

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DG 22-064

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP. d/b/a LIBERTY

2022 Least Cost Integrated Resource Plan

**Order Motion for Interlocutory Transfer of Questions to the New Hampshire
Supreme Court**

O R D E R N O. 26,786

March 17, 2023

In this order the Commission denies a Motion for Interlocutory Transfer of Questions to the New Hampshire Supreme Court (Motion) filed by the Office of the Consumer Advocate (OCA).

I. Background

In Docket No. DG 17-152, the Commission considered Liberty Utilities' 2017 Least Cost Integrated Resource plan. The lengthy history of that docket, culminating in Commission Orders No. 26,684 and 26,702, is publicly available via the Commission's virtual file room and does not bear repeating here. Two intervenors filed motions for rehearing of Commission Order No. 26,684. Although ultimately denied, these motions raised numerous issues that are now the focus of the OCA's motion for interlocutory transfer in this proceeding. The OCA requests the Commission reserve, certify, and transfer four questions to the New Hampshire Supreme Court: (1) whether the Commission's guidance on LCIRPs in Order No. 26,684 improperly focuses exclusively on capital planning and supply portfolios, (2) whether the Commission's guidance on LCIRPs in Order No. 26,684 improperly construes the law concerning energy efficiency, (3) whether the Commission's guidance on LCIRPs in Order No. 26,684 improperly construes the statutory requirements to consider environmental impacts, and (4) whether the

Commission's conditional waiver of certain LCIRP elements but requiring such elements to be filed at a later date is improper.

Intervenor Terry Clark filed a Conditional Assent and Conditional Objection to the OCA's Motion. Intervenor Clark conditionally assents to the OCA's request for interlocutory transfer of any and all of the four proposed questions so long as any resulting transfer does not allow for the filing of a new least cost integrated resource plan (LCIRP) to replace the LCIRP filed October 3, 2022. Intervenor Clark conditionally objects if interlocutory transfer results or permits the filing of a new LCIRP.

II. Legal Standard

As authorized by RSA 365:20, the Commission "may at any time reserve, certify and transfer to the Supreme Court for decision any question of law arising during the hearing of any matter before the commission."

The New Hampshire Supreme Court also permits the interlocutory transfer of a question of law without a ruling by an administrative agency by rule. Under New Hampshire Supreme Court Rule 9:

The supreme court may, in its discretion, decline to accept an interlocutory transfer of a question of law without ruling by a trial court or by an administrative agency. The interlocutory transfer statement shall contain ... (d) a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an interlocutory transfer may materially advance the termination or clarify further proceedings of the litigation, protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice; and (e) the signature of the trial court or of the administrative agency transferring the question.

III. Commission Analysis

Under RSA 365:20, the transfer of questions of law to the New Hampshire Supreme Court is a decision committed to Commission discretion. If the Commission elects to exercise its discretion and submit a question or questions to the Supreme Court, the Court has discretion whether to accept any transfer request it receives. The Court has previously

declined to answer important legal questions transferred by the Commission when it deemed the transfer to be a request for an advisory opinion. *Petition of Public Service Company of New Hampshire*, 125 N.H. 425 (1984). For the reasons, below we decline to transfer the questions presented by the OCA.

The first three questions the OCA proposes the Commission transfer to the Supreme Court all center on non-binding interpretations of the LCIRP statute that have yet to be applied by the Commission to any LCIRP. Moreover, we note the concerns underlying the questions proposed for transfer have already been raised by the OCA, considered, and analyzed by the Commission in previous orders. In both Order No. 26,684 and Order No. 26,702 – the orders that are the genesis of the OCA’s proposed questions – the Commission specifically did not espouse any interpretations of law or issue any requirements binding on the filing of a future LCIRP. *See, e.g.*, Order No. 26,684 at 6; Order No. 26,702 at 6-8.

As the Commission has previously held, non-binding guidance related to LCIRP filings, and application of the LCIRP statute to any specific LCIRP, are fully litigated in adjudicative proceedings. Accordingly, we find questions of interpretation concerning the LCIRP statutes, including the statutory requirements of a plan, to be appropriately at issue in this proceeding. As recognized by the OCA in its Motion, all parties will have their arguments heard and considered before the Commission approves or denies the LCIRP at issue in this docket. Motion at 7.

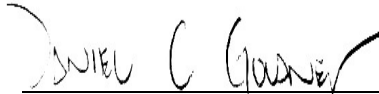
It is our intent to move forward in this proceeding. The parties can develop the record to assist us in interpreting the statute, making necessary findings of fact, and applying the law to the facts to render legal conclusions. To this end, we look forward to the parties developing a robust record. Accordingly, we elect not to transfer these three questions to the Supreme Court.

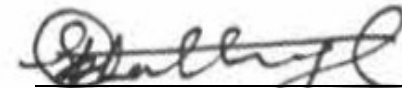
We note that the proposed fourth question for interlocutory transfer regarding the ability a utility to file an LCIRP in “serial fashion” has also been previously considered and ruled on by the Commission. The Commission analyzed this question as part of the OCA’s motion to reconsider Order No. 26,684. Order No. 26,702 at 4-5. We find the Commission’s prior analysis on this question to be clear and concise. We see no reason to revisit this question or exercise our discretion to request the Supreme Court provide additional clarity. Accordingly, we elect to not transfer this question as well.

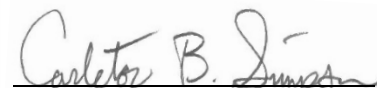
Based upon the above, it is

ORDERED, that the Office of the Consumer Advocate’s Motion for Interlocutory Transfer of Questions to the New Hampshire Supreme Court is DENIED.

So ordered, this seventeenth day of March, 2023.


Daniel C. Goldner
Chairman


Pradip K. Chattopadhyay
Commissioner


Carleton B. Simpson
Commissioner

Service List - Docket Related

Docket#: 22-064

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