

THE STATE OF NEW HAMPSHIRE
Before the
PUBLIC UTILITIES COMMISSION

IR 22-042

ELECTRIC AND NATURAL GAS UTILITIES

Investigation of Energy Efficiency Planning, Programming, and Evaluation

MOTION FOR REHEARING OF ORDER OF NOTICE

Pursuant to New Hampshire Code of Administrative Rules Puc 203.07 and RSA 541:3, Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty; New Hampshire Electric Cooperative, Inc.; Public Service Company of New Hampshire d/b/a Eversource Energy; Unitil Energy Systems, Inc. (UES); Liberty Utilities (EnergyNorth Natural Gas) Corp d/b/a Liberty; and Northern Utilities, Inc. (Northern) (collectively the “NH Utilities”) respectfully request rehearing of the Order of Notice (August 10, 2022) (the “Order”), issued by the New Hampshire Public Utilities Commission (the “Commission”) in this docket.

As detailed in this motion, the NH Utilities move for rehearing on the following grounds: that the Order is contrary to the various provisions of Chapter 5 of the 2022 New Hampshire Laws (“HB 549”), runs afoul of the New Hampshire Administrative Procedure Act RSA Chapter 541-A, and is superseded by the New Hampshire Department of Energy enabling statute RSA Chapter 12-P.

In support of this motion the NH Utilities state the following:

I. BACKGROUND AND PROCEDURAL HISTORY

On July 28, 2022 the Commission issued a procedural order closing Docket No. DE 20-092 pertaining to the 2021-2023 Triennial Energy Efficiency Plan on the NHSaves programs. In the procedural order, the Commission noted the ongoing reporting requirements of the NHSaves

programs stating “[a] new docket, No. IR 22-042, will be opened, in which the Commission will receive, examine, and investigate the Joint Utilities’ regular and supplemental reports on energy efficiency programming for the remainder of the 2022 and 2023 triennium.” July 28, 2022 Procedural Order in Docket No. DE 20-092 at 1. Despite this stated purpose for the new docket, on August 10, 2022 the Commission issued the Order, which goes much further than reviewing, examining and investigating the NH Utilities’ regular and supplemental reporting. The Order states that reviewing the reports is merely a first step, and that the investigation is to:

make additional inquiries, receive stakeholder input, and examine the development of the 2024-26 Plan. These topics of investigation will help inform whether changes to current energy efficiency programming, planning, performance incentives, and evaluation are warranted; and if such changes are warranted, to help inform how such changes will be pursued. Accordingly, this docket will examine, inter alia, issues related to RSA 374-F:3, including current and future energy efficiency program offerings based on the Commission’s inquiries into the following topics identified in Order 26,621:

1. The Granite State Test, Total Resource Cost Test, and Discount Rates;
2. Performance Incentive;
3. Impact on New Hampshire Economy;
4. Subsidized Services and Equipment;
5. Market Barriers;
6. Reporting on Spending by Category;
7. Reporting on Low-Income Program Offerings; and
8. Reporting made to other regional or regulatory organizations.

(Order at 2-3).

II. SUMMARY

The bases for this motion are: the Order conflicts with the explicit language of HB 549 regarding the scope of the Commission’s role and obligations relating to energy efficiency programming in New Hampshire, and frustrates the overall purpose of the statute; the Order contravenes RSA Chapter 541-A; and the investigatory authority cited in the Order is superseded by the Department of Energy’s enabling statute, RSA Chapter 12-P. More specifically, although HB 549 expressly confines the role of the Commission relative to the NHSaves programs as

including review, approval and denial of plans submitted by the NH Utilities, the Order exceeds the scope of this role by initiating an investigation to “examine the Joint Utilities development of the 2024–2026 triennial plan” and the intent to examine “issues related to RSA 374-F:3, including current and future energy efficiency program offerings.” (Order at 2-3). The scope of the Order also contradicts the Legislature’s intent of ensuring stability and consistency of certain aspects of the NHSaves programs which are memorialized in statute, by subjecting these aspects of the programs to scrutiny to see if “changes are warranted” and “to help inform how such changes will be pursued.” (Order at 3). For these reasons the NH Utilities seek rehearing as the Order is contrary to the law and the policy purpose of the statutory provisions of HB 549.

