STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. PUC-23-388

INDUSTRIAL ENERGY CONSUMER GROUP

Appellant,

v.

PUBLIC UTILITIES COMMISSION, et al.

Appellees.

ON APPEAL FROM
THE MAINE PUBLIC UTILITIES COMMISSION

BRIEF OF APPELLANT INDUSTRIAL ENERGY CONSUMER GROUP

January 24, 2024

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Table of Contents

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Table of Authorities

Cases

Statutes

Administrative Orders

Other Authorities

Rules

Regulations

I. STATEMENT OF FACTS

A. Introduction

Industrial Energy Consumer Group[1] ("IECG") appeals the April 21, 2023, decision of the Public Utilities Commission ("Commission") allocating a new and historically expensive category of above-market electricity charges among the customers of Maine's two largest electric utilities. This appeal is not a challenge to a typically dusty and limited rate decision of the Commission. Rather, it raises enduring issues for all Maine electric utility customers: namely, whether it is lawful to allocate hundreds of millions of dollars annually[2] to utility customers to recover costs associated with Maine's Net Energy Billing ("NEB") program, not on the basis of the cost-causation principles as required by statute, but on the basis of supporting vaguely defined state climate "policy." Moreover, allocation of these costs violates the Supremacy of the United States Constitution because the Federal Power Act preempts the states' ability to set rates affecting wholesale sales of electricity in interstate commerce, such as sales made under the NEB program. IECG respectfully requests that this Court vacate the Commission's order and remand the proceeding

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[1] Industrial Energy Consumer Group incorporated in 1985 as a Maine trade associated to represent the interests of its members in energy source, supply and cost matters. Each IECG member is a transmission-level electric customer.

[2] The Commission has allowed utilities Central Maine Power and Versant Power to recover over $100,000,000 of NEB subsidy costs in rates. *See Cent. Me. Power Co., Request for Approval of Rate Change Regarding Annual Reconciliation of Stranded Cost Revenue and Costs*, docket no. 2023-00039, Order Approving Stipulation (Jun. 15, 2023); *Versant Power, Request for Approval of Rate Change Regarding Annual Reconciliation of Stranded Cost Revenue and Costs*, docket no. 2023-00076, Order Approving Stipulation (Jun. 21, 2023).

to the Commission with instructions to devise a stranded cost rate design in accordance with Maine law and the Commission's own precedent.

B. Procedural history

On June 16, 2022, the Commission issued a Notice of Investigation ("NOI") in docket no. 2022-00160 to consider inter-class and intra-class rate design[3] for the recovery of "stranded costs," including costs related to the NEB program.[4] (A. 28.) The NOI directed parties to comment on "'the relevant attributes of, and policies furthered by, the contracts and programs included in stranded costs and what factors and principles should be considered when determining how these costs should be allocated among customers and rate components,'" as well as whether the case "'should include consideration of design approaches that align rates with goals to encourage electrification in the heating and transportation sectors.'" (A. 28-29.)

Noting that improper rate design could have an extraordinarily harmful impact on Maine's manufacturing sector and that Maine law requires that rate recovery be

[3] In utility parlance the "inter-class" portion of a rate design is often referred to as the "allocation," while the "intra-class" portion is referred to, confusingly, as "rate design." The purpose of rate design, broadly considered, is to allocate costs among rate classes (e.g., residential, commercial, or transmission- and sub-transmission level customers) and then to recover those costs in rates in a particular manner from each class. *See generally* James C. Bonbright et al., Principles of Pub. Util. Rates (2nd ed. 1988).

[4] NEB (also commonly referred to as net metering), is a term broadly used to describe state programs under which utility ratepayers, or consumers of electricity, either generate their own electricity (e.g., through a rooftop solar system) or otherwise acquire electricity virtually and swap it with their electric utility in exchange for a credit that reduces their electric bill. The instant proceeding arose out of an earlier proceeding in which the Commission determined that the "lost" revenue from the NEB Kilowatt-hour ("kWh") Program, *see* 35-A M.R.S. § 3209-A, should be included in the stranded cost recovery process and stated its intention to initiate a review of its stranded cost rate design. S*ee Me. Pub. Utils. Comm'n*, *Investigation of Rate treatment of NEB Program Costs*, docket no. 2021-00360, Order (Mar. 11, 2022).

aligned with cost, IECG stated that stranded cost rate design "should focus on the application of the accepted economic principles, cost accounting and allocation methodologies and rate making theory," rather than be contorted in the name of pursuing vaguely defined state "policy." (A.R. no. 14, at 1.) "Rates are to be designed to recover costs from the customer who causes the cost to be incurred. In the case of the NEB-related costs, the costs are incurred primarily to achieve the expansion and powering of the distribution system and its customers." (A.R. no. 14, at 2.) Therefore, IECG argued, "under a principled approach to rate design, the major share of the costs of NEB, if not all the cost, should be borne by individual residential and commercial customers." (A.R. no. 14, at 3.)

Initial comments were also filed by Versant Power ("Versant"), Central Maine Power ("CMP"), the Office of the Public Advocate ("OPA"), Efficiency Maine Trust ("EMT"), and Competitive Energy Services, LLC ("CES"). (A. 9.) A case conference was held on July 13, 2022, at which time the Hearing Examiners granted petitions to intervene. Versant, CMP, CES, and EMT filed testimony on August 10, 2022, and the parties and Commission Staff issued data requests on August 23. (A. 9.) Versant, CMP, and CES filed Rebuttal Testimony on September 16. The Commission held a technical conference on September 21, after which the Hearing Examiners issued oral data requests, and a hearing was held on October 5. Following the hearing, Versant, CMP, CES, OPA, and IECG filed briefs and reply briefs.

In its brief, IECG again emphasized that "rates [should be] based on costs, designed to replicate the efficiency of competitive markets, modified to be equitable to all ratepayers." (A.R. no. 41, at 2.) Rate design "should seek, among other objectives, the '. . . wise use, not the mere non-use, of electricity.'" (A.R. no. 41, at 2.) Fundamentally, NEB should be considered a cost, IECG argued, while also recognizing the possibility "that a thoroughly analyzed allocation and rate design might result in" a collection scheme in which all ratepayers pay in proportion to their energy usage if a cost analysis, performed consistent with Maine law and Commission precedent, demonstrated that the NEB program benefitted all ratepayers equally. But IECG warned that "[t]he record is barren of evidence supporting an allocation and rate design charging NEB to ratepayers on an equal cents per kilowatt hour basis," as well as evidence of the "benefits" that all ratepayers receive from the NEB program. (A.R. no. 41, at 3-4, 16.)

On January 23, 2023, Commission Staff issued its Examiners' Report recommending in relevant part that NEB costs be "allocated to each rate class according to each class's overall kWh usage and recovered through volumetric charges."[5] (A. 20.) "[T]he Examiners found that ensuring NEB program participants pay a portion of stranded costs could not be achieved equally and consistently among

[5] In essence, this means costs are allocated to rate classes in proportion to how much electricity each class collectively consumes. Customers within a respective class will then pay a charge in proportion to volume of electricity each respective customer uses.

all NEB participants through a fixed charge, and thus, the Examiners recommended a volumetric charge for NEB stranded costs." (A. 20.) Versant, CMP, the OPA, and IECG each filed exceptions to the Examiners' Report. (A. 5; A.R. nos. 54-57.)

