STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Electric and Natural Gas Utilities

2021-2023 Triennial Energy Efficiency Plan

Docket No. DE 20-092

Motion for Rehearing of Order No. 26,415

NOW COMES the Office of the Consumer Advocate ("OCA"), a party in this docket, and moves pursuant to RSA 541:3 for rehearing of Order No. 26,415, issued on October 8, 2020 to deny a motion by the OCA, the Acadia Center, and the Conservation Law Foundation for staff advocate designations pursuant to RSA 363:32. In support of this Motion, the OCA states as follows:

I. The Nature of PUC Authority

This motion, tendered on behalf of the state's residential utility customers by the office tasked with representing their interests, is less concerned with the actual determination made in Order No. 24,414 than it is with the view of the nature of the agency's ratemaking authority adopted by the Commission to reach its results. Accordingly, this pleading begins with a brief disquisition on fundamental constitutional, statutory, and administrative law principles.

A. The Vesting Clause and the PUC

Part 2 of Article 2 of the New Hampshire Constitution states that "[t]he supreme legislative power, within this state, shall be vested in the senate and house

of representatives, each of which shall have a negative on the other." This has a direct analog in the United States Constitution – specifically, the so-called "Vesting Clause" of Article I.[1]

In light of the Vesting Clause, "the legislature is prohibited from abdicating its legislative powers." *Opinion of the Justices*, 143 N.H. 429, 441 (1999). The New Hampshire Supreme Court has described this bedrock principle as "rooted both in the philosophy of John Locke – because the power to legislate is a delegated power from the people, the legislature has no power to delegate it to anyone else – and in the separation of powers doctrine – the power to legislate is an exclusive power granted to the legislature." *Id.* at 441-442 (citations to Illinois and Florida courts omitted).[2] However, the General Court "may still authorize others to do those things which it might properly, yet cannot understandingly or advantageously do itself." *Id.* At 442 (citation omitted). In other words, no one but the General Court may legislate but the Legislature can confer authority elsewhere when it comes to "execution" of New Hampshire law. *Id.* (citing *Loving v. United States*, 517 U.S. 748, 758-59 (1996) (other citations omitted).

---

[1] "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Constitution, Article 1, Section 1. Clearly, these parallel provisions of the state and federal constitution are to precisely the same effect.

[2] Here is what John Locke himself had to say on this subject:

> The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. . . . The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what positive grant conveyed, which being only to make laws, and not to make legislators."

Locke, *The Second Treatise of Government* (1690) at § 141.

Hence the establishment of the Public Utilities Commission, tasked by the General Court with, *inter alia*, "the general supervision of all public utilities . . . so far as necessary to carry into effect the provisions of [Title 33 of the Revised Statutes Annotated]," RSA 374:3 (a classic example of execution authority), and since 1913 the responsibility to assure that public utilities do not charge rates that are "unjust and unreasonable," RSA 378:7. *See also* RSA 374:2 (affirmatively requiring utility rates to be "just and reasonable").

B. A Key Precedent: *Appeal of Richards*

The New Hampshire Supreme Court has described both the regulation of public utilities and the setting of appropriate rates for such regulated entities to be "the unique province of the legislature." *Appeal of Richards*, 134 N.H. 148, 158 (1991) (citing *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989); the *Minnesota Rate Cases*, 230 U.S. 352, 433 (1913); and *Legislative Utility Consumers' Council v. PSNH*, 119 N.H. 332, 340 (1979)). The General Court delegated its ratemaking authority to the Commission in light of "the need for expertise not readily available as part of legislative resources." *Id.* One might also observe that although the General Court typically includes numerous lawmakers whose expertise in utility regulation arguably rivals that of many public utility commissioners, the press of other legislative business makes the prospect of rate cases being heard directly by the meagerly paid citizen-lawmakers of the General Court unfathomable.

In *Appeal of Richards*, the declaration that ratemaking is the unique province of the Legislature set the stage for the Court's rejection of a challenge to the Commission's approval of the reorganization plan that took Public Service Company of New Hampshire (PSNH) out of its legendary Seabrook-induced 1988 bankruptcy, largely at the expense of ratepayers. The General Court had specifically tasked the Commission via RSA 362-C:3 with consideration of an agreement between Northeast Utilities (the Connecticut-based entity that had agreed to acquire PSNH for $2.3 billion) and the State (which had acquiesced to a series of annual 5.5 percent rate increases for PSNH, presumably to give Northeast Utilities an opportunity to earn a reasonable return on its investment).

