STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Electric and Natural Gas Utilities

Development of a Statewide, Multi-Use Online Energy Data Platform

Docket No. DE 19-197

Motion for Rehearing and/or Clarification

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to this docket, and moves pursuant to RSA 541:3 for rehearing and/or clarification of Order No. 26,589, issued in this docket on March 2, 2022. In support of this request, the OCA states as follows:

I. Introduction and Background

The Commission instituted this proceeding in late 2019 at the express directive of the General Court. Specifically, via section 2 of chapter 286 of the 2019 New Hampshire Laws, codified as RSA 378:51, II, the Legislature required the Commission to "open an adjudicative proceeding" to make certain specifically enumerated determinations in connection with the development of a "statewide, multi-use, online energy data platform" as described in paragraph I of the statute and referred to in this motion as the Statewide Data Platform. The Commission issued an Order of Notice on December 13, 2019 (tab 1), conducted a prehearing conference on February 3, 2020, and, by secretarial letter entered on February 14,

2020 (tab 21), approved a procedural schedule that culminated in an evidentiary hearing to take place in February 2021.[1] Discovery, the submission of prefiled written direct testimony as well as other materials, and meetings of the parties (including settlement negotiations) ensued. Thanks to various helpful scheduling adjustments approved by the Commission, on April 28, 2021 Public Service Company of New Hampshire d/b/a Eversource Energy filed a Settlement Agreement bearing the signatures of every party still actively participating in the proceeding.

The terms of the Settlement Agreement are ably summarized by the Commission on pages 3 through 8 of Order No. 26,589. Essentially, the Settlement Agreement contains certain design parameters that would apply to the Statewide Data Platform and its governance (including privacy and security standards), clarifies that the utilities (as operators of the Statewide Data Platform pursuant to RSA 378:51, I) would be allowed to recover their prudently incurred costs associated with the Statewide Data Platform, and that the signatories would jointly develop a Request for Proposals (RFP) from third-party contractors interested in developing and operating the Statewide Data Platform. The results of the RFP, in turn, would be germane to the question of whether the Commission should, in the future, exercise its authority under RSA 378:51, III to "defer the implementation" of the Statewide Data Platform upon a determination "that the cost of such platform to be recovered from customers is unreasonable and not in the public interest."

[1] In addition to the state's electric and natural gas utilities, which are mandatory parties pursuant to RSA 378:51, II, and the OCA, which automatically became a party upon its appearance pursuant to RSA 363:28, II, the Commission received intervention requests from 12 other parties. The Commission granted the requests by secretarial letter issued on April 17, 2020 (tab 42).

The Commission conducted an evidentiary hearing on May 5, 2021 to consider the Settlement Agreement. Thereafter, the Settlement Agreement was under advisement to the Commission for 301 days, at which point the Commission entered Order No. 26,589, purporting to approve the agreement.

In the meantime, certain events overtook the Commission and its consideration of the Settlement Agreement. Specifically, on July 1, 2021, the Department of Energy came into existence and, in relevant part, the legislation creating the Department transferred oversight authority for the Statewide Data Platform from the Commission to the Department. *See* 2021 N.H. Laws Ch. 292:91 (substituting references to "the department of energy" for references to "the commission" throughout RSA 378:51 (except paragraphs II and III) and :52. Order No. 26,589 makes no reference to these changes.

Order No. 26,589 explicitly approves the Settlement Agreement, but only "subject to . . . additional Commission oversight." Order No. 26,589 at 17. Specifically, the Commission ruled that

- "additional Commission involvement prior to the issuance of an RFP is warranted to ensure that the bids result in a software development process that is successful and provides the lowest cost for implementation," *id.* at 12;
- the parties must "describe in more detail the current privacy standards in place at the [application programming interfaces of the utilities] and the commensurate standards to be applied to third-parties seeking access to customer data," *id.* at 13;
- the Parties must submit "additional detail on the registration process, to ensure compliance with current best practices in the utility industry, as the parties prepare the RFP for Platform development," *id.* at 14;

- the parties must "propose ways to provide the necessary technical leadership for this software development project as they refine the software design and move toward the RFP process," *id.* at 14-15;

- the Parties must "develop a more detailed description of the data and functions needed for platform operation," *id.* at 15;

- the utilities must "conduct customer surveys of a statistically valid representative sample of their New Hampshire customer classes to determine for each of the customer classes, the current level of customer interest and the likelihood of customers opting-in to the use of the data platform," *id.*;

- the Parties must "survey existing software, and software under development in other jurisdictions, to determine whether any costs can be saved through licensing existing technology," *id.*;

- the Parties, planning to hire a consultant to assist with RFP development, must "submit the RFP *for the consultant* . . . to the Commission for review and approval prior to issuance," *id.* at 16 (emphasis added);

- the parties must "submit the proposed RFP for the platform development to the Commission for review and approval prior to issuance," along with any other RFPs the parties determine are necessary, *id.*; and

- the Parties must "provide a forward-looking benefit-cost analysis and recommend a rate design that reasonably aligns cost recovery across users and ratepayers with the benefits they receive," *id.*

The Commission even provided the parties with an "illustrative timeline" for complying with these directives, noting that the requirements outlined by the Commission are "subject to update depending upon the results of the analysis required by the parties and the Commission." *Id.* at 16-17.

