STATE OF MAINE

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 INTERVENOR OFFICE OF THE PUBLIC ADVOCATE

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March 13, 2024

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INTRODUCTION

The Office of the Public Advocate (the "OPA") offers this brief in response to the Brief of Appellant dated January 24, 2023 ("Appellant's Brief") filed by Industrial Energy Consumer Group ("Appellant") on appeal from the Order dated April 21, 2023 (the "Order") issued by the Maine Public Utilities Commission (the "Commission") approving a rate design for recovery of costs and lost revenues resulting from the State's implementation of two net energy billing ("NEB") programs, as well the costs of other State energy policy initiatives. The OPA is an agency of Maine state government whose duties and responsibilities include representing the consuming public in matters within the jurisdiction of the Commission. 35-A M.R.S. §1702. The OPA agrees with Appellant that the Commission should revisit the rate design adopted in the Order. However, the OPA does so on policy grounds. For the reasons described herein, the Commission did not commit legal error in adopting the findings set forth in the Order.

STATEMENT OF FACTS, PROCEDURAL HISTORY, STANDARD OF REVIEW, AND STATEMENT OF THE ISSUES

The OPA adopts the Statement of Facts, Procedural History, Standard of Review, and Statement of the Issues as presented in Appellant's Brief.

SUMMARY OF ARGUMENT

The OPA offers the following arguments in support of its recommendation that the Appeal be denied.

The Appeal is untimely. The Order was issued on April 21, 2023. The appeal period was stayed pending consideration of a Petition for Reconsideration by the Appellant. However, Appellant withdrew its Petition, thereby restarting the deadline for appeal, a deadline with which Appellant failed to comply.

Appellant failed to preserve the issue of preemption. Appellant did not raise the issue of preemption below, and now asserts that this issue raises a jurisdictional issue that would allow its consideration. However, the issues in the proceeding below related only to how to allocate costs arising from the legislatively directed implementation of NEB programs. The decision to permit recovery of these costs was made in previous orders that Appellant did not appeal.

The Commission complied with Maine law in adopting the rate design implemented by the Order. Because the costs at issue are incurred by the utilities at the direction of the Legislature to promote public policy goals, there is no need to perform a cost-of-service study to determine how customer usage is contributing to these costs. Appellant's argument that the recovery of the costs is prohibited by Maine electric industry restructuring laws misconstrues limitations applicable only to pre-restructuring "stranded costs."

Finally, the Commission's Order was not arbitrary and capricious and was supported by substantial evidence in the record. The Order is consistent with legal precedent and is entirely rational given that the costs arise from public policy initiatives of the Legislature. The rate design is further supported by testimony presented by witnesses offered by Maine utilities.

ARGUMENT

I. The Appeal is Untimely

Appellant's Notice of Appeal was filed on October 3, 2023, almost five and a half months after the Order was issued on April 21, 2023. While the appeal period was stayed by a procedural order to allow consideration of a pending petition for reconsideration, that petition was subsequently withdrawn. For the reasons described herein, that withdrawal effectively terminated the stay and required the prompt filing of any appeal.

Maine Rules of Appellate Procedure specify:

> The time within which an appeal may be taken in a civil case shall be 21 days after entry into the docket of the judgment or order appealed from, unless a shorter time is provided by law.

M.R. App. P. 2B(c)(1). The Rules do allow for an extension of the 21-day deadline upon the timely filing of the following specified motions, which include petitions for reconsideration by the Commission:

(A) for judgment as a matter of law under M.R. Civ. P. 50(b); or

(B) to make or amend findings of fact or conclusions of law under M.R. Civ. P. 52(a) or (b); or

(C) for a new trial under M.R. Civ. P. 59; or

(D) to alter or amend the judgment, including a motion for reconsideration of the judgment under M.R. Civ. P. 59; or

(E) for reopening or reconsideration before the Public Utilities Commission pursuant to its rules of practice is filed within the time allowed by statute or rule after entry of judgment, a notice of appeal need not be filed within 21 days after entry of judgment. Instead, a notice of appeal may be filed at any time after the entry of judgment but not later than 21 days after the entry of the order on the motion.