The rate increases in particular became a matter of significant public controversy but, nevertheless, the Commission persisted and blessed the rate agreement. The Court, in turn, rejected a challenge to the Commission's decision lodged by Robert C. Richards and two other PSNH shareholders along with a PSNH ratepayer and a ratepayer advocacy group (Campaign for Ratepayer Rights). The appellants had argued the Commission should have used traditional cost-of-service ratemaking analysis to consider the agreement; the Court ruled that imposing such a requirement would "directly contravene the express intent of the legislature in enacting RSA chapter 362-C." *Id.* at 162-63.

In other words, the reference in *Appeal of Richards* to ratemaking as "the unique province of the legislature" was intended to set the stage for an exercise in statutory construction rather than to lay out an analysis of the nature of Public

Utilities Commission decisionmaking authority. So, too, with the cases relied upon by the Court from other jurisdictions. In *Barasch*, the U.S. Supreme Court refused to invalidate certain specific rate-setting directives adopted by Pennsylvania's legislature to that state's utility regulator. *See Barasch*, 488 U.S. 313 ("We have never doubted that state legislatures are competent bodies to set utility rates"). The *Minnesota Rate Cases* were a much earlier opportunity for the U.S. Supreme Court to observe that because "[t]he rate making power is a legislative power and necessarily implies a range of legislative direction," the nation's highest court does not "sit as a board of revision to substitute [its] judgment for that of the legislature, or of the commission lawfully constituted by it, as to matters within the province of either." *Minnesota Rate Cases*, 230 U.S. at 313 (citation omitted). The *Legislative Utility Consumers' Council Case* was a determination that the Commission did not violate the statutory command to set just and reasonable rates, and allow only that which is used and useful into rate base, by allowing Seabrook-related construction work in progress into rates*, see Legislative Utility Consumers' Council*, 119 N.H. at 339 (noting that ratemaking is "a highly technical and complicated process calling for an expertise which frequently taxes the experience and knowledge" of commissioners). This act of statutory construction was swiftly rebuffed by the General Court via the enactment in 1979 of RSA 378:30-a ("Public utility rates or charges shall not in any matter be based on the cost of construction work in progress").

C. The Commission as an Executive Branch Agency

Thus, although it is a well-established principle of New Hampshire law that ratemaking is a legislative act regardless of whether performed by the General Court or delegated to the Commission, that principle in and of itself says nothing about the nature of PUC decisionmaking from a procedural standpoint. This question is a more difficult one to resolve under the scheme of government created by the New Hampshire Constitution.

As to the U.S. Constitution, one might consider the perspective of Associate Justice Stephen Breyer given that he is generally recognized as one of the nation's foremost experts on administrative law. In 1986, via a dissenting opinion also joined by Justices Stephens, Souter, and Ginsburg, Justice Breyer noted that independent regulatory agencies belong not to the legislative or judicial branches of the government; they are, rather, actually part of the executive branch despite their ostensible independence from the executive (i.e., the President or, here, the Governor). *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 773 (2002) (Breyer, J., dissenting) (citations omitted). In the view of Justice Breyer, although such agencies "derive their legal powers from congressionally enacted statutes," and "execute" those laws by enforcing them via rulemaking or adjudication, in constitutional terms when an independent regulatory agency acts it is actually doing so pursuant to Article II of the U.S. Constitution, which defines *executive branch* authority. *Id.* At 773-74 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *INS v. Chadha*,

462 U.S. 919, 953 n. 16 (1983)) (other citations omitted). Thus, frequent references to an independent regulatory agency as quasi-legislative or quasi-judicial "indicate that the agency uses legislative like or court like procedures but that it is not, constitutionally speaking, either a legislature or a court." *Id.* At 774 (citing *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472-73 (2001)) (other citation omitted).[3]

Thus, in 1936, the U.S. Supreme Court observed that although "[t]he fixing of rates is a legislative act," when the legislature "appoints an agent" to perform this function "it may endow the agent with power to make findings of fact which are conclusive, *provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily*." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 50-51 (1936) (emphasis added, citations omitted). *See also Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908) ("The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind").[4]

---

[3] It should be noted that although Justice Breyer was writing in dissent, the quoted portions of his opinion did not engender any disagreement in, nor are they inconsistent with, the holding in the majority opinion. *See Federal Maritime Comm'n.*, 535 U.S. at 761 (declining to distinguish administrative adjudications from judicial proceedings for purposes of applying the doctrine of state sovereign immunity).

