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 APPELLEE MAINE PUBLIC UTILITIES COMMISSION

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INTRODUCTION

On April 21, 2023, the Maine Public Utilities Commission ("Commission") issued an Order in Commission Docket No. 2022-00160 concluding that all categories of costs collected through the stranded cost mechanism will be allocated among customer classes based upon each class's proportionate kilowatt-hour (kWh) load share. *Public Utilities Commission, Investigation of Rate Treatment of NEB Program Costs*, Docket No. 2021-00360, Order (Mar. 11, 2022) (the "Order"). The Order also determined that, after the costs have been allocated, the costs and lost revenues resulting from the State's implementation of net energy billing ("NEB") programs (one category of costs recovered through the stranded cost mechanism) will be recovered from customers through a fixed charge. The Order provided that all other non-NEB categories of costs recovered through the stranded cost mechanism would be recovered through a volumetric charge.

Appellant appeals the portion of the Order that allocated NEB costs among customer classes based on each class's proportionate kWh load share. For the reasons stated herein, the Commission respectfully requests that this Court affirm the Commission's Order.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. STATUTORY AND REGULATORY BACKGROUND

A. History of Stranded Costs

The concept of "stranded costs" originated during the restructuring of the electric industry in Maine that occurred in the late 1990s. Title 35-A, Chapter 32 Electric Industry Restructuring (the "Restructuring Act"). Prior to industry restructuring, utilities provided regulated generation and supply services, as well as regulated transmission and distribution ("T&D") services. The primary purpose of restructuring was to deregulate the generation and supply of electricity, while the local transmission and distribution of electricity would remain a regulated public utility service.

At the time of restructuring, electric utilities had generation assets as well as contractual and other obligations regarding generation and supply. After generation and supply were deregulated, the assets and obligations associated with generation and supply were no longer included in the costs that electric utilities (now strictly T&D utilities) could recover from their ratepayers. These costs were primarily related to purchased power contracts, but deregulation also resulted in some gains for the utilities in the form of revenue from the sale of generating assets.

The Legislature specifically addressed the recovery of costs associated with deregulation in the Restructuring Act by enacting a "stranded cost" statute: 35-A M.R.S. § 3208 ("Section 3208"). Section 3208 defined, and continues to define, stranded costs as "legitimate, verifiable and unmitigated costs made unrecoverable as a result of the restructuring of the electric industry." 35-A M.R.S. § 3208(1). Thus, since the restructuring of the electric industry, utilities have recovered the costs specified in Section 3208 through the "stranded cost" mechanism.[1]

B. Policy Costs

Since restructuring, in addition to using the stranded cost mechanism to recover the Section 3208 costs, the Commission has used the stranded cost mechanism as a procedurally efficient means to allow T&D utilities to recover other costs and lost revenues that fall outside of traditional cost-of-service utility ratemaking and also do not fall within the Section 3208 definition of stranded costs. Such costs are generally related to state policy initiatives directed by the Legislature. Examples include instances where the Legislature has directed the T&D utilities to enter into long-term contracts pursuant to 35-A M.R.S. § 3210-C,

[1] Separate from traditional T&D rate cases, every three years the Commission determines the revenue requirement associated with the T&D utilities' stranded costs and legislatively mandated policy costs and sets "stranded cost" rates for the next three years. 35-A M.R.S. § 3208(6). These are generally referred to as "reset" cases. The T&D utilities then make annual filings where actual stranded cost mechanism revenue and actual stranded cost mechanism costs are reconciled with the revenue requirement that was set in the reset case. Any accumulated difference is recovered from ratepayers beginning on July 1. These annual filings are referred to as "reconciliation" cases.

long-term community-based renewable energy contracts pursuant to 35-A M.R.S. § 3604, long-term Renewable Portfolio Standard ("RPS") contracts pursuant to 35-A M.R.S. § 3210-G, and NEB program costs pursuant to 35-A M.R.S. § 3209-A and § 3209-B. *See, e.g., Public Utilities Commission, Long-Term Contract Bidding Process*, Docket No. 2018-00137; *Goose River Hydro, Inc., Request for Certification of a Community Based Renewable Energy Project*, Docket No. 2013-00216; *Public Utilities Commission, Request for Proposals for the Sale of Energy or Renewable Energy Credits from Qualifying Renewable Resources Pertaining to Emera Maine and Central Maine Power Company – Tranche 2*, Docket No. 2021-00004; *Public Utilities Commission, Petition for Good-Cause Exemption Pursuant to 35-A M.R.S. § 3209-A*, Docket No. 2022-00365.

