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Via Electronic Mail

April 23, 2020

Debra A. Howland, Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, N.H. 03301-2429

RE: **Order No. 26,344, Order Implementing Governor's Emergency Order #3 Pursuant to Executive Order 2020-04 Relative to Competitive Electric Power Suppliers and Competitive Natural Gas Suppliers**

Dear Executive Director Howland:

Attached is the Retail Energy Supply Association's Motion for Rehearing of Order No. 26,344.

Pursuant to the Public Utilities Commission's temporary changes in filing requirements, the motion is only being submitted electronically. We will maintain the original for filing in accordance with the Commission's future instructions.

Please feel free to contact me if you have any questions or require additional information. Thank you.

Sincerely,

Joey Lee Miranda

Attachment

Copy to: Office of Consumer Advocate

BEFORE THE

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

ORDER IMPLEMENTING GOVERNOR'S EMERGENCY ORDER #3 PURSUANT TO EXECUTIVE ORDER 2020-04 RELATIVE TO COMPETITIVE ELECTRIC POWER SUPPLIERS AND COMPETITIVE NATURAL GAS SUPPLIERS	:	ORDER NO. 26,344

RETAIL ENERGY SUPPLY ASSOCIATION'S
MOTION FOR REHEARING OF ORDER NO. 26,344

Pursuant to RSA 541:3, RSA 365:21 and Rule Puc 203.33, the Retail Energy Supply Association ("RESA")[1] respectfully requests that the New Hampshire Public Utilities Commission ("Commission") grant rehearing to reconsider Order No. 26,344.[2]

BACKGROUND

On March 13, 2020, the Governor issued Executive Order 2020-04 declaring a state of emergency ("State of Emergency") due to the novel coronavirus known as COVID-19 ("COVID-19").[3] On March 17, pursuant to Executive Order 2020-04, the Governor issued Emergency Order #3.[4] Emergency Order #3 prohibits all providers of electric, gas, water, telephone, cable, VOIP, internet, and deliverable fuels service in the State of New Hampshire from disconnecting or discontinuing service for non-payment for the duration of the State of

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

[2] Order No. 26,344, Order Implementing Governor's Emergency Order #3 Pursuant to Executive Order 2020-04 Relative to Competitive Electric Power Suppliers and Competitive Natural Gas Suppliers (Mar. 31, 2020) ("Order No. 26,344").

[3] Executive Order 2020-04 (Mar. 13, 2020) ("Executive Order 2020-04"); *see also* Executive Order 2020-05 (Apr. 3, 2020) (extending Executive Order 2020-04 and all emergency orders issued pursuant to it).

[4] Emergency Order #3 Pursuant to Executive Order 2020-04 (Mar. 17, 2020) ("Emergency Order #3").

Emergency.[5] Emergency Order #3 also directed the Commission to "provide assistance and guidance to the public utilities in implementing the provisions of this order."[6]

On March 31, the Commission issued Order No. 26,343[7] prohibiting public utilities, including the electric and natural gas utilities, from disconnecting or discontinuing service for non-payment for the duration of the State of Emergency.[8] On that same day, the Commission also issued Order No. 26,344.[9] In that order, the Commission concluded that Emergency Order #3 also applies to competitive electric power suppliers ("CEPSs") and competitive natural gas suppliers ("CNGSs") (together with CEPSs, "competitive suppliers") as providers of electric and gas service, respectively.[10] RESA now hereby requests that the Commission grant rehearing of Order No. 26,344.

MOVANT

RESA is a non-profit organization and trade association that represents the interests of its members in regulatory proceedings in the Mid-Atlantic, Great Lakes, New York and New England regions. RESA members are active participants in the retail competitive markets for electricity and natural gas, including the New Hampshire market. Several RESA member companies are licensed by the Commission to serve residential, commercial and industrial customers in New Hampshire and are presently providing energy supply to customers in the State. As such, they are subject to, and directly affected by, Order No. 26,344.

[5] Emergency Order #3, ¶ 2.