[4] *Prentis* does not speak to the question of what procedural safeguards ought to be available, either as a matter of constitutional or statutory law, when a utility regulator engages in such a legislative act. Rather, the Court in *Prentis* held that an attack in federal court on a rate order entered by Virginia's utility regulator was premature because the so-called legislative process available under Virginia law had not fully run its course. *Prentis*, 211 U.S. at 228; *see also New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 371-72 (1989) (explaining and distinguishing *Prentis*).

Although it does not appear the New Hampshire Supreme Court has ever opined on these precise questions, there is every reason to suppose that the same principles would apply under the New Hampshire Constitution. The New Hampshire Supreme Court *has* observed, in the context of judicial immunity, that "actions by administrative agencies are quasi-judicial if the adjudicatory process, provided by statute, requires notification of the parties involved, a hearing including receiving and considering evidence, and a decision based upon the evidence presented." *Gould v. Director, N.H. Div. of Motor Vehicles*, 138 N.H. 343, 347 (1994) (citation omitted). *See* RSA 378:7 (concerning "fixing of rates by Commission" and imposing hearing requirement) and RSA 374-F:4, XI (subjecting restructuring-related decisions to RSA 541-A). As to the Commission, the New Hampshire Supreme Court has observed that "[i]mplicit in the dual character of administrative boards is that some of their acts are within the legislative or administrative area and others have the effect of a judgment." *Petition of Boston & Maine Corp.*, 109 N.H. 324, 327 (1969). Thus, [w]hen in fact the decision of a board affects only public matters essentially legislative then the Legislature may properly override the decision." *Id.* (citing *Farnum's Petition*, 51 N.H. 376 (1871)).[5] But "[i]f private rights are affected by the board's decision the decision is a judicial one," giving it the same force and effect as if made by an actual court. *Id.* (citations omitted).

[5] The 1871 case cited by *Boston & Maine* merely stands for the proposition that a school district, as a public corporation, is "subject to legislative control" because it derives its "powers, privileges, and rights" from the General Court. *Farnum's Petition*, 51 N.H. 376, 1871 WL 4082 at **5.

However much a Commission decision about rates and charges is legislative in character, in the sense of invoking authority that is delegated by the General Court rather than exercised by the Legislature itself, private rights are most assuredly at issue. Indeed, that is the very essence of such decisionmaking inasmuch as the Commission's fundamental purpose is to serve as the arbiter between one group of private parties (utility shareholders) and another (utility ratepayers). *See* RSA 363:17-a ("The commission shall be the arbiter between the interests of the customer and the interests of the regulated utilities as provided in [the Commission's enabling statutes, title 33 of the Revised Statutes Annotated] and all powers and duties provided to the commission by RSA 363 or *any other provisions of this title* shall be ex other provisions of this title shall be exercised in a manner consistent with the provisions of this section") (emphasis added).

D. The Oklahoma Problem

Admittedly, to the opposite effect is a 1994 decision of the Oklahoma Supreme Court. In *Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission*, 873 P.2d 1001 (1994), that state's highest court held that in light of the "legislative nature of ratemaking proceedings" before the Oklahoma utility regulator, "judicial concerns and standards" (including the notice-and-hearing requirements of due process and the right an impartial tribunal) were inapplicable. *Id.* at 1005-07 (citations omitted). But the *Southwestern Bell Telephone* decision is inapposite for at least four reasons.

First, unlike the New Hampshire Public Utilities Commission the Oklahoma Corporation Commission is a creation of the applicable state constitution. *See* Oklahoma Constitution, Art. 9, § 15(A) ("A Corporation Commission is hereby created, to be composed of three persons, who shall be elected by the people at a general election for State officers, and their terms of office shall be six (6) years"). Essentially, the Oklahoma Corporation Commission is its own distinct branch of its state's government, since separate articles establish Oklahoma's legislative, executive, and judicial departments (articles 5, 6, and 7, respectively). Particularly given that in Oklahoma utility regulators share with legislators the attribute of being popularly elected, one can understand why the state's judicial department is reluctant to interfere. For present purposes, it suffices to note that the Oklahoma Corporation Commission is no mere executive branch agency nor even a subdivision of the legislature.

