STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Liberty Utilities (Energy North Natural Gas) Corp. d/b/a Liberty

2017 Least Cost Integrated Resource Plan

Docket No. DG 17-152

Motion for Rehearing of Order No. 26,684

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to this docket, and moves pursuant to RSA 541:3 for rehearing of Order No. 26,684 as issued by the Commission on September 14, 2022. In support of this request, the OCA states as follows:

I. Introduction

This proceeding is nearing its fifth anniversary. It began on October 2, 2017 when the subject utility, Liberty Utilities (Energy North Natural Gas) Corp. d/b/a Liberty ("Liberty"), made a timely filing of a Least Cost Integrated Resource Plan ("LCIRP") pursuant to RSA 378:38 and requested approval of the Plan pursuant to RSA 378:39. To this day, the 2017 LCIRP that is the subject of this docket remains pending, with most (but not all) of the delay attributable to the decision by Liberty in late 2019 to abandon a massive project – known as Granite Bridge – that was the centerpiece of the LCIRP as originally filed.

Over the past two years, the Office of the Consumer Advocate ("OCA") has been actively engaged with both of our state's natural gas utilities – Liberty and Northern Utilities d/b/a Unitil ("Unitil")— on the question of how such a utility can best comply with both the letter and the spirit of the LCIRP statute, RSA 378:37 *et seq*. Along with other interested parties, we reached agreements with both utilities – Liberty in the instant proceeding and Unitil in Docket No. DG 19-126. In our judgment, each of these investor-owned utilities deserves great credit for its willingness to think creatively and proactively about the question of how a natural gas utility can best comply with an LCIRP statute that is something of a relic of the 20th Century.[1] Nevertheless, via Order No. 26,664 (August 8, 2022) and Order No. 26,688 (September 19, 2022) in DG 19-126, and, here, via Order No. 26,684 issued on September 14, 2022, the Commission has now made fully and unambiguously known its unwillingness to accept the results of those efforts. In the case of the Commission's latest order in this docket, there is good cause for rehearing pursuant to RSA 541:3 for the reasons that follow.

[1] By "something of a relic of the 20th Century" we mean principally that the LCIRP statute was first adopted in 1990 – six years before the Legislature set in motion the process of restructuring the state's electric utilities – and thus assumed the existence of vertically integrated utilities that were fully in control of their supply resources, much of which consisted of owned generation assets. We do not intend to suggest that compliance with such a regime by restructured electric utilities is impossible or even unhelpful. To the contrary, the OCA believes that full, creative compliance with the LCIRP statute by all utilities subject to the statute has the potential to improve the planning of how utilities deploy their resources.

II. The Commission has issued an *ultra vires* advisory opinion

At page six of Order No. 26,684, the Commission states that its determinations about least-cost integrated resource planning are mere "guidance" and "not binding." According to the Commission, it is simply acting "in the interest of efficient process" so as to "provide[] expectations" while nevertheless remain[ing] open to receiving and reviewing any LCIRP that is consistent with the applicable statutes."

The OCA commends the Commission for endeavoring to acquaint those with business before the agency with commissioner expectations and policy preferences. Nevertheless, the fact remains that New Hampshire law does not authorize the PUC to issue rulings in this fashion.

As the Commission has recently acknowledged, the 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." Order No. 26,688 (September 19, 2022) in Docket DG 19-126 at 6 (citing *Appeal of Public Service Co. of New Hampshire*, 122 N.H. 1062, 1066 (1982)). The Administrative Procedure Act, RSA 541-A, to which the Commission is unmistakably subject, speaks clearly and unambiguously about how and when an agency may make decisions that affect the rights and obligations of persons subject to the agency's jurisdiction. *See* RSA 541-A:1, II (definition of "agency" subject to the Act); RSA 541-A:30-a through :35 (authorizing adjudicative proceedings); RSA 541-A:I, XV (defining "rule" as any

"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"); RSA 541-A:3 (specifying procedure for adoption of rules).

Although this docket is styled as an adjudicative proceeding, Order No. 26,684 contains no "findings of fact" as required for adjudicative decisions pursuant to RSA 541-A:35. Rather, the determinations made here are mainly policy pronouncements that fall squarely within the APA definition of "rule" but, critically, lack the formalities and public accountability that are distinctive to the rulemaking process set forth in RSA 541-A:3.