Me.R. App. P. 2B(c)(2).

In the event an appellant violates the requirements for filing a notice of appeal, this Court has traditionally dismissed the appeal, requiring strict compliance with the time limits in the rules as a prerequisite to the Law Court entertaining an appeal. As described below, the Appellant's Notice of Appeal was untimely and, thus, this Appeal should be dismissed.

In the proceeding below, the Commission issued its final decision on April 21, 2023. On May 11, 2023, the Appellant filed a timely Petition for Reconsideration, stating that the matters decided in the Commission's April 21, 2023 Order require additional analysis and evidence. Pursuant to the Commission's Rules of Practice and Procedure, any petition for reconsideration not granted within 20 days is denied. 65-407 C.M.R. ch. 110, § 11(D). The Rule further states that the time for appeal of a final Commission order does not begin to run until the motion for reopening, rehearing or reconsideration is acted upon or presumed to be denied. *Id.*

On May 24, 2023, the hearing officers issued a Procedural Order that tolled the reconsideration period to allow the Commission additional time for review. On July 14, 2023, the Appellant withdrew its Petition for Reconsideration. This withdrawal effectively mooted the procedural extension of the deadline for review of the Petition and restarted the 21-day deadline for appeal. However, the Appellant's Notice of Appeal was not filed until October 3, 2023.

Subsequent to Appellant's withdrawal of its Petition for Reconsideration, a number of post-Order petitions to intervene and untimely requests to reopen the docket were filed with the Commission by customers affected by the Order. These untimely requests cannot be reasonably construed to affect the deadline for appeal. In response to these filings, on July 26, 2023, the hearing officers suspended deadlines in the proceeding relating to those filings. On September 12, 2023, the Commission issued a Notice of Investigation opening a new proceeding, Docket No. 2023-00230, to investigate a limited set of issues arising from or left unresolved by the Order.

In its Notice of Appeal, the Appellant argues that somehow the Order did not become final until the Commission opened this new proceeding. This argument lacks merit. The Order itself was final and its directives had been implemented. There were no timely petitions for reconsideration pending following Appellant's withdrawal of its Petition. Accordingly, the Appellant's Notice of Appeal was untimely, and this Appeal should be dismissed. *Harris Baking Co. v. Mazzeo*, 294 A.2d 445, 453 (Me. 1972).

Maine case law is consistent with the rules. Strict compliance with the time limits of M.R.App. P. 2B, formerly M.R. Civ. P. 73(a), is a prerequisite to the Law Court entertaining an appeal. *See, e.g., Lussier v. Oxford Dev. Assocs.*, 1997 ME 117, ¶ 5, 695 A.2d 1188, 1189-90. The limits are "unaffected by the failure of the party intending to appeal to learn of the entry of judgment ... even if such failure is caused by the Clerk's omission to give notice of the entry of judgment on the docket." *Harris* at 451 (Me.1972). Maine's unambiguous precedents and the plain language of the rules require a dismissal of this Appeal.

II. Appellant's Arguments Regarding Net Energy Billing Were Not Properly Preserved

A. The Issue of Preemption Raised by Appellant is Important and Unresolved

The Appellant argues, for the first time on appeal, that Maine's NEB program is preempted by federal law, specifically Part II of the Federal Power Act (FPA), 16 U.S.C. §§ 824 et seq. The argument relies on the proposition that the NEB programs are the regulation of electric energy in interstate commerce, which is the responsibility of the Federal Energy Regulatory Commission (FERC) under the FPA.

Pursuant to the FPA, FERC has exclusive jurisdiction to authorize rates for the sale of electricity in interstate commerce. *See Hughes v. Talen Energy Mktg., LLC*, 578 U.S.150 (2016). The sale of electric energy in interstate commerce has been defined to include transactions that may be entirely within a single state, but which impact

wholesale energy markets or which make use of FERC regulated transmission facilities. *See FERC v. Electric Power Supply Association*, 577 U.S. 260 (2016).

