STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Electric and Gas Utilities

Investigation of Energy Efficiency Planning, Programming, and Evaluation

Docket No. IR 22-042

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 the Order of Notice ("OON") issued in the above-referenced proceeding on August 10, 2022. In support of this request, the OCA states as follows:

I. Introduction

RSA 541:3 provides that "[w]ithin 30 days after any order or decision has been made by the commission . . . any person directly affected thereby may apply for a rehearing in respect to any matter . . . covered or included in the order." Typically, parties to Commission proceedings seek RSA 541:3 relief (such requests being a condition precedent to appellate relief pursuant to RSA 541:6) with respect to final orders in adjudicative proceedings. But, by its terms, RSA 541:3 does not limit rehearing relief to such post-hearing merits orders. When, as here, the Commission makes substantive and procedural determinations in an Order of Notice issued pursuant to RSA 541-A:31, III, and such determinations are contrary

to New Hampshire law, a rehearing motion provides aggrieved parties the opportunity to object at a juncture calculated to avoid forcing parties and the Commission itself to participate in a proceeding whose announced parameters are contrary to law.

II. Administrative Procedure Gone Awry

According to the Order of Notice, the Commission is commencing this proceeding "pursuant to Order No. 26,621, as clarified by Order No. 26,642 (June 21, 2022) as well as the Commission's other [sic] investigatory authorities: RSA 365:5, 365:6, 365:15, 365:19, 374:4, 374:7, and 374-F, X." We begin with the statutes invoked by the Commission as the basis for conducting the proceeding described in the OON.

Collectively, these statutes implement what is clearly authority vested in the Commission, with a long history, to exercise a form of plenary oversight of regulated utilities. Indeed, if the Commission's purpose here were simply to develop as much information as possible in quest of learning how the utilities are discharging, or plan to discharge in the future, their obligations with respect to ratepayer-funded energy efficiency, RSA 365:7 would facially authorize unannounced visits to utility offices around the state by Commission employees demanding instant access to all relevant books and records upon the furnishing of "written authority to make such inspection signed by . . . some member of the commission." We do not recommend such a course of action, but it is, at least, statutorily permissible.

But the Commission has announced plans to do much more than just gather information here. The OON plainly expressed an intention to conduct an adjudication of some sort. See OON at 3-5 (requiring utilities to "participate," inviting "all other parties to Docket No. DE 20-092" to "participate," scheduling a "prehearing conference" (presumably pursuant to RSA 541-A:31, which governs adjudicative proceedings), inviting utilities and other stakeholders to "pre-file comments on the procedural schedule and scope of this investigation," and inviting formal intervention petitions from parties wishing to be "admitted as a party in this proceeding," at 2. None of the statutes cited by the Commission authorize the agency to proceed in this fashion.

The only possible exception is RSA 365:19. This section authorizes the Commission to conduct an investigation "[i]n any case in which the commission may hold a hearing" and, in the event the investigation uncovers anything actionable, "such facts shall be stated and made a part of the record" so that "any party whose rights may be affected shall be afforded a reasonable opportunity to be heard with reference thereto or in denial thereof." In reality, RSA 365:19 is not applicable to the present circumstances.

In exercising its RSA 365:19 authority, the Commission cannot simply presuppose that its investigation involves a "case in which the commission may hold a hearing." In other words, for the OON to have successfully and validly invoked RSA 365:19 it would have had to cite some *other provision* of its enabling statutes

authorizing a hearing. All of the other statutes cited in the OON involve investigative authority, not the power or responsibility to hold hearings.