The Commission has acknowledged that such policy costs arising out of long-term contracts and NEB programs do not meet the Section 3208 definition of stranded costs, because they are not "costs made unrecoverable as a result of the restructuring of the electric industry" as defined by Section 3208. (A. 12.) Nevertheless, the Commission has concluded that it is appropriate to utilize the stranded cost mechanism for the purpose of cost recovery by the T&D utilities.[2] (A.12.)

[2] The Commission acknowledges that confusion may surround the use of the term "stranded costs" in the Order. In the Order, the Commission refers to stranded costs that meet the definition of "stranded costs" under Section 3208(1) as "pre-restructuring stranded costs." The Order then refers to all policy costs, *i.e.*,

The above-cited policy programs implemented post restructuring generally require T&D utilities to buy energy at a particular price from an eligible generator.[3] 35-A M.R.S. § 3210-G. The utility then resells the energy in the wholesale market. The difference between what the generator was paid and what the utility is able to earn in the resale may be either a benefit or a cost. If the difference is a net positive, customers benefit from the contracts through reduced rates. 35-A M.R.S. § 3210-C(8). If the difference is a net negative the utility must recover those costs from customers. *Id.*

Title 35-A M.R.S. § 3210-F ("Section 3210-F") directs the Commission to allocate to each investor-owned T&D utility that utility's pro rata share of eligible costs and benefits from such contracts on an annual basis. 35-A M.R.S. § 3210-F.

C. Net Energy Billing

NEB in Maine consists of two separate programs: 1) the kWh Credit Program, which is available to all classes of customers, pursuant to 35-A M.R.S. § 3209-A; and 2) the Tariff Rate Program, which is available to commercial and institutional ("C&I") customers, pursuant to 35-A M.R.S. § 3209-B. (A.12.). While both NEB programs engender policy costs in the form of a Legislatively mandated

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costs that came about after restructuring and thus do not meet the definition of stranded costs as "post-restructuring costs," or "post-restructuring stranded costs." The Order also refers to all costs recovered through the stranded cost mechanism collectively as "stranded costs." Nevertheless, all post-restructuring costs are not stranded costs because they do not meet the definition under Section 3208.

[3] The contracts may sometimes be for electric capacity or renewable energy credits ("RECs").

subsidy that inures to the benefit of certain generators who generate electricity using renewable resources, the two programs are designed differently.

1. kWh Credit Program

The kWh Credit Program provides kWh credits to participating customers, thereby reducing the amount of kWh for which the customer is billed and reducing the bills of those customers. 35-A M.R.S. § 3209-A, 65-407 C.M.R. ch. 313, § 3(J)(4) (A.13.) In other words, customers participating in the kWh Credit Program offset the kWh portion of their bill, thereby reducing the revenue collected by the T&D utility. (A.13.) The application of these credits to customers' bills results in a cost to the utilities in the form of lost revenues, which must be recovered from other customers.[4] (A.13.) Thus, there is no distinction between the "lost revenue" that results from the kWh Credit Program and the "costs" resulting from other policy programs. Both result in a cost that must be recovered from ratepayers.

2. Tariff Rate Program

In 2019, the Legislature significantly expanded the State's NEB program through changes to the structure of the kWh Credit Program and the creation of the

[4] Until 2022, the lost revenues of the kWh Credit Program were recovered through the T&D utilities' distribution rates.

Tariff Rate Program available only to C&I customers. 35-A M.R.S. §§ 3209-A, 3209-B. (A.13.)

The Tariff Rate Program provides a financial credit on the bill of participating customers. 35-A M.R.S. § 3209-B. All energy generated by an NEB facility is transferred to the T&D utility, which then sells it at the real-time price in the wholesale market. (A.13.) 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. (A.13.) This cost must be recovered from ratepayers.

The statute creating the Tariff Rate Program did not specify how to recover the costs of the program. 35-A M.R.S. § 3209-B. Instead, the Legislature left it to the Commission to determine how the T&D utilities should recover the costs of the Tariff Rate Program. Thus, in 2019 the Commission amended Chapter 313 of the Commission's rules to provide that the costs and benefits incurred or realized from the Tariff Rate Program by the T&D utilities be recovered through the stranded cost mechanism. *Public Utilities Commission, Amendments to Chapter 313 – Net Energy Billing*, Docket No. 2019-00197, Corrected Order Adopting Rule and Statement of Factual and Policy Basis (Nov. 25, 2019). (A.14.)

D. Commission Docket No. 2021-00360

As noted above, the costs and benefits incurred or realized from the Tariff Rate Program have been recovered through the annual stranded cost mechanism since the implementation of the program. However, the lost revenues resulting from the kWh Credit Program were originally recovered through distribution rates. (A.14.)