Although the Commission attempts to disclaim the binding nature of Order No. 26,684, the decision is rife with statements that interpret the LCIRP statute and communicate expectations the agency plainly expects this and other utilities to follow. *See* Order No. 26,684 at 4 ("Going forward, the Commission expects conformity by Liberty to the supply and capital plans developed through the LCIRPs"); *id.* ("we will consider how each utility's capital investments align with its LCIRP and thus support the goal of secoring the last cost resources and minimizing the rate impacts for customers"); *id.* ("we find that this approach is consistent with . . . RSA 378:40"); *id.* ("[i]t is the Commission's objective to consider LCIRPs as a useful component of the capital planning process for Liberty"); *id.* at 5 ("[w]e will

require that Liberty conduct its planning processes in a manner consistent with the LCIRP statute with a thoughtful approach to both supply and capital investments"); *id.* ("what Liberty submits to the Commission need be little more than the same documentation and format that Liberty's senior leadership, Board of Directors, and/or relevant subcommittees review"); *id.* (adopting "holistic approach" that includes "two views, a functional view and a project view"); *id.* at 6 (requiring certain submissions Liberty on an "annual basis"); *id.* (ruling that energy efficiency is "subsumed" by the ratepayer-funded NHSaves programs and thus Liberty should not "explor[e] additional ratepayer funding sources for EE"); *id.* at 6-7 (ruling that "promoting C&I customer fuel switching at a company or system-wide level is within the scope of the LCIRP" but the PUC will "consider C&I demand-side fuel switching programs focused on providing natural gas at the lowest possible cost on a project-by-project basis"); *id.* at 7 ("an analysis of the emissions caused by Liberty's combustion of the natural gas they receive is a broad inquiry beyond the purpose of the LCIRP"); *id.* at 8 (ruling that funding a study by Liberty of the health impacts of its leakage is "beyond the scope of the LCIRP"); *id.* (limiting the extent to which Liberty may analyze employment impacts based only on "direct jobs"); *id.* (requiring analysis of non-pipeline alternatives but only insofar as they "could avoid or defer reinforcement costs associated with distribution system infrastructure"); and *id.* at 8-9 ("[t]he Commission does not wish to see substantial time and resources diverted to issues not directly involved with Liberty's core business or

issues beyond the scope of the Company's LCIRP"). To the extent some of these substantive determinations are objectionable as a matter of law, that problem is discussed *infra*. The point here is that the Commission has made a series of binding determinations that are anything but trivial – indeed, they go to the heart of how the LCIRP statute should apply in the case of a natural gas utility. The Commission may disclaim responsibility for these pronouncements as mere "guidance" but the clear intent is to exact compliance from Liberty and, indeed, presumably other utilities as well. There is no authority in New Hampshire law for allowing the Commission to make decisions in this manner. If it wants to make general pronouncements of how it interprets this or any of its other enabling statutes, the Commission must do so by promulgating rules.[2]

III. Energy Efficiency is not "subsumed within the Energy Efficiency Resource Plans" funded exclusively by ratepayers.

Certain rulings made in Order No. 26,684 reflect erroneous interpretations of the LCIRP statute. Without waiving the arguments laid out, *supra*, about why this order should be withdrawn as *ultra vires*, we point out those errors here and request that the Commission reconsider them.

The most troubling of these determinations concerns energy efficiency. As

[2] There is a separate reason why the Commission should proceed with extreme caution when it comes to offering informal "guidance" on matters within its jurisdiction, particularly when the "guidance" is offered about something as consequential as least-cost integrated resource planning and the state energy policy enumerated therein. *See Appeal of Seacoast Anti-Pollution League*, 125 N.H. 465 (1984) (discussing the implications of commissioners offering informal opinions about issues the agency must later decide via adjudication). We reserve the right to raise the issues described in *Seacoast Anti-Pollution League* in a future proceeding.

the Commission pointed out at page six of its Order, the Legislature has imposed strict limits on the amount of funds that can be collected from ratepayers for energy efficiency programs reliant on the electric utilities' System Benefits Charge and, for gas utilities like Liberty, the energy efficiency portion of their LDAC charges. *See* RSA 374-F:3, VI-a(d) (limiting these charges to their 2020 levels, automatically escalated by a specified inflation factor). It therefore follows, contrary to the Commission's Order here, that there could be additional energy efficiency opportunities that are both outside the budget of the SBC/LDAC-funded programs but would nevertheless be least-cost in relation to other options considered in the LCIRP process.