The two previous orders referenced by the Commission in the OON likewise do not provide the basis for the agency to assert the authority to conduct some sort of adjudicative process under the guise of an investigative docket. "The PUC is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute." *Appeal of Public Service Co. of New Hampshire*, 122 N.H. 1062, 1066 (1982) (citation omitted). The obvious implication of this longstanding principle is that the Commission cannot cite one of its own orders as the basis of its authority to do anything. Order No. 26,621 approved the revised 2021-2023 Triennial Energy Efficiency Plan in Docket No. DE 20-092. As such, it has no prospective effect. Order No. 26,642 granted in part and denied in part a motion for rehearing of Order No. 26,621; the effect of the latter order was to clarify certain ongoing reporting requirements applicable to electric and natural gas utilities in their joint capacities as administrators of the ratepayer-funded NHSaves programs. Nothing in either of those orders provides anything close to a basis for adding yet another RSA 541:A, 31 adjudicative proceeding (or some variation on the adjudication theme that is not tethered to the Administrative Procedure Act) to the mix of what the program administrators and other interested parties must do in quest of a sustainable future for NHSaves.

The Administrative Procedure Act, RSA 541-A, lays out a rational and coherent framework for administrative decisionmaking. It does so by authorizing two 'flavors' of administrative action in circumstances where the results of that action will have a binding effect on the "legal rights, duties, or privileges of a party." See RSA 541-A:1, IV (defining "contested case"). When those rights, duties, or privileges are "required by law to be determined by an agency after notice and an opportunity for hearing," *id.*, the agency must commence adjudicative proceedings pursuant to RSA 541-A:31. See RSA 541-A:31, I (requiring an agency to "commence and adjudicative proceeding if a matter has reached a state at which it is considered a contested case"). If the agency wishes to make a decision of "general applicability" in the course of implementing its enabling statute, this meets the definition of "rule" in the Administrative Procedure Act, see RSA 541-A:1, XV and, pursuant to RSA 541-A:3, the agency must invoke the rulemaking procedures enumerated via sections 3 through 22 of the statute. The OON attempts to perform an end-run around these requirements by invoking the Commission's investigative authority to conduct its "examination" of the existing NHSaves programs and possible changes and updates to that programming. This transgresses the principle that "[w]here reasonably possible, statutes should be construed as consistent with each other" so as to "lead to reasonable results and effectuate the legislative purpose of the statute." *Nault v. N&L Development Co.*, 146 N.H. 35, 38 (2001) (citation omitted); see also Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* (2012) ("Scalia & Garner) at 253 ("Statutes . . . cannot be read intelligently if the eye is

closed to considerations evidenced in affiliated statutes) (quoting Justice Felix Frankfurter, citation omitted). In other words, the Commission misapplies and creates disharmony between the Administrative Procedure Act and the statutes enumerating the agency's investigative authority by attempting to create a third flavor of administrative decisionmaking that is part investigation with whatever adjudicative features the Commission deems to be convenient.

The invitation for parties to "pre-file comments on the procedural schedule and the scope of the investigation," OON at 3, is especially troubling. The reference to pre-filing seems to imply that such submissions will be treated as prefiled direct testimony – which would make them subject to discovery, rebuttal, and cross-examination at some hearing on a to-be-determined date. The notion that parties suggest a procedural schedule presupposes that the docket will end with some kind of binding resolution, and implies that anyone is free to come up with whatever procedural roadmap seems advantageous so that the Commission might pick one of them regardless of existing statutes or procedural rules. This is the very definition of improvident regulatory uncertainty, and for the reasons already stated the Commission may not flaunt the Administrative Procedure Act in such fashion. This is particularly so given that, presumably, the results of the investigation would have to be known well before the July 1, 2023 filing date for the 2024-2026 Triennial Energy Efficiency Plan.

It is instructive to compare the Commission's announced approach to this proceeding to the manner in which the agency handled its grid modernization

investigation, Docket No. IR 15-296. In that proceeding, the Commission arguably erred in the other direction, allowing the investigation to extend for too protracted period. Notably, roughly three years of the seven-plus years in which that investigation was open were taken up with internal PUC deliberations and ruminations (at a time before the PUC Staff was spun off to become the regulatory support division of the new Department of Energy); during the rest of the time, stakeholders were actively engaged in discussions and information exchange. The Commission issued what was regarded (at least by Eversource) as a controversial new approach to grid modernization investments, see Order No. 26,358 (May 22, 2020) and Eversource motion for rehearing of same (tab 112 of that docket). Eventually, the Commission resolved the problem by issuing Order No. 26,575 on February 3, 2022 closing the investigation, denying the rehearing motion as moot, and clarifying that the policy determinations announced two years earlier were intended as "guidance" as opposed, presumably, to binding legal rulings. Procedurally, the Commission should treat the instant docket in similar fashion.

