

New Hampshire Public Utilities Commission

Docket No. IR 22-042

Comments of Matthew Fossum on January 13, 2023 Report

January 26, 2023

I write today to submit comments on the “Report on Energy Efficiency, Planning, Programming, and Evaluation” (“Report”) issued by the New Hampshire Public Utilities Commission (“Commission”) on January 13, 2023. I am writing to express my profound disappointment in Commission’s decision to issue the Report at all, and to note some concerning aspects of findings in the Report. Hopefully, these comments will provide some useful observations about the Report and its associated proceeding.

By way of brief background for my comments, I was previously involved in the development and delivery of energy efficiency (“EE”) plans and programs in New Hampshire. For nearly 15 years I was directly and substantially involved in the work of the Commission, and numerous stakeholders, regarding the regular EE plan filings and program delivery – first as an employee of the Commission itself, and then as an employee of two of the State’s regulated utilities where I focused on work before the Commission. While I no longer have such a role, I retain a keen interest in supporting the successful delivery of EE programs in New Hampshire. For that reason, I write to offer these comments in my personal capacity as a New Hampshire utility customer, and in the hope that my comments might have some value in the process.

First, as a long-time participant in Commission matters, I write to express my profound disappointment in the very existence of the Report. As the Commission is well aware, in late 2021 the Commission essentially halted all EE programming in New Hampshire when it issued Order No. 26,553 (November 12, 2021). Despite the Commission’s various attempts to frame the conclusions of that order otherwise, its decision directly, and with minimal justification, undermined the ongoing delivery of EE programs in New Hampshire by rejecting a plan that had been developed following an extensive and broad-reaching stakeholder process. The practical effect of that order was to sow sufficient confusion and doubt about the continued delivery of EE programs that many programs were unnecessarily scaled back, suspended, or closed entirely. We may never know the total scope of cost-effective EE opportunities lost as a direct result of that order. Not surprisingly, the Commission’s order generated numerous legal challenges, including multiple appeals to the New Hampshire Supreme Court, nearly immediately.

Ultimately, the General Court resolved matters by amending the law through HB 549 to clarify that certain EE issues – such as the cost-benefit test and the calculation of performance incentives – would be handled in a particular way in New Hampshire. That new legislation walked back some of the worst results of the Commission’s order, and, I believed, demonstrated that the Commission should exercise extraordinary caution in this area in the future. On that front, it bears noting that the most recent State Energy Strategy as published by the New Hampshire Department of Energy (“DOE”) in July 2022, and referenced in the Report, indicates

a similar understanding of the effect of HB 549 when it states, “Going forward, HB 549 will provide significant stability to the utilities, businesses, households and other stakeholders involved in New Hampshire energy efficiency.” 2022 State Energy Strategy at 20.

Despite this direction from the General Court (to say nothing of the public backlash to the order), on its own motion the Commission determined that it would challenge the hoped-for stability by probing and evaluating issues around EE programming in Docket No. IR 22-042. As an outside observer, it is difficult to understand why the Commission would elect such a course after having recently faced such a public and unified rebuke of its prior actions relating to EE programs.

Furthermore, in July 2021, the General Court created the DOE for the specific purpose of improving “the administration of state government by providing unified direction of policies, programs, and personnel in the field of energy and utilities, making possible increased efficiency and economies from integrated administration and operation of the various energy and utility related functions of the state government.” RSA 12-P:2, II. Thus, to the extent the policies or practices around the delivery of EE programs merit investigation, it would seem that even prior to the opening of Docket No. IR 22-042 the authority to undertake such an investigation was assigned to the DOE and not the Commission. Again, as an outside observer, in light of this modification of regulatory responsibilities, it is difficult to comprehend what the Commission is doing, or why, and what it intends to accomplish in this docket.