[6] *Id.* at ¶ 4.

[7] Order No. 26,343, Order Implementing Governor's Emergency Order #3 Pursuant to Executive Order 2020-04 (Mar. 31, 2020) ("Order No. 26,343").

[8] *Id.* at 2.

[9] Order No. 26,344.

[10] *Id.* at 2.

LEGAL STANDARD

Any person directly affected by an order of the Commission, or an association whose members are so affected, may apply for rehearing.[11] "Such motion shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable."[12]

The Commission may grant rehearing for good reason.[13] A movant can establish "good reason" by showing that there are matters that the Commission "overlooked or mistakenly conceived in the original decision"[14] or by presenting new evidence that was "unavailable prior to the issuance of the underlying decision . . . ."[15]

ARGUMENT

RESA understands the impact COVID-19 is having on consumers and businesses across the United States.[16] Everyone, including RESA member companies, is facing unprecedented challenges. RESA supports the development and implementation of effective and prudent policies to respond to these challenges. However, particular care must be taken to ensure that decisions implementing these policies do not have unintended, negative consequences.

Because the Commission issued Order No. 26,344 *sua sponte* and without the benefit of stakeholder input, it did not have the opportunity to consider evidence of the impact of that order

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[11] *See* RSA 541:3; *see also* Puc 203.07(a) ("A motion may be filed by any party or, in the case of a motion for rehearing, a person directly affected by a commission action pursuant to RSA 541:3."); *Appeal of Richards*, 134 N.H. 148, 156 (1991) (observing that an association has "standing to represent its members if they have been injured").

[12] RSA 541:4.

[13] *See* RSA 541:3 ("[T]he commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.").

[14] *Dumais v. State*, 118 N.H. 309, 311 (1978) (quotation and citations omitted).

[15] Order No. 25,088 (Apr. 2, 2010), at 14.

[16] *See* Retail Energy Supply Association Issues Statement Regarding COVID-19, Energy Choice Matters, http://www.energychoicematters.com/stories/20200323ztac.html (last visited Apr. 23, 2020).

on competitive suppliers. Moreover, the Commission's conclusions concerning the applicability of the order to competitive suppliers were "mistakenly conceived." Order No. 26,344 is also unlawful and unreasonable because application of Emergency Order #3 to competitive suppliers could violate the Contracts Clause and constitute a regulatory taking. Thus, for the reasons discussed more fully below, good cause exists for the Commission to grant rehearing to reconsider Order No. 26,344.

I. THE COMMISSION MISCONCEIVED EMERGENCY ORDER #3 AS APPLYING TO COMPETITIVE SUPPLIERS

Fundamentally, Emergency Order #3 is intended to ensure that residents and business in the State of New Hampshire continue to have access to "[c]ertain essential services" "necessary for the safety and protection of the public."[17] Consequently, it applies only to those providers of electric, gas, water, telephone, cable, VOIP, internet, and deliverable fuels service that are actually capable of denying customers access to such essential services by disconnecting or discontinuing customers' service.

Electric, gas, telephone, and water utilities are able, and, subject to regulation, authorized, to disconnect service to customers.[18] Once these public utilities do this, customers may have no further access to electric, gas, telephone, or water service. Similarly, cable, VOIP, and internet service providers are all capable of preventing customers from accessing those services by disconnecting or discontinuing service. Comparably, deliverable fuels service providers can also prevent customers from receiving essential services by discontinuing delivery of fuels. In stark contrast, however, because of the way in which the retail energy supply market is designed, competitive suppliers are simply incapable of denying customers access to essential services.

[17] *See* Emergency Order #3, ¶ 1.

[18] *See, e.g.*, Puc 1203.11 (electric, gas, water utilities); *cf.* Puc 405.04(b) (imposing restrictions on disconnection of service by telephone utilities).