Although the LCIRP statute is hardly a model of clarity, in this respect the enactment is crystal clear. The state energy policy enumerated in the first section of the LCIRP statute, RSA 378:37, directs utilities "to maximize the use of cost effective energy efficiency" as opposed to maximizing the use of energy efficiency to the extent it fits within the limited budgets provided by the SBC/LDAC revenue stream. Pursuant to RSA 378:38, II, each LCIRP must include "[a]n assessment of demand-side energy management programs, including . . . [energy] efficiency." And when reviewing an LCIRP as required by RSA 378:39, , energy efficiency is specifically listed as the top priority to the extent available options have equivalent financial costs, reliability impacts, and "environmental, economic, and health-related impacts."

The Office of the Consumer Advocate does not know, at present, whether energy efficiency initiatives, in addition to those funded by NHSaves, could be least-cost in relation to other options available to Liberty for meeting the service needs of its customers in a manner consistent with the RSA 378:37 state energy policy. Our best guess is that any such opportunities would be geo-targeted to allow the Company to avoid (or defer) specific investment in infrastructure. The point here is that to rule incremental energy efficiency to be out of scope when it comes to preparing an LCIRP is contrary to the plain meaning of the LCIRP statute.

As we pointed out on August 17, 2022 in DG 17-126, *see* OCA Motion for Rehearing and Clarification (tab 51) at 13-14, in considering the role energy efficiency plays in the LCIRP process the Commission must take account of the effect of Chapter 5 of the 2022 New Hampshire Laws, commonly referred to as House Bill 549 and codified as RSA 374-F:3, VI-a(d).[3] The General Court imposed a

[3] The Commission denied our rehearing motion via Order No. 26,688, entered in DG 19-126 on September 19, 2022. With respect to incremental energy efficiency, the Commission ruled:

> The Order did not limit other non-ratepayer funded energy efficiency or load curtailment programs in the context of a future [Unitil] LCIRP. Such programs might include grants or tariffed energy efficiency and load curtailment offerings in which costs are borne solely by the participating customers and not by ratepayers generally. Because the Order's guidance is consistent with legislative directives, the OCA has not provided the Commission with a basis to reconsider or clarify its order on this point.

Order No. 26,688 at 9. Order No. 26,688 is not yet final and, for present purposes, it suffices to say here that the Commission should not reiterate such a facially mistaken interpretation of the LCIRP statute. The LCIRP statute does not concern itself with programs or opportunities that are simply endorsed by utilities but financed via grants or by participating customers themselves. The question for LCIRP purposes is the extent to which *a utility* should pay for energy efficiency or other demand-side measures (with the costs included in rates) because the company's expenditure of such resources is least-cost in comparison to supply side options. If a utility were to use a Commission-approved tariff to offer energy efficiency programs that customers simply pay for themselves, it would be an empty exercise and certainly not an example of least-cost planning at work.

strict limit on energy efficiency charges and thus ratepayer-funded (as opposed to utility-funded) energy efficiency programs, thus definitively bringing an end to the previous era of Energy Efficiency Resource Standard with its objective of all cost-effective energy efficiency. Therefore, the possibility that additional energy efficiency investment relying on utility capital would be least-cost in relation to supply-side options must now receive consideration by both the utilities and the Commission in the LCIRP. To conclude otherwise is to reduce the energy efficiency language in the LCIRP statute to a nullity. *See State v. Beattie*, 173 N.H. 716, 724-25 (2020) ("whenever possible, every word of a statute should be given effect" and tribunals should "not construe a statute in a way that would render it a virtual nullity") (citations omitted); *Professional Fire Fighters of Wolfeboro, IAFF Local 14 3708 v. Town of Wolfeboro*, 164 N.H. 18, 22 (2021) (implied repeal of preexisting statute is "disfavored" unless "it is clear that the later act conflicts with the earlier act" or "the later act clearly is intended to occupy the entire field covered by the prior enactment") (citations omitted); A. Scalia and B Garner, *Reading Law: The Interpretation of Legal Texts* (2012) ("Scalia & Garner") at 327 ("Repeals by implication are disfavored – very much disfavored" unless the newer statute "flatly contradicts" the earlier one) (citation omitted).

IV. Fuel Switching cannot be summarily ruled out of LCIRP scope.

The Commission's discussion of the role that fuel switching might play in a gas utility's LCIRP is similarly flawed. However, unlike the case of energy

efficiency, there is no explicit language in the LCIRP statute that covers this topic.

