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New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301

Re: Docket No. IR 22-053
Electric and Gas Utilities
Investigation of Energy Commodity Procurement Renewable Portfolio Standard, Default Service Electric Power, and Cost of Gas Methodology and Process

To the Commission:

In its Order of Notice commencing the above-referenced proceeding, the Commission invited interested stakeholders to "pre-file comments" on or before today "so that the presiding officer can address any matters on which there is disagreement during the prehearing conference." Please treat this letter as the comments of the Office of the Consumer Advocate ("OCA").

I. Procedural Concerns

The OCA respectfully contends the parameters of this docket as outlined in the Order of Notice are inconsistent with the Administrative Procedure Act ("APA"), RSA 541-A, and are not otherwise authorized by the Commission's enabling statutes. The APA authorizes two 'flavors' of administrative decisionmaking in circumstances where the rights, duties or privileges of any person (including a corporate 'person') are at issue: 'vanilla' (rulemaking pursuant to RSA 541-A:3) and 'chocolate' (adjudication pursuant to RSA 541-A:31 *et seq*.). As in certain other proceedings recently commenced by the Commission, the agency is here attempting to invent a 'strawberry' flavored mode of administrative decisionmaking – or, perhaps, something like a vanilla-chocolate twist -- inasmuch as the Commission has made selective choices from its rules governing adjudicative proceedings (i.e., formal intervention and the scheduling of a pre-hearing conference, which implies an evidentiary hearing at some point in the future) and the more informal procedures associated with rulemaking (but without the ultimate review by the Joint Legislative Committee on Administrative Rules and the other accountability mechanisms imposed by the APA).

Perhaps anticipating this concern, the Commission stresses at page 2 of its Order of Notice that this is an "investigative docket" that will "not conclude with a final order or other result bunding on the participants in this or future dockets." Rather, according to the Commission, the purpose here is "to engage stakeholders in an open, overarching, and collaborative process that is free of certain procedural constraints that exist in adjudicative dockets."

Nothing in New Hampshire law authorizes the Public Utilities Commission to engage in such a free-wheeling inquiry, particularly one that features mandatory parties. *See* Order of Notice at 3 ('[a]ll electric and gas utilities shall participate in this investigation"). Indeed, broad public policy inquiries such as the one described in the Order of Notice are arguably the province of the Department of Energy. Although the Order of Notice invokes RSA 374:4 (vesting in the Commission both the "power" and the "duty" to "keep informed as to all public utilities in the state") and various other organic statutes related to oversight of public utilities, the Commission appears to be confusing its right to gather information from utilities with its right to conduct formal proceedings that affect the rights and obligations of utilities and other interested parties, requiring such parties to participate in order to protect those interests.

In the respectful opinion of the OCA, the Commission cannot insulate itself from these concerns by claiming the results of the investigation will not be binding. If, in effect, the Commission intends to offer opinions at the conclusion of the investigation that will be germane to future adjudicative proceedings, this raises issues of fundamental fairness that may need to be addressed during those proceedings. *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).

For the foregoing reasons, the Commission should close this investigation and take one of three steps: (a) request that the Department of Energy undertake an informal investigation of wholesale commodity procurement practices of electric and natural gas utilities, (b) commence a generic but formal adjudicative proceeding that will culminate in an evidentiary hearing followed by findings of fact and conclusions of law, or (c) open a rulemaking docket to address matters of wholesale procurement by electric and natural gas utilities.

II. Default Energy Service from Electric Utilities

Regardless of how the Commission proceeds, the Office of the Consumer Advocate suggests proceeding with extreme caution when it comes to reforming the procurement of default energy service by electric distribution companies.

Default energy service rates as high as 26 cents per kilowatt-hour threaten the well-being of residential customers in all corners of New Hampshire, particularly given the lack of any reason to assume those rates will go no higher. This is an unacceptable situation that compels some sort of action by regulators and utilities. But such action must be undertaken carefully and deliberately in light of the competing policy imperatives applicable to the situation.

One obvious template for future approaches to default energy service is the one adopted by the New Hampshire Electric Cooperative ("NHEC" or "the Co-op"). The NHEC's "Co-op Power" rate is currently 5.5 cents lower than Eversource's default energy service rate – and the reason is obvious. The NHEC manages its default energy service portfolio in exactly the same fashion a vertically integrated utility with captive energy customers (but few owned generation resources) would approach its participation in the wholesale energy

market – i.e., by maintaining an actively managed and fully diversified portfolio of wholesale entitlements.