As the Commission is aware, even if a competitive supplier de-enrolls a customer, the customer will continue to receive service from the utility.[19] In fact, the customer will receive utility service automatically if it is no longer receiving service from a competitive supplier (unless the customer choses another competitive supplier).[20] Thus, competitive suppliers are unlike every other entity subject to Emergency Order #3 because they cannot deny customers access to essential services. Consequently, the Commission "mistakenly conceived" Emergency Order #3 as applying to competitive suppliers.

In addition, Emergency Order #3 makes clear that the Commission's responsibility and authority in implementing that order is limited to public utilities. Specifically, Emergency Order #3 directed the Commission to provide assistance and guidance to the "public utilities" in implementing its provisions.[21] However, as the Commission is aware, competitive suppliers are not public utilities.[22] In fact, the Commission itself recognized this by issuing a separate order regarding Emergency Order #3 - Order No. 26,343 - to public utilities.[23] Notably, Emergency Order #3 did not direct the Commission to provide any assistance or guidance to competitive

[19] *See, e.g.*, RSA 374-F:2(I-a) (defining "default service" as "electricity supply that is available to retail customers who are otherwise without an electricity supplier . . . ."); Puc 2004.18(e) (requiring that a CEPS terminating service to a customer provide notice with a statement "that termination of service will ***not*** result in disconnection from the electric distribution system and that the customer may obtain service from another CEPS or through utility default service") (emphasis added); *cf.* Puc 3002.12 (defining local distribution company ("LDC") sales service as "natural gas commodity service provided on a firm basis to a retail customer that is not receiving service from a CNGS, in accordance with the LDC's retail natural gas services tariff").

[20] *See, e.g.*, Puc 2004.18(e) (requiring that a CEPS terminating service to a customer provide notice with a statement "that termination of service will ***not*** result in disconnection from the electric distribution system and that the customer may obtain service from another CEPS or through utility default service") (emphasis added).

[21] *See* Emergency Order #3, ¶ 3.

[22] *See* RSA 374-F:7(I) ("Competitive energy suppliers are not public utilities pursuant to RSA 362:2"); *see also* RSA 362:2(I) (defining "public utility"); Puc 3002.07 (defining "competitive natural gas supplier").

[23] *See* Order No. 26,343.

suppliers. As a consequence, the Commission's application of Emergency Order #3 to competitive suppliers exceeds the authority granted to it by Emergency Order #3.[24]

Moreover, Order No. 26,344 is unnecessary to protect ratepayers. Order No. 26,343 prohibits the electric and natural gas public utilities from disconnecting or discontinuing service for non-payment for the duration of the State of Emergency.[25] Thus, as is the case even when there is no state of emergency, any customer that is unable to timely pay amounts due to competitive suppliers that is de-enrolled will continue to receive electric and natural gas service.[26] Thus, it is unnecessary to subject competitive suppliers to the requirements of Emergency Order #3 in order to protect customers.

II. THE COMMISSION SHOULD HAVE CONSIDERED THE DIRE FINANCIAL CONSEQUENCES THAT APPLICATION OF EMERGENCY ORDER# 3 TO COMPETITIVE SUPPLIERS COULD HAVE

Order No. 26,344 prohibits competitive suppliers from discontinuing service for non-payment and from charging late fees.[27] However, because the Commission issued Order No. 26,344 *sua sponte* and without the benefit of stakeholder input, it did not have the opportunity to consider evidence of the impact of the order on competitive suppliers. While the competitive supply community generally remains financially sound, competitive suppliers are already facing reductions in revenue as a result of declines in energy consumption related to reductions in

[24] *Cf. Bach v. New Hampshire Dept. of Safety*, 169 N.H. 87, 94 (2016) (concluding that administrative rules that added to, detracted from, or modified the interpretation of a statute were *ultra vires*).

[25] Order No. 26,343 at 2.

[26] *See, e.g.*, Puc 2004.18(e) (requiring that a CEPS terminating service to a customer provide notice with a statement "that termination of service will ***not*** result in disconnection from the electric distribution system and that the customer may obtain service from another CEPS or through utility default service") (emphasis added).