In 2021, the Commission opened an investigation into the rate treatment of NEB program costs. *Docket No. 2021-00360*, Notice of Investigation (Nov. 18, 2021). In Docket No. 2021-00360, the Commission noted "that the kWh Credit program was designed primarily for residential customers, while the Tariff Rate program was designed for larger C&I ratepayers and is not available to residential customers." *Docket No. 2021-00360*, Order at 11 (March 11, 2022). The Commission also noted that certain C&I ratepayers do not pay distribution costs.[5] (A.15.) Therefore, because the T&D utilities recovered the costs of the kWh Credit Program though distribution rates, C&I ratepayers were not paying for the costs (*i.e.*, lost revenues) of the kWh Credit Program. Thus, because all classes of customers pay costs determined by the stranded cost mechanism (*i.e.,* pre-restructuring stranded costs and legislatively mandated policy costs), non-C&I

[5] The Commission's Order in Docket No. 2022-00160 refers to these certain C&I ratepayers as "transmission and sub-transmission" ratepayers.

customers were paying for the kWh Credit Program though distribution costs and *also* paying for the Tariff Rate Program through the stranded cost mechanism. *Docket No. 2021-00360*, Order at 11. While certain C&I customers, many of whom do not pay distribution rates, were only paying for the Tariff Rate program. *Id.*

The Commission found that the above situation was inherently inequitable and ordered the utilities to stop recovering the kWh Credit Program costs through distribution rates and instead recover both Tariff Rate and kWh Credit Program costs through the annual stranded cost mechanism, resulting in all classes of customers paying for the costs of the programs. *Id.* The Commission's order in Docket No. 2021-00360 also indicated that the Commission would initiate a review of the existing rate design governing how pre-restructuring stranded costs and legislatively mandated policy costs are recovered through the stranded cost mechanism. *Id.* at 13.

II. PROCEDURAL BACKGROUND

On June 16, 2022, the Commission issued a Notice of Investigation ("NOI") in Commission Docket 2022-00160 to consider "both the allocation of and retail rate design for recovery of stranded costs, that is, both inter-class and intra-class rate design." (A.28.). "Rate Design," as used in the NOI, refers to how to recover costs from customers within those classes after costs have been allocated among customer classes.

The Commission conducted its investigation over the following ten months. (A.1-8.) The Commission received comments from the parties, received direct and rebuttal testimony, conducted a formal hearing, received initial and reply briefing from the parties, and considered comments and exceptions to the recommendations of Commission Staff contained in a written Examiners' Report. (A.1-8.)

On April 21, 2023, the Commission issued the Order that is on appeal. (A.9-27.) With respect to NEB-related policy costs, the Commission found that such costs should be allocated to all rate classes based on each class's proportionate kWh load share. (A. 21.) The Commission concluded that because the policy objectives of the legislation by which the Legislature established such programs do not benefit any particular class of customers (*i.e.*, the policy objectives benefit all Mainers—and, thus, all Maine electricity users—generally), such costs should be allocated to all rate classes based on each class's load share.

In examining the intra-class recovery, the Commission looked at two options: a volumetric and fixed charge. (A.22-25.) In its decision, the Commission noted that a volumetric rate design results in costs largely being paid by customers that are non-NEB participants due to NEB program participants' ability to offset volumetric charges. (A. 22.) The Commission therefore adopted a fixed charge for recovery of NEB costs to ensure that all customers paid NEB program costs. (A.25.)

ISSUES PRESENTED FOR REVIEW

1. WHETHER THE RATE DESIGN ADOPTED IN THE ORDER COMPLIED WITH MAINE LAW.
2. WHETHER THE COMMISSION'S ALLOCATION OF NEB COSTS TO RATE CLASSES BASED ON KWH LOAD SHARE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.
3. WHETHER THE COMMISSION'S ALLOCATION OF NEB COSTS IS PREEMPTED BY THE FEDERAL POWER ACT.
4. WHETHER APPELLANT'S APPEAL IS AN IMPERMISSIBLE COLLATERAL ATTACK ON A PRIOR COMMISSION DECISION.

STANDARD OF REVIEW

"Generally, decisions of the Commission are reviewed only to determin[e] whether the agency's conclusions are unreasonable, unjust or unlawful in light of the record." *Central Me. Power Co. v. Pub. Utils. Comm'n*, 2014 ME 56, ¶ 18, 90 A.3d 451, 458 (*quoting Competitive Energy Servs. LLC v. Pub. Utils. Comm'n*, 2003 ME 12, ¶ 15, 818 A.2d 1039). The Law Court's review of a Commission decision is deferential, and a Commission decision is reviewed for an abuse of discretion. *Friedman v. Pub. Utils. Comm'n*, 2012 ME 90, ¶ 6, 48 A.3d 794, 797 (*quoting Dunn v. Pub. Utils. Comm'n*, 2006 ME 4, ¶ 5, 890 A.2d 269) ("Only when the Commission abuses the discretion entrusted to it, or fails to follow the mandate of the legislature, or to be bound by the prohibitions of the constitution, can this court intervene."); *see also Central Me. Power Co. v. Pub. Utils. Comm'n*, 405 A.2d 153, 182 (Me. 1979) (The Law Court "possesses neither the resources, the expertise, nor the inclination to act as a '*super-commission.*'") (emphasis in original).