Second, to quote a hoary legal maxim, hard cases make bad law. *See, e.g.*, the famous "Pentagon Papers" case, *New York Times Co. v. United States*, 403 U.S. 713, (1971) (Harlan, J., dissenting) (quoting Justice Holmes in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904), to the effect that "[g]reat cases, like hard cases, make bad law" because "immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful"). The *Southwestern Bell Telephone* case decided by the Oklahoma Supreme Court in 1994 arose out of a scenario worthy of a John Grisham novel, in which a member of the Corporation Commission made the "startling public announcement" that "for four

years he had been secretly acting as an investigator and informant in an ongoing FBI investigation concerning the conduct of his fellow commissioners and employees and representatives of SWB," i.e., Southwestern Bell Telephone. *Southwestern Bell Telephone*, 873 P.2d at 1003. From an equity standpoint, given that Southwestern Bell Telephone had invoked the original jurisdiction of the Oklahoma Supreme Court in quest of disqualifying the commissioner in question, it is certainly understandable why the Court treated the utility like the proverbial youth who murders his parents and then throws himself upon the mercy of the tribunal because he is an orphan.

Third, a lengthy and persuasive dissent written by Justice Marion Peter Opala explains in lucid terms why New Hampshire should not follow the precedent set by the majority in *Southwestern Bell Telephone*. Justice Opala explained that the notion of rate proceedings as "legislative" is a relic of British jurisprudence; ratemaking, he noted, "was the responsibility of the British Parliament before our tripartite division of government came into being." *Southwestern Bell Telephone*, 873 P.2d at 1012 (Opala, J., dissenting) (citations omitted). Noting that the majority relied on a series of U.S. Supreme Court decisions to reach its controversial conclusion, particularly the *Prentis* case discussed *supra*, he correctly pointed out that these were "first-generation exposition[s] of our constitutional framework" and that, although the concept of ratemaking as legislative has persisted thereafter, subsequent federal jurisprudence "has superimposed upon its framework a host of due process protections." *Id.* (citations omitted).

Fourth, as suggested by *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 465 (1984), the role and responsibilities of a state utility commissioner as adopted by the Oklahoma Supreme Court cannot be squared with New Hampshire law in light of the Commission's enabling statutes. *See id.* at 514 (disqualifying PUC Chairman Paul McQuade from ruling on a Seabrook-related financing request from PSNH because of his June 28, 1984 speech to the Portsmouth Chamber of Commerce that he was "pleased" with the proposal filed *the following day* and, because "Public Service Company will be with us for a long time," "[w]e must put past events behind us and look to a bright future" rather than scrapping the Seabrook project). The court noted that in light of the code of ethics legislatively imposed via RSA 363:12, commissioners must conduct themselves as impartial judicial decisionmakers. *Id.* at 513-14. Although the matter in question was utility financing request, the justices did not carve out an exception for rate proceedings – nor is there such an exception in the plain language of RSA 363:12.[6]

[6] The Supreme Court of Washington has also ruled that rate-setting is not "quasi-judicial" even though it "may have an administrative aspect." *Earle M. Jorgensen Co. v. City of Seattle*, 665 P.2d 1328, 332 (Wash. 1983) (citations omitted). But that decision and the precedents upon which it relies all concern municipal decisionmaking rather than state utility regulators. *See id.* at 1331 ("a municipality's setting of rates is a legislative act") (citations omitted).

The Supreme Court of Nebraska has likewise stated that rate-setting is "legislative in character," but it did so in the context of pointing out that the exercise of such regulatory authority is "in derogation of the common law" because "[a]t common law, a common carrier was not permitted to charge a different rate to different per[s]ons for the identical service under the same conditions." *Application of Nebraska Limestone Producers Ass'n*, 97 N.W.2d 331, 334 (Neb., 1959). Thus, in Nebraska 61 years ago, it was permissible for a regulator to refuse to adjust rail rates applicable to crushed rock and stone to the same level as those applicable to sand and gravel. *Id.* at 333. The question of rate preferences in New Hampshire has since 1911 been resolved via specific statutory prohibition of "undue or unreasonable" preferences rather than with reference to the nature of the Commission's rate-setting authority. RSA 378:10. Nebraska's highest court has restated the principle as recently as 1989, but the precise question of whether ratesetting is legislative was one conceded rather than litigated. *See State ex. rel. Spire v. Northwestern Bell Tel. Co.*, 445 N.W.2d 284, 298-99 (Neb. 1989).

II. There is good cause for rehearing of Order No. 26,415.

It follows, therefore, that Order No. 26,415 is based on a premise that is erroneous as a matter of New Hampshire law. In Order No. 26,415, the Commission denied an RSA 363:32 motion, seeking the designation of two Commission employees as staff advocates in this proceeding, without reaching the merits of the request. Instead, the Commission simply determined that RSA 363:32 did not apply because the statute, by its terms, may be invoked only in adjudicative proceedings. The Commission concluded that, here, it is "exercising its quasi-legislative authority pursuant to the general court's delegation" rather than exercising an "adjudicative function." Order No. 26,415 at 7.