[27] Order No. 26,344.

economic activity and transitions to remote work.[28] If Order No. 26,344 remains in effect, competitive suppliers, including RESA members, will incur even more substantial losses that, unlike the public utilities, they will be unable to recover later.

Both Emergency Order #3 and Order No. 26,344 specifically state that they do not relieve customers of the obligations to pay their bills for service received during the State of Emergency.[29] However, even though customers remain obligated to pay their arrearages, there is no guaranty they actually will do so. If customers ultimately are unable to pay the utility charges, the utilities have mechanisms available to recoup those uncollectible amounts from all ratepayers.[30] Competitive suppliers, however, do not have this option. Moreover, the possibility that customers will pay arrearages after the State of Emergency ends does not address the impact the accrual of those arrearages will have on current competitive supplier cashflows.

Unlike other states, New Hampshire utilities do not purchase the accounts receivable of competitive suppliers.[31] Thus, if customers are unwilling or unable to pay their bills, the competitive suppliers serving those customers will not receive revenues to which they are entitled under their contracts. Despite this, competitive suppliers will continue to incur

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[28] *See, e.g.*, ISO Newswire, ISO New England implements actions in response to the Coronavirus (COVID-19) outbreak, Friday, April 10, 2020 Update, http://isonewswire.com/updates/2020/4/10/iso-new-england-implements-actions-in-response-to-the-corona.html ("Our forecasters continue to see a 3 to 5% decline in overall consumer demand for electricity due to pandemic-related societal changes.") (last visited Apr. 23, 2020); PJM Info-Connection, PJM Coronavirus (COVID-19) Information, https://www.pjm.com/about-pjm/newsroom/info-connection.aspx (Apr. 15, 2020) (identifying COVID-19-related energy and demand reductions within the PJM Interconnection footprint, including an average weekday decrease in peak demand of between approximately eight percent (8%) and ten percent (10%)) (last visited Apr. 23, 2020).

[29] Emergency Order #3, ¶ 3; Order No. 26,344 at 2.

[30] *See, e.g.*, Order No. 20,166 (Jul. 2, 1991) ("The Uniform System of Accounts adopted by this Commission for Electric Utilities includes uncollectible accounts in the operation and maintenance expenses (Account 904). That account provides for losses from uncollectible utility revenues and is included in base rate costs.").

[31] *See, e.g.*, Public Service Company of New Hampshire dba Eversource Energy Tariff for Electric Delivery Service (available at: https://www.eversource.com/content/docs/default-source/rates-tariffs/electric-delivery-service-tariff-nh.pdf?sfvrsn=7fb7f062_60) (eff. May 1, 2016) ("Eversource Tariff") (last visited Apr. 23, 2020), at 36 (describing allocation of "[c]ustomer payments received").

considerable costs to serve these customers. However, if Order No. 26,344 remains in effect, competitive suppliers will not be able to reduce those costs by transferring non-paying customers to default service and eliminating their obligations to purchase energy to serve those customers. As a consequence, in order to cover their costs, competitive suppliers may have to enter into additional credit facilities for which they will be required to pay interest. Unlike the utilities, however, competitive suppliers do not have a captive rate base from whom they can recover those additional financing costs.[32] Further, competitive suppliers will not even be able to collect late fees on arrearages accrued during the State of Emergency from customers[33] to help offset those added credit costs.

The impacts on competitive supplier cashflows will become increasingly acute as the State of Emergency continues[34] and more and more customers potentially become unable to make timely payments. And, those impacts will continue for at least six months after the State of Emergency has concluded[35] and, likely, significantly longer. For example, when customers make payments to the electric utilities in New Hampshire, those payments are applied in the following order:

> (1) utility outstanding deposit obligations, (2) any utility current payment arrangement obligations, (3) any utility budget billing arrangement obligations, (4) utility and supplier aged accounts receivables, ***with a priority*** for the utility aged receivables, (5) utility and supplier current charges, ***with a priority*** for the utility's current charges, and (6) any miscellaneous nonelectric service product or services.[36]

[32] *See, e.g.*, Order No. 25,202 (Mar. 10, 2011), at 18 (approving settlement agreement providing for, among other things, cost recovery of debt financing).