The Settlement Agreement (tab 125) whose rejection is the centerpiece of Order No. 26,684 commits Liberty to "look for opportunities for Commercial and Industrial fuel switching" in connection with preparing future LCIRPs. Settlement Agreement at 3. This and other recommendations in the Settlement Agreement are derived from the report of the LCIRP Working Group convened by Unitil in connection with its pending LCIRP docket, DG 19-126.[4] As the report of the Working Group notes, it is currently the case that commercial and industrial customers of natural gas utilities in New Hampshire switch from natural gas to other fuels (e.g., electricity) in response to "market price signals." Working Group Report filed in Docket DG 19-126 (tab 47) on March 31, 2022 at 12. Therefore, in both DG 19-126 and in the instant proceeding, the references to C&I fuel switching fall within a broader effort to widen the universe of cognizable supply-side options to which a gas utility may devote its capital and operational resources beyond merely selling natural gas to customers in whatever quantity they require.

In Order No. 26,684, the Commission draws an apparent distinction between "C&I demand-side fuel switching programs focused on providing natural gas at the lowest possible cost on a project-by-project basis," which the Commission states a gas utility may "consider" as it prepares an LCIRP, and the idea of "promoting C&I

[4] In much the same manner as it has done here, the Commission rejected the recommendations of the Unitil Working Group (in which the OCA participated) via Order No. 26,664 entered on August 8, 2022. The OCA and Unitil each sought rehearing, which the Commission rejected on September 19, 2022 via, respectively, Order No. 26,688 and Order No. 26,689. As already noted, pursuant to RSA 541:6, these orders are still subject to appeal and are, therefore, not final.

fuel switching at a company or system wide level," which the Commission declared to be outside the permissible scope of LCIRP options. Order No. 26,684 at 6-7.

Drawing such a distinction is fundamentally at odds with the language of the LCIRP statute. RSA 378:38, III simply requires that a utility assess "supply options," of which several examples ("owned capacity, market procurement, renewable energy, and distributed energy resources") are given on a plainly non-exclusive basis. Although RSA 378:38-a allows the Commission to waive this requirement (or any of the other LCIRP content requirements of RSA 378:38), nothing in either section 38 or section 39-a can reasonably be understood as *ruling out* any supply options. To impute such authority to the Commission would be to transgress the well-established principle that one can "neither ignore the plain language of the legislature nor add words which the lawmakers did not see fit to include." *Brewster Academy v. Town of Wolfeboro*, 142 N.H. 382, 385 (1997) (citation omitted); *see also* Scalia & Garner at 93 ("The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it").

Even if it were permissible to rule out C&I fuel switching as an LCIRP resource option, the distinction between *promoting* a resource option at a system-wide level and *considering* the same option on a case-by-case basis is illogical and at variance with the statutory framework. The statute requires a utility to assess available supply- and demand-side options and choose those that advance the RSA 378:37 state energy policy in a manner that is least-cost for ratepayers. A resource

option is either least-cost or not, and if an option is least-cost then the Commission cannot direct a utility to eschew promoting it on a system-wide basis. *See, e.g., General Insulation Co. v. Eckman Const.*, 159 N.H. 601, 609 (2010) (refusing to interpret a statute so as to create "an illogical result") (citation omitted).

V. "Second or Third Tier Impacts" cannot be summarily ruled out of LCIRP scope

The Commission's gloss on the role environmental impacts play in the LCIRP process is also at stark variance with the clearly expressed intentions of the General Court. As the OCA has previously made clear, environmental advocacy is not within our statutory mission to advance the interests of residential utility customers. But, in quest of least-cost service to those customers, neither the OCA nor the PUC can ignore the express directive for utilities to deploy their resources in a manner calculated to "protect . . . the physical environment of the state" as set forth in the RSA 378:37 state energy policy.

And, yet, via Order No. 26,684, the Commission states that "second or third-order impacts" (as distinct from direct impacts via leakage from the utility's own distribution system) of the service provided by a natural gas utility have no place in the LCIRP process. The problem is that the statute says otherwise. Not only does the RSA 378:37 state energy policy draw no such distinction, but RSA 378:38 explicitly requires a utility to include in its LCIRP of the plan's long- and short-term environmental . . . impact on the state." RSA 378:38, VI. No reasonable reader could understand this language as reflecting anything other than an expansive view of environmental impacts.

VI. Rejection of the Settlement Agreement was arbitrary and not supported by factual findings

In addition to being an impermissible advisory opinion, and in addition to adopting a flawed and unsustainable gloss on the LCIRP statute, Order No. 26,684 reflects an improper treatment of a settlement agreement submitted for approval in an adjudicative proceeding. The relevant provision of the Administrative Procedure Act, RSA 541-A:35, requires that "[a] final decision shall include findings of fact and conclusions of law, separately stated." Order No. 26,684 is devoid of factual findings or, indeed, any discussion of the evidence adduced at the August 18, 2022 hearing at which the Settlement Agreement was presented. Instead, the Order is simply an elaborate recitation of why the agency disagrees, largely for policy reasons, with the approach to least-cost integrated resource planning for gas utilities as adopted by the settlement signatories.