A. Order No. 25,980 was wrongly decided.

The only authority cited by the Commission for the proposition that New Hampshire law recognizes a distinction between quasi-legislative administrative proceedings and adjudicative proceedings is a prior order of the Commission, No. 25,980 (January 24, 2017). Both orders are wrong as a matter of law and, thus, the Commission should reconsider its holding. *See* RSA 541:3 (authorizing rehearing when movant shows "good cause" for such a result).

Order No. 25,980 concerned a proceeding commenced by the Commission at the specific directive of the General Court. The task was the development of tariffs for net metering, which, the Commission noted "is fundamentally a rate setting function." Order No. 25,980 at 8. The Commission noted that the General Court had determined the pre-existing net metering rates itself but, in this instance,

delegated this rate-setting authority to the agency. Accordingly, Order No. 25,980 concluded that the net metering proceeding was "a legislative docket" rather than an "adjudicative proceeding." *Id.* at 8.

In reality, outside of the rulemaking realm, there is no such thing as a "legislative docket." Although Order No. 25,950 ruled that the distinction between legislative dockets and adjudicative dockets was "well described in case law," *id.* at 9, the caselaw cited in Order No. 25,980 do not stand for the proposition invoked by the agency in 2017.

Appeal of Pennichuck Water Works, 120 N.H. 562 (1980), was a dispute involving the effective date of temporary rates established pursuant to RSA 378:27. The Court noted that when the Commission establishes rates for public utilities, it is "performing essentially a legislative function." *Id.* at 565. For the reasons already noted, *supra*, this is an unexceptionable proposition but one from which it does not follow that rate cases are not adjudicative proceedings. Indeed, in the context of the 1980 dispute, the Court's reference to the agency's "legislative function" was for the purpose of making clear that the Commission may not "exceed the limitations imposed upon the exercise of that function under our State and Federal Constitutions." *Id.* at 565-66.

Appeal of the Office of the Consumer Advocate, 134 N.H. 651 (1991), was likewise a dispute about temporary rates. *Inter alia*, the OCA objected to the Commission having taken administrative notice of information in the subject utility's annual reports, but the Court declined to consider this objection "in view of

the fact that no adjudicative proceeding was ever commenced in the present case." *Id.* at 659 (citing RSA 541-A:16 and *Appeal of Pennichuck Water Works*, *supra*).

For present purposes, the conclusion that "no adjudicative proceeding was ever commenced" is both dicta (in the sense that no party had raised the issue of whether the Commission was obligated to commence a rate case in the circumstances of that particular proceeding) and inapposite (because the Court relied on a version of the Administrative Procedural Act that has since been repealed and replaced). Section 16 of RSA 541-A now concerns rulemaking procedure; pursuant to RSA 541-A:33, V the concept of "administrative notice" has been replaced by the concept of "official notice."

The 2017 order on which the Commission now relies also cites Order No. 20,608, entered on September 21, 1992 and reported at 77 NH PUC 553. The case was captioned "Generic Investigation Into IntraLATA Toll Competition" and concerned the question of whether competition (rather than monopoly) in the provision of intrastate toll service was in the public interest. The OCA complained that because the "legal rights" of residential ratepayers were at issue, the Commission should have invoked the contested case procedures specified in the Administrative Procedure Act. Shockingly, the Commission not only rejected the OCA argument but observed that, if the Commission were to accept the Consumer Advocate's reasoning, "it would follow that all ratemaking proceedings are adjudicative as they all involve the legal rights of utilities and their ratepayers." *Id.* at 555 (citing *Appeal of the Office of the Consumer Advocate, supra*).

The Commission has correctly understood the OCA's reasoning and its implications. All ratemaking proceedings *are* adjudicative, for the reasons already discussed. Fortunately, there is no such thing as *stare decisis* at the PUC; the Commission "is not disqualified from changing its mind." *Appeal of Public Service Co. of New Hampshire*, 141 N.H. 13, 22 (1996) (cquoting *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993)).

The Commission's failure to change its mind in 2017 is of no consequence. The holding of the 2017 order, to the effect that the net metering proceeding was not adjudicative, was never amenable to judicial review because the pre-hearing dispute (over certain positions taken by Commission employees) was overtaken by the parties' apparent satisfaction with the ultimate determination about net metering rates (in which the Commission exercised its Solomonic wisdom in finding a suitable middle ground between rival settlement agreements entered into by two groups of parties). Meantime, apart from the RSA 363:32 question, the Commission treated the proceeding exactly as if it were an adjudicative proceeding subject to the contested case provisions of the Administrative Procedure Act and the Commission's Chapter Puc 200 rules.