Congress has established limited exceptions to FERC's exclusive jurisdiction in this area. One such exception is for "net metering" as defined under federal law. 16 U.S.C. § 2621(d)(11). Another is for the establishment of prices paid to "qualifying facilities" under to the Public Utility Regulatory Policies Act of 1978 ("PURPA"), subject to the limitation that such prices may not exceed "incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3. Further, states may require utilities to conduct procurement programs to purchase electric energy providing that such programs do not dictate the price paid for such purchases. *See Allco Financial Limited v. Klee*, 861 F.3d 82 (2d Cir. 2017).

With respect to net metering, in 2005, as part of the Energy Policy Act of 2005 ("EPAct 2005"), Congress amended PURPA to direct states to consider implementing net metering programs as a retail rate design standard. 16 U.S.C. § 2621(d). As now codified, these provisions state, in relevant part:[1]

> Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall consider each standard established by subsection (d) and make a determination concerning whether or not it is appropriate to implement such standard to carry out the purposes of this chapter. ...
>
> (d) Establishment. The following Federal standards are hereby established: ...

[1] 16 U.S.C. § 2621(d)(11) codified previous administrative determinations that net metering does not violate the FPA. *See MidAmerican Energy Co.*, 94 FERC ¶ 61,340 (2001)

(11) Net metering
Each electric utility shall make available upon request net metering service to any electric consumer that the electric utility serves. For purposes of this paragraph, the term "net metering service" means service to an electric consumer under which electric energy generated by that electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period.

16 U.S.C. § 2621(emphasis supplied). Critically, to fit this definition, an eligible generation facility must be located "on site" and its production must be used to offset energy provided during the "applicable billing period."

In 2019, the Maine Legislature adopted two new net energy billing programs, one set forth as 35-A M.R.S. §3209-A and the other as 35-A M.R.S. §3209-B. The program codified under Section 3209-A allows any customer of an investor-owned transmission and distribution utility that has a "shared financial interest" in a "distributed generation resource" of five megawatts or less to use its share of the output of that resource to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period. The program codified under Section 3209-B allows any commercial or institutional customer of an investor-owned transmission and distribution utility that has a "shared financial interest" in a "distributed generation resource" of five megawatts or less to receive bill credits in the form of a financial reduction to their bill to offset the cost of delivery and supply of electricity billed to them by their utility and by their energy supplier.

Critically, neither program requires the relevant generating facility to be located "on site" at the participating customers' location.[2] 16 U.S.C. § 2621(d)(11). Indeed, under both programs, generators can be located anywhere within the transmission and distribution utility service territory and may require their energy to be transported extended distances over federally regulated transmission and state regulated distribution facilities owned by investor-owned utilities. Such programs have been described in the industry variously as "remote net metering" or "virtual net metering."

Further, energy produced under the commercial and institutional program codified in Section 3209-B is not "used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period." 16 U.S.C. § 2621(d)(11). Rather, participating customers are provided a financial credit to offset their bills rather than a credit in the form of kilowatt hours to offset their usage.

To the OPA's knowledge, neither FERC nor any court has taken up the question of whether "virtual net metering" violates FERC's exclusive jurisdiction to authorize rates for the sale of electric energy in interstate commerce. Similarly, the OPA is unaware of any decision regarding whether a financial payment would be considered a permitted "offset [to] electric energy provided by the electric utility to the electric consumer" under 16 U.S.C. § 2621(d)(11). However, the adoption of such

[2] Section 3209-B was amended in 2021 to require new projects eligible under that program larger than one megawatt to be collocated with at least fifty percent of the load served by that project.

programs by the State of Maine and other states implicates these issues and may require their resolution at some point.

