STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire d/b/a Eversource Energy

2020 Least Cost Integrated Resource Plan

Docket No. DE 20-161

Reply Brief of the Office of the Consumer Advocate

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to this docket, and offers the following reply brief according to the schedule established by the Commission on April 25, 2023. This reply brief focuses on certain incorrect statements made by the subject utility in its brief ("Eversource Brief") submitted on June 5, 2023. Additionally, this reply brief explains why it is necessary for the Commission to issue a final order in this docket notwithstanding the impending repeal of the statute requiring least-cost integrated resource plans such as the one at issue in this docket.

I. It's the forest, not the trees.

Eversource claims in its brief that the record adduced in this docket "demonstrates that it has met all statutory requirements with respect to its 2020 LCIRP," a reference to the 2020 Least Cost Integrated Resource Plan pending before the Commission in this proceeding pursuant to the LCIRP statute, RSA 378:37 *et seq*. This is incorrect as a matter of fact and law, for the reasons stated in the initial brief of the OCA.

The Eversource Brief focuses on the trees while, as we explained in our initial brief, the LCIRP statute requires the Commission to look at the forest. The Eversource Brief offers a detailed account of the series of filings, made over several years, that according to Eversource collectively comprise its 2020 least-cost integrated resource plan. It maps Eversource's filings against the laundry list of plan contents set forth in RSA 378:38. Such an approach violates the spirit *and the letter* of the statute by ignoring the enactment's central and fundamental purposes – to require utilities to plan in a manner that is both integrated and least-cost from the customer perspective, and to require the Commission to determine whether the utility has accomplished such planning.

At pages 15 and 16 of its brief, Eversource contends that its 2020 LCIRP complies with settlement agreements approved by the Commission in Docket Nos. DE 19-139 and DE 17-136. Assuming *arguendo* that Eversource is correct, the contention is irrelevant. The Commission has a long history of failing to enforce the LCIRP statute according to its terms; the final orders in the two dockets in question are examples of this phenomenon. In essence, the Commission in those two dockets – and proceedings of a similar vintage involving other utilities – treated LCIRP cases as an opportunity to review the adequacy of utility planning *processes* as opposed to utility planning *results*. *See, e.g.*, Order No. 26,362 (2020) in Docket No. DE 19-139 (the immediately preceding Eversource LCIRP docket)[1] at 8 ("A well-crafted LCIRP should allow the Commission the opportunity for input regarding the

[1] The referenced Order is available at https://www.puc.nh.gov/Regulatory/Docketbk/2019/19-139/ORDERS/19-139_2020-06-03_ORDER_26362.PDF.

Comopany's current planning processes, procedures, and criteria described in that LCIRP"), *id.* ("A well-crafted LCIRP also provides a regular snapshot of the factors supporting a utility's investment decisions, which can be helpful in a later rate case"), and *id.* at 9 (finding that the settlement agreement calling for LCIRP approval "prescribes a reasonable approach to the revised planning criteria").

In making this observation, the OCA intends no criticism of the Public Utilities Commission. Indeed, in some instances the OCA could be understood to have acquiesced to this flawed approach. *See, e.g., id.* at 2 (identifying the OCA among the settlement signatories in the previous Eversource LCIRP docket). Both electric distribution utilities and the Commission struggled with how to apply the LCIRP statute, originally adopted in 1990, with the world created by the 1996 Restructuring Act (RSA 374-F), related changes to federal law, and the long, slow, and difficult transition to a paradigm in which electric utilities in New Hampshire were no longer vertically integrated.[2]

Although it may have been easier for a utility to plan its resource deployment at a time when the company (or an affiliate) owned most of the generation resources on which it relied, the fact remains that when the General Court opted for

[2] It also bears keeping in mind that since 2014 the LCIRP statute has also applied to gas utilities. 2014 N.H. Laws, ch. 129:1, amending RSA 378:38. The question of how to apply the LCIRP statute has applied to those utilities as well even though, obviously, the RSA 374-F restructuring did not affect them. Nevertheless, gas utility compliance with the LCIRP statute has proven to be no less vexatious an issue. *See, e.g.*, Order No. 26,382 (2020) in Docket No. DG 19-126 (Northern Utilities LCIRP Docket) at 6 (accepting gas utility's 2019 LCIRP as one that "adequately satisfies the statutory requirements" and adopting recommendation to form a working group to "collaborate on further development of the general guidelines provided for LCIRPs" under the statute); Order No. 26,664 (2022) at 13 (rejecting most of the working group's recommendations as "lack[ing] appropriate focus on the need to reduce gas supply costs and distribution system costs"). These orders are available at https://www.puc.nh.gov/Regulatory/Docketbk/2019/19-126.html.

restructuring and generation asset divestiture the Legislature did not eliminate the requirement to submit least-cost integrated resource plans. The prefiled direct testimony of our witnesses, and their live testimony at hearing, explains why the Legislature made this choice: Even under a paradigm in which an electric distribution utility does not invest in or plan the development of new generation assets, it can and indeed must still take steps to assure that every aspect of the electricity service it delivers to customers are least-cost.