The Commission's summary rejection of the settlement agreement in this proceeding departs from the approach to settlement long employed by the agency and as recently explained in Order No. 26,623 (May 3, 2022) in Docket No. DE 21-030 (the recent distribution service rate case filed Unitil's electric affiliate). Here is the approach as outlined at pages 20-21 of that order:

> Informal disposition is encouraged and may be made of any case at any time prior to the entry of a final decision or order. RSA 541-A:31, V(a),:38. New Hampshire Code of Administrative Rules Puc 203.20(b) requires the Commission to determine, prior to approving a settlement, that the settlement results are just and reasonable and serve the public interest.
>
> The Commission encourages parties to attempt to reach a settlement of issues through negotiation and compromise, as it is an opportunity for creative problem solving, allows the parties to reach a result more in line

> with their expectations, and is often a more expedient alternative to litigation. *Pub. Serv. Co. of N.H. d/b/a Eversource Energy*, Order No. 26,433 at 18 (December 15, 2020); *EnergyNorth Natural Gas, Inc. d/b/a National Grid N.H.*, Order No. 25,202 at 18 (March 10, 2011). Even when all parties join a settlement agreement, the Commission cannot approve it without DE 21-030 - 21 - independently determining that the result comports with applicable standards. *Id.*

Although the Commission is not bound by its own precedents, and in particular cannot be forced to honor its stated practice of encouraging settlement through negotiation and compromise, neither can the Commission in light of the rules and principles stated above simply reject a settlement because it dislikes the terms and any policy judgments reflected therein. In this instance, Order No. 26,684 does not even pretend to analyze how the settlement terms compare with what the parties positions would have been, had the case been presented at hearing on a fully contested basis. The order is therefore clearly "unjust and unreasonable" and should be withdrawn on that basis. *See Appeal of Lakes Region Water Co.*, 171 N.H. 515, 517 (2018) (noting that a PUC decision will be set aside when "the order is contrary to law or, by a clear preponderance of the evidence, is unjust or unreasonable") (citation omitted).

VII. Review of the Liberty LCIRP is not "proceeding in the ordinary course."

Finally, we turn to a point the OCA makes with considerable reluctance. RSA 378:40 precludes a utility from increasing its rates unless the Commission has an approved LCIRP on file.[5] Liberty's previous LCIRP, approved in 2015, has long

[5] The actual language of RSA 378:40 is that no "rate change" may be "approved or ordered" in the absence of an approved LCIRP. Read literally, this could be deemed to apply to rate decreases as well as rate increases. But, as the New Hampshire Supreme Court reiterated as recently as September 2, "all parts of a statute" – here, sections 37 through 40 of RSA 378 – must be construed

since expired. The pending LCIRP has not been approved. RSA 378:40 contains an exception for the situation in which "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."

In the circumstances of this case – five years after the company filed its LCIRP, literally days before the *end* of the period covered by the plan, in the aftermath of a period of nearly three years (from the filing of non-petitioner testimony in October 2019 to the motion Liberty filed on June 1, 2020 seeking to extend the deadline for submission of the next LCIRP) in which *no progress* on moving the docket toward resolution occurred – no one can seriously suggest that this LCIRP is the subject of a Commission review that is proceeding in the ordinary course.

The Commission, we acknowledge, claims otherwise in Order No. 26,284. *See* Order No. 26,284 at 4 ("The review of Liberty's 2017 LCIRP in this docket is proceeding in the ordinary course, but has not been completed, for the purpose of RSA 378:40"). But saying so does not make it so. Should the New Hampshire Supreme Court be called upon to review this "ordinary course" determination, the Court would consider whether the order is, by a "clear preponderance of the evidence . . . unjust or unreasonable" and/or "contrary to law." *Appeal of Lakes Region Water Co., supra*. The "ordinary course" determination made here is a

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together to "effectuate the overall purpose" of the statute and "to avoid absurd or unjust results." *Petition of Devin Miles*, 2022 WL 4005651 (N.H. Supreme Ct., September 2, 2022) at *2 (citation omotted). The obvious purpose of section 40 is to lend some teeth to the overall LCIRP statute; reading section 40 as applying to rate decreases would indeed be absurd in that light.

textbook example of such an order that would warrant being vacated in spite of the deferential posture the state's highest court typically adopts when reviewing a decision of the Commission.