II. The Commission has exceeded its authority.

a. Transfer of Authority to the Department of Energy

To paraphrase Justice Cardozo, *see A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring), this is regulatory

micromanagement "running riot." It is also inconsistent with New Hampshire law, this requiring reconsideration pursuant to RSA 541:3 or clarification, for the reasons that follow.

The Commission was within its authority to consider and rule on the Settlement Agreement because, when this docket was commenced and when the agreement was formally presented to the Commission, RSA 378:51 still vested in the Commission both the authority and the responsibility to conduct this proceeding. A Commission determination that it lacked authority to consider a settlement agreement presented to the agency nearly a year ago would have risked transgressing the constitutional ban on retrospective legislation. *See, e.g., Fisher v. New Hampshire State Bldg. Code Rev. Bd.*, 154 N.H. 585, 587 (2006) (describing purpose of the constitutional ban of retrospective legislation as preventing "the unfairness that results from changing the legal consequences of an act after the act has occurred"). Indeed, in amending RSA 378:51, the General Court very pointedly did *not* delete the reference to the Commission in paragraph II, which concerns authority to conduct this very adjudicative proceeding.

The situation going forward is an entirely different story. In every respect but one, regulatory authority over the Statewide Data Platform now rests with the Department of Energy. The instant adjudicative proceeding, still the responsibility of the Commission, required only four specific determinations, concerning:

> (a) Governance, development, implementation, change management, and versioning of the statewide, multi-use, online energy data platform.

> (b) Standards for data accuracy, retention, availability, privacy, and security, including the integrity and uniformity of the logical data model.
>
> (c) Financial security standards or other mechanisms to assure compliance with privacy standards by third parties.

RSA 378:51, II. The Commission made these determinations, at least insofar as necessary to approve the Settlement Agreement. Its work on these subjects is now done even if, as is reasonable in the circumstances, additional work on these subjects is necessary. As an administrative agency, the Commission "must act within the scope of its delegated powers." *Appeal of Granite State Electric Co.*, 121 N.H. 787, 792 (1981) (citation omitted). Here, the power to oversee the Statewide Data Platform and its development, once delegated to the Commission, have now been transferred to the Department.

This is not necessarily because the Department's expertise is superior to that of the Commission. Both agencies are well-stocked with professionals with insight, relevant expertise, and (as to the Commission, given the discussion in Order No. 26,589) obvious zest for project management. The problem, rather, is that the Commission is now fully and firmly ensconced behind an *ex parte* wall, such that collaboration or even anything like informal contact with those involved in this docket is impossible. This is not true of the Department which, presumably, is a key reason why the General Court modified sections 51 and 52 of RSA 378 when creating the Department of Energy.

b. Limited Regulatory Responsibilities

Even if it were possible to assume that the previous version of RSA 378:51 and :52 still applied, the Commission exceeded the authority granted to it when the General Court first adopted these provisions in 2019. As noted, *supra*, the specific directive from the General Court was to address (1) governance, development, implementation, and related issues, (2) various data standards, (3) and financial security standard – not as to participation in the platform generally but only so as to assure compliance by nonregulated entities with privacy standards. The parties diligently focused on these elements in their settlement negotiations (along with agreeing on a process calculated to address the ultimate hurdle – avoiding a determination that development of the Statewide Data Platform should be deferred on the ground that the cost to be recovered from customers would be unreasonable pursuant to RSA 378:51, III). The "additional Commission oversight" described in Order No. 26,589 is nowhere authorized, either explicitly or implicitly, in either section 51 or 52 of RSA 378.

The Commission appears to have anticipated this concern in two ways: by referencing RSA 378:53, *see* Order No. 26,589 at 11, and by invoking RSA 363:17-a for the proposition that the Commission is obliged to "minimize costs," *see id.* at 15. Neither of these provisions is a source of Commission authority.

The latter is an oft-cited section of the agency's enabling statute stating that the Commission

> shall be the arbiter between the interests of the customer and the interests of the regulated utilities as provided by this title and all powers and duties provided to the commission by RSA 363 or any other provisions of this title shall be exercised in a manner consistent with the provisions of this section.