An abuse of discretion may be found where an appellant demonstrates that the decision maker exceeded the bounds of reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law. *Sager v. Town of Bowdoinham*, 2004 ME 40, ¶ 11, 845 A.2d 567. A party appealing a decision committed to the reasonable discretion of a state decision

maker has the burden of demonstrating that the decision maker abused its discretion in reaching the decision under appeal. *Id.* It is not sufficient to demonstrate that on the facts of the case, the decision maker could have made choices more acceptable to the appellant or to the reviewing court. *Id.*

SUMMARY OF ARGUMENT

The Commission complied with Maine law when it allocated NEB costs on a kWh load share basis. The costs at issue—NEB costs—are not stranded costs. They are not costs "made unrecoverable as a result of the restructuring of the electric industry." 35-A M.R.S. § 3208(1). Thus, they are policy costs, and recovery of them is not bound by the restrictions in the Restructuring Act.

Further, the question of whether NEB costs may be recovered through the stranded cost mechanism is not before the Court. The Commission addressed that issue in prior Commission dockets that were not appealed to this Court. Nevertheless, Appellant uses this appeal to continue to dispute whether such costs may be recovered through the stranded cost mechanism. Not only that, but Appellant also appears to suggest that such costs incurred by utilities may not be recoverable at all.

There is no question that the costs and lost revenues incurred by the T&D utilities through the NEB programs must be recovered from ratepayers. The statutes implementing the NEB programs provided the Commission discretion in determining how to recover such costs.

The Order's decision on the allocation of NEB costs was based on substantial evidence. The Commission reviewed the evidence in the record, including alternative proposals for allocation of costs. Ultimately the Commission

found that, consistent with Commission precedent, costs imposed on the T&D utilities by the Legislature in furtherance of climate change goals cannot be attributed to a particular class of customers. While traditional rate design principles, such as cost-of-service studies, are appropriate for cost recovery related to the provision of regulated T&D service, they have little relevance when allocating the cost of State energy policies. Thus, because policy costs cannot be attributed to individual classes of customers, the Commission looked to the legislative intent behind the NEB programs. It is, after all, the Legislature that created these programs. Finding that the intent of the Legislature was in furtherance of climate change goals that benefit all ratepayers, the Commission's finding on allocating such costs to all customer classes was reasonable. Additionally, because the NEB contracts are energy-based, it was reasonable for the costs to be allocated among the classes based on each class's proportionate load share.

Finally, it appears Appellant's argument on appeal centers not on the Commission's decision on allocation, but rather its decision to allow kWh Credit Program lost revenues to be recovered through the stranded cost mechanism. The Commission made that decision was made in a prior case that was not appealed, and it cannot be collaterally attacked in the instant appeal.

ARGUMENT

I. THE RATE DESIGN ADOPTED IN THE ORDER COMPLIED WITH MAINE LAW

A. The Restructuring Act does not Apply Because NEB Costs are Policy Costs and not Stranded Costs

Appellant asserts that the allocation of NEB costs established in the Order is unlawful because it violates the Restructuring Act. (Blue Br. 24). The Restructuring Act, however, specifically dealt with how to recover costs that are "legitimate, verifiable and unmitigated costs made unrecoverable as a result of the restructuring of the electric industry." 35-A M.R.S. § 3208(1). NEB costs are not stranded costs because they are clearly not costs made unrecoverable as a result of industry restructuring. Neither are other non-NEB policy costs, such as costs incurred from long-term contracts entered into pursuant to post-restructuring legislation. The Commission has consistently held that these policy costs are not "stranded costs." *Public Utilities Commission, Investigation Into Recovery of Expenses and Disposition of Resources from Long-Term Contracts by Maine's T&D Utilities*, Docket No. 2011-00222, Order at 4-5 (Oct. 26, 2011).

Nevertheless, the Commission has found that the stranded cost mechanism is the appropriate vehicle to recover the costs and lost revenues resulting from NEB programs.

