

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

IR 22-042

ELECTRIC AND GAS UTILITIES

Investigation of Energy Efficiency Planning, Programming, and Evaluation

Order on Motion for Rehearing of Order of Notice

O R D E R N O. 26,678

September 7, 2022

I. Background

On August 10, 2022, the Commission issued an order of notice (Order of Notice) initiating an investigation of ratepayer funded energy efficiency planning, programming, and evaluation. The Commission stated the investigatory docket would examine responses to reporting requirements imposed by the Commission by Order 26,621, as clarified by Order No. 26,642 (June 21, 2022), as well as to “further probe these topics through follow-up questions, and examine the Joint Utilities development of the 2024–2026 triennial plan.” Order of Notice at 2.

On August 17, 2022, the Office of the Consumer Advocate (OCA) filed a motion for rehearing and/or clarification (Motion) of the Order of Notice, pursuant to RSA 541:3.

No other interested persons or stakeholders filed any response to or comments on either the Order of Notice or the OCA’s Motion.

The Order of Notice, Motion, and other docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted at: <https://www.puc.nh.gov/Regulatory/Docketbk/2022/22-042.html>.

II. Summary of the OCA's Motion

The OCA requested the Commission rescind the Order of Notice and direct that the docket remain open to receive “such reports as the Commission may require of the ... utilities as administrators of the energy efficiency programs mandated by RSA 374-F:3, VI-a.” Motion at 16.

As a basis for its position that the Order of Notice should be rescinded, the OCA argued that: 1) the investigation launched by the Order of Notice is inconsistent with RSA 541-A, New Hampshire's Administrative Procedure Act; 2) the investigation launched by the Order of Notice contravenes the directives found in 2022 N.H. Laws, ch. 5; 3) the Commission is precluded from examining the Granite State Test or Total Resource Cost Test by 2022 N.H. Laws, ch. 5; and 4) the Commission should reconsider its approach as improvident and improperly timed.

The OCA supported its argument that the Order of Notice is inconsistent with RSA 541-A by construing the Order of Notice as a commencement of an adjudicative proceeding pursuant to RSA 541-A:31, III. In examining the authorities the Commission cited in the Order of Notice, the OCA agrees that RSA 365:19 may permit an administrative action that bears on another on a future matter, but only if invoked with another authority authorizing the Commission to hold a hearing. The OCA argued that Commission orders do not confer authority to convene an adjudicate proceeding. The OCA also argued that RSA 541-A constrains the Commission to two types of administrative actions that will have binding effect on rights, duties, or privileges of any party: adjudicative proceedings or rulemaking proceedings. The OCA construed the Order of Notice as convening a third “flavor” of administrative decision-making featuring some adjudicative features.

In support of the argument that the Order of Notice contravenes the directives found in 2022 N.H. Laws, ch. 5, the OCA argues that the General Court explicitly prescribed the rate funding energy efficiency programming, the procedure for review of changes to energy efficiency programming offerings, and the tests for benefit cost evaluation. The OCA argues that the Commission's investigation of existing energy efficiency programming and future planning not only contravenes the General Court's procedural prescriptions, but also imposes an unreasonable workload on both the utilities and stakeholder development process facilitated by the Energy Efficiency Committee of the Energy Efficiency and Sustainable Energy Board.

Finally, the OCA encourages the Commission to be focused on the goals and intent of public utility regulation, discouraging the imposition of direct management of the Joint Utilities' Energy Efficiency program management outside the statutorily mandated review and approval of triennial plans and plan modifications.

III. Commission Analysis

The Commission may grant rehearing or reconsideration for "good reason" if the moving party shows that an order is unlawful or unreasonable. RSA 541:3; RSA 541:4; *Rural Telephone Companies*, Order No. 25,291 (November 21, 2011); *see also Public Service Company of New Hampshire d/b/a Eversource Energy*, Order No. 25,970 at 4-5 (December 7, 2016). A successful motion must establish "good reason" by showing that there are matters that the Commission "overlooked or mistakenly conceived in the original decision," *Dumais v. State*, 118 N.H. 309, 311 (1978) (quotation and citations omitted), or by presenting new evidence that was "unavailable prior to the issuance of the underlying decision," *Hollis Telephone Inc.*, Order No. 25,088 at 14 (April 2, 2010). A successful motion for rehearing must do more than merely restate prior arguments and ask for a different outcome. *Public Service Co. of N.H.*, Order No. 25,970, at 4-5

(citing *Public Service Co. of N.H.*, Order No. 25,676 at 3 (June 12, 2014); *Freedom Energy Logistics*, Order No. 25,810 at 4 (September 8, 2015)).