III. House Bill 549 Thwarted and Disregarded

Most importantly, the investigative proceeding whose existence and parameters were announced via the OON in this docket directly contravenes both the letter and the spirit of Chapter 5 of the 2022 New Hampshire Laws, more commonly referred to as House Bill 549. For this reason alone, the Commission

must stand down.

House Bill 549 inserted a series of detailed provisions into RSA 374-F:3, VI-a, which concerns the System Benefits Charge that funds both the Electric Assistance Program for low-income customers and the NHSaves energy efficiency programs. The manifest intention of this language was to supersede certain determinations made by the Commission in its Order No. 26,553, which was entered in Docket No. DE 20-092. Order No. 26,553 rejected the proposed 2021-2023 Triennial Energy Efficiency Plan, ordered a drastic curtailment of the energy efficiency portion of the System Benefits Charge (and its gas utility counterpart, the energy efficiency portion of the LDAC charge), and declared an intention to phase-out ratepayer-funded energy efficiency programs altogether over the next three years in favor of allowing the free market to determine the extent to which customers acquire energy efficiency measures. By inserting language in RSA 374-F:3, VI-a, the General Court explicitly overrode what the Commission misleadingly characterized as "long-held tenets" grounded in the Restructuring Act (RSA 374-F). See Order No. 26,553 at 27 (referencing "long-held tenets" as articulated by the Commission in 1998, 2000, and 2009 but not the 2016-2021 period when the Commission-authorized Energy Efficiency Resource Standard was in place).

Specifically, House Bill 549 prescribed the energy efficiency portion of the System Benefits charge (setting 2020 as a benchmark year and providing for

automatic annual adjustment according to a specified formula). See RSA 374-F:3, VI-a(d)(2) (repeatedly using the verb "shall," thereby indicating an unmistakable legislative intent both to perpetuate the NHSaves programs and to fund them at statutorily determined levels). Procedurally, the General Court was unusually precise with a set of detailed directives to the agency. See RSA 374-F:3, VI-a(d)(3) (establishing March 1, 2022 as the deadline for seeking "changes to current programming offerings that will be available for the period between May 1, 2022 and January 1, 2024," also setting May 1, 2022 as the Commission's deadline for ruling on such requests); RSA 374-F:3, VI-a(d)(5) (similarly establishing July 1, 2023 as the date for utility s submission of the proposed 2024-2026 Triennial Energy Efficiency Plan and directing the Commission to approving any resulting program changes by November 30, 2023; further requiring a similar process "no less frequently than every 3 years"). The Commission nevertheless now announces, via the OON, a "treansparent and open examination of the Joint Utilities' existing energy efficiency programming, opportunities for changes and updating to existing programing" and potentially "other dockets to address specific issues or areas of concern." This is a direct affront to these legislative directives, which implicitly but unmistakably instruct the Commission to stand down until receipt of the 2024-2026 Triennial Energy Efficiency Plan on July 1, 2023.

Why is this important? Because as the Commission is aware, or at least should be aware, the development of the 2024-2026 Triennial Energy Efficiency

Plan is an enormous undertaking. Via the Energy Efficiency Committee of the RSA RSA 125-O:5-a Energy Efficiency and Sustainable Energy Board, the NHSaves utilities are keeping faith with a longstanding commitment to develop that plan in collaboration with interested stakeholders (the OCA among them). The Commission's recent pronouncement that the House Bill 549, RSA 374-F:3, VI-a(d)(4) directive that "[i]n no instance shall an electric utility's planned electric system savings fall below 65 percent of its overall planned energy savings" really means "in no instance shall an electric utility's annual *and lifetime* electric system savings fall below 65 percent of its overall planned energy savings," see Order No. 26,642 at 8, itself triggers a herculean task to reconfigure NHSaves (in a manner, by the way, that will likely be fatal to weatherization programs offered to residential electric customers who do not qualify for low-income assistance).