Admittedly, a utility has no control over rates offered by competitive power suppliers or community power aggregation programs. But a utility can certainly take steps that are calculated to insulate customers from the wholesale market realities that drive the prices charged by these non-utility suppliers. And, of course, as to default energy service there is plenty that utilities can do to keep the relevant charges under control. This, presumably, accounts for why the General Court could have but did not repeal the LCIRP statute when it opted for restructuring via enacting RSA 374-F and, in particular, why the Legislature left intact the reference to '[a]n assessment of supply options including . . . market procurements" to the statutory list of mandatory LCIRP elements. RSA 378:38, III. Eversource nevertheless unapologetically dismisses these concerns about the cost of wholesale supply as irrelevant. Nevertheless, the lack of vertical integration does not excuse a lack of planning integration as a matter of New Hampshire law.

Footnote 11 at page 16 of the Eversource Brief takes aim at the OCA's contention that the Commission should require utilities to submit a definitive LCIRP at the beginning of a proceeding such as this one, as opposed to the practice that prevailed in this docket of allowing the utility to continually revise and update the plan so that whatever is truly before the agency for approval is a patchwork of various filings made over the course of several years. According to Eversource, accepting the OCA's position "would undermine the collaborative nature of the regulatory process pursuant to which information is shared and the utilities work to provide clarification to stakeholders including the Department of Energy." Eversource Brief at 16, n. 11.

This contention is flawed in two respects. First, contested cases under the Administrative Procedure Act are not "collaborative." *See* RSA 541-A:31 (specifying parameters of contested adjudicative proceedings). Rather, to state the obvious, this is adjudication, not unlike what occurs in a civil court – an adversarial process in which the relief requested by the petitioner – in this case, approval of a utility's LCIRP – meets the statutory standard. Second, Eversource nowhere explains why the "collaboration" whose virtues the Company extolls here cannot occur *prior* to LCIRP submission, an idea the Company's own key witness enthusiastically embraced at hearing. Tr. of March 7, 2023 hearing (tab 77) at 78 lines 14-20 (Eversource witness Lavelle Freeman testifying that "[t]he Company has acknowledged that the transition of the electric glid is occurring, and the Company

supports a working group to receive stakeholder input in advance of the next LCIRP").

Eversource's only additional engagement with the OCA's position is the utility's complaint that the Office of the Consumer Advocate urges Plan rejection "without engaging with the Company in any discovery and through limited participation in technical sessions." Eversource Brief at 25. According to Eversource, this is both "counterproductive" and "particularly problematic" because "the OCA supports its position (in part) by arguing that it could not discern how the company complained with the relevant statute due to the 'disjointed' presentation of the information." *Id.*, citing Exh. 18 at Bates 32.

The OCA is not on trial here, and neither is the extent or nature of our participation in this docket. The result we advocate is based on an assessment of the record adduced at hearing, and the answer would be the same even if the OCA had not so much as entered an appearance in the docket. While Eversource has correctly quoted our witnesses as having found the Company's LCIRP to be disjointed, these experts' reading comprehension or the level of their engagement with Company officials at technical sessions or otherwise are entirely beside the point.

At hearing, the Eversource witnesses focused on how individual supply-side capital projects are evaluated and, to a significant degree, the process appeared to be a robust one. But at no point did Eversource produce any evidence of a truly integrated planning process, in which all the various options available to the utility

are considered together so that the Commission and ultimately the public can be assured that Eversource is advancing the state's energy policy in a manner that is least-cost overall.

When the OCA's witnesses were on the stand during the second day of hearings, Chairman Goldner asked them whether they, or the OCA generally, had made Eversource aware over the course of the proceeding that its LCIRP was deficient because the Plan lacked any overall assessment of available resource deployment options. *See* tr. 2 at 215, lines 8-13. "Would it be fair to say," the Chairman asked, "that this would be the first time that they have heard that you're concerned about their lack of assessment, or would they have heard about it before?" *Id.* at lines 19-24. Tim Woolf, the OCA's lead witness, conceded that the OCA had not pressed these concerns via the formal discovery process, but added that "they certainly got an earful with our testimony" as filed more than nine months previously in August of last year. *Id.* at 215, lines 14-17 and 216, lines 1-3; *see also id.* at 188, lines 14-21 (similar colloquy between Mr. Woolf and counsel for the Department of Energy). As noted, *infra*, the record does not support an inference that Eversource was somehow blindsided with respect to the key deficiencies in its LCIRP, but even if such a claim could be proven it would be irrelevant.