B. Traditional Rate Design is not Applicable when Allocating Costs that are not Related to the Provision of T&D Service

Appellant argues that the Commission ignored traditional rate design principles, including the principle of cost causation, when it allocated NEB costs to all classes on a kWh basis. (Blue Br. at 35.)

Appellant conflates the costs a utility incurs when it provides T&D service to its customers with the policy costs the utility incurs due to implementation of legislatively created programs that are distinct from the utility's cost of its T&D operations. The Commission has found that NEB program costs, like other State policy costs, are fundamentally different from the cost of providing T&D service. *Docket No. 2021-00360*, Order at 11.

Further, with respect to cost-causation, the Commission found that traditional cost causation principles—where costs are allocated to the classes that cause the costs—are unworkable when applied to NEB costs. The concept that classes of customers are the cost "causers" was originally proposed by Central Maine Power Company ("CMP"). *Docket No. 2021-00160*, CMP Corrected Testimony at 13 (CMS Item No. 34).[6] CMP originally proposed allocating the costs of the NEB programs to what CMP termed "the cost causer rate classes." *Id.* For

[6] For the convenience of the Court, throughout this Brief the Commission will refer to items in the administrative record of Docket No. 2022-00160 that are not contained in the Appendix by the item's "CMS Item No." The CMS Item No. corresponds to the number in the "Item No." column in the docket sheets found on pages 1-8 of the Appendix.

example, CMP stated, if the net costs for the kWh Credit program were $100 and the Small General Service ("SGS") class were responsible for 20% of those costs, CMP would allocate $20 to the SGS class. *Id.*

The Commission ultimately rejected the idea that it is the customers in a class that "cause" NEB costs. The Commission agreed with the Maine Office of the Public Advocate ("OPA") and Appellant itself in the proceeding below where both argued that CMP's cost-causer approach raised issues of fairness. *Docket No. 2022-00160*, OPA Brief at 4 (CMS Item No. 40). Appellant pointed out in its brief below that CMP's "cost-causer" approach makes little sense because non-NEB participants within the class also pay as though they were "cost causers." *Docket No. 2022-00160*, IECG Br. At 12 (CMS Item No. 41). In other words, because a non-NEB customer has no control over how many customers within their class participate in NEB, assigning costs to the class as a whole bears no resemblance to principles of cost causation.

While before the Commission Appellant appeared to understand why CMP's cost-causer approach was unworkable due to non-NEB customers being treated as "cost causers," Appellant now argues that the unfairness of allocating costs to consumers who have no control over that specific cost causation "can be mitigated by keeping costs within a class." (Blue. Br. 33). The Commission, however, has consistently spread policy costs across all customer classes in a relatively

comparable manner. The Commission has contrasted this to traditional T&D rates, which are designed in a manner to recognize, among other factors, cost causation differences between rate classes to promote economic efficiency and appropriate price signals. *Docket No. 2021-00360*, Order at 10.

II. THE COMMISSION'S ORDER WAS NOT ARBITRARY OR CAPRICIOUS AND WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD

A. The Commission's Allocation of NEB Costs was not Arbitrary or Capricious

Appellant argues that the Commission has no authority to allocate NEB costs on the basis of "climate policy." (Blue Br. 35.) To the contrary, the Commission has clear and unambiguous legislative authority to consider climate policy when designing utility rates. Section 103-A of Title 35-A, titled "Climate requirements," provides that in executing its powers, the Commission "shall facilitate the achievement by the State of greenhouse gas emissions reduction. . . ." 35-A M.R.S. § 103-A.

Appellant also appears to suggest that designing rates based on legislative policy is unprecedented. Appellant states that with respect to traditional rate design, rates must reflect costs to the maximum extent possible. (Blue Br. 30.) Appellant goes on to state that "before its allocation of NEB costs, the Commission has never reversed or materially modified these guiding principles." (Blue Br. 31.) Appellant completely ignores Commission precedent that has consistently found

that all ratepayers benefit from not only NEB policies (Docket No. 2021-00360), but all legislatively mandated post-restructuring policies. (A. 21.)

With the allocation of Tariff Rate Program costs, for example, Chapter 313 of the Commission's rules provides that the "process established by the Commission shall be consistent with the allocation of costs and benefits specified in Title 35-A, section 3210-F." 65-407 C.M.R. ch. 313, § 3(K)(7). Section 3210-F of Title 35-A specifies that the costs and benefits of the post-restructuring long-term contracts be allocated among investor-owned utilities based on each utility's total retail kilowatt-hour energy sales to ratepayers. The concept that all ratepayers benefit from State climate policies is nothing new, and an entirely rational position for the Commission to base its decision on allocation.