In its eighteen-page Order, issued April 21, 2023, the Commission agreed with the Examiners on allocation, finding "that the most reasonable allocation . . . is to all rate classes based on each class's proportionate kWh load share[,]" (A. 21), but, without pointing to any record evidence, "conclude[d] that all ratepayers benefit from State policies on climate change and . . . . [b]ecause the benefits are the same, it makes little sense to attribute the 'costs' of such benefits differently." (A. 21.)

As for the intra-class component, though, the Commission recognized that "under a volumetric rate design, (1) not all beneficiaries of NEB's financial incentives pay NEB stranded costs, and (2) most beneficiaries of NEB's financial incentives pay significantly less in stranded costs than non-participants. This is inequitable." (A. 22.) The Commission also found that while NEB costs are created on a volumetric basis, the benefits of NEB projects to ratepayers "are not a function of the consumption of electricity by ratepayers." (A. 22.) Lastly, the Commission noted that volumetric recovery could create a disincentive for customers to invest in beneficial electrification, and therefore undermine the State's climate policy. (A. 22.) Instead, the Commission found that recovering NEB costs through a fixed charge, rather than a volumetric charge, "ensure[d] that all customers, including

NEB program participants, pay a portion of stranded costs." (A. 22.) Further, the Commission ordered that pre-electric industry restructuring stranded costs (*i.e.*, incurred pre-2000) should no longer be allocated among customer classes on the bases of 25% capacity and 75% energy, but entirely on energy. (A. 20.) Lastly, the Commission required that the kWh Program "lost revenues" be collected as stranded costs. (A. 21-25.) Those revenues are "lost," or not collected, when kWh Program NEB participants do not pay normal transmission and distribution fixed costs when they receive kilowatt hour credits pursuant to NEB.

In its Order, the Commission also held open the record to explore "the implications of recovering pre-restructuring stranded costs and non-NEB post-restructuring stranded costs through a fixed charge." (A. 9.) In a Procedural Order issued on May 2, the Commission then expanded the scope of its continued exploration, directing CMP and Versant to "provide stranded cost rates and bill impact analyses by rate class reflecting all NEB-related stranded costs recovered through a fixed charge, and the same analysis for pre-restructuring and non-NEB post-restructuring costs under two scenarios: (1) costs being recovered volumetrically; and (2) costs being recovered through a fixed charge." (A.R. no. 59.)

Once this new rate design went into effect for CMP customers on July 1, several late-filing petitioners requested reconsideration of the April 21 Order. IECG objected. On July 26, 2023, the Commission issued a procedural order in which it stayed pending procedural deadlines and indicated that it "may potentially take action" to resolve the underlying petitions and requests. (A.R. no. 83.) Rather than take action in docket 2022-00160, however, the Commission opened a new docket, 2023-00230, to continue its investigation of stranded cost rate design on September 12, 2023. (A. 40.) Even though it recognized the generators' petitions for intervention were untimely in the previous case, the Commission nevertheless *sua sponte* granted all those parties intervention in the new proceeding, which was "intended to be limited to examining the impact of the fixed charge on customers, clarifying the definition of 'rate class,' as requested by Versant, and examining the possibility of a fixed charge for recovery of non-NEB stranded costs." (A. 40.)

With the opening of a new docket to continue its stranded cost rate design investigation on September 12, the Commission's April 21 Order became final, and IECG timely filed this appeal on October 3, 2023. *See* 35-A M.R.S. § 1320(1), (5); M.R. Civ. P. 80C; M.R. App. P. 2, 22.

II. ISSUES PRESENTED FOR REVIEW ON APPEAL

This appeal presents the following issues:

1. Does the Federal Power Act preempt the Commission's allocation of NEB costs?

2. Did the Commission fail to conduct a rate design proceeding in accordance with Maine law?

3. Is the allocation of NEB costs arbitrary, capricious, and not supported by substantial evidence?

III. ARGUMENT

A. Standard of Review

This Court may reverse or modify the Commission's decision if it violates a constitutional or statutory provision, exceeds the Commission's statutory authority, is unsupported by substantial evidence, or is arbitrary and capricious. 5 M.R.S. § 11007(4); *AngleZ Behav. Health Servs. v. Dept. of Health and Hum. Servs.*, 2020 ME 26, ¶ 12, 226 A.3d 762 ("[P]ursuant to M.R. Civ. P. 80C, [this Court] review[s] the administrative agency's decision directly for legal errors, abuse of discretion, or unsupported factual findings." (quotation marks omitted)).

"Generally, decisions of the Commission are reviewed only to determine whether the agency's conclusions are unreasonable, unjust or unlawful in light of the record." *Cent. Me. Power Co. v. Pub. Utils. Comm'n,* 2014 ME 56 ¶18, 90 A.3d 451. Agency findings must be based on evidence, not speculation unsupported by the record. *Hannum v. Bd. of Env't Prot.*, 2003 ME 123, ¶ 15 n.6, 832 A.2d 765. Furthermore, this Court will find that an administrative agency has acted arbitrarily and capriciously when the agency is willful and unreasoning and fails to consider the facts and circumstances before it. *AngleZ Behav. Health Servs.*, 2020 ME 26, ¶ 23, 226 A.3d 762 (internal quotation omitted).

Additionally, here, the Commission has attempted to force legal significance onto Maine's climate roadmap, the *Maine Won't Wait* plan. (A. 22.) Agencies in general, and the Commission in particular, do not have unlimited rulemaking authority, nor may they make decisions by means of non-legislative rulemaking – such as through policies, guidance, or memoranda – that have not gone through the required steps of notice-and-comment rulemaking pursuant to specific guidelines and direction set forth in Maine statutes necessary to have the force of law.

> [T]he Commission's rulemaking authority is not unlimited. The ultimate authority to make laws rests with the Legislature, and state agencies may not adopt rules with the force of law without legislative guidance through a particular statutory policy or purpose along with standards to guide implementation. Without this legislative guidance, the delegation of rulemaking authority would be unconstitutional . . . each of the Commission's current rules also relies on specific guidelines and direction set forth in statute.

William S. Harwood et al., Maine Regulation of Public Utilities, 845 (2nd ed. 2018).

While the Commission may suggest that this appeal raises great complexity and that the Court should defer to its expertise, IECG respectfully disagrees. In a typical rate case, the Court defers substantially to the Commission's exercise of technical expertise, especially in an area as complex as rate design. *Office of Pub. Advoc. v. Pub. Utils. Comm'n*, 2023 ME 77, ¶¶ 7-8, --A.3d--. But rather than performing rigorous analysis and basing its decision on sound reasoning and competent evidence, the Commission itself simply deferred to a purported legislative policy for which there is no evidence. While deference could not be seriously questioned in the serious application of law and precedent on rate design, it cannot apply in the abandonment of such law and precedent.

B. The Commission's allocation of NEB costs is preempted by the Federal Power Act.

1. Legal Background on NEB

The term "net energy billing" as used in scores of states has almost as many different meanings.[6] The lawfulness of any NEB paradigm depends not on the political convenience of its name but on how it actually works.

The risk to expansive NEB programs is preemption of the regulation of wholesale electric rates under the Federal Power Act, 16 U.S.C. §§ 824 *et seq.*, by the Federal Energy Regulatory Commission ("FERC"). NEB advocates have sought safe harbor in what FERC does not regulate, the generation of electricity and the sale of electricity at retail. *Ferrey* at 417, 427; *see also* 16 U.S.C. § 824(a)(6).