Against that backdrop, the Commission elected to pursue its investigation, nominally to aid its understanding of the EE planning process. As the Commission put it:

We therefore open this investigatory proceeding to review the responses to these reporting requirements, further probe these topics through follow-up questions, and examine the Joint Utilities development of the 2024–2026 triennial plan (2024–26 Plan). This investigation will aid the Commission in its role ensuring that the 2024–26 Plan comports with the standards and policy priorities of RSA 374-F. This docket will facilitate a transparent and open examination of the Joint Utilities’ existing energy efficiency programming, opportunities for changes and updates to existing programming, and may serve as a starting point for other dockets to address specific issues or areas of concern in advance of the Joint Utilities’ filing of the 2024–26 Plan on July 1, 2023.

August 10, 2022 Order of Notice in Docket No. IR 22-042 at 2. Somewhat similarly, in the Report the Commission contends that “The goal of this study was to provide the Commission and the participants, including state policymakers, with increased clarity of key EE topics and the impact on Granite Staters.” Report at 1. Even assuming goals stated in the order of notice are appropriate areas of Commission inquiry (and I am not certain they are), and even assuming the Commission’s goals in issuing the Report are what it claims, the text of the Report does not support those goals and appears to ignore them in the pursuit of a specific, pre-ordained outcome.¹

¹ For purposes of this letter, I do not attempt to discuss the process employed in the docket for gathering the information sought by the Commission. I do note, though, that as a long-time participant in Commission matters,

As one example of the disconnect between the Commission's stated purposes, and the conclusions in the Report itself, one need look little further than the Executive Summary. There, the Commission states, "As markets transform, opportunities arise to shift resources to areas where market barriers continue to exist. ***This shift is critical to ensure that ratepayer-funded EE investments generate the greatest possible return*** by lowering the energy expenditures of individual ratepayers." Report at 2 (emphasis added). Thus, in the Report the Commission has not indicated that it is seeking to understand or provide clarity around the way current plans align with the stated policy goals of the Legislature (and DOE), but rather that it is seeking to influence the planning process to assure that EE investments "generate the greatest possible return." A variation on this conclusion is presented elsewhere in the Executive Summary where the Commission states "As the regulator responsible for oversight of the Granite State's ratepayer-funded EE planning, programming, and evaluation, the Public Utilities Commission (Commission) is responsible for ***ensuring that EE investments return the maximum benefits*** for all classes of ratepayers." Report at 1 (emphasis added). Despite my years of involvement in the development of EE programming in New Hampshire, and my years researching and analyzing public utility law in New Hampshire, I am not aware of any such requirement in New Hampshire law.

While RSA 374-F:3 anticipates that EE programs should be cost-effective, there is nothing in that law of which I am aware requiring that the Commission ensure programs "generate the greatest possible return." In fact, following the amendments in HB 549, the law specifically provides that "The commission shall use benefit per unit cost as only one factor in considering whether the utilities have prioritized program offerings appropriately among and within customer classes." RSA 374-F:3, VI-a(d)(4). Thus, the General Court has clearly indicated that the cost-benefit ratio is only one factor in the analysis surrounding EE programs. Even marginally cost-effective programs may well be worth implementing for reasons beyond a benefit per unit cost metric.

The conclusion in the Report that EE investments are to "generate the greatest possible return" makes no reference to any supporting law or policy, does not explain why that is the preferred or intended purpose of EE investments, and does not explain why the Commission believes it, rather than the General Court or DOE, is responsible for assuring that the EE programs are constructed to achieve this goal. Given that this conclusion appears to be manufactured entirely for purposes of this Report, it is unclear to me what the Commission is looking to achieve by making such a pronouncement. So far as I can tell, this conclusion exists solely to provide a basis for the Commission to reject future EE program proposals, even cost-effective ones, on the basis that they do not generate a sufficient, undefined, level of return. Though I have other concerns with the Report, this example seems sufficient to demonstrate that the Report does not appear to do what the Commission claims it was intending to do. As a utility customer and prior (and potential future) participant in EE programs in New Hampshire, I am disappointed in the

the Commission's process appears, to me, to improperly blend and blur the lines between the requirements of investigations and those of adjudications.

direction of the Report generally, as well as what the existence of the Report appears to mean for the future of EE programs in New Hampshire.