Our reluctance to raise this issue arises out of a desire not to punish a utility for its good deeds – specifically, this Company's willingness to work in good faith with us and other parties over a period of years to bring this docket to a negotiated resolution. Ultimately, however, we are obliged to protect the interests of residential utility customers. Here, it would be unjust and unreasonable indeed for the ratepayers of a utility, as opposed to its owners, to suffer the consequences of a breakdown in an adjudicative process that was, throughout, under the active supervision of the Commission.[6]

VIII. Equitable Considerations Require Settlement Approval

Finally, we must respectfully but emphatically take exception to the manner in which the Commission rejected and, indeed, implicitly disparaged the good faith effort made by the settlement signatories to address the regulatory dilemma this case presents in light of its longevity. According to the Commission, approval of

[6] Order No. 26,684 directs Liberty to file its next LCIRP in just a few days – October 3, 2022. That would presumably lead Liberty to argue that it gets a re-set on the "proceeding in the ordinary course" exception to the prohibition of rate increases for a utility lacking an approved LCIRP. But, to be clear: Our position is that the Commission improperly rejected the Settlement Agreement, section 2.7 of which provides for a further extension of the next LCIRP deadline to give Liberty time to meet the substantive commitments it made in the agreement. *See* Settlement Agreement at 5 (deferring the next LCIRP deadline "until the earlier of either (1) six months after the Commission issues an order on the merits in this docket, or (2) six months following the October 2, 2022 deadline for filing Liberty's next LCIRP"). Therefore our position here, that the Commission should rescind its previous determination and approve the Settlement Agreement, should be understood as an objection to the previously ordered October 3, 2022 LCIRP filing date. If Liberty attempts to file a new LCIRP on October 3, the Commission should expect the OCA to object to consideration of the submission.

section 2.2 of the Settlement – which calls for approval of the pending LCIRP without a specific finding "as to the LCIRP's compliance with specific provisions of RSA 378: or :39" – would "constitute a violation of [the] statutory mandate" set forth in RSA 378:39 (stating that the Commission "shall" review LCIRPs "in order to evaluate the consistency of each utility's plan" with the requirements of the LCIRP statute.

Neither the Office of the Consumer Advocate, the Department of Energy, nor Liberty are responsible for putting the Commission in the position of having to review an LCIRP that is stale beyond all reason. The OCA could not, without abandoning notions of common sense, advise the Commission that an LCIRP whose centerpiece is the now-canceled Granite Bridge project meets the substantive approval standards of RSA 378:39. Thus, in light of other concessions laudably made by Liberty as recited in the settlement, we agreed to elide questions about the substantive content of the 2017 LCIRP and simply urge the Commission to approve it. In these circumstances, the Commission was (and still is) free to make the RSA 378:39 findings that we declined to endorse. Had the Commission done so, and approved the settlement, the likelihood is vanishingly small of appellate proceedings in which such a determination would be successfully challenged as unjust and unreasonable by a preponderance of the evidence.

To make the point in a different manner, equitable considerations counsel strongly in favor of approving the Settlement Agreement as a reasonable pathway toward an LCIRP process for this utility that will put past issues in the rear-view

mirror and place the focus where the General Court intended the spotlight to be – on the future. The Commission should therefore reconsider its rejection of the Settlement.

IX. Conclusion

For the reasons stated above, the Commission should grant rehearing of Order No. 26,684 and approve the settlement agreement previously rejected by that Order. In the course of so doing, the Commission should reconsider and revise its previously announced but profoundly misguided approach to Least Cost Integrated Resource Planning as the General Court has mandated the process. We share the sense, expressed by the Commission in its recent series of LCIRP orders, that Least Cost Integrated Resource Planning is one of the central tasks of electric and natural gas utilities as well as their state regulator. But, if the Legislature had simply wanted the Commission to require utilities to plan for reliable service that is as inexpensive as possible, then the General Court would have said so. Instead, the Legislature endeavored to reconcile a variety of policy imperatives that the Commission is not free to disregard. As the U.S. Supreme Court observed 35 years ago, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987).

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Grant rehearing of Order No. 26,684 pursuant to RSA 541:3;

B. Approve the Settlement Agreement entered into by Liberty Utilities (Energy North Natural Gas) Corp., Conservation Law Foundation, and the Office of the Consumer Advocate, 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