Even for the OCA, which does not make a habit of indulging utility complaints of overwork, these demands seem unreasonable. Also, the expense associated with such frantic efforts to comply with a labile and ill-defined set of Commission directives can only end up harming ratepayers financially, either by covering costs or suffering reductions to the NHSaves programs in light of additional administrative overhead.

IV. Benefit-Cost Testing: Game Over

Via House Bill 549, the General Court further directed the Commission to review the cost effectiveness of the NHSaves programs

> based upon the latest completed and available Avoided Energy supple Cost Study for New England, the results of any Evaluation, Measurement, and

> Valuation studies contracted for by the department of energy or joint utilities, incorporate savings impacts associated with free ridership for those programs and measures where such free-ridership may have a material impact on savings figures, and *use the Granite State Test* as the primary test, with the addition of the Total REsource cost test as a secondary test.

RSA 374-F:3, VI-a(d)(5). The Legislature is rarely this prescriptive, and the message could not be more clear and obvious given the manner in which the Commission did not simply reject but outrightly ridiculed the previously approved and laboriously developed Granite State test in its November 2021 order. See Order No. 26,553 at 39 (describing the Granite State Test as "overly dependent upon subjective factors such that any desired outcome could potentially be obtained from its application" and complaining that "the Granite State Test and its growing complexity cannot be expected to be reasonably understood by the general public"). Now, the Commission thumbs its regulatory nose at the General Court by again indicating, at page 3 of the OON, that it intends to "examine" "[t]he Granite State Test, Total Resource Cost Test, and Discount Rates."

No principle of statutory construction is more fundamental to the law of New Hampshire and, indeed, every other jurisdiction, than the notion that to effectuate the intention of the legislative body one must "first look to the language of the statute itself, and if possible, construe that language according to its plain and ordinary meaning." *Doe v. Attorney General*, 2022 WL 2839234 (N.H. Supreme Ct., July 21, 2022) at *2 (citation omitted); see also *Attorney General v. Hayes*, 77 N.H. 358, 358 (1914) ("[a] statute is ordinarily construed according to the plain and

natural import of its words") and every one of the 867 other decisions of New Hampshire's highest court in between, all, according to the Westlaw database, invoking this "plain meaning" canon); see also Scalia & Garner at 69 ("The ordinary-meaning rule is the most fundamental semantic rule of interpretation"). If the Commission continues to believe that the Granite State Test is too subjective and too confusing to be applied to the NHSaves programs in quest of just and reasonable rates, then the Commission should make that concern known to the General Court. Meanwhile, the Granite State Test is enshrined in statute as the primary benefit-cost screening method and the Commission is without authority to revisit that determination on its own initiative.

V. The Case for Regulatory Humility

Finally, even assuming for the sake of argument that everything about the Order of Notice issued in this docket is lawful, the Commission should reconsider the approach to exercising its authority that is implicit in the OON. In his influential 2013 treatise *Preside or Lead?*, attorney and regulatory scholar Scott Hempling (now an administrative law judge with the Federal Energy Regulatory Commission) makes a powerful argument that utility commissions should not merely preside but should (to run down the list in Hempling's table of contents) be "purposeful," "educated" (by which he means not just possessing academic credentials but also being well-informed), "decisive," "independent," "disciplined," "synthesizing," "creative" and "ethical." Hempling, *Preside or Lead?* (2d ed., 2013) at v. But Hempling also counsels utility regulators to be "respectful," devoting an

entire chapter to this subtopic. See *id.* at 33-36, especially 33 (defining "respect" in this context as "recognizing and exploiting the value brought by others") (internal quotation marks omitted).