B. The Issue of Preemption was not Properly Preserved

This Court has repeatedly held that issues not raised at the administrative level are deemed unpreserved for appellate review. *Forest Ecology Network v. Land Use Regul. Comm'n*, 2012 ME 36, ¶ 24, 39 A.3d 74 ("Issues not raised at the administrative level are deemed unpreserved for appellate review."); *see, also, Bayside Enterprises, Inc. v. Maine Agricultural Bargaining Bd.*, 513 A.2d 1355, 1360-61 (Me.1986); *Hale v. Petit*, 438 A.2d 226, 232-33 (Me.1981). This rule applies even to unpreserved issues implicating constitutional questions. *Oronoka Restaurant, Inc. v. Maine State Liquor Comm'n*, 532 A.2d 1043, 1045 n. 2 (Me.1987). The OPA's review of the record does not reveal any documentation that the Appellant made these arguments to the Commission. Accordingly, absent circumstances justifying an exception to this general rule, the Court should not address the issue of preemption raised in this appeal.

C. Appellant has not Raised a Cognizable Jurisdictional Issue

Recognizing that it did not raise the issue below, the Appellant argues in its Brief (at 10-23) that issues of jurisdiction can be raised at any time, including by the court itself citing *Ford Motor Co. v. Darling's*, 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). However, Appellant has not raised a cognizable jurisdictional issue. The only issue addressed in the Order was the establishment of

rates for public utilities, one over which the Commission clearly has jurisdiction. *See, e.g.*, 35-A M.R.S. §§ 301(4), 307, 3195(1).

Appellant argues, *inter alia*, that if the court accepts its arguments regarding the preemption of the net energy billing programs under federal law, the Commission then lacks jurisdiction to allow recovery of the costs of the program. This makes no sense. The Order does not address the establishment of the NEB programs of which the Appellant complains. The Order does not even address the NEB-related costs to be recovered in rates, which were approved in previous orders. The Appellant does not argue that the NEB programs (or aspects of the programs) should be terminated as preempted by federal law. Appellant argues only that the asserted legal infirmities of the programs undermine the Commission's jurisdiction to establish rate design mechanisms for the recovery of costs arising from the programs.

The programs were established by the Maine Legislature by statute. The costs and lost revenues at issue, therefore, are the direct result of the enactment of the relevant statutes and are prudently incurred by the utilities. Regardless of the lawfulness of the programs, the utilities are therefore entitled to recovery, again an issue over which the Commission has clear jurisdiction.

III. The Commission Complied with Maine Law in Adopting the Rate Design Adopted in the Order

In the Order, the Commission concluded that pre-restructuring stranded costs, non-net energy billing ("non-NEB") post-restructuring costs, and NEB related costs,

would be allocated to each rate class according to each class's proportionate kilowatt-hour (kWh) load share.[3] Further, the Commission found that with respect to rate design, NEB related costs shall be recovered through a fixed customer charge. The Commission also determined that pre-restructuring stranded costs and non-NEB post-restructuring costs should be recovered through volumetric charges, but decided to consider in future proceedings whether these costs should also be recovered through a fixed charge.

As discussed below, pre-restructuring stranded costs refer to cost obligations electric utilities incurred prior to the restructuring of the industry that began in 2000.[4] By statute, utilities were allowed to recover these costs. 35-A M.R.S. § 3208. Prior to the adoption of the Order, Central Maine Power Company recovered pre-restructuring costs through capacity and energy charges, while Versant Power recovered such costs through energy charges. For consistency purposes, the Commission decided that both utilities should recover these costs on a per kWh basis.[5] Order at 12.

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[3] In the Order, the Commission contributes to the confusion regarding the statutory definition of pre-restructuring "stranded costs" discussed below by referring occasionally to all three of these categories of costs as stranded costs. The use by the Commission of this labeling convention does not legally trigger the application of statutory requirements relating to the recovery of costs falling within this category to costs that do not.
[4] Through industry restructuring, electric utilities were no longer allowed to provide electric generation service and only would provide transmission and distribution service. Electric generation service would be provided through a competitive market. Title 35-A, Ch 32.
[5] "Energy," "kilowatt hour" or "kWh" refer to a customer's total use of electricity. "Capacity" or "demand" refers to a customer's usage at a particular point in time.