The LCIRP statute imposes no burdens on the OCA, the Department of Energy, or any party other than the subject utility. *See* N.H. Code Admin. Rules Puc 203.25 ("Unless otherwise specified by law, the party seeking relief through a

petition, application, motion or complaint shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence."). Rather, section 38 of the statute states that each electric and gas utility "shall" file an LCIRP at an appropriate interval, and section 39 of the statute states that the Commission "shall" conduct an adjudicative proceeding to "evaluate the consistency of each utility's plan with this subdivision," i.e., the LCIRP statute as it appears in sections 37 through 40 of RSA 378.

The OCA did nothing improper in this docket; to the contrary, we clearly and consistently maintained – both to the utility and to the Staff of the PUC (which morphed into the regulatory support division of the Department of Energy on July 1, 2023) – that what Eversource was tendering for approval was *not* consistent with the statute. Eversource deems the OCA's conduct during the case to have been "counterproductive," Eversource Brief at 25, and tending to undermine a comfortably "collaborative" process, *id.* at 16 n. 11, in contrast to the Commission being "helpful" by providing feedback from the bench to the same very same effect, *id.* at 2. We disagree with these criticisms of our office's conduct and ask the Commission to ignore them as distractions.

II. This case is not moot.

As this docket approaches its conclusion after nearly three long years, it is impossible to ignore the reality that the Governor is poised to sign H.B. 218 into law and thereby effectuate the repeal of the LCIRP statute sixty days later. This does

not leave the Commission free to leave this docket unresolved; indeed, it bolsters the importance of there being a final and unappealable order in this docket.

This timing issue has constitutional implications. Part I, Article 23 of the New Hampshire Constitution provides that "[r]etrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." This principle applies to statutes that withdraw substantive rights that were previously available as a matter of New Hampshire Law. *See Petition of N.H. Sec'y of State*, 171 N.H. 728, 736 (2019) (concerning statute that eliminated public availability of voter registration database); *In re Goldman*, 151 N.H. 770, 772-73 (2005) (concerning statute that eliminated any right of divorced parent to force former spouse to continue to pay adult child's college expenses).

Article 23 applies *inter alia* to "every statute which takes away or impairs vested rights, acquired under existing laws." *Goldman*, 151 N.H. at 772 (quoting *Burrage v. N.H. Police Standards Council*, 127 N.H. 742, 746 (1986) and *Woart v. Winnick*, 3 N.H. 473, 479 (1826)). When engaging in Article 23 analysis, the New Hampshire Supreme Court "distinguishes new laws that affect substantive rights and liabilities from those that solely affect procedures or remedies enforcing those rights." *Id.* (citation omitted). In the *Goldman* case, the statute in question was deemed to have withdrawn a right that was only "discretionary" and thus there was no Article 23 problem. Goldman, 151 N.H. at 774. In the Secretary of State

dispute, the statutory right in question (access to voter registration databases) was not "vested" and the right itself not "substantive." *Sec'y of State*, 171 N.H. at 736.

In this instance, the right secured to ratepayers via RSA 378:40 is both substantive and vested. It can no longer be said, after nearly three years and countless attempts to amend and revise, that the Eversource LCIRP is under review "in the ordinary course" as specified in section 40. Thus, the utility is statutorily precluded from imposing any rate increase on its customers, including those whose interests are represented by the OCA.[3]

Moreover, the LCIRP statute currently remains in effect and the Commission has no basis for treating the case as not requiring a decision. "[A] matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead." *Londonderry School Dist. SAU #12 v. State*, 157 N.H. 734, 736 (2008) (citation omitted). While the Commission could arguably achieve such a result by running out the clock, this would be unfair, unreasonable and, we reserve the right to argue if necessary, illegal. Thus, the issues here are far from academic or dead.

III. Conclusion

The arguments in the Eversource brief are unpersuasive. Though the Department of Energy supports the result sought by Eversource, the Department did not see fit to offer any arguments in support of its position, at least in an initial

[3] RSA 378:40 actually refers to any "change" in rates but it would be absurd to conclude that the Legislature intended thereby to preclude rate reductions. *See, e.g., Rudder v. Director, N.H. Dep't of Motor Vehicles* 175 N.H. 38, 43 (2022) (eschewing a "literal reading" of a statute that would "lead to an absurd result").

brief. The case is not moot. Thus, for the reasons stated in the OCA's initial brief, the Commission must promptly reject the pending Least Cost Integrated Resource Plan and enter an order declaring that the subject utility may not increase its rates pursuant to RSA 378:40.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Reject, pursuant to RSA 378:39, the Least Cost Integrated Resource Plan submitted by Public Service Company of New Hampshire d/b/a Eversource Energy for approval in this docket,

B. Order, pursuant to RSA 378:40 that Public Service Company of New Hampshire d/b/a Eversource Energy may not increase its rates until the effective date of any repeal of RSA 378:40 or the approval of a new Least Cost Integrated Resource Plan from the Company, whichever comes first, and

C. Grant such further relief as shall be necessary and proper in the circumstances.

Sincerely,

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Certificate of Service

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

Donald M. Kreis