Advocates have expanded NEB far beyond "pure" NEB, under which only a single electric utility customer swapped power generated behind their own meter for power they took from the utility when their need exceeded their generation. *Ferrey* at 417. This concept involves only one electric meter that can run forwards and backwards. The customer avoids a higher utility rate, and the utility becomes, essentially, a bank. When "pure" NEB was challenged, FERC held that the exchange of power was a retail billing and metering practice, not a wholesale sale. *SunEdison, LLC*, 129 FERC ¶ 61,146, 61,620 (2009); *MidAmerican Energy Co.*, 94 FERC ¶

[6] *See generally*, Steven Ferrey, *Tightening the Legal 'Net': The Constitution's Supremacy Clause Straddle of the Power Divide*, 10 Mich. J. of Env. & Admin. L. 415, 417 (2021) (analyzing net metering laws state-by-state based on susceptibility to preemption) (hereinafter "*Ferrey*").

61,340 (2001). This ratification of "pure" NEB involved only two parties (the customer and their utility) and one meter. The power generated behind-the-meter of the customer became the utility's power only at the instant it touched the interstate electric grid.[7] This is a fact of pivotal legal significance. Through FERC's rulings, grid access and operation are within the federal domain.

"Pure" NEB is constrained by the limited power demand of homes and small businesses. To expand NEB, advocates increased the number of customers the NEB generator could serve, including by serving customers not physically associated with the host meter, "banking" generation benefits for future billing periods, and securing pricing more favorable to them.[8]

Maine's new NEB paradigm provides one program for all customers (the kWh Program), 35-A M.R.S. § 3209-A, and one for non-residential customers (the "Tariff Program"), *id.* § 3209-B. The programs are structurally similar. Each begins with a "distributed generation resource" located in the service territory of a transmission and distribution utility. *Id.* §§ 3209-A(1)(B), 3209-B(1)(C). There is no longer a requirement that the generator be located behind any customer's meter, making NEB

[7] Under the Federal Power Act, the Federal Energy Regulatory Commission has long asserted jurisdiction from the meter of the generator, across the transmission and distribution system, to the meter of the retail customer. *See, e.g., Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

[8] Controversy over some of these changes has also reached FERC, including a case involving New Hampshire's net metering program, in which FERC appeared to simply duck the issues. *See New England Ratepayers Assn.*, 172 FERC ¶ 61,042, Order Dismissing Petition for Declaratory Order (Jul. 16, 2020). In this and similar cases, petitioners sought to invalidate a specific NEB program based on alleged violation of an amendment to the Federal Power Act created by the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601 *et seq*.

generators like typical merchant generators selling at wholesale in competitive electricity markets.[9]

Each "project sponsor" "solicits customers to participate in a net energy billing arrangement based upon a shared financial interest in a distributed generation resource," 35-A M.R.S. § 3209-A(1)(D), and enters into a Customer Net Energy Billing Agreement (CNEBA) with its utility. The CNEBA describes terms on which the utility receives an entitlement to the energy and capacity generated by the NEB project. The utility provides credits to the electricity bills of NEB customers.

The project sponsor designates the customer to the utility as a credit recipient, in exchange for which the customer agrees to pay money to the project sponsor. *Id.* § 3209-A(5)(D). As does the typical wholesale generator, the NEB project interconnects, creates energy and sends it to the utility. *Id.* § 3209-A(1)(A)-(D), (7). The utility transmits the energy to the customer. The customer pays. The customer's "shared financial interest" is defined as including "facility ownership, a lease agreement or a power purchase agreement". *Id.* § 3209-A(2). There are no minimum

[9] As discussed below, the wholesale nature of the sale and the tether of its price to the ISO-New England market auction price leads to the inescapable conclusion that the Commission's allocation of costs is preempted by the Federal Power Act. *See generally, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,937 (1996), order on reh'g, Order No. 888-A, 62 FR 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048, order on reh'g, Order 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom., *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. *New York v. FERC*, 535 U.S. 1 (2002).

requirements, not even proportional ownership of the resource in relation to energy purchased. *Id.*

The "shared financial interest" attempts to leap the critical new gap of the NEB paradigm between the customer and the generator no longer located behind the customer meter. The generator may be hundreds of miles from those with the "shared financial interest." It is a leap too far; the reality is that the "distributed generation resource," as the existence of a typical wholesale "power purchase agreement" proves, *see* 35-A M.R.S. § 3209-A(2), is engaging in the sale of electric energy across the interstate transmission grid.

There is another leap from "pure" NEB to the Maine paradigm. The distributed generation developer invests millions of dollars in a generating project; it must receive compensation. All the Maine NEB paradigm apparently requires is a gossamer-thin "touch" on paper by a distant utility customer. There is no necessary substance but the inevitable payment of money for electricity. This is de facto a sale.

Maine's structure is interpreted by the Commission to create NEB costs in two ways. To maximize the value of the NEB power it has purchased in the Tariff Program, the utility sells it in the ISO New England ("ISO-NE") wholesale auction mandated by FERC. (A. 13 (explaining that "the utilities incur a net cost if the value they receive from the sale of the energy generated by the NEB facilities into the wholesale market is less than the financial credit it allocates to participating customers' bills. This amount must be recovered from ratepayers.")); *see also* 65-407 C.M.R. ch. 313, § 3(K)(5), (7).[10] The difference between the original Tariff rate and the auction price is treated by the utility and the Commission as a "stranded cost" to be recouped from all utility consumers. *Id.* In the kWh Program, the utility transmission and distribution revenues "lost" when NEB customers virtually "use" NEB power also are treated as "stranded costs." *Id.* at 1.

2. The Commission's Order is preempted by the FPA.

In this appeal, IECG does not seek to invalidate the Maine NEB program but, rather, to prohibit the collection in state-approved rates of costs preempted by the Federal Power Act ("FPA"). IECG therefore raises a jurisdictional issue: How can a Maine Commission decision be affirmed when the electric rates which are its subject are preempted by federal law? *See Me. Yankee Atomic Power Co. v. Pub. Utils. Comm'n*, 581 A.2d 799, 799, 803-05 (Me. 1990) (vacating a Commission order for lack of agency jurisdiction because a state law impermissibly interfered with FERC's rate setting authority). As this Court is well aware, issues of jurisdiction can be raised at any time, including by the Court itself. *Ford Motor Co. v. Darling's*,

[10] The Commission's invocation of 35-A M.R.S. § 3210-F in chapter 313, § 3(K)(7) implicates other long-term contracting statutes with which the utilities and Commission are familiar. In those statutes, the concept of reselling power in the wholesale market is more explicit. For example, under the Community-Based Renewable Energy Act, the Legislature directed the contract counterparty utilities to "sell energy, capacity resources or renewable energy credits purchased pursuant to this subsection into the wholesale electricity market." 35-A M.R.S. § 3604 (1). The Wood-fired Combined Heat and Power Act (35-A M.R.S. § 3624 (1)) and Capacity Resource Adequacy Program (35-A M.R.S. § 3210-C (8)) have similar directives.

2014 ME 7, ¶ 41, 86 A.3d 35; *State v. Sloboda*, 2020 ME 103, ¶ 19 n.8, 237 A.3d 848; *Moody v. Port Clyde Dev. Co.*, 102 Me. 365, 384, 66 A. 967 (1907).