[33] Order No. 26,344, at 1-2.

[34] *Cf.* Executive Order 2020-05 (Apr. 3, 2020) (extending the effectiveness of Executive Order 2020-04 and all emergency orders issued pursuant to it).

[35] Order No. 26,344, at 1 (requiring that competitive suppliers provide customers with arrearages accrued during the State of Emergency a payment arrangement of at least six months).

[36] *See, e.g.*, Eversource Tariff, at 36 (emphasis added).

Under this payment hierarchy, the arrearages owed to competitive suppliers are fifth priority. Thus, if customers continue to struggle to pay their bills even after the State of Emergency has concluded, there may not sufficient funds available from the customer payments to pay competitive suppliers their past due balances. Further, even if there are sufficient funds to pay past due balances owed to competitive suppliers, there may not be sufficient funds available to pay the competitive supplier's current charges which are seventh in priority under the payment hierarchy. As a consequence, the impact of Order No. 26,344 on competitive supplier cashflows will continue long after the State of Emergency has concluded.

The effect of Order No. 26,344 on competitive supplier cashflows may make it impossible for some competitive suppliers to be able to satisfy their financial obligations. If this were to occur, competitive suppliers may no longer be able to serve their customers. For instance, if a CEPS is unable to satisfy its ISO New England obligations, it may become unable to continue to serve customers.[37] Notably, if this were to occur, customers would not have their service disconnected or discontinued. Instead, those customers would be transferred to utility default service[38] - the same result that would occur if the competitive supplier was permitted to de-enroll customers for non-payment. Thus, to ensure their financial health and the proper functioning of the restructured market, competitive suppliers must be able to transfer customers to default service that do not pay their bills timely.

[37] *See* Puc 2004.16(a) (recognizing suspension from regional market participation by ISO New England as an event that could cause a CEPS to be unable to provide service to customers in New Hampshire).

[38] *See, e.g.*, RSA 374-F:2(I-a) (defining "default service" as "electricity supply that is available to retail customers who are otherwise without an electricity supplier and are ineligible for transition service"); Puc 2004.18(e) (requiring that a CEPS terminating service to a customer provide notice with a statement "that termination of service will ***not*** result in disconnection from the electric distribution system and that the customer may obtain service from another CEPS or through utility default service") (emphasis added); *see also* Order No. 25,942, Order Addressing Question Transferred from Superior Court (Sep. 12, 2016) (discussing transfer of customers to default service when competitive supplier unable to meet its financial obligations at ISO New England).

III. APPLICATION OF EMERGENCY ORDER #3 TO COMPETITIVE SUPPLIERS COULD VIOLATE THE CONTRACTS CLAUSE

It is a well-settled principle of democratic society that those who lawfully contract amongst themselves must have reasonable assurances that their rights and obligations will not be disturbed.[39] Both the federal and state constitutions forbid the state from impairing the integrity of contracts.[40] Article I, Section 10 of the United States Constitution ("Federal Contracts Clause") declares that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts . . . ."[41] A statute that "work[s] a severe, permanent, and immediate change in . . . [a contractual relationship] irrevocably and retroactively" is rendered unconstitutional by the Federal Contracts Clause.[42] Similarly, Part I, Article 23 of the New Hampshire Constitution ("New Hampshire Contracts Clause") declares that "[r]etrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made . . . for the decision of civil causes . . . ."[43] It is well-settled in this state that "'every statute, which takes away or impairs vested rights, acquired under existing laws'" must be deemed a retrospective law within the meaning of Part I, Article 23.[44] The Federal Contracts Clause and the New Hampshire Contracts Clause provide equivalent protections.[45]

In order to determine whether state action unconstitutionally impairs a contract, courts generally embark on a three-part analysis: (1) whether the change in state law has operated as a

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[39] *See Lower Village Hydroelectric Assoc, L.P. v. City of Claremont*, 147 N.H. 73, 78 (2001); *see also Geldhof v. Penwood Assoc.*, 119 N.H. 754, 755 (1979) ("[W]hen corporations or citizens lawfully contract to exchange rights and obligations, they may have confidence that those rights and obligations will not subsequently be disturbed by the legislature").