The New Hampshire Public Utilities Commission (and its counterpart agency in nearly every state) exist not because legislature after legislature has somehow determined that appointed or elected public officials are better at running utilities than directors and executives of investor-owned businesses are. It is, rather, a matter of constraining natural monopolies so that such firms do not take advantage of their exclusivity in the provision of essential public services. See, e.g., Regulatory Assistance Project, *Electricity Regulation in the US: A Guide* (2d ed., 2016) ("RAP Guide")[1] at 3-6 (discussing the purposes of utility regulation). As the authors of the RAP Guide note, the need for regulation of utilities "arises primarily from the monopoly characteristics" of regulated industries and, thus, RAP concludes that "the general objective of regulation is to ensure the provision of safe, adequate, and reliable service at prices (or revenues) that are sufficient, but no more than sufficient to compensate the regulated firm for the costs (including returns on investment) that it incurs to fulfil its obligation to serve." *Id.* at 6 (emphasis omitted).

The RAP Guide describes as an "implied agreement" between the regulator and the regulated that is "sometimes called the regulatory compact," in which the

[1] The referenced treatise is available at www.raponline.org/knowledge-center/electricityregulation-in-the-us-a-guide-2.

utility accepts an obligation to serve in return for the government's promise to approve and allow rates that will compensate the utility fully for the costs it incurs to meet that obligation." *Id.* A different gloss on the regulatory compact might be that states have opted to rely on private capital, rather than private funds, to provide essential public services and, in exchange for putting that private capital to public use, the sources of that capital are entitled to reasonable compensation.

Nowhere in the regulatory compact is there room regulators purporting to substitute their managerial judgment or business priorities for those tasked with actually deploying the private capital in question. Utility regulation is generally an after-the-fact proposition, in which the utilities make investments and operate their companies and the regulator retrospectively reviews those activities – typically but not always in the context of rate proceedings -- to assure those activities were lawful, prudent, and consistent with the public interest. (A notable exception, Least Cost Integrated Resource Planning ("LCIRP") pursuant to RSA 378:37 *et seq.*, is not implicated by the instant proceeding. Pending issues arising under *that* statute are being addressed in other dockets.)

The NHSaves programs now mandated by RSA 374-F:3, VI-a depart from this paradigm in only one limited respect: The utilities place none of their own capital at risk but, instead, collect funds directly from customers and effectively make investments and deploy programs strictly on the customers' behalf. This paradigm may nor may not be flawed (e.g., by preventing ratepayer-funded energy

efficiency investments from being amortized over their useful lives, thus disfavoring them in comparison to supply-side investments made by utilities), but that is not an invitation for regulatory micromanagement or even management. There is, obviously, a form of preapproval at work here – the statute requires the utilities to submit triennial energy efficiency plans for their approval prior to their implementation – but the paradigm carves out no role for the Commission prior to that point. This investigation, which purports to implement a wide variety of inquiries and activities under the direct supervision and with the direct involvement of the Commission prior to the submission of the next triennial plan roughly 10.5 months from now, is simply improvident. The Commission has made more than plain its skepticism about ratepayer-funded energy efficiency; even accepting, *arguendo*, the legitimacy of that skepticism, this is the wrong time to bring it to bear on the utilities that administer the NHSaves programs.

VI. Conclusion

For the reasons stated above, the Commission should rescind its Order of Notice and cancel the investigation announced therein. Consistent with its July 28, 2022 procedural order closing Docket No. DE 20-092 (tab 221), the Commission should keep this docket for the purpose of receiving and making publicly available the various reports the utilities are required to submit in their joint capacities as administrators of the NHSaves programs.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Grant rehearing pursuant to RSA 541:3 of the Order of Notice entered in this docket on August 10, 2022 and rescind such Order, and

B. Direct that this docket shall remain open purely for the purpose of receipt and filing of such reports as the Commission may require of the NHSaves utilities as administrators of the energy efficiency programs mandated by RSA 374-F:3, VI-a.

Sincerely,

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August,17, 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