The OCA has not stated good cause to grant rehearing. The OCA's motion assumes a straw man version of the Commission's Order of Notice over features nowhere to be found therein. An investigative docket is definitionally non-adjudicative, and the Order of Notice includes no indication that the Commission intended that this docket be adjudicative or to resolve a contested case. Nor does the Order of Notice suggest that the Commission intends to conclude this docket with a binding order of any kind. As the Order of Notice makes abundantly clear, the purpose of this investigation is to engage stakeholders in an open, overarching, and collaborative process that is free of certain procedural constraints that exist in adjudicative dockets.¹ Such an inquiry is plainly within the Commission's broad investigative authority, which encompasses "any rate changed or proposed or . . . any act or thing having been done, or having been omitted or proposed by any public utility." RSA 365:4. The results may take the form of non-binding guidance, procedural and/or operational changes on the part of the Commission, a decision by the Commission to initiate one or more rulemaking or adjudicative dockets, a report with information that may benefit legislators, or some combination of the above. To the extent that procedural requirements in the Order of Notice mirror or reference adjudicative practice, they do not separately convene an adjudication, imply an order binding on

¹ It is worth noting that it is precisely this open and collaborative process that the OCA and others have, in previous *adjudicative* dockets, found to be lacking. *See, e.g.*, Mot. for Reh'g of Order No. 26,577, Docket No. DE 22-004 at 6 (Mar. 21, 2022) ("[B]ecause [the Commission is] behind an *ex parte* wall and must operate with a high degree of formality, the necessary channels of communication are closed and the needed degree of flexibility is missing."); Mot. for Reh'g and/or Clarification, Docket No. DE 19-197 at 6 (Mar. 11, 2022) ("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.")

the parties will issue in this docket, or that the Commission authorizes discovery between the parties.

As acknowledged by the OCA, the Commission possesses investigatory authorities identified in the Order of Notice. The Commission is also required to review the Joint Utilities' statewide triennial energy plans and any annual updates to those plans. RSA 374-F:3, VI-a(d)(5) *et seq.* Commission review of such plans will be conducted through an adjudicative proceeding within a statutorily abbreviated timeframe. *Id.*, *see also* RSA 374-F:4, XI. These adjudicative proceedings will, of course, be self-contained, and the Commission's decisions will be based upon the record presented in those proceedings. Nevertheless, exercising the Commission's investigatory authorities provides a means for the Commission to stay informed of the Joint Utilities' energy efficiency program management, planning, and to assess compliance with laws and other authorities, RSA 374:4, thereby honing the Commission's inquiry in its adjudicative dockets and enabling efficient, expeditious decisions

As stated in the Order of Notice at pages 1 and 2, the Commission reviews the Joint Utilities' statewide triennial energy plans and any annual updates to ensure they are: 1) optimized to deliver ratepayer savings as made possible by funding; 2) appropriately prioritize program offerings among and within customer classes; and 3) adequately designed to address state policy principles related to market barriers. Thus, the Commission investigation of various aspects of these plans is in furtherance of 2022 N.H. Laws, ch. 5 and the Commission's broader role overseeing public utilities.

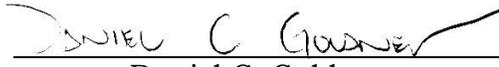
With respect to the OCA's remaining arguments, we find them to be premature, and better suited to the comments we invited on the scope and procedural schedule in

this investigation. These are topics the Commission has already announced will be discussed at a prehearing conference on October 12, 2022, and which may also be addressed in writing in advance of the prehearing conference. The OCA's motion for rehearing of these points is, therefore, denied as unripe.

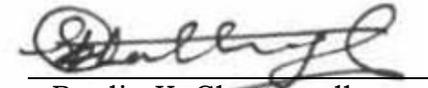
Based upon the foregoing, it is hereby

ORDERED, the Office of the Consumer Advocate's Motion for Rehearing and/or Clarification is DENIED.

By order of the Public Utilities Commission of New Hampshire this



Daniel C. Goldner
Chairman



Pradip K. Chattopadhyay
Commissioner

Service List - Docket Related

Docket# : 22-042

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