[40] *Smith Insurance, Inc. v. The Grievance Committee*, 120 N.H. 856, 862 (1980).

[41] *Opinion of the Justices (Furlough)*, 135 N.H. 625, 630 (1992).

[42] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250 (1978).

[43] *See Lower Village*, 147 N.H. at 77.

[44] *Id.* (*citing Opinion of the Justices (Furlough)*, 135 N.H. 625, 630 (1992) (*quoting Woart v. Winnick*, 3 N.H. 473, 479 (1826)).

[45] *Opinion of the Justices (Furlough)*, 135 N.H. at 630.

substantial impairment of a contractual relationship; (2) whether the law serves a significant and legitimate public purpose; and (3) whether the means employed by the law is reasonable and necessary to accomplish the legitimate public purpose.[46] Under the first prong, the parties' reasonable expectations are central to the issue of substantiality.[47] This is because, "once these parties, as between themselves, have allocated rights and responsibilities, it is not within the power of the government to rearrange them."[48]

Further, "[i]n determining whether contract impairment is substantial, some courts look to whether the subject matter of the contract has been the focus of heavy state regulation."[49] However, past regulation of some aspects of activity does not "put the regulated firm on notice that an entirely different scheme of regulation will be imposed."[50] Rather, the issue is whether the statutory enactments present a "plausible . . evolution" or "small and predictable" refinement of existing law.[51]

Here, as noted above,[52] the impairment of prohibiting competitive suppliers from exercising contractual rights to transfer customers to default service who do not choose another competitive supplier or impose late fees if payments are not made timely will be substantial. For some competitive suppliers, it could be catastrophic. Moreover, the application of Emergency Order #3 to competitive suppliers is a drastic departure from the current manner in which the

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[46] *See Energy Reserves Group, Inc. v. Kansas City Power and Light Co.*, 459 U.S. 400, 411-13 (1983); *U.S. Trust Company of New York v. New Jersey*, 431 U.S. 1, 25 (1977); *Allied Structural Steel Co.*, 438 U.S. at 244; *Mercado-Boneta v. Adm. Fondo Compensación al Paciente*, 125 F.3d 9, 12-13 (1st Cir. 1997).

[47] *All. of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 42 (1st Cir. 2005); *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 190 (1st Cir.1999) ("In order to weigh the substantiality of a contractual impairment, courts look long and hard at the reasonable expectations of the parties.").

[48] *South Terminal Corp v. E.P.A.*, 504 F.2d 646, 679 (1st Cir. 1974) (*citing Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934)).

[49] *Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Ass'n*, 159 N.H. 627, 650 (2010).

[50] *Chrysler Corp. v. Kolosso Sales, Inc.*, 148 F.3d 892, 895 (7th Cir.1998).

[51] *Id.*

[52] *See supra* Section II.

Commission regulates competitive suppliers. New Hampshire law does not empower the Commission to prohibit competitive suppliers from exercising their contractual rights to transfer a customer to default service or impose late fees if payments are not made timely. In fact, Commission regulations actually authorize competitive suppliers to stop serving customers who fail to meet their contractual obligations.[53] The Commission has also approved competitive supplier registration applications that include form contracts providing for the termination of the agreement and/or the imposition late fees in the event of a customer's failure to pay bills timely.[54] Thus, the application of Emergency Order # 3 it is not a "small and predictable" refinement of existing law. Instead, it presents an entirely different scheme of regulation that will have a drastic effect on the competitive supply market in New Hampshire. Accordingly, application of Emergency Order # 3 to competitive suppliers will operate as a substantial impairment of supplier contractual relationships.