Maine has transgressed the parameters of preemption, while still wrapping its program in the talismanic term "billing and net metering practice." 35-A M.R.S. § 3209-A(1)(C). Maine's program, although it began simply, is now much more. It is Maine's "more" that is preempted by the FPA.

The Tariff Program is based on statutory formulae mandating a price for NEB generation output to be only ministerially calculated by the Commission. 35-A M.R.S. § 3209-B(5).[11] Each path creates an annually fixed price that is guaranteed to be significantly higher than the wholesale electricity rate.

Maine NEB advocates seek safety from preemption in the contrived complexities of the retail billing process. Participating customers receive a credit on their utility bill, not a direct cash payment. This, even with gossamer, is simply artifice. The credit acts as payment by money. The statutory formulae determine the credit in dollars and cents. The credit process presumes the electricity is transmitted to the customer over the electric grid by the utility. The NEB generator is paid by the customer in exchange for the monetary credits. 35-A M.R.S. §3209-B(5). The

[11] The Tariff rate for a customer is determined by one of two formulas: either it "must equal the standard offer service rate established under section 3212 that is applicable to the customer receiving the credit plus 75% of the effective transmission and distribution service rate for the rate class that includes the smallest commercial customers of the . . . utility" or it must equal the output of that formula for 2020, escalated by 2.25 percent per year starting in 2023. 35-A M.R.S. § 3209-B(5)(A), (A-1).

utility sells the NEB generator's output at wholesale, and then nets the proceeds against the costs it incurs when applying bill credits to participating off takers pursuant to the legislatively mandated rate. The gap or difference is charged to all customers as above-market costs, the very costs at issue in this proceeding. This is precisely what the utility does with all legislatively mandated third-party power purchases. *See*, *e.g*., 35-A M.R.S. §§ 3210-C(8), 3604(1), 3624(1).

The fatal preemption caused by this paradigm arises from the third-party NEB generator role, use of the interstate transmission grid, the mechanisms by which the NEB generator is compensated, and the utility resale of Tariff Program energy in the wholesale market. Those mechanisms have no purpose but to compensate the generator at a rate designed by the Legislature to be higher than the rate federal law allows in its pursuit of wholesale electricity competition.

This substitutes the Tariff Program for the FERC-mandated ISO-NE auction rate, clearly attempting to occupy the field assumed by Congress in the FPA and interfering with the ISO-NE auction power rate applicable to the sale of electricity at wholesale. The Tariff Program exceeds the ISO-NE wholesale auction rate, as shown by the Commission's many official reports to the Legislature.[12] The gap

[12] For example, in its December 1, 2021 Presentation to the Committee on Energy, Utilities and Technology, the Maine Public Utilities Commission demonstrated that: (1) wholesale electricity prices have been around $40 per megawatt-hour, or $.04 per kWh, since 2012, with a few exceptional years (slide 3); (2) Maine's electricity supply or standard offer rates for generation were about $.12 per kWh in 2022 (slide 5); and (3) the NEB Tariff Rate, of which the standard offer rate is one component, was about $.20 per kWh in 2022

between the Tariff Program and the ISO-NE auction rate creates the subsequent customer assessments IECG disputes as improper for allocation to and collection from customers, the NEB costs. These costs are unlawful as preempted and therefore may not be included in the rates of CMP and Versant customers.

The Supreme Court of the United States has established that the commingled nature of electricity on the modern interconnected grid makes even intrastate wholesale sales subject to federal jurisdiction. *See, e.g.*, *FPC v. Fla. Power & Light Co.*, 404 U.S. 453 (1972) (sustaining the Federal Power Commission's finding that electric energy from two utilities was commingled and therefore transmitted in interstate commerce, even though one utility had no direct connections to any out-of-state utility and sold no power to out-of-state buyers, because the power from various sources was commingled on a common bus facility); *Conn. Light & Power Co. v. FPC*, 324 U. S. 515, 525-30 (1945) ("Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test. Technology of the business is such that, if any part of a supply of electric energy comes from outside of a state, it is or may be present in every connected distribution facility. Every facility, from generator to the appliance for consumption, may thus be called one for transmitting such interstate power."); *see*

(slide 6). Additionally, the Commission showed that its other long-term renewable energy contracts had prices around $.035/kWh (slide 7). Available at: https://www.maine.gov/mpuc/legislative/reports.

also New England Ratepayers Assn., 168 FERC ¶ 61,169, Order Granting Petition for Declaratory Order (2019) (granting a petition for declaratory order that a New Hampshire statute "mandating a purchase price for wholesale sales by certain generators in the state, is preempted by the [FPA and PURPA].").[13]

This Court has dealt carefully and as necessary with cases arguing Maine law is preempted by federal law. For example, in *Maine Yankee Atomic Power Company v. Maine Public Utilities Commission*, this Court articulated the law of preemption in finding that the federal Nuclear Regulatory Commission has exclusive jurisdiction over nuclear decommissioning, thereby preempting Maine from approving a proposed decommissioning financing plan pursuant to state law. 581 A.2d 799, 800 (Me. 1990). As this Court stated, federal law must preempt even validly enacted state law if: (1) Congress clearly intended so; (2) there is a direct conflict making compliance with both laws impossible; (3) Congress has legislated comprehensively and left no room for supplemental state action; or (4) the state law is an obstacle to accomplishing Congress's full objective. *Id*. at 802-03. While federal supremacy is not to be "presumed lightly," "when no other conclusion is possible given the nature

[13] Moreover, at least one Maine NEB project sponsor has conceded that federal jurisdiction applies to its participation in NEB because NEB entails wholesale sales by the project sponsor to the utility. *See Standard Solar, Inc., et al.*, FERC docket no. EL23-5-000, Petition for Declaratory Order (Oct. 18, 2022) (seeking waivers of federal law and reporting on refunds made to utilities by a series of project sponsors based on the conservative assumption that they were making wholesale sales to their interconnecting utilities as a result of their participation in the these state community solar or net energy billing programs, including a refund by ECA Maine BET, LLC to Central Maine Power Company).

of the regulated subject matter, or Congress has clearly ordained this result, federal law must preempt conflicting state law." *Maine Yankee*, 581 A.2d at 803.

In 1935, Congress enacted Part II of the FPA to require the regulation of the use or sale of electric energy at wholesale in interstate commerce. Courts have long held that the FPA occupies the field of interstate rates for electricity, and that state attempts to affect such rates directly and indirectly were preempted. *See, e.g., New York v. FERC*, 535 U.S. 1, 17-20 (2002). As the states have sought to affect the development of new clean and renewable energy resources, the principles of federal preemption increasingly have been tested.

In *Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150, 194 (2016), the Supreme Court invalidated as preempted a Maryland guaranteed power capacity rate that deviated from the FERC-authorized regional transmission organization ("RTO") capacity auction rate. Maryland's objective of encouraging new generation could not prevent preemption. Previously, New Jersey had failed on similar grounds in another attempt to increase capacity prices for generators. *PPL Energy Plus, LLC v. Solomon*, 766 F.2d 241 (2014), *cert. denied*, 578 U.S. 944.