B. The Commission's Fixed Charge Decision with Respect to Recovery of NEB Stranded Costs is Consistent with its Decision on Allocation

Appellant asserts that the Commission's decision to recover NEB related costs within classes on a fixed charge (per-customer) basis instead of a volumetric basis, is in direct contrast to the Commission's logic when it allocated costs among classes based on kWh usage. (Blue Br. 35-39).

Appellant ignores the distinction in the reasoning between inter-class allocation (allocation among different customer classes) and recovery of those costs within classes (intra-class recovery). As noted above, the Commission's

determination that NEB costs should be recovered through a fixed charge rather than a volumetric charge was based on removing the loophole that allowed NEB program participants to not pay NEB costs. This is entirely consistent with the Commission's reasoning regarding allocation. A fixed charge ensures that all customers pay the costs of NEB, while allocating based on load share to all classes ensures that all classes of customers pay.

C. The Commission's Order was Based on Substantial Evidence in the Record

The Commission based the Order on a thorough review of substantial evidence in the record.[7] Following its issuance of its NOI, the Commission received initial comments from the parties with varying interests, including Appellant, Versant Power ("Versant"), CMP, the OPA, the Efficiency Maine Trust ("EMT"), and Competitive Energy Services, LLC ("CES"). Versant, CMP, CES, and EMT filed direct testimony. The parties engaged in discovery and Versant, CMP, and CES filed Rebuttal Testimony. The Commission convened a technical conference and a hearing and provided further opportunity for discovery. Versant, CMP, CES, OPA, and Appellant filed comprehensive briefs and reply briefs based upon the evidence collected in the record.

[7] No party raised any concern or expressed any confusion as to whether the docket filings in the Commission's proceeding below were properly before the Commission for consideration as evidence and legal argument with respect to the Commission reaching its findings of fact and conclusions of law. Thus, in issuing the Order on appeal, the Commission took all docket filings under advisement as part of the record in reaching its decision.

The Law Court will "sustain findings of fact issued by the Commission unless [those findings are] not supported by substantial evidence in the record", a standard of review which requires the Court to "determine whether there is any competent evidence in the record to support a finding." *Me. Coalition to Stop Smart Meters v. Pub. Utils. Comm'n*, 2023 ME 8, ¶ 7, 288 A.3rd 1195, 1198 (*quoting Dunn v. Pub. Utils. Comm'n*, 2006 ME 4, ¶ 5, 890 A.2d 269 and *Friends of Lincoln Lakes v. Bd. of Env't Prot.*, 2010 ME 18, ¶ 14, 989 A.2d 1128) (internal quotations omitted).

The Order's ultimate decision regarding allocation was supported by the OPA, Versant, and CMP (CMP moderated its prior position, noting it supported allocation of NEB costs based on each class's load share if a fixed charge was implemented). Indeed, the allocation of NEB costs according to the class's overall energy consumption was already the allocation in place for Versant's stranded cost mechanism. *Docket No. 2022-00160*, Exhibit A to Versant Initial Testimony at 2 (CMS Item No. 23).

Further, the OPA, CMP, and Versant also expressed their position that post-restructuring policy costs benefit all ratepayers.

Despite support from the utilities and the OPA on the Commission's decision on NEB allocation, Appellant still contends that the Commission did not engage in a complex analysis based on substantial evidence or precedent, and thus the Court

should not defer to the Commission. (Blue Br. 9). It is clear that Appellant believes that any allocation not based on a cost-of-service study is not an allocation based on substantial evidence. For the reasons described above, the lack of a cost-of-service study in the record does not render the evidence relied upon deficient.

III. APPELLANT'S FEDERAL PREEMPTION ARGUMENT IS NOT PROPERLY BEFORE THE COURT

In its Brief, Appellant states that it "does not seek to invalidate the Maine NEB program" by arguing that the Tariff Rate Program is preempted by the Federal Power Act ("FPA"). (Blue Br. at 14.) The Commission agrees with Appellant that the Tariff Rate Program and NEB statute, 35-A M.R.S. § 3209-B, is not preempted. *See, e.g., Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150, 166 (2016) (holding, in part, that state programs to encourage development of new or clean methods of electricity generation are not preempted by the FPA and the Federal Energy Regulatory Commission ("FERC") "[s]o long as a State does not condition payment of funds on [electric] capacity clearing" FERC's wholesale electric capacity auction).

Appellant, however, goes on to challenge "the collection in state-approved rates" of the policy costs of the legislatively mandated Tariff Rate Program. (Blue Br. at 14.) This type of quasi-preemption challenge fails for a series of reasons.