When a state law constitutes substantial impairment, the state must have a significant and legitimate public purpose behind the law.[55] A significant and legitimate public purpose is one aimed at remedying "an important general social or economic problem."[56] Emergency Order #3 is intended to ensure that residents and business in the State of New Hampshire continue to have access to "[c]ertain essential services" "necessary for the safety and protection of the public."[57] However, Order No. 26,344 does not serve this purpose because, even if competitive suppliers

[53] *See* Puc 2004.18(a); Puc 3004.09(a).

[54] *See, e.g.*, Docket No. DM 18-042, *First Point Power, LLC*, Commission letter approving registration (Apr. 6, 2018).

[55] *Energy Reserves Group*, 459 U.S. at 411-12; *see also Mercado-Boneta*, 125 F.3d at 13.

[56] *See Allied Structural Steel*, 438 U.S. at 247; *Mercado-Boneta*, 125 F.3d at 13.

[57] *See* Emergency Order #3, ¶ 1.

de-enroll customers, those customers will still receive those essential services from their public utilities.[58] Thus, Order No. 26,344 does not serve a significant and legitimate public purpose.

Further, the mere existence of a significant and legitimate public purpose does not end the relevant inquiry. Rather, the means chosen to accomplish this purpose must be "reasonable and necessary."[59] "[T]he reasonableness inquiry asks whether the law is reasonable in light of the surrounding circumstances and the necessity inquiry focuses on whether . . . [the state] imposed a drastic impairment when an evident and more moderate course would serve its purposes equally well."[60] As noted above, the application of Emergency Order #3 to competitive suppliers will have severe and substantial consequences. In addition, there are far less draconian alternatives available to achieve Emergency Order #3's goals. Specifically, the Commission could limit the applicability of Emergency Order #3 to the public utilities who have mechanisms in place to ensure their continued financial well-being and to recoup losses resulting from compliance with the order. By limiting the Emergency Order #3's applicability in this way, the Commission could still ensure that customers have access to essential services without placing an unreasonable and, for some an unbearable, burden on competitive suppliers. Thus, the application of Emergency Order #3 to competitive suppliers is not reasonable in light of the surrounding circumstances. As such, it could constitute a violation the Federal Contracts Clause and the New Hampshire Contracts Clause.

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[58] *See, e.g.*, RSA 374-F:2(I-a) (defining "default service" as "electricity supply that is available to retail customers who are otherwise without an electricity supplier and are ineligible for transition service"); Puc 2004.18(e) (requiring that a CEPS terminating service to a customer provide notice with a statement "that termination of service will not result in disconnection from the electric distribution system and that the customer may obtain service from another CEPS or through utility default service"); *cf.* Puc 3002.12 (defining LDC sales service as "natural gas commodity service provided on a firm basis to a retail customer that is not receiving service from a CNGS, in accordance with the LDC's retail natural gas services tariff").

[59] *Opinion of the Justices (Furlough)*, 135 N.H. at 634 (*quoting U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977).

[60] *United Auto, Aerospace, Agr. Implement Workers of American Intern. Union v. Fortunato*, 633 F.3d 37, 45-6 (1st Cir. 2011) (citations and internal quotation marks omitted).

IV. APPLICATION OF EMERGENCY ORDER #3 TO COMPETITIVE SUPPLIERS COULD CONSTITUTE A REGULATORY TAKING

Because, unlike the public utilities, competitive suppliers do not have mechanisms to recover their lost revenues, application of Emergency Order #3 to competitive suppliers could constitute a regulatory taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution.[61] Although "property may be regulated to a certain extent, if that regulation goes too far it will be recognized as a taking."[62]

Generally, after determining that an independent property right is implicated,[63] courts apply a three-part "ad hoc, factual inquiry" to evaluate whether a regulatory taking has occurred: (1) what is the economic impact of the regulation; (2) whether the government action interferes with reasonable investment-backed expectations; and (3) what is the character of the government action.[64] However, all three factors need not be satisfied. In fact, "the Supreme Court has frequently found that one of the . . . factors is dispositive."[65]

Competitive suppliers enter into contracts with their customers.[66] These contracts generally specify the competitive suppliers' property right to receive payment,[67] to do so within required timeframes and to assess late fees or take other action (such as transferring customers to

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[61] U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation."); U.S. Const. amend. XIV; *see also* N.H. Const. Part 1, Art. 12 ("[N]o part of a man's property shall be taken from him . . . without his own consent . . . .").

