



OFFICE OF THE CONSUMER ADVOCATE
21 S. Fruit St., Suite 18
Concord, N.H. 03301-2429

Website:
www.oca.nh.gov

January 31, 2023

New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301

via e-mail to: clerksoffice@puc.nh.gov

Re: Docket No. IR 22-042
Investigation of Energy Efficiency Planning, Programming, and Evaluation
“Report on Energy Efficiency Planning, Programming, & Evaluation”

To the Commission:

Please treat this letter as the response of the Office of the Consumer Advocate (“OCA”), on behalf of the state’s residential utility customers, to the report issued by the Commission on January 13, 2023 entitled “Report on Energy Efficiency Planning, Programming, & Evaluation.” In light of the publicly available information about the provenance of this document, as discussed *infra*, it is referred to hereinafter as the “Zellem Report.”

The Zellem Report does not refer to the above-referenced docket by number although the titles are nearly identical and the Commission (via its Virtual File Room) has docketed the Report in IR 22-042. Neither the Zellem Report nor any order or pronouncement of the Commission invite responses to the Report. However, the Zellem report is the result of flawed procedure, is riddled with factual and analytical errors, and is redolent of skepticism if not outright hostility with respect to the state’s ratepayer-funded energy efficiency programs as enshrined by statute and offered by the state’s electric and gas utilities under the “NHSaves” banner. In these circumstances, the OCA deems itself compelled to respond and requests that this letter be docketed and made publicly available in IR 22-042.

We are aware of two prior responses to the Zellem Report that have been filed with the Commission, both on January 26, 2023. The first (tab 60) was filed by Attorney Matthew J. Fossum, a residential ratepayer writing on his own behalf in light of his significant experience as a former employee of two electric utilities as well as the Commission itself. The second is a joint filing from the six utilities administering the NHSaves programs (tab 61). The OCA has reviewed these filings and concurs with both of them in every respect. Accordingly, we incorporate them here by reference and, in particular, we commend Mr. Fossum for having contributed his time and insight to what has become an interminable struggle to maintain the NHSaves programs.

Apart from the substantive problems with the Zelle Report, discussed in the memorandum attached to this letter, the OCA has significant concerns about the procedure employed by the Commission in developing and issuing the report.

When the Commission opened IR 22-042 in August 2022, the agency announced a “transparent and open examination” of “existing energy efficiency programming, opportunities for changes and updates to existing programming” – an inquiry that “may serve as a starting point for other dockets and address specific issues or areas of concern” in advance of the statutorily mandated filing of the 2024-2026 Triennial Energy Efficiency plan on July 1, 2023 Order of Notice (tab 1) at 2. We urged the Commission to abandon these stated intentions on the ground that they reflected an intention to revisit issues previously resolved