Post-restructuring costs refer to costs resulting from State policy initiatives after industry restructuring such as long-term energy supply contracts entered into pursuant to 35-A M.R.S. §§ 3210-C, 3604, and 3210-G, as well as NEB program costs.[6]

In deciding that post-restructuring costs should be allocated based on each customer class's load share, the Commission noted these costs arise out of energy-related public policy programs (primarily climate-change), and thus are not informed by the kind of cost-of-service studies and methods that are typically the focus of electric utility rate design. Order at 13. Accordingly, the Commission found that, because such costs do not benefit any particular class of customers, costs should be spread across all customer classes in a relatively comparable manner. *Id.*

A. The Restructuring Act does not Apply to the Rate Design for Recovery of Net Energy Billing Costs Approved in the Order

Appellant argues that the rate design established in the Order is impermissible because it violates the 1997 Restructuring Act. Appellant's Brief at 24. Specifically, Appellant argues that the rate design violates the provisions related to the recovery of "stranded costs" set forth in 35-A M.R.S. §§ 3208(5) and 3209(1). *Id.* However, the costs and lost revenues at issue are not stranded costs as defined in the Restructuring

[6] The statute specifically refers to pre-restructuring costs as "stranded costs." Post-restructuring costs are not referred to as "stranded costs" in statute. However, the Commission has historically referred to such costs as "stranded costs." The long-standing use of this terminology has no legal significance.

Act and not subject to the limitations established with respect to the recovery of such costs.

Stranded costs are defined under Maine law as "a utility's legitimate, verifiable and unmitigable costs made unrecoverable as a result of the restructuring of the electric industry required by this chapter and determined by the commission as provided in this subsection." 35-A M.R.S. § 3208(1). These consist only of cost commitments and investments made by electric utilities prior to the date of restructuring to meet their electric supply obligations as vertically integrated public utilities, offset by the reasonable mitigation of these costs, for instance through the sale of assets. Critically, with limited exceptions, "the commission may not include any costs for obligations incurred on or after April 1, 1995 in a utility's stranded costs." 35-A M.R.S. § 3208(3)(emphasis supplied). The statute implementing the NEB programs was not enacted until 2019 and under no reasonable interpretation can the costs and lost revenues resulting from the NEB programs be considered "stranded costs" as that term is defined under Maine law with respect to pre-restructuring costs.

Notwithstanding the narrow definition of stranded costs under Maine statute, the Commission has used the opportunity of the annual stranded cost recovery proceedings that it conducts to establish rates for the recovery of various energy procurement programs undertaken by the Commission at the direction of the

Legislature, for instance, those authorized under 35-A M.R.S. § 3210-C.[7] The Commission has now determined that these proceedings are an appropriate regulatory vehicle to provide for the recovery of costs and lost revenues resulting from NEB programs. However, the use of these proceedings for this purpose in the interest of regulatory efficiency does not render other costs addressed in these proceedings as pre-restructuring stranded costs, nor does it subject them to any legislative requirements applicable to the recovery of such stranded costs.

Similarly, Appellant argues that because NEB related costs are stranded costs, and because stranded costs are not identified in 35-A M.R.S. § 3195(1) for recovery through alternative rate plans and rate adjustment mechanisms, that NEB related costs may not be recovered through such mechanisms. Appellant's Brief at 33. For the reasons discussed above, NEB related costs and lost revenues are not stranded costs, so this argument fails. Further, the Commission would be reasonable in finding that costs arising from these public policy programs directed by the Legislature help "promote efficiency in transmission and distribution utility operations and least-cost planning" and may therefore be collected through a rate adjustment mechanism pursuant to 35-A M.R.S. § 3195(1).