RSA 363:17-a. The plain meaning of this provision is that section 17-a instructs the Commission on *how* it should exercise the "powers and duties" delegated to it by other sections of its enabling statute, as opposed to vesting the Commission with any *additional* powers or duties. *See, e.g., Appeal of Pinetree Power, Inc.*, 152 N.H. 92, 100 (2005) (relying on the RSA 363:17-a "arbiter" obligation to conclude that the Commission properly applied RSA 374:3 and RSA 374:3-a).

As for RSA 378:53, this provision simply imposes upon the utilities the obligation to assure that the Statewide Data Platform is "certified by the Green Button Alliance and support[s] the Energy Service Provider Interface of the North American Energy Standards Board and the Green Button 'Connect My Data' initiative of the Green Button Alliance." To the extent this section of RSA 378 creates any powers and duties and assigns them either to the Commission or the Department, it is merely a matter of verifying compliance with two very specific technical requirements. This can be easily and straightforwardly done without requiring anything like the sort of plenary operational oversight contemplated by Order No. 26,589.

It is true that both the Commission and the Department are vested with "the general supervision of all public utilities and the plants owned, operated or controlled by the same," but only "so far as necessary to carry into effect the provisions of [title 33]." RSA 374:3. But this does not authorize either agency to

micromanage investor-owned utilities in the manner explicitly contemplated by Order No. 26,589. In particular, the Commission correctly observed that the Statewide Data Platform is a "complex project" requiring expertise in software development and related technical realms, and the Commission correctly identified intervenor Kat McGhee as an avatar of this perspective among the parties.[2] But utilities undertake complex projects with regularity and without direct interference from regulators. Indeed, if the Commission embroiled itself in the process of developing the Statewide Data Platform it would potentially compromise the Commission's authority to review the utilities' conduct under the well-established "prudence" and "used and useful" standards. *See, e.g., Appeal of McCool*, 128 N.H. 124, 142 (1986) (referring to the "prudence and usefulness principles" that are relevant to potential exclusion of costs from rate recovery).

Accordingly, one of the nation's most respected authorities on the topic of effective utility regulation, Scott Hempling,[3] has offered this counsel: "There is no good time to determine prudence. Pre-expenditure, we lack the perspective and facts needed to make binding decisions on cost caps or cost approvals." Scott

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[2] Order No. 26,583 correctly identifies this intervenor as "Representative McGhee," as does her petition for intervenor status (tab 6). However, the basis of Rep. McGhee's intervention was not her membership in the General Court but, rather, her status as an Eversource customer and so as "to ensure that the Public Utilities Commission understood the potential points of failure in the technical collaboration that can be addressed in order to bring about the significant advantages of a successful docket/project for the state and its ratepayers." Petition of Kat McGhee for Intervention at 2, 4. This is important because the Commission has typically eschewed bestowing intervenor status on state lawmakers in their capacities as legislators, presumably to avoid separation-of-powers problems.

[3] Mr. Hempling is an Adjunct Professor of Law at Georgetown University and since June of last year has been serving as an administrative law judge at the Federal Energy Regulatory Commission. In addition to his *Preside or Lead* treatise, he is the author of two other respected books on the subject of utility regulation and numerous law review articles.

Hempling, *Preside or Lead? The Attributes and Actions of Effective Regulators* (2d ed., 2013) at 192. He cautions against "drawing the commission into monthly project management decisions before it has enough perspective to judge prudence," *id.*, and contends that the correct approach to the timing of prudence reviews is for regulators to be become "initiator rather than umpire" as to the timing of rate cases, *id.* at 193-195.

It is beyond the scope of this motion to consider the extent to which the Commission should assert control over the timing of rate cases. It suffices here to remind the Commission of what Mr. Hempling correctly characterizes as "the general purpose of regulation." *Id.* at 259. It does not include regulators embroiling themselves in the minutia of the planning and deployment of operational initiatives, even one as significant and game-changing as the Statewide Data Platform. Rather, the purpose of regulation is "to align private behavior with the public interest. Applied to utilities, this purpose requires regulators to define standards of performance, create financial inducements (both positive and negative) to produce that performance, and impose consequences for subpar performance." *Id.*

For the foregoing reasons, the Commission should withdraw the ten specific directives enumerated *supra* via bullet points, either because rehearing on these points is warranted pursuant to RSA 541:3 or as a matter of clarification. The OCA does not disagree with the Commission as to the significance of these issues (or, at

least, all but one of them),[4] particularly with respect to protecting data privacy at the level of both the utilities and the platform itself and the related need to assure compliance with privacy standards with third parties that access customer data. Our point is that these directives are more properly framed as recommendations to the Department as to how it should exercise its oversight responsibilities.