These cases are virtually on point with IECG's argument regarding the Tariff Program. Maryland and New Jersey sought to incentivize new generation by adding state subsidies to federally mandated capacity auction prices. Maine similarly seeks to encourage small renewables through higher energy prices to NEB generators in a scheme that goes far beyond "pure" NEB. Maine's higher prices are equally invasive of the field occupied by the FPA as were Maryland or New Jersey's.

NEB advocates will contend these cases are inapposite because the rates in those cases were "tethered" to the federally mandated capacity auction, and Maine NEB rates are not. *See, e.g.*, *Coalition for Competitive Energy, Dynegy Inc. v. Zibelman*, 272 F.Supp.3d 554 (2012). This argument would misunderstand both "tethering" and the law of retail rate setting. For one, Maine NEB rates are inextricably tethered to the ISO-NE wholesale auction: that pricing is essential to set the amount of the NEB revenue gap to be filled by other ratepayers. The ratepayer money used to fill this gap enables the Tariff Program to fund the legislatively mandated rate. Without that true-up tether, NEB funds would be inadequate to pay NEB generators the legislative rate. The Maine "tether" merely attaches at the end of the rate making process rather than at the Maryland and New Jersey beginning.

No party can doubt that FERC has required ISO-NE to conduct wholesale energy and capacity markets to create competitive energy and capacity auctions. No party can doubt the role of CMP and Versant in those auctions to resell at wholesale the power they receive from the Tariff Program generators. That role is not incidental to or independent of Maine NEB. The auction sales are inextricably part of the Tariff Program; without them the amounts of money to be recovered from CMP and Versant ratepayers in cases such as this could not be determined.

NEB advocates will next return to *Hughes* and its dicta that schemes states "might employ to encourage development of new or clean generation, including tax incentives, land grants [and] direct subsidies" are not preempted. *Hughes*, 578 U.S. at 166. The Court tellingly did not exempt rates set to compensate a generator. The Tariff Program fits none of the possible exceptions; it departs from pure NEB by creating rates of monetary value that facilitate the transactions among generators, the utility, and multiple customers. This is the same triangular relationship that involves federal regulation of the sale of generation.

IECG also contends the Tariff Program is preempted because compliance with both Maine law and the ISO-NE auction is impossible. Any rational generator, given a choice, would take the higher Tariff rate over the ISO-NE auction rate, directly frustrating attainment of FERC's goal of creating competitive electricity markets. The Tariff Program creates rates set without competition and which are five times more costly for CMP and Versant consumers than are the ISO-NE auction prices. *Supra*, n.12. These rates deprive Maine consumers, including IECG's members, of the benefits of federally mandated electricity competition. As the Commission has reported to the Legislature, the total capacity of Maine's two NEB programs far exceeds the state's goal of 750MW. These are not incidental or de minimis harms.

NEB advocates may also argue the failure of FERC to find that "pure" NEB is preempted indicates the Tariff Program is not preempted. This would misconstrue

FERC's actions. FERC has declined to take on the issue on procedural grounds arising from filings which were premised on the limited opportunities under the Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. § 2601 *et seq.* Most recently, FERC declined to entertain a petition for declaratory order finding that "pure" NEB rates are subject to exclusive federal jurisdiction and must be priced under the FPA or PURPA. *New England Ratepayers Assn.*, 172 FERC ¶ 61,042, Order Dismissing Petition for Declaratory Order (Jul. 16, 2020). FERC held that a declaratory order was not justified, as the petitioners had not identified a specific controversy or uncertainty an order would resolve. *Id.* ¶¶ 33-37.

In this void the decisions of the Supreme Court cast even brighter light. The Court's decision in *Hughes* invalidated a state attempt to increase the FERC-mandated capacity rate. Likewise, the Supreme Court has rejected a contention that the FPA did not preempt state demand response programs where customers were paid to interrupt their consumption, thus imitating generation. *FERC v. Elec. Power Supply Assn.*, 577 U.S. 260 (2016). There, the Court focused on the setting of a retail rate, stating: "[T]o set a retail rate is . . . to establish the amount of money a consumer will hand over in exchange for power." *Id.* at 777. As noted by another court, there is "no principled basis . . . to conclude that the definition of 'to set a rate' is different in the retail and wholesale contexts. *Coalition for Competitive Energy, Dynegy Inc.*, 272 F.Supp.3d at 571-72. That court further observed that the capacity scheme in *Hughes* also set a retail rate by being based in part on a wholesale rate. *Id.* at 572.

The Tariff Program seeks to occupy the field occupied by the FPA and directly interferes with the creation of wholesale competition mandated by FERC in the auctions conducted by ISO-NE. The Tariff Program imposes unlawful costs on most Maine electric consumers. Those unlawful costs may not be collected in rates set by the Commission, by any rate design.

C. The Commission failed to conduct a rate design proceeding in accordance with Maine law.

Several laws work together to prescribe how the Commission conducts a rate design proceeding constrain it—namely, provisions on electric industry restructuring, 35-A M.R.S. §§ 3201 *et seq.* (the "Restructuring Act"), the Electric Rate Reform Act ("ERRA"), *id.* §§ 3151 *et seq.*, and PURPA, as well as this Court's and the Commission's own precedent. The Commission's "policy"-based NEB cost allocation is based on neither evidence, law, nor argument that such a change in stranded cost allocation is required by law, will better achieve the policy of climate mitigation, and would be consistent with PURPA, ERRA, and Commission precedent. Purportedly supporting a policy of climate mitigation is not a rate design principle, unless it is shown that one cost-based rate design principle is better than another in achieving climate mitigation. No such showing has been made.

1. The Commission's allocation of NEB costs violates the 1997 Restructuring Act and the Electric Rate Reform Act.

In Maine electricity rate design precedent, and in rate design generally, costs are not allocated based on their societal purpose. This is particularly true where, as here, the Legislature has not mandated that a cost be allocated in a certain way to achieve a specific societal purpose. Relying on ERRA, the Commission (pre-restructuring) allocated costs related to the Seabrook nuclear facility based on the nature of its costs, including its capacity to meet the demand of the utility and its customers. *Cent. Me. Power Co., Investigation into Cost of Service of Customer Classes of Rate Design of CMP,* Docket No. 80-66, Order (Sept. 11, 1985).[14] Deviating from this precedent would violate the Restructuring Act mandate that stranded cost recovery not change after restructuring. *See* 35-A M.R.S. §§ 3208(5), 3209(1). It would violate Commission precedent without analysis or reason while ignoring the practical reality that Seabrook and Maine Yankee, a former nuclear facility, were contracted in part to provide capacity to meet customer demand.

This discussion highlights the fundamental mistake in allocating costs to customers based on the "policy" the energy purchases supposedly pursue, instead of the type of costs the purchases impose on consumers. "Policy," unless documented by binding legislation, is speculative and potentially political and arbitrary. One

[14] A copy of this order, as well as the order in docket no. 97-580, *infra* at 31, is provided for convenience in the Supplement of Legal Authorities, *see* M.R. App. P. 8(n).

Commission's climate mitigation may be the next Commission's energy mistake. The purposes of PURPA, ERRA, and Commission precedent are to cause rates to be based on the amount and types of costs the consumer places on the grid so rational consumer action will reduce costs to all consumers. *See, e.g.*, 35-A M.R.S. § 3152. Nowhere in Maine statute is there a policy that all NEB costs are to be allocated based on kWh, or even that the sole purpose of NEB is climate mitigation.