Beyond the general confusion around the purpose and intent of Report itself, my second concern is with many of the specific conclusions in the Report. I will not attempt to catalog every concern in this communication, but will outline a few for illustrative purposes. First, in the Report the Commission examines various cost-effectiveness tests, including the Granite State Test (“GST”), for EE investments. The GST is required by law to be used in evaluating the EE plan proposals. *See* RSA 374-F:3, VI-a(d)(4). The Commission compares this test with the cost-effectiveness tests in other jurisdictions and notes what it believes to be shortcomings in the GST. The purpose of this analysis is, at best, unclear to me.

The Commission’s ultimate finding on the GST, Report at 13, is that future cost-effectiveness tests might be based on tests from other jurisdictions, might look at different costs and benefits, and/or might reach different conclusions regarding particular programs. In other words, the Report concludes that if the facts and law were different, the results of an analysis using those different facts and law might be different. Whether the Commission’s comparison of the different tests is accurate, I do not know, but even if it is, it is irrelevant.

The General Court has told the Commission what cost-benefit analysis to use for “the March 1, 2022 filing, and future plan offerings,” RSA 374-F:3, VI-a(d)(4). The Commission is not the body charged with assessing the State’s policy on matters such as this, and if the policy around these issues should change, that is a matter for the DOE or the General Court to address. The Commission is charged with judging the plans submitted to it for their conformance with existing law. If the submitted plans conform to and are supported by the GST, that should end the Commission’s analysis. The fact that some programs or plans may, or may not, fare differently under a different, hypothetical, standard does not matter, and should not be of concern to the Commission. Similarly, the Report reviews performance incentives and concludes that in some hypothetical case where the facts and law are different the incentives might be different than they are today. The Report does not, however, explain why this matters generally, nor does it explain why it matters in this docket, which is nominally related to assisting the Commission in understanding how EE planning aligns with existing law and policy.

An additional specific finding of the Report that is concerning relates to the Commission’s review of market barriers. In the Report, the Commission notes that “While no uniform definition of ‘market barriers’ exists in statute or has been adopted by the Commission, various participants to the investigation suggested definitions, following Commission requests, for consideration.” Report at 4. Additionally, the Report states that “No uniform definition of ‘market barriers’ has been adopted by the Utilities.” Report at 17. Following its conclusions that there are no current agreed-upon definitions against which to measure supposed “market barriers”, the Commission speculates that current programs might be reevaluated for their prudence if or when those items are studied in the future. Specifically, the Report states “Future study of successful EE programs or measures that have reduced market barriers could provide

opportunities to evaluate the prudence of current and future incentives and programs to transform the market and continuously reduce barriers.” Report at 17. Why the Commission believes that current EE program offerings should be reevaluated for prudence under some as-yet-unknown standard at some undefined time in the future is not explained anywhere in the Report. As above, this conclusion appears to exist solely for the Commission to justify rejecting future proposals (and/or cost recovery) for failing to meet a standard that does not exist.

Lastly, I wish to express my profound concern regarding, and disappointment in, the Report’s review of the income-qualified EE programs. Initially, and for the same reasons described above regarding cost-effectiveness, it is unclear why the Commission has determined that it is necessary or proper for it to review a matter clearly covered by statute. There is no reason that I can see for the Commission electing insert its own analysis on this issue. More troublingly, however, is the Report’s clear implications that the cost-effectiveness of these programs is in question and, therefore, the programs themselves may be curtailed in the future. When provided the opportunity to weigh in on the continuation of these programs, the General Court has seen fit to protect them by ensuring a minimum level of spending to support those programs. That the Commission has determined, on its own, to evaluate the spending on those programs and has indicated a desire to potentially roll back those programs despite the General Court’s decision to the contrary (presumably because they do not generate the “greatest possible return”) is deeply troubling.

Having reviewed the Report, I urge the Commission to reevaluate this docket and the Report and reconsider whether pursuing either is aligned with the goals and intentions of the General Court and the people of New Hampshire.

Yours,

/s/ Matthew J. Fossum

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