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[7] *See, e.g., Re Cent. Me. Power Co.,* Request for Approval of Rate Change Regarding Annual Reconciliation of Stranded Cost Revenue and Costs, No. 2023-00039, Order Approving Stipulation (Me. P.U.C. Jun. 15, 2023); *Re Versant Power,* Request for Approval of Rate Change Regarding Annual Reconciliation of Stranded Cost Revenue and Costs, No. 2023-00076, Order Approving Stipulation (Me. P.U.C. Jun. 21, 2023).

B. The Commission Was Not Required by Law to Conduct a Cost-of-Service Rate Design Proceeding to Determine the Allocation of "Stranded Costs" Among Utility Customer Classes

The Commission concluded in its Order below that all categories of costs under review, including pre-restructuring stranded costs, non-NEB post-restructuring costs, and NEB related costs, should be allocated to each rate class according to each class's proportionate kWh load share. Further, the Commission found that with respect to rate design, NEB-related costs should be recovered through a fixed customer charge, and that pre-restructuring stranded costs and non-NEB post-restructuring costs should be recovered through kWh charges.

The Appellant argues (Appellant's Brief at 22-34) that the Commission's allocation of NEB related costs, as well as other cost categories addressed in the Order, violates Maine's Electric Rate Reform Act, 35-A M.R.S. § 3151 et seq., and PURPA, as well as this Court's and the Commission's own precedent, specifically, citing *Re Cent. Me. Power Co.,* Investigation into Cost of Service of Customer Classes of Rate Design of CMP, No. 80-66, Order (Me. P.U.C. Sept. 11, 1985). This argument is based on the false proposition that the Commission cannot allocate these costs without a full-blown rate design proceeding that includes a cost-of-service study.[8]

Essentially, the Appellant argues that all of these cost categories must be allocated based on traditional rate design principles. Primarily, Appellant suggests that

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[8] The OPA notes that "cost-of-service" studies are extremely technical and complicated and are typically the subject of a time-consuming and heavily litigated process.

such costs must be based on a "cost-of-service" study that determines the amount of costs by customer class incurred by the following categories: number of customers served, the amount of kWh consumed, and the demand usage during certain pre-established hours. The fundamental error in the Appellant's argument is that there is an essential distinction between the costs a utility incurs to provide transmission and distribution ("T&D") service to its customers, as opposed to costs incurred as a result of State policy mandates which are unrelated the utility's costs of operations.

The laws and precedents cited by the Appellant apply only to traditional rate design proceedings in which the actual costs of service are allocated among customer classes based on a cost study. These laws and precedents do not apply to costs that are not related to the cost of providing T&D service to customers.

There may be an argument that there is a distinction between pre-restructuring (such as investments in Seabrook and Maine Yankee nuclear facilities) and post-restructuring costs, in that it can be asserted that pre-restructuring obligations were incurred at the time utilities provided generation service and such costs were incurred to meet both demand and energy consumption requirements. However, there is no such valid argument regarding post-restructuring costs.

Post-restructuring costs are indisputably the result of energy-related legislative policies, notably with the goal of reducing greenhouse gas emissions. This is the case with both above-market long-term contracts and NEB related costs. Because such

costs are the result of legislative policies and not related to the costs of providing T&D service, previous precedents regarding rate design do not apply.

The Appellants also argue that somehow lost revenues resulting from the NEB programs are not costs, and thus shouldn't be allocated as such. As a practical matter, there is no actual distinction between "costs" and "lost revenue" in determining the allocation of NEB costs. Lost revenues impact a utility's ability to recover its revenue requirement in the same manner as incurring payment obligations for above-market costs. Indeed, the Legislature addresses this directly in authorizing the Commission to provide for revenue reconciliation, including revenue reconciliation collected on a per customer basis, when it finds that doing so "promote[s] efficiency in transmission and distribution utility operations and least-cost planning." 35-A M.R.S. § 3195(1).