III. The Commission misinterpreted RSA 378:51, III.

Finally, the Office of the Consumer Advocate respectfully suggests that the Commission has mischaracterized the requirements of RSA 378:51, III in a manner that should be corrected or clarified. This provision originally required the Commission, and now requires the Department, to "defer the implementation of the statewide, multi-use, online energy data platform . . . if the commission determines that the cost of such platform to be recovered from customers is unreasonable and not in the public interest."

The Commission has oversimplified the requirements of this provision as one that requires the utilities to "minimize costs" and, therefore, to undertake a "forward-looking benefit-cost analysis." Order No. 26,589 at 14, 16. The OCA does

[4] The issue on which we respectfully disagree with the Commission on the merits concerns the usefulness of surveying customers to determine their interest in the Statewide Data Platform and their likelihood of using it. Just a few months ago, a customer survey of interest in playing a daily game that gave them the opportunity to guess a random five-letter word would probably have yielded a message of public indifference and, yet, "Wordle" is now a national if not a global phenomenon. *See, e.g.*, Marc Tracy, "The New York Times Buys Wordle" (N.Y. Times, Jan. 31, 2022) (noting that the game had 90 users in November but, now, "millions play the game daily"). In fact, the residential customers whose interests are represented by the OCA would ideally seldom if ever use the Statewide Data Platform themselves or even be aware of it; rather, they would use innovative services provided by unregulated third parties – and it is those third parties that would literally use the Statewide Data Platform to obtain authorized access to customer data necessary for the provision of those innovative services.

not contend that a benefit-cost analysis would be irrelevant or unhelpful. However, the Commission should take note that RSA 378:51, III does not require a determination that the benefits of the Statewide Data Platform exceed its costs; rather, the requirement is that costs not be "unreasonable" and "not in the public interest." *Cf.* RSA 374-F:3, VI-a(4) as recently enacted via Chapter 5 of the 2022 N.H. Laws (House Bill 549) (explicitly requiring application of benefit-cost tests to ratepayer-funded energy efficiency programs). The General Court specifically eschewed a requirement that benefits exceed costs, and the reason for this choice is quite plain: Costs are easy to limn and/or to overestimate in a spirit of caution, whereas benefits will be, in significant part, inchoate and even in some circumstances to-be-determined in light of innovations in technology and services provided by both utilities and unregulated service providers. Therefore, the Commission should grant rehearing and/or clarify Order No. 26,589 to the effect that RSA 378:51, III does not require an affirmative determination by the Commission that the benefits of the Statewide Data Platform exceed its costs.

IV. Conclusion

In specifically authorizing the development of the Statewide Data Platform via the enactment of sections 51 through 54 of RSA 378, the General Court explicitly found that "it is necessary to provide consumers and stakeholders with safe, secure access to information about their energy usage" if New Hampshire is to accomplish the purposes of electric industry restructuring under RSA 374-F, to implement the state's energy policy as enumerated in RSA 378:37, and to make the

state's energy systems "more distributed, responsive, dynamic, and consumer focused." 2019 N.H. Laws Ch. 286:1, I. The General Court also found that implementation of the Statewide Data Platform is "well calculated to advance the objectives" of recent Commission proceedings involving grid modernization, net metering, and energy efficiency. *Id.* at paragraph II.

These findings support the notion that the regulatory mandate here is a limited one – to facilitate rather than to hinder the development of the Statewide Data Platform, and to assure that costs are not unreasonable. Particularly given that the Commission's job is nearly complete in the wake of its March 2 approval of the very detailed and specific framework developed by the parties over more than a year of collaboration, and the General Court's reassignment of regulatory responsibility, this is an occasion for regulating with a light touch. Future rate cases are the right place for the Commission to scrutinize utility investments and expenses associated with the Statewide Data Platform, just as the Commission would review all other aspects of a utility's revenue requirement. Ongoing, real-time prudence review is neither appropriate nor authorized here. Thus, for the reasons stated above, the Commission should grant rehearing of Order No. 26,589 pursuant to RSA 541:3 and/or clarify Order No. 26,589 to the effect that (1) the ten requirements described in the Order and enumerated on pages 3 and 4, *supra*, are not to be regarded as anything more than recommendations of the Commission, and (2) RSA 378:51, III does not require an affirmative showing by any party that the benefits of the Statewide Data Platform exceed its costs.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Grant rehearing pursuant to RSA 541:3 of Order No. 26,589 as enumerated herein, and

B. To the extent not covered via a rehearing determination, clarify Order 26,589 as requested herein, and

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

Sincerely,

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March 11, 2022

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