As an initial matter, it is unclear how Appellant would separate preemption of the Tariff Rate Program and statute itself from preemption of the recovery of the

costs engendered by that program. As discussed earlier in this Brief, the policy costs of the Tariff Rate Program are a Legislatively mandated subsidy that inures to the benefit of certain generators who generate electricity using renewable resources. 35-A M.R.S. § 3209-B. The Legislature requires that this subsidy be applied by compensating the qualifying generators even if the power purchase rate is above the wholesale market rate for electricity. *Id.* Initially, this subsidy is paid to the qualifying generators by requiring the T&D utilities to purchase the qualifying generators' power at the above market rate. *Id.* The difference between the wholesale market rate set by FERC (at which the T&D utility must sell the electricity purchased from the qualifying generators) and the above-market rate at which the T&D utility must purchase the electricity from the qualifying generator is a direct cost to the T&D utility.

Thus, by challenging the collection of Tariff Rate Program costs through electric rates, Appellant is necessarily challenging the NEB program itself. Indeed, Appellant appears to concede as much in its Brief:

> Maine has transgressed the parameters of preemption, while still wrapping its program in the talismanic term 'billing and net metering practice.' . . . Maine's program, although it began simply, is now much more. It is Maine's "more" that is preempted by the FPA.

(Blue Br. at 15) (emphasis added). Further, even if Appellant could surgically preempt the *raison d'etre* of the Tariff Rate Program, (the subsidy) from the NEB

statute, Appellant provides no guidance for this Court as to how the T&D utilities should recover NEB costs if not from ratepayers through electricity rates. Not authorizing recovery is constitutionally untenable.

Clearly, and Appellant provides no argument to the contrary, the T&D utilities must be able to recover the policy costs of the Tariff Rate Program that the T&D utilities pay to the generators by way of a legislatively mandated subsidy; to do otherwise would amount to the taking of private property for public use without just compensation in violation of the Fifth Amendment. U.S. Const. amend. V; *Fed. Power Comm'n v. Hope*, 320 U.S. 591, 620 (1944). The recovery mechanism chosen by the Legislature is to have the T&D utilities recover the NEB costs from electricity ratepayers. 35-A M.R.S. § 3210-C(8).

Further, Appellant failed to raise preemption below. While, in the abstract, Appellant may be correct that "issues of jurisdiction can be raised at any time," (Blue Br. at 14), here Appellant's preemption argument turns on the specific factual circumstances of the Tariff Rate Program, and how that program is administered. For example, in *Hughes*, a case cited by Appellants, the Supreme Court invalidated a Maryland electricity generation program that interfered with FERC's electric capacity auctions and set an interstate wholesale rate for electricity. *Hughes*, 578 U.S. at 163. The Court, however, pointedly did not invalidate "various other measures States might employ to encourage development

of new or clean generation, including . . . direct subsidies . . .." *Id.* at 166. In the Commission's view, it is too late to raise preemption because further factual development would be required to determine whether Maine's Tariff Rate Program is more akin to the Maryland program invalidated in *Hughes* or is more akin to a "direct subsidy" to generators that T&D utilities must be allowed to recover.[8]

Finally, the Commission respectfully suggests that a preemption challenge to a State statute would be more properly brought before the Superior Court in an action for declaratory judgment, and defended by the Office of the Attorney General, rather than be brought in an administrative proceeding where the Commission—a quasi-judicial Legislatively-created Executive Branch agency—presumes the propriety of the directives it receives from the Legislature. *See, e.g.*, *Dickinson v. Me. Pub. Serv. Co.*, 223 A.2d 435, 436 (Me. 1966) (The [Public Utilities] Commission as a quasi judicial tribunal very properly assumed the constitutionality of the new legislation." (citing *Heath et al. v. Me. Pub. Serv. Co.*, 161 Me. 217, 210 A.2d 701 (1965))).

Accordingly, the Commission respectfully argues that preemption is not properly before this Court based on the record below and, to the extent Appellant

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[8] A finding of preemption in this matter could have national implications. As Appellant correctly points out, net energy billing or net metering programs are in use by many states across the country. (Blue Br. at 10.) Indeed, the law review article cited by Appellant (Blue Br. at 10 n. 6) posits that 80% of states have enacted similar programs to mitigate climate change. Steven Ferrey, *Tightening the Legal 'Net': The Constitution's Supremacy Clause Straddle of the Power Divide*, 10 Mich. J. of Env. & Admin. L. 415, 415-416 (2021).

indeed wishes to challenge 35-A M.R.S. § 3209-B on preemption grounds, they be required to raise this complex legal and factual matter before a tribunal better suited to address this matter in the first instance.