At its essence, the Appellant is simply wrong that costs resulting from State policies must be allocated based on a traditional cost-of-service study. Such a study would involve functionalizing <u>all</u> costs incurred by a utility to determine whether they are customer related, demand related, or related to volumetric consumption, as well as whether they are required to serve individual customer classes based upon the voltage level at which they are taking service. This is a single category of costs that can be analyzed without the need to review all other costs. Further, these are costs incurred at the direction of the Legislature to further public policy objectives and cannot be analyzed in the same manner as other utility costs that are analyzed based upon the

operational drivers underlying the individual investments and expenditures. There would be simply no benefit derived from conducting a full cost-of-service study.

IV. The Commission's Order was not Arbitrary or Capricious and was Supported by Substantial Evidence

A. The Commission's Allocation of Net Energy Billing Related Costs to Rate Classes was not Arbitrary or Capricious

The Appellant (Brief at 35-39) argues that the Commission does not have the legislative authority to conduct stranded cost rate design on the basis of "climate policy," and the Commission provided no logic for its determination to allocate stranded costs to classes based on kilowatt-hour usage, and to allocate NEB related costs within customer classes on a per customer basis.

The Appellant is simply wrong. The Commission has clear legislative authority to set public utility rates, including rates that recover the costs resulting from the State's climate policies. 35-A M.R.S. § 301(2) explicitly requires the Commission to set utility rates that are just and reasonable and 35-A M.R.S. §§101 and 103-A require the Commission to consider policies regarding the reduction of greenhouse gas emissions.

First, by adopting climate policy requirements that would clearly result in utility costs and lost revenue, the Legislature surely recognized that the Commission would have the authority and discretion to allocate such costs among utility ratepayers.

Second, the Order contains a detailed explanation for its cost allocation decisions that are rational and clear and not arbitrary or capricious. The Commission

explicitly found that "T&D rates are typically designed in a manner to recognize, among other factors, cost causation differences between rate classes to promote economic efficiency and appropriate price signals." Order at 13. However, the Commission went on to find that, because the majority of the policy objectives of the legislation by which post-restructuring programs were established do not benefit any particular class of customers, such costs are reasonably allocated to all rate classes based on each class's load share. *Id.* at 13-15. The Commission noted that all ratepayers benefit from State policies on climate change, a point that cannot be seriously challenged. The Commission continued that it finds little to distinguish the policy-related objectives of NEB from other post-restructuring stranded costs. Because the benefits are the same, it makes little sense to attribute the "costs" of such benefits differently. *Id.*

Third, the Commission's decision to recover NEB costs within customer classes through a fixed charge is rational given the State's beneficial electrification policies. Among other things, these policies promote the installation and use of heat pumps and the use of electric vehicles. To promote these policies, it is clearly justified to reduce kWh charges by collecting NEB stranded costs through a fixed customer charge.

Finally, the Legislature has explicitly authorized the Commission to permit recovery of lost revenues resulting from initiatives such as NEB through a customer

charge. 35-A M.R.S. § 3195(1)(B)(permitting "[r]econciliation of actual revenues or costs with projected revenues or costs, either on a total or per customer basis."

This Court has traditionally provided the Commission with substantial discretion in the review of ratemaking decisions. Recently, this Court stated:

> Our review of such a ratemaking decision is highly deferential. *See New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 470 A.2d 772, 776 (Me. 1984) ("The Commission has broad discretion in selecting among various rate-making methodologies, provided that they are reasonably accurate. The Commission is not required to manipulate its methodologies to eliminate every shred of suggested inaccuracy." (citation omitted)). "We defer to the Commission's choice of ratemaking methodologies or techniques. 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." *Am. Ass'n of Retired Persons v. Pub. Utils. Comm'n*, 678 A.2d 1025, 1029 (Me. 1996) (citation and quotation marks omitted).

Office of Pub. Advoc. v. Pub. Utils. Comm'n, 2024 ME 11, ¶ 13.

The provision of such deference by the Court is enhanced under the circumstances of this case in which the decisions regarding "stranded cost" (particularly NEB-related costs) rate design are a novel endeavor without any specific legislative direction or Court precedent.