[62] *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

[63] *See Puerto Rico Telephone Co. v. Telecommunications Regulatory Bd. of Puerto Rico*, 189 F.3d 1, 16 (1st Cir. 1999).

[64] *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 33 (1st Cir. 2002) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

[65] *Id.* at 35 *(citing Hodel v. Irving*, 481 U.S. 704, 716 (1987) (finding that the character of the government action involved determined the issues)); *see also Ruckelshaus v. Monsanto Co.*,467 U.S. 986, 1005 (1984) (finding the interference with reasonable investment-backed expectations to be dispositive).

[66] *See, e.g.*, Puc 2004.04 (setting forth required disclosures before the end of contracts); 3006.01(s) (requiring form contracts to be provided with CNGS registration applications).

[67] *See Nat'l Educ. Ass'n-Rhode Island ex rel. Scigulinsky v. Ret. Bd. of Rhode Island Employees' Ret. Sys.*, 172 F.3d 22, 30 (1st Cir. 1999) (observing that a contractual right to payment constitutes property for the purposes of the Takings Clause).

default service) when customers do not abide by those payment terms.[68] As detailed above,[69] the economic impact of Order No. 26,344 on competitive suppliers will be considerable and, for some, could be disastrous.

Order No. 26,344 would also interfere with competitive suppliers' investment-backed expectations. For example, competitive suppliers must procure energy and related services in the wholesale energy markets to hedge their retail load positions. These procurement activities carry a significant cost. This is especially true when a competitive supplier is extending a fixed price offering to retail customers because the supplier must have wholesale positions in place to support those fixed price offerings. Competitive suppliers set payment terms based on these and other investment-backed expectations. Suppliers also set late fees based on investment-backed expectations. For instance, some suppliers' operations are backed by credit extended by third parties that result in those suppliers having to pay or incur certain costs if customers do not make timely payments. Late fees offset those credit costs.

Because Order No. 26,344 will have a substantial adverse economic impact on suppliers and will interfere with investment-backed expectations, it goes too far. As a consequence, application of Emergency Order #3 could constitute a regulatory taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

CONCLUSION

The Commission mistakenly conceived Emergency Order #3 as applying to competitive suppliers. Further, when the Commission issued Order No. 26,344, it did not have the opportunity to consider evidence of the impact of that order on competitive suppliers. Moreover,

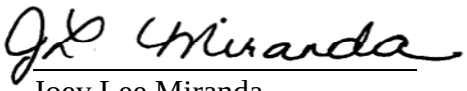
[68] *See, e.g.*, Docket No. DM 18-042, *First Point Power, LLC*, Renewal Registration as a Competitive Electric Power Supplier, Electricity Sales Agreement (Mar. 20, 2018).

[69] *See supra* Section II.

application of Emergency Order #3 to competitive suppliers could violate the Contracts Clause and constitute a regulatory taking. Consequently, Order No. 26,344 is unlawful and unreasonable. Thus, for all of the foregoing reasons, the Commission should grant rehearing to reconsider Order No. 26,344.

Dated: April 23, 2020

Respectfully Submitted,
RETAIL ENERGY SUPPLY ASSOCIATION

By: 

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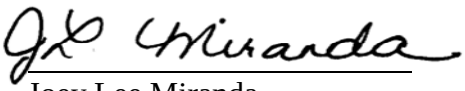
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by electronic mail to the Office of the Consumer Advocate (ocalitigation@oca.nh.gov) on this 23rd day of April 2020.



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