Given the dynamics of the instant proceeding, the Commission may not be so fortunate this time around. Order No. 26,415 is completely silent on the merits of the request for RSA 363:31 Staff Advocate designation, which amounts to an implicit concession that the designation motion was meritorious. There is the very real possibility here that all or substantially all of the parties will be supporting a

Triennial Energy Efficiency Plan while certain Commission employees object because their policy preferences do not allow them to embrace real, long-term rate relief (and, incidentially, increased environmental sustainability, since "negawatts" emit very little carbon into the atmosphere) arising out of ratepayer-funded energy efficiency programs because they dislike the near-term effects on System Benefits Charges and their natural gas analog (the LDAC). In such circumstances, the likelihood of appellate proceedings is relatively high.

When it comes to the rights and duties of parties with business before the Public Utilities Commission, the General Court has authorized only two flavors: chocolate (adjudication) and vanilla (rulemaking). The ongoing though subtle effort to invent strawberry – what is referred to in Order No. 26,415 as a "legislative docket" – is inconsistent with New Hampshire law and *ultra vires* for the Commission.

B. The Commission's Order is Inconsistent with the Restructuring Act

Finally, Order No. 26,415 is patently inconsistent with the relevant provision of the Electric Industry Restructuring Act, RSA 374-F. As the Commission acknowledged in its Order of Notice issued on September 8, 2020 (Tab 16), the instant proceeding concerns, *inter alia*, "whether the proposed [triennial energy efficiency] Plan programs offer benefits consistent with RSA 374-F:3, VI," and whether the programs are "reasonable, cost-effective, and in the public interest pursuant to RSA 374-F:3, X." Order of Notice at 2. The implementation provisions of RSA 374-F appear at section 4 of the Act. Paragraph IX could not be more plain:

"*Any* administrative or adjudicative proceedings relating to this chapter shall be subject to the provisions of RSA 541-A" – i.e., the Administrative Procedure Act, governing rulemakings and adjudications. RSA 374-F:4, XI (emphasis added).

III. Conclusion

It is settled practice in New Hampshire that rate proceedings, whether general rate cases like the currently pending DE 19-057 (distribution service rates for Eversource) or a case such as the instant proceeding where specific charges are at issue, are conducted pursuant to the contested case provisions of the Administrative Procedure Act, RSA 541-A, and the Commission's rules governing adjudicative proceedings, N.H. Code Admin. Rules Part Puc 203. The Commission has now placed that settled practice in grave doubt by issuing its second order in recent years to the effect that rate cases are something else altogether: "legislative" dockets. Indeed, as noted immediately *supra*, what is a settled practice with respect to rate proceedings generally is explicitly required for determinations made under the Electric Industry Restructuring Act, given RSA 374-F:4, XI.

The text of the Administrative Procedure Act begs the relevant question by stating that an agency must commence an adjudicative proceedings for any matter that has "reached a stage at which it is considered a contested case," RSA 541-A:31, I, with "contested case" defined as "a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing," RSA 541-A:1, IV. The text of Part Puc 203 of the agency's rules is silent on when they actually apply.

Rate proceedings are the bread and butter of the PUC's work; all parties to them have the right to count on the procedures enshrined in the Administrative Procedure Act and the Commission's rules for adjudications. To do otherwise is to allow an agency to select at whim what protections and procedures will apply in any given docket – and, indeed, what evidence it will consider and where that evidence will come from. This cannot be the law in New Hampshire and the Commission must clarify by granting rehearing of Order No. 26,415.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Grant rehearing pursuant to RSA 541:3 of Order No. 26,415 for good cause shown;

B. Enter an order designating the two Commission employees referred in the underlying motion as Staff Advocates pursuant to RS 363:32 for purposes of this proceeding, and

C. Grant any other such relief as it deems appropriate.

Sincerely,

D. Maurice Kreis
Consumer Advocate
Office of the Consumer Advocate
21 South Fruit Street, Suite 18
Concord, NH 03301
(603) 271-1174
donald.kreis@oca.nh.gov

October 17, 2020

Certificate of Service

I hereby certify that a copy of this Motion was provided via electronic mail to the individuals included on the Commission's service list for this docket.

D. Maurice Kreis