums owed to them for services rendered. The Executive Order specifically states that it does not relieve customers "of their obligation to pay bills for receipt of any service covered by this Order." Emergency Order No. 3 at ¶ 3.

[4] Indeed, the state's largest electric utility recently filed a pleading in its pending rate case, complaining that "the socioeconomic impacts of the current public health emergency are having significant operational and adverse financial impacts" even as the company is "fully committed to meeting the needs of all of its customers during this uncertain time." Public Service Co. of New Hampshire, Objection to AARP Petition Requesting that Eversource Be Ordered to File Supplemental Testimony Regarding Impact of the COVID-19 Crisis and Suspension of Temporary Rate Increase, filed on April 27, 2020 in Docket No. DE 19-057, at 4. *See also id*. at 6 (complaining that "these impacts are currently the subject of inquiry from the financial and investment community," could "increase borrowing costs" and "impact the utility's credit rating," and could "degrade PSNH's ability to procure the materials and supplies necessary to conduct its business"). The Office of the Consumer Advocate cannot muster much sympathy for *any* provider of so essential public service as electricity, regulated or not, given the massive uptick of unemployment and consequent suffering of residential utility customers and small businesses. The point here is that *none* of these firms deserve special treatment or relief from the Governor's directive.

The Association complains of a newly imposed and "entirely different scheme of regulation that will have a drastic effect on the competitive supply market in New Hampshire." Motion at 12. In reality, energy suppliers will simply have to defer the collection of arrearages while the state of emergency is in effect and for up to six months thereafter. *See* Emergency Order No. 3 at ¶ 3. This would barely register on the Contracts Clause radar screen. *See, e.g., Sveen v. United States*, 138 S.Ct. 1815, 1822 (2018) (requiring "substantial" impairment, which turns on "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating [its] rights") (citation omitted); *see also Deere & Co. v. State*, 168 N.H. 460, 471 (2015) (noting that the federal and New Hampshire constitutions provide "equivalent protections" against contractual impairment) (citation omitted).

In other words, the grousing about a new "scheme of regulation" is simply another way of complaining that the pandemic, and the state's laudably proactive response to it, have had disruptive effects that all Granite Staters, and all firms doing business in New Hampshire, must bear. The Retail Energy Supply Association apparently thinks the contracts clauses of the federal and state constitution protects competitive energy suppliers from harms other participants in the New Hampshire economy must suffer in otherwise equal if not more severe measure. No clause in either the federal or state constitutions requires such an unfair result.

D. No unconstitutional regulatory takings have occurred.

The Association's "takings" argument is also unavailing even if it were cognizable in the present circumstances. As the U.S Court of Appeals for the First Circuit has explained, "[t]he Takings Clause of the Fifth Amendment, which applies to the states through the Fourteenth Amendment, prohibits the taking of private property for public use without just compensation."

Franklin Memorial Hospital v. Harvey, 575 F.3d 121, 125 (CA1 2009) (citing *Lingle v. Chevron USA, Inc*., 544 U.S. 528, 536 (2005). As distinguished from physical takings, a "regulatory taking" of the sort the Retail Energy Supply Association is claiming here occurs when "some significant restriction is placed upon an owner's use of his property for which justice and fairness require that compensation be given." *Id*. (citations and internal quotation marks omitted). Regulatory takings jurisprudence is "characterized by essentially ad hoc, factual inquiries." *Id*. (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), other citation omitted).

This is not a situation in which competitive energy suppliers are suffering a permanent, physical invasion of their property, nor is it a matter of regulations that completely deprive such suppliers of all economically beneficial use of their property. These are the two situations that would allow a court to find a per se regulatory taking. *See id.* at 125-26. Thus, as the Association explicitly concedes, the so-called *Penn Central* factors apply: (1) the economic impact of the regulation, (2) the extent to which the regulation interferes with "distinct investment-backed expectations," and (3) "the character of the government action." *Penn Central*, 438 U.S.at 124. The purpose is to halt regulatory actions that are "functionally equivalent" to a physical taking. *Id*. at 124.

Application of any of these factors would be fatal to the Association's takings argument. The explicit provision for repayment of all obligations in arrears attenuates the economic impact of the regulation beyond constitutional significance. Investment-backed expectations go undisturbed in a scenario that allows energy providers to continue to produce, to sell, and to collect payment for their product, particularly when compared to other sectors of the economy

(e.g., retailers, hostelries, restaurants, manufacturers) that have been forced to shut down as non-essential.

Finally, the Associations taking argument founders on the third *Penn Central* factor – i.e., the character of the government action. A program merely "adjusting the benefits and burdens of economic life to promote the common good" is not of a character sufficient to amount to an unconstitutional taking. *Id*. Thus, in *Franklin Memorial Hospital*, the First Circuit found no unconstitutional regulatory taking when Maine adopted a law requiring hospitals "not refuse to treat patients based on their ability to pay and that they provide these services freely to those with incomes at or below 150% of the federal poverty level." *Franklin Memorial Hospital,* 575 F.3d at 129.

If free hospital care to some patients, based on indigence, is of a character insufficient to trigger the constitutional protection against regulatory takings, then surely the alleged taking claimed here can be swiftly dispatched. Each supplier is entitled to collect any arrearage that is incurred during the State of Emergency. The supplier simply loses out on the collection of late payment fees. Meanwhile thousands of companies across the State have been shut down in full with no ability to continue business during the State of Emergency. Any impact from the Governor's decision is not relevant to the Commission's Order and therefore does not need to be reconsidered. No competitive energy supplier is being forced to do business with any customer. No regulatory regime interferes with a competitive supplier's right to collect balances due from non-paying customers at the termination of the State of Emergency so long as such customers are given at least a six-month period to rectify the arrearage. Competitive energy suppliers remain free to confine themselves to doing business with customers they deem sufficiently reliable to pay their bills notwithstanding the stresses imposed by the pandemic.

V. CONCLUSION

The Retail Energy Supply Association has no standing to seek rehearing of the Commission's Order No. 26,344. Even if it could demonstrate standing, the Association's grievance is with the Governor, not the Commission. If the standing problem were surmountable and the Commission were somehow the right forum, the Association's arguments are devoid of merit. This tone-deaf bid for special treatment of competitive energy suppliers in a time of unprecedented economic and social crisis should be swiftly and summarily rejected.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Deny the Motion for Rehearing of Order No. 26,344 submitted by the Retail Energy Supply Association and

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

Sincerely,

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April 28, 2020

Certificate of Service

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

D. Maurice Kreis