Through the Restructuring Act, the Legislature dealt directly with the utilities' desire to recover stranded costs after restructuring, beginning in 2000, and the need of customers to continue efficient existing cost allocation in rate design. The Legislature decreed that "[t]he design of rate recovery for the collection of transmission and distribution costs, stranded costs and other costs . . . must be consistent with existing law." 35-A M.R.S. § 3209(1).

As the Commission acknowledges in its Order, the Commission traditionally allocated Seabrook's costs partially on demand or capacity and partially on energy. (A. 20); *Cent. Me. Power Co., Investigation into Cost of Service of Customer Classes of Rate Design of CMP*, Docket No. 80-66, Order (Sept. 11, 1985) (hereinafter "*Seabrook*:). In the *Seabrook* decision, the Commission allocated costs 25% based on demand and 75% based on energy. *Id.* The Commission noted that as a baseload unit, Seabrook met customer demand <u>and</u> provided energy. *Id.* No substantive rationale was offered by the Commission here for changing this allocation, despite

IECG's argument to the contrary. (A. 20.) This decision exemplifies "existing law" as mandated by § 3209: a technical or engineering analysis of the above-market cost incurrence and an allocation based on the demand (or capacity) and energy characteristics of the unit. Seabrook is a zero-emissions generator, as are the renewable generators participating in NEB. Commission decisions similarly analyze allocation of the costs of Maine Yankee, another zero emissions nuclear plant. These decisions reflect the purposes generating units serve. Section 3209(1) requires an analytical method that must be continued, even with "new" (post-2000) costs.[15]

Some part of NEB costs may be properly allocated among classes based on energy. That depends, as it did for Seabrook and Maine Yankee, on the application of engineering, accounting, and rational analysis. For example, solar NEB generators provides output during virtually only daylight hours: Which classes consume what proportions of demand and energy during daylight hours? Demand and capacity also matter: ISO-NE attributes capacity (demand-meeting) value to solar generation. Considering this and other cost factors is what cost allocation and rate design must be about.

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[15] Strictly construed, "stranded costs" are limited to "costs made unrecoverable as a result of [electric industry] restructuring." 35-A M.R.S. § 3208. Thus, there can be no "new" stranded costs unrelated to restructuring. The Commission ducks this legal bar by "treat[ing] them [no] differently than stranded costs." *Me. Pub. Utils. Comm'n, Investigation of Rate Treatment of NEB Program Costs*, docket no. 2021-00360, Order at 10 (Mar. 11, 2022).

The Commission's leap to the conclusion that all renewables have the sole purpose of avoiding carbon emissions is simply wrong, just as it would be about Seabrook. Imagine, for example, a grid entirely powered by renewables. Some of those renewables must provide the capacity to meet demand that ensures this Court's lights provide illumination when the switch is flipped. Engineering estimates of reliability of generation dictate the architecture of a reliable grid. Every solar project has some capacity value, as ISO-NE acknowledges. As ERRA states, relating rates more closely to costs is essential to increase grid efficiency, reduce grid investment, and reduce costs. 35-A M.R.S. § 3152. That is why ERRA mandates that rates be based on costs. *Id.* at § 3154(2). Reaching zero carbon requires both increasing renewables and creating rate designs that allow intelligent customer decisions at the point of consumption. Existing Maine law and precedent continues to require disciplined cost allocation and rate design.

2. The Commission's allocation of NEB costs ignores Law Court and Commission rate design precedent.

The determination of rates for a public utility involves two essential functions. The first is to determine, on the basis of an analysis of costs, the amount of revenue the utility is entitled to receive, the "revenue requirement." The second is to determine the actual rates to be charged to customers so as to produce that revenue requirement, the "rate design." IECG appeals the latter: the recovery of NEB costs in rates. A rate design proceeding itself has two basic steps: allocation of costs to customer, or rate, classes and recovery of costs from within those classes. This appeal arises out of the Commission's decision in the first step of the rate design process—its allocation of costs among customer classes. The principles of customer class allocation must apply in this case.

Maine law requires that rates be just and reasonable. 35-A M.R.S. § 301. The setting of rates, which "are, and remain, just and reasonable," is a "paramount" objective of Title 35-A, *Cent. Me. Power Co. v. Pub. Utils. Comm'n,* 414 A.2d 1217, 1224-25 (Me. 1980), and therefore the Commission has "the overarching responsibility . . . to assure the justness and reasonableness of rates." *Id.* at 1229.

Rate design is of equal importance. This Court has declared "that the rate design among rates, as well as the revenue level they will generate, must be given Commission attention as a facet of 'ratemaking'." *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 382 A.2d 302, 324 (Me. 1978). Thus, "in determining how the additional revenues were to be allocated, the Commission was required to see that the allocation was just and reasonable." *Cent. Me. Power Co. v. Pub. Utils. Comm'n,* 416 A.2d 1240, 1251 (Me. 1980). Moreover, when the Commission makes a change in rate design, it has the obligation to assure there is an evidentiary record that actually supports any new rate design:

> [W]ere the Commission to substitute a new rate design for the existing one, the Commission staff would have <u>an affirmative duty to develop evidence in the record</u> to support the justness and reasonableness of that new design.

Id. at 1249 (emphasis added).

In a seminal, 50-page rate design case, the Commission adopted the principles to govern rate design for transmission and distribution utilities.[16] *Cent. Me. Power Co., Investigation into Cost of Service of Customer Classes of Rate Design of CMP*, Docket No. 80-66, Order (Sept. 11, 1985). That proceeding was intended "to consider the standards set forth in [PURPA] and to determine the policies and the cost-of-service methods to be used in setting rates for CMP."[17] (S.A. at 4.) In implementing PURPA and ERRA, the Commission emphasized the importance of the cost-of-service standard for rate design and described the overlap of ERRA and PURPA with respect to the critical role that analysis plays:

> ERRA provides a policy basis to govern this proceeding which coincides in most major respects with PURPA. . . . The broad policy concerns, derived both from PURPA and ERRA, are conservation, efficient use of resources and equity. . . . For example, Dr. E. Odgers Olsen, testifying on behalf of IP/OP, believes that conservation is the wise use, not mere non-use, of electricity; that efficiency includes both efficient production (i.e., meeting given demand at the lowest cost) and rational end use (i.e., adjusting the level and pattern of demand to the proper cost signal); and that equity is achieved by relating rates paid by an individual customer to the costs he imposes upon the system.

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[16] PURPA, the ERRA and Commission adoption of the principles of cost causation remain no less important or effective with the deregulation and divestiture of generation in 2000. There is no basis to conclude that the Legislature intended in 2000 to amend the ERRA or otherwise abandon the principle of cost responsibility in any part of rates over which the Commission had control. In fact, 35-A M.R.S. § 3209 (1) requires that "existing law" as of 1997 continued to be following after restructuring.

[17] The Commission stated that the legal principles governing the proceeding are contained in PURPA and ERRA, and noted, "PURPA provides that its purposes are to encourage: Conservation of energy supplied by electric utilities; The optimization of the efficiency of use of facilities and resources by electric utilities; and Equitable rates to electric consumers. Section 111 of PURPA provide six standards which must be "considered" by state regulatory commissions and about which a "determination" must be made regarding whether "implementation" is reasonable." *Id.*

(S.A. at 6-7.) The Commission noted that it previously had adopted the cost-based rates principle, recognizing "that its task was 'to insure that those who buy electricity pay what it costs to generate and deliver that electricity to them, and that no one group of customers is subsidized at the expense of another. By doing this, [the Commission] believe[s] that all customers will be treated as fairly as possible; that they will be more able to choose wisely among competing energy technologies; that use of electricity will be neither promoted nor discouraged artificially; and that rates will, ultimately, be more stable than might otherwise be the case.'" (S.A. at 8 (internal quotation omitted).)