The Order also runs afoul of the Administrative Procedures Act, RSA Chapter 541-A. While the Order claims that the docket is only an investigation, it purports to implicate the rights, duties and privileges of parties with its request for interested stakeholders to file petitions for intervention, and its stated goal to facilitate “opportunities for changes and updates to existing programming . . . [and] address specific issues or areas of concern in advance of the Joint Utilities’ filing of the 2024–26 Plan on July 1, 2023.” Proceedings that implicate the rights of parties, however, are contested cases, which require an adjudication. *See* RSA 541-A:1, IV; RSA 541-A:31, I. There should be no parties, intervenor or otherwise, in an investigation. Investigations should be for information gathering only, rather than for making “changes or updates” that would impact any participant to the investigation. The Order’s implications relative to party rights, duties and privileges, and references to parties and requests for petitions to intervene are inconsistent with the statutory scheme of RSA 541-A and must be reconsidered.

Finally, the investigation announced by the Order is more directly within the purview of the New Hampshire Department of Energy (“DOE”), and out of line with the explicit purpose of

the DOE's enabling statute: "to improve 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, II. RSA Chapter 12-P indicates it is the DOE, not the Commission, that should carry out the types of functions described in the Order (if those functions were not already assigned by HB 549), and for this reason the Order should be reconsidered.

III. LEGAL STANDARD

Pursuant to RSA 541:3, "[w]ithin 30 days after *any order* or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter . . . covered or included in the order." (emphasis added). The Commission may grant rehearing or reconsideration where a party states good reason for such relief. *Public Service Company of New Hampshire*, Order No. 25,361 (May 11, 2012) at 4. Good reason may be shown by identifying specific matters that were overlooked or mistakenly conceived by the deciding tribunal. *Id.* at 4-5. Within 30 days of the filing of a motion for rehearing, the Commission must grant, deny, or suspend the order or decision complained of pending further consideration, and the suspension may be upon such terms and conditions as the Commission may prescribe. RSA 365:21.

While motions for rehearing are commonly made regarding final orders of the Commission, RSA 541:3 states that any party or person affected by *any* order of the Commission may submit a motion for rehearing. The Commission made the NH Utilities mandatory participants in the Order, and the terms of the Order demonstrably affect the NH Utilities. The fact that the Order is an order of notice does not negate either of these elements. When coupled

with the unlawful and unreasonable provisions in the Order, this motion for rehearing is justified and the NH Utilities are entitled to relief.

IV. THE NH UTILITIES' REQUEST FOR REHEARING

a. The Order is Contrary to the Provisions of HB 549

The intent of HB 549 is to ensure consistency in the continued provision of the NHSaves energy efficiency programs in New Hampshire as a course-corrective measure to Commission Order No. 26,553 (November 12, 2021), which would have drastically altered energy efficiency programming moving forward. Despite the clear intent of HB 549, the Order attempts to resurrect the now invalidated Order No. 26,553. The provisions of HB 549 prescribe the roles of the Commission, the NH Utilities, and the EESE Board as they pertain to all aspects of the NHSaves energy efficiency plans, and the Commission cannot undermine those provisions through its general investigatory authority. The language of HB 549 is clear: “On July 1, 2023, the joint utilities shall petition the commission to approve changes to program offerings for the next 3-year period, consistent with the system benefits charge and local distribution adjustment charges described in subparagraph (2). The commission shall issue its order approving or denying a joint utility request to alter program offerings. . .” (RSA 374-F:3, VI-a, (d)(5)). Later in the same provision the law reiterates the same process for future plans: “[t]he joint utilities shall present a joint energy efficiency plan to the commission for review and approval no less frequently than every 3 years.” *Id.* All references in RSA 374-F:3, VI-a to the Commission pertain exclusively to its role in reviewing and approving (or denying) a plan designed and submitted by the NH Utilities.

If HB 549 had intended for the Commission to manage and oversee the development of these plans, language to that effect would have been included in the statute. *See, e.g., MJJ*

Props., LLC v. Town of Auburn, 168 N.H. 127, 131 (2015) (noting that if the legislature had intended a particular outcome, “it could have included language to that effect,” but that since it did not, the Court would “not add language to the statute that the legislature did not see fit to include.”). HB 549 limits the Commission’s function to the review and approval or denial of completed plans submitted to it; development of those plans has been entrusted to and is the responsibility of the NH Utilities. Further, the declaration of intent in the Order to “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” injects an operation of oversight and management absent from and entirely un contemplated by HB 549, and frustrates the manifest purpose of the statute contrary to the presumption against ineffectiveness that serves to ensure that a statute’s overall purpose is furthered, not hindered. *See, e.g., Petition of Carrier*, 165 N.H. 719, 721 (2013) (stating that the Court does “not consider words and phrases in isolation, but rather within the context of the statute as a whole. This enables us to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme”)(internal citation omitted).¹