Because the NHEC is owned by its customers, and therefore the Co-op can truly be considered the agent of its members without recognition of the competing interests of return-maximizing shareholders, there is no reason to discourage the NHEC from making its default supply option as desirable as possible. For investor-owned utilities, however, the calculus is somewhat different; in that context, it is well to remember that when the General Court restructured the electric industry via RSA 374-F it wished to relieve retail customers of generation-related business risks and rely on market forces (rather than utility managers) to advance the public good. At that point, investor owned utilities as well as the Co-op had a notably poor record (as evidenced by the bankruptcy filings of both the Co-op and Public Service Company of New Hampshire) when it came to meeting retail load in a prudent fashion. It would be improvident simply to assume that the state's electric utilities have learned the relevant lessons in the ensuing 34 years since the PSNH bankruptcy filing.

In the opinion of the OCA, it is the advent of opt-out community power aggregation ("CPA") pursuant to RSA 53-E that offers the last best hope for delivering meaningful benefits to consumers from the restructured electric industry. In essence, CPA municipalities, particularly when acting jointly, have the potential to be at least as effective and customer-supportive as the Co-op is when acquiring wholesale power.

Indeed, if we could assume that every New Hampshire municipality will offer its local electric users the opportunity to receive electricity from a CPA initiative, we would urge the Commission to institute no reforms of default energy service procurement. Unfortunately, such an assumption would be unwarranted.

Therefore, the Commission should indeed require Eversource, Unitil, and Liberty, as the state's three investor-owned electric distribution companies, to change the way they procure default energy service. In today's volatile wholesale environment, where over-reliance on natural gas as a generation technology shows no signs of abating, it is simply not fair to leave default energy service customers to the vicissitudes of semi-annual all-requirements procurements. The risks priced into the bids of wholesale suppliers, and the alarmingly small number of bidders, are realities too grim to ignore.

On behalf of residential electric customers, we urge consideration of all plausible approaches to default energy service procurement, including but not limited to combined statewide procurement, procurement conducted by the Department of Energy (or some other instrumentality of government) as opposed to the utilities themselves, active portfolio management, common procurements among retail affiliates across state lines, annual rather than semi-annual retail rate determinations, and even a shrinking of the universe of available retail options to just CPA offerings and default energy service. Eversource, in particular, has complained of playing a role in the default energy service context that offers no financial reward to the Company. *See* Testimony of James G. Daly, James R. Shuckerow, and Frederick B. White, filed in Docket No. DE 21-077 on October 7, 2021 (tab 6), at 9 (complaining of "risk without any offsetting benefit, particularly where there are market mechanisms in place to provide the same service"). It may make sense to relieve

Eversource, Liberty, and Unitil of an obligation that does not advance the interests of their shareholders.

The OCA further contends that the Commission must require electric distribution companies to consider the costs and procurement of default energy service from the standpoint of the least-cost integrated resource planning ("LCIRP") required by RSA 378:37 *et seq*. To date, electric distribution companies have treated key elements of their service to residential customers – i.e., default energy service and energy efficiency – as 'check-box' constants that need not be analyzed in the context of demonstrating they are choosing those available options that are least-cost from a customer standpoint while advancing the state energy policy set forth in RSA 378:37. In our opinion, the LCIRP statute when properly applied requires a holistic approach that involves the analysis of *every* service provided to customers and every cost recovered from them.

III. Cost of Gas

In connection with the state's two natural gas utilities, the challenges to date have centered on procedural problems – i.e., the lack of time afforded by the process for meaningful review of the utilities cost of gas. We expect to recommend the demise of a so-called "fixed price option." Though we know that residential customers value rate stability and are generally willing to pay at least a small premium for such certainty, it is simply bad public policy to allow fixed-price customers to reallocate risk as between them and other customers (as opposed to the company selling them the commodity, as happens in the context of fuel oil). As suggested recently by Chairman Goldner, it may make sense to make cost-of-gas charges and default energy service charges more closely resemble each other with respect to how and when they are determined.

IV. Conclusion

Thank you for the opportunity to communicate the above-referenced concerns in writing. We reserve the right to raise additional concerns and issues depending on the course of this or any other related proceeding. The OCA is committed to working with the Commission, the Department of Energy, all of the utilities, and other interested stakeholders in addressing what has surely become the biggest crisis to confront our electric and natural gas utilities so far this century.

Sincerely,

Donald M. Kreis
Consumer Advocate

cc: Service List, via e-mail