This seminal rate case reveals a telling example of the analytical approach the Commission should have used to allocate NEB costs:

> An analysis of the CMP system supports the conclusion that base load capacity costs are incurred in part to reduce energy costs. For example, Maine Yankee is a significant portion of the Company's base load capacity. While it clearly provides a benefit in terms of meeting CMP's peak load requirements, it operates at less than one-third the cost of the Company's oil-fired plants and confers the additional benefit of producing low-cost energy . . . .

(S.A. at 20-21.) The Commission emphasized a singular, guiding principle in designing rates—that rates must reflect costs "to the maximum extent practicable." (S.A. at 29 (internal quotation omitted.)

This principle has guided the Commission to equitable rate designs in the past, namely those with allocations reflecting both energy and demand. In another classic, 150-page rate decision, the Commission determined that allocations based 75% on energy use and 25% on demand reflect a reasonable weighing of the components. *Me Pub. Utils. Comm'n, Investigation of Cent. Me. Power Co.'s Revenue Requirements and Rate Design (Phase I)*, docket no. 97-580, Order at 115, 120, 126, 140, (Mar. 19, 1999). As the Commission explained:

> To achieve equity objectives, these costs should be allocated in a manner consistent with the reasons they were incurred. Because stranded costs are generation-related, it is appropriate to allocate them on the basis of a mix of energy and capacity . . . . Although CMP's stranded costs are most often associated with resources that could be characterized as baseload [i.e., energy], these resources contain a capacity component . . . . However, rather than examining the characteristics of each purchase, the Commission decided to allocate stranded costs to class in the same way it had allocated excess costs in base rates, allocating stranded costs on an 'equiproportional' basis, that is, in proportion to the previous marginal cost allocations to base rates. This methodology identifies the capacity component of generation as the least-cost means to meet peak demand.

(S.A. at 204-05.) When an agency deviates from longstanding precedent, it must explain why. *Pub. Utils. Comm'n v. FERC*, 625 F.3d 754, 759-60 (D.C. Cir. 2010).

This Court's caselaw and Commission precedent are clear. Until its allocation of NEB costs, the Commission has never reversed or materially modified these guiding principles. The proper task below was for the Commission to apply those principles usefully to NEB costs. The Commission failed in that task.

3. "Lost" NEB revenues are not stranded costs.

The Commission's decision to recover revenues "lost" by CMP and Versant due to the NEB programs through stranded costs is error. (A. 9, 13-14.) In fact, no category of "lost revenues" are stranded costs; they are revenues which are not collected. Here, too, the Commission hangs to the gossamer fiction that kWh Program customers take fewer kWh from the utility. That is false. The kWh Program customer takes all of its power through the utility. Only through the NEB fiction of "self" generation left over from "pure" NEB is the kWh Program participant relieved of that portion of its cost responsibility for the distribution system. That cost is then charged to all customers. This is the antithesis of basing rates increasingly on costs.

As IECG observed, many programs and procurements affecting the grid result in decreased electricity use. Efficiency programs from Efficiency Maine Trust, subsidized home weatherization, interruptible rates, and radio ads encouraging reduced use to relieve grid stress are among the many. Consumption reductions in response to rising electricity costs, some of which may be influenced by regulatory "policies," create lost revenues. That does not make them stranded costs. The Commission has long held that utilities remain at risk for loss of load as part of their enterprise. Those risks include the business cycle, efficiency investment by consumers, fuel switching, and customers leaving the grid in whole or part. Exit fees remain unlawful in Maine for that very reason. *See* 35-A M.R.S. § 3209(3).

The Legislature, or the Commission pursuant to statutory authority, may choose to mitigate certain risks of load loss. *See* 35-A M.R.S. § 3195. Alternative rate plans and rate adjustment mechanisms may be adopted with Commission approval. Stranded cost recovery is not among the alternative rate plans or mechanisms allowed by the statute. *Id.* The NEB statute neither requires nor permits load loss from NEB to be recovered as stranded costs.

In practical terms, capacity cost of the demand imposed by that customer class, or customer, would not have changed; the same grid infrastructure is required by the customer and class. Carried to its logical conclusion, the demand and capacity costs created by the consumption behavior of an entire universe of utility customers would have NO capacity costs signaled in rates, and none paid. This would be contrary to PURPA, ERRA, Commission precedent, and common sense. It also would increase the cost of electricity consumption without regard to its "wise use," and therefore would impair beneficial electrification, as discussed below.

Rates based on cost are the fairest to all: no one subsidizes anyone else, and we each control and pay for our cost causation. Regulators make some exceptions, but they remain just that unless we broadly abandon cost causation as the guiding principle. Allocating lost revenues to consumers who have no control over that specific cost causation strides onto that slope. The unfairness can be mitigated by keeping costs within class. Classes are created by aggregating consumers with similar consumption characteristics. Typical class segregation is based on maximum demand, which tends to occur in similar time frames. It is not perfect, but it is fair.

4. The Commission's allocation of NEB costs ignores its capacity resource obligation.

The Commission's allocation on NEB costs entirely among classes based on energy fails to comply with the Legislature's mandate to procure renewables primarily for their capacity value, not their energy value. Through the Renewable Portfolio Standard, the Legislature has sought "to ensure an adequate and reliable supply of electricity." 35-A M.R.S. § 3210(1). Maine's renewable energy targets are stated in terms of "new renewable *capacity* resources," not energy resources.[18] *Id.* § 3210-C(2)(A). NEB solar resources qualify as "renewable capacity resources." Allocation of NEB costs among classes based entirely on energy is the exact opposite purpose for which NEB projects are developed.

Until this case, the Commission has never deviated from its long implementation of the principle of rates based on costs. The opposite has occurred. The Legislature has amended 35-A M.R.S. § 101, virtually the Commission's charter, to establish as one of four specified Commission objectives to minimize the cost of energy available to Maine consumers. It is difficult to see how energy costs

[18] "Capacity" is a generating resource's maximum capability to produce energy; "energy" is the varying output a resource produces.

can be minimized if the proper treatment of costs in rates to achieve efficiency is ignored.

D. The Commission's allocation of NEB costs to rate classes is arbitrary, capricious, not supported by substantial evidence, and contrary to beneficial electrification as a climate solution.

This Court has long affirmed that the Commission is an entity of limited, delegated powers. *Me. Pub. Servs. Co. v. Pub. Utils. Comm'n*, 524 A.2d 1222, 1226 (Me. 1987); *Stoddard v. Me. Pub. Utils. Comm'n*, 19 A.2d 427, 428 (1941). The Legislature has never delegated to the Commission the broad authority to conduct stranded cost rate design on the basis of "climate policy," let alone a broad and unspecified climate policy. The Commission has never adopted a "climate policy" by rule. Indeed, the term "climate policy" is nowhere defined in Title 35-A, a title replete with scores of important definitions. Which climate policy? Whose?