As previously mentioned, HB 549 was passed by the legislature and signed by the Governor with the express purpose of rectifying the upheaval and erosion that Order No. 26,553 would have had on energy efficiency planning and programming. Adding an “examination of the Joint Utilities’ existing energy efficiency programming” to look for “opportunities for changes” and that “may serve as a starting point for *other dockets* to address specific areas of

¹ Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* (2012) at 63.

concern *in advance* of the Joint Utilities’ filing of the 2024-26 Plan” (emphasis added) by its plain language runs counter to the overall policy purpose of HB 549. The purpose of HB 549 is to securely establish energy efficiency programs generally as well as specifically memorializing components of that programming such as the cost benefit tests, utility performance incentive payments, lost base revenue calculations, and evaluation, measurement, and verification. Despite the explicit statutory language and overall statutory purpose embodied by this language, all of the aforementioned elements are specifically identified in the Order as topics for determining “whether changes . . . are warranted; and if such changes are warranted . . . [and] how such changes will be pursued.” (Order at 2-3). On its face, the investigation as described in the Order will hinder rather than further the purpose of HB 549, rendering the statute ineffective. Therefore, the scope of the investigation should be reconsidered to, at a minimum, eliminate the examination of existing energy efficiency programming already approved, energy efficiency elements enshrined in HB 549, and the development of the 2024-2026 triennial energy efficiency plan.

The fact that the Commission has some general authority to investigate certain matters under RSA 365:19 does not remedy the conflict with the statutory provisions of HB 549 because “[t]o the extent two statutes conflict, the more specific statute controls over the general statute.” *EnergyNorth Nat. Gas, Inc. v. City of Concord*, 164 N.H. 14, 16 (2012). Moreover, to the extent that two statutes are employed simultaneously, “[w]here reasonably possible, statutes should be construed as consistent with each other . . . so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute.” (*Id.*, internal citations omitted). Taking these two principles of statutory construction together, the general provision of RSA 365:19 permitting the Commission to investigate certain matters must

be harmonized to effectuate the more specific purpose of the statutory provisions of HB 549. Therefore, the scope of the investigation must be limited as suggested above.

The Commission also relied upon its authority to investigate matters as established by RSA 365:4 in Order No. 26,678 (September 7, 2022) denying the OCA's motion for rehearing. However, that reliance is misplaced because such investigative authority no longer resides with the Commission, but with the DOE, as explained more fully below. And the Order's reliance on the investigative authority granted under RSA 365:5 is also misplaced, as there has been no allegation of wrongdoing by the NH Utilities "in regard to any rate charged or proposed or to any act or thing having been done or having been omitted or proposed by any such utility in violation of any provision of law or order of the commission." Because the investigatory powers of RSA 365:5 are limited to the above-described situations, that statute is inapplicable in this instance.

Beyond being contrary to the policy embedded in HB 549, the investigation as outlined in the Order would frustrate the purpose of HB 549 as a practical matter. Energy efficiency plan development is not only critical to providing consistent beneficial programs but is also a protracted and complex undertaking by the energy efficiency subject matter expert staff of the NH Utilities working closely with the EESE Board, the DOE, and diverse state stakeholders. This collaborative development process which has been employed for several years has produced detailed, comprehensive, and overwhelmingly successful statewide energy efficiency plans and programs, which are submitted upon completion to the Commission for review and approval. Examining the existing energy efficiency programming, the development of the upcoming 2024-2026 triennial energy efficiency plan, and those energy efficiency planning elements on page 3 of the Order that are explicitly enshrined in HB 549 are functions that are not within the Commission's statutory purview, and will create an unreasonable burden on the staff of the NH

Utilities to the extent that participating in the investigation while simultaneously collaborating with stakeholders to develop the 2024-2026 energy efficiency plan is untenable. The Order's investigative impediment to the development of the 2024-2026 plan is neither contemplated nor authorized by HB 549, and therefore must be reconsidered.