IV. APPELLANT'S APPEAL IS A COLLATERAL ATTACK ON A PRIOR COMMISSION DECISION

Despite the Appellant devoting a large portion of its Brief arguing that the Tariff Rate Program is federally preempted and that the lost revenues resulting from the kWh Credit Program cannot be recovered through stranded costs, Appellant argues that it is not in fact seeking to invalidate NEB. (Blue Br. 10-23; 31-34). Appellant's ultimate request is that the Court declare that the Commission's decision regarding the allocation of NEB costs to classes based on kWh to be unlawful. (Blue Br. 40). Appellant does not seek to vacate the Commission's decision on allocation with respect to other categories of costs (which have the same allocation as NEB), nor the Commission's decision on intra-class rate design. Additionally, when discussing Commission precedent, Appellant appears to entirely disregard the precedent contained in Docket No. 2021-00360, which determined that kWh Credit Program lost revenues should be recovered from all classes of customers through stranded costs because all ratepayers benefit from climate policies. *Docket No. 2021-00360*, Order at 12. This leads the Commission to believe that what Appellant seeks to do is relitigate a prior Commission decision.

"Normally, a final judgment in one court is binding on the same parties in a subsequent action before another court; in such a setting, the first judgment ordinarily cannot be collaterally challenged in the second proceeding." 21A Fed. Proc., L. Ed. § 51:221, Collateral Attack on Judgments (Mar. 2024). Appellants, while not framing their argument in precisely this manner, are attempting to make just such an impermissible collateral attack in this appeal.

As discussed above, in 2019, by rule, the Commission determined that costs associated with the Tariff Rate Program would be recovered using the stranded cost mechanism. *Docket No. 2019-00197*, Corrected Order Adopting Rule and Statement of Factual and Policy Basis (Nov. 25, 2019). In 2022, in Docket No. 2021-00360—a case in which Appellant was an intervenor and active participant—the Commission made a similar determination regarding cost recovery for the kWh Credit Program. *Docket No. 2021-00360*, Order (Mar. 11, 2022). Neither Appellant nor any other party filed an appeal of the Commission's Order in that proceeding. Thus, since 2019 for the Tariff Rate Program and since 2022 for the kWh Credit Program, the Commission has provided for recovery of the costs of those programs using the stranded cost mechanism. The Commission's rules are not subject to challenge on appeal at the Law Court, *Conservation Law Foundation v. Pub. Utils. Comm'n*, 2018 ME 120, ¶ 13, 192 A.3d 596, 599, and the Commission's final unappealed judgements are *res judicata*. *Quirion v. Pub. Utils. Comm'n*, 684 A.2d

1294, 1296 (Me. 1996) (*quoting Standish Tel. Co. v. Saco River Tel. & Tel. Co.*, 555 A.2d 478, 481 (Me. 1989) (the Law Court "has extended the principle of the res judicata effect of final judgments to administrative bodies") *and citing Ervey v. Northeastern Log Homes*, 638 A.2d 709, 711 (Me. 1994) ("A valid and final judgment of the PUC has res judicata effect")).

In its Brief, however, Appellant attempts to have this Court revisit and reject the Commission's decision in Docket No. 2021-00360 to review policy costs using the stranded costs mechanism for the purpose of T&D cost recovery. Appellant states:

> 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).

(Blue Br. at 26 n. 15.)

Based on the principles of *res judicata* discussed above, this Court should reject Appellant's collateral attack on the Commission's decision to review policy costs and other post-restructuring costs in the same proceeding as stranded costs for the purposes of cost recovery. Appellant cannot on appeal from the Commission's decision in this matter attempt to alter the Commission's decision in an earlier proceeding where Appellant was a party and where Appellant chose not

to appeal. Similarly, this Court should reject Appellant's attack on the Commission's decision in Docket No. 2021-00360 on "jurisdictional" or "preemption" grounds. (Blue Br. at 14-23.) To paraphrase Appellant, this is a collateral attack wrapped in the gossamer of jurisdiction.

If Appellant wanted to challenge the cost recovery mechanisms established by the Commission for the Tariff Rate Program or kWh Credit Program as preempted by the FPA or FERC, it should have done so during the proceedings where the Commission established the mechanisms. As argued above, this is not the proper forum to challenge a Commission rule and the Commission's final orders are entitled to *res judicata* effect, and for these reasons the orders are immune from collateral attack not only in the instant appeal, but also would have been immune from collateral attack had Appellant raised the matter in the Commission's proceeding below. Concomitantly, *res judicata* would apply to any proceeding on remand that may result from this appeal.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this honorable Court affirm the Commission's April 21, 2023, Order in Docket No. 2022-00160.

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Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, Leslie Raber, hereby certify that I have served two copies of the above Brief of Appellee Maine Public Utilities Commission upon the following parties in the above-described matter by hand delivery or U.S. Mail, first class, with all charges prepaid:

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