Over IECG's strenuous advocacy, the Commission intentionally ignored decades of settled rate design principles, including the bedrock principle of cost-causation, and unlawfully and unwisely allocated NEB costs among classes on a kWh basis. Even more mystifying than the conclusion reached is that the Commission's reasoning for doing so is exactly backwards. By abandoning cost-causation, the Commission eliminated the meaningful ability for consumers to understand the cost implications of their decisions and act accordingly, especially as it relates to mitigating climate change through beneficial electrification.

The Commission acknowledges this cost allocation imperative in its decision to allocate costs within classes on a per capita customer basis, rather than on an energy or volumetric basis, finding that "recovering NEB stranded costs through volumetric charges is both inequitable and contrary to the State's climate policy goals" because that "could create a disincentive for customers to invest in beneficial electrification, such as electric vehicles (EVs) and heat pumps." (A. 22.)

The Commission provided no reason as to why this logic does not apply to allocation of costs to classes for subsequent recovery from customers. Because the Commission conducted no analysis of "climate policy" itself—its scope, alternatives, and comparative results—and failed to conduct the thorough analysis conventionally conducted by the Commission to comply with existing law, the disparity in logic from class allocation to cost recovery from customers fully undermines the Commission's allocation of costs among classes.

The Commission NOI requested comment on the effect of NEB stranded cost rate design on beneficial electrification. (A. 29.) IECG reported that the goal of beneficial electrification is not the mindless increase of electricity generation and consumption. *See* 35-A M.R.S. § 3803 (codifying beneficial electrification in 2023 as a tool in procuring renewable energy, a concept to be planned by Efficiency Maine Trust, and as a directive to be advanced by the Commission in its decisions). The goal is "wise use," which includes substitution of renewables for fossil fuel use.

Wise use also requires consideration of both capital costs and energy costs. That calculus provides the mechanics for the transition from fossil fuels to renewables.

Increasing electricity consumption is not inherently good; but doing so in an informed, strategic manner to reduce electric rates and emissions, without sacrificing reliability, is inherently good. Affordable electricity is obviously necessary to achieve the pace and scale of heat pump and electric vehicle penetration necessary to mitigate climate change and achieve the State's goals. Lower electric rates will increase use of beneficial technologies and higher electric rates will decrease use of those technologies. As more end uses are electrified, throughput on the grid will increase while its costs remain static, at least until the grid reaches a point of maximum efficiency and upgrades are needed. Simply put, more electrons over the same wires means the unit price for electrons will decrease. Due to more efficient utilization of the grid, unnecessary grid upgrades can be avoided, and necessary grid upgrades can be optimized, each keeping rates in check for consumers.

On the emissions side, electrification is beneficial when it cost-effectively reduces overall emissions. Electrifying heating and transportation initially reduces emissions through the inherent 300 to 500% efficiency advantage of heat pumps and electric vehicles relative to fossil fuel combustion, regardless of the source of electricity. This is enormously impactful in Maine, where expensive and volatile foreign oil is used to heat nearly two-thirds of all homes and businesses. Further, electrifying heating and transportation creates a viable pathway to zero emissions as renewables overtake and then eliminate fossil fuels as sources of grid electricity.

The theory of beneficial electrification, however, falls apart under the Commission's choice to allocate NEB costs on a kWh basis. Allocating the costs of needlessly expensive small-scale solar to customers on the basis of how much electricity is consumed will not only penalize those consumers who have early-adopted heat pumps and EVs (and now use more electricity than before), it will also dissuade the next wave of consumers from adopting heat pumps and EVs.

The reality of using beneficial electrification to mitigate climate change is that rate design must become even more important than it currently is. Customers must know what costs they cause, and thus what expenses they will incur, in order to respond appropriately to price signals. In its 2020 report to the Legislature, Efficiency Maine Trust identified rate design as a critical tool for beneficial electrification:

> One way to leverage the benefits of this load flexibility is through rate mechanisms that set price signals to incentivize or disincentivize certain behaviors. Indeed, the value of flexible electrified loads must be communicated through the electricity prices consumers pay or avoid. To that end, electric delivery utilities can use various forms of time-varying pricing, charging different rates per kWh or kW consumed depending on the time of day, season, and type of day (e.g., critical peak day) to better align prices with costs of delivering electricity.

Beneficial Electrification: Barriers and Opportunities in Maine, 22, Report to J. Standing Comm. on Energy, Utils. & Tech. (Jan. 31, 2020). Myriad other studies and reports make the same fundamental point: prices must reflect costs for beneficial electrification to work.[19]

Cost allocation and ultimate rate design are also likely to get more complex with climate change. But that is a reason to use the rate design principles that were created, refined, and established over many decades, not ignore them. Rate design principles, while sometimes internally inconsistent and useful only when applied as an artform rather than a science, are virtually incontrovertible at this point.

However, concluding without any evidence that NEB is a state climate policy from which "all ratepayers benefit" and that "it [therefore] makes little sense to attribute the 'costs' of such benefits differently" is a transparent excuse for avoiding what is an inherently complex endeavor. Worse, it is incorrect and puts at risk the very objectives the Commission claims to be safeguarding. This is not a situation where complexity warrants deference to a specialized agency, it is a situation where clear over-simplification by the Commission is unlawful and dangerous in light of

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[19] *See generally*, Deason et. al., Lawrence Berkely National Laboratory, *Electrification of buildings and industry in the United States: Drivers, barriers, prospects, and policy approaches*, at 40 (March 2018) (stating that "electricity rates are important to the prospects of electrification in several respects. Naturally, lower rates will encourage electrification and higher rates will discourage it. However, rate design also is an important factor."); Kolokathis et al., Regulatory Assistance Project, *Cleaner, Smarter, Cheaper: Network tariff design for a smart future*, at 8 (January 2018) (citing principles for smart rate design including that "[c]ustomers should pay for grid services in proportion to how much and when they use the grid" and that "[c]ustomers who produce their own electricity should cover their fair share of grid costs by paying more to use the grid when it is heavily loaded, but less when it is not."); Yim et al., ACEEE, Equity and Electrification-Driven Options, at 8 (September 2023) ("A couple ways to reduce utility bills through rate design are by incentivizing ratepayer behavior change through some version of time-varying rates and by designing rates that are tailored to the operational characteristics of ratepayer appliances.").

its specialty. The Commission is obligated to make the best of NEB for consumers by effectively employing rate design principles.

IV. CONCLUSION

IECG respectfully requests that the Court find the Commission's Order regarding allocation of NEB- costs to class based on kWh to be unlawful, declare the Order to be vacated, and remand to the Commission with instructions to immediately restore the allocation to class previously in place prior to the April 21, 2023 Order and to timely determine and implement a new allocation which is just and reasonable and consistent with the decision of this Court.

Dated at Augusta, Maine, this 24th day of January, 2024

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CERTIFICATE OF SERVICE

I, Anthony W. Buxton, hereby certify that on this 24th day of January, 2024, caused two (2) copies of the foregoing Brief of Appellant to be served on counsel for Appellee and the other Appellees by first-class mail, postage prepaid upon, and provided a courtesy copy by electronic mail to, the following:

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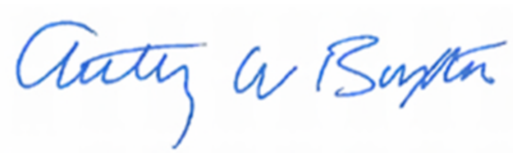

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