b. The Order Contravenes RSA Chapter 541-A

Order No. 26,678 on page 4 states “[a]n 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.” While the definition of an investigation may be non-adjudicative, the language in the Order is not so clear. First, the Order states that petitions for intervention must be submitted so that entities or individuals may be made parties to the proceeding. RSA 541-A:32, I(b) requires that a petition for intervention state “facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law.” The Order's requirement for intervention petitions, and even the reference to party status, is in conflict with the Commission's assertion in Order No. 26,678 that it does not intend to reach a conclusion with a binding effect. Party status, intervenor or otherwise, necessarily implicates a binding resolution. The NH Utilities understand that the intent of the Order was not to hold an adjudication or resolve a contested case, but if the rights of parties will be affected by the outcome, then an adjudication is the appropriate forum. Alternatively, if the proceeding is not adjudicative, then any individual or entity should be able to participate without requesting intervenor status or otherwise demonstrating that their rights or duties or other interests are at issue. However, the language in the Order at pages 2-3 that states

the “investigation will help inform whether changes to current energy efficiency programming, planning, performance incentives, and evaluation are warranted; and if such changes are warranted, to help inform how such changes will be pursued” does seem to imply that rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding. Based on the foregoing, the NH Utilities ask that language indicating that this proceeding would be adjudicative be resolved or removed.

c. Applicability of RSA Chapter 12-P

Even if the adjudicative implications are removed from the Order, and the scope of the investigation were to be scaled back and harmonized to be consistent with the statutory purpose of HB 549, the investigation in the Order is misaligned with RSA Chapter 12-P, the DOE’s enabling statute, as well as RSA 365:4, which shifts investigatory authority from the Commission to the DOE. The purpose of the DOE is as follows:

...[T]o improve 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. In addition to its other functions, it shall be the duty of the department of energy to provide all necessary administrative, technical, and staff support to the public utilities commission to assist the ***commission in carrying out its regulatory and adjudicative functions. The department shall have the authority to investigate any matter that may come before the public utilities commission*** and to appear before the commission to advocate for the department's position and for the purposes of providing a complete record for consideration by the commission.

(RSA 12-P:2, II-IV) (emphasis added). This provision of RSA Chapter 12-P is another more specific statute than that of the general investigative authority afforded the Commission in RSA 365:19. RSA Chapter 12-P makes plain that it is the DOE that should engage in investigative functions and use its findings to present its position to the Commission in the course of the

Commission executing its adjudicative function. Given this more direct investigative authority of the DOE, the Commission should defer to the DOE in this instance.

The investigation set forth in the Order hinders the “possible increased efficiency and economies from integrated administration and operation of the various energy and utility related functions of the state government”, and instead creates an onerous, and potentially duplicative, effort. The bifurcation of the Commission and the DOE in 2021 was intended to streamline and harmonize the creation and effectuation of energy policy. That the Commission is still granted some general investigative authority under RSA 365:19 should not overcome the express purposes of RSA 12-P:2 and RSA 365:4. For these reasons the Order should be reconsidered.

WHEREFORE, the NH UTILITIES respectfully request that the Commission:

- (1) Grant rehearing on the issues presented in this motion pursuant to RSA 541:3 by;
- (2) Limiting the scope of this docket to the reporting requirements of Order No. 26,621 as modified by Order No. 26,642 by the NH Utilities and the Commission issuing information requests pertaining to those reports; and
- (3) Order such further relief as may be just and equitable.

Respectfully submitted,
Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty; New Hampshire Electric Cooperative, Inc.;
Public Service Company of New Hampshire d/b/a Eversource Energy; Unitil Energy Systems, Inc.; Liberty
Utilities (EnergyNorth Natural Gas) Corp d/b/a Liberty; and Northern Utilities, Inc.

____09/09/2022____

By:  _____
Jessica A. Chiavara
Senior Counsel, Eversource Energy
780 N. Commercial Street, P.O. Box 330
Manchester, NH 03101
(603) 634-2972
Jessica.chiavara@eversource.com

By:  _____
Matthew J. Fossum
Senior Counsel, Unitil Service Corp.
6 Liberty Lane West
Hampton, NH 03842
(603) 773-6537
fossumm@unitil.com



By: _____
Michael Sheehan
Director, Legal Services, Liberty Utilities
(603) 724-2135
Michael.Sheehan@libertyutilities.com



By: _____
New Hampshire Electric Cooperative
Susan Geiger, Esq.
Orr & Reno
45 South Main Street, P.O. Box 3550
Concord, NH 03302-3550
(603) 224-2381
SGeiger@orr-reno.com

CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

_____09/09/2022_____

Date



Jessica A. Chiavara