B. The Commission's Findings Regarding Allocation of Costs Were Supported by Substantial Evidence

Appellant is incorrect in its assertion that the Order's conclusions regarding allocation of NEB-related costs and lost revenues were not supported by substantial evidence. Appellant's Brief at 39. The Commission's findings are set forth in the Order at page 13 as follows:

> For the reasons stated above, the Commission finds that the most reasonable allocation of post-restructuring stranded costs, including NEB-related stranded costs, is to all rate classes based on each class's proportionate kWh load share. The majority of the policy objectives of the legislation by which all post-restructuring programs were established do not benefit any particular class of customers. Thus, the Commission concludes that all ratepayers benefit from State policies on climate change and finds little to distinguish the policy-related objectives of NEB from other post-restructuring stranded costs. Because the benefits are the same, it makes little sense to attribute the "costs" of such benefits differently. Thus, the Commission rejects CMP's original proposal to allocate NEB stranded costs only to those classes eligible to participate in each respective NEB program. Rather, such costs should be recovered from all rate classes based on each class's proportionate kWh load share.

With respect to the allocation of costs among customer classes, these conclusions closely reflect the direct testimony of a panel of witnesses presented by Versant Power, who testified as follows:

> Q. What are Versant's recommendations regarding rate design for stranded cost rates?
>
> A. Versant's recommendations were set forth in comments filed in this docket on July 8, 2022 and attached to this testimony as Exhibit A. To summarize, Versant recommends that all customer classes pay stranded cost rates; that all customers, including those enrolled in net energy billing pay stranded cost rates; and that the Commission continue to use a volumetric energy charge for stranded cost rates.[9]

While the Commission declined to adopt Versant Power's recommendation that the NEB related stranded costs be collected through energy charges, it accepted its expert recommendation that these costs be collected from all customers.[10]

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[9] Testimony and Exhibits of Stephen Johnston and Lisa Henaghen (August 10, 2022) at 2 (emphasis supplied).

[10] The Commission's decision to collect NEB related costs through a customer charge was supported by the Testimony and Exhibits of Peter Cohen, Mark Marini, Mary Alice Laiho,

Appellant cites *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 416 A.2d 1240, 1251 (Me. 1980) for the proposition that, 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. Appellant's Brief at 29. However, as noted in Central Maine Power Company's (CMP) Direct Testimony, the allocation of public policy related costs among rate classes in prior rate proceedings was already allocated in the manner adopted by the Commission for NEB related costs:

> CMP proposes that post-restructuring costs, excluding NEB costs, be allocated to all customers using the Company's current methodology described above as the policy objectives for and the legislation by which these programs were established do not benefit any particular class of customers.[11]

The only substantial change that the Commission made in adopting rate design for NEB related costs was the decision to use a customer charge to collect these particular costs. The method of allocation among classes remained the same as other post-restructuring costs incurred to meet public policy objectives. Thus, the Commission had no obligation to develop any further record, beyond Versant Power's and CMP's testimony regarding "stranded cost" rate design.

CONCLUSION

For all of the reasons set forth herein, the Office of the Public Advocate urges the Court to reject the appeal of Industrial Energy Consumer Group and to affirm the

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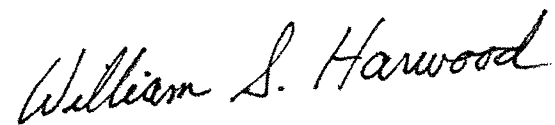
Susan Clary, Dr. Jason Rauch on behalf of Central Maine Power Company (August 10, 2022) at 13 (the "CMP Direct Testimony").

[11] CMP Direct Testimony at 12.

Order of the Maine Public Utilities Commission adopting a rate design for recovery of costs and lost revenues resulting from the State's implementation of two NEB programs and other policy related costs.

Respectfully submitted this 13th day of March, 2024.



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CERTIFICATE OF SERVICE

I, Andrew Landry, hereby certify that I have served two copies of this brief on the following parties by hand delivery or U.S. Mail, first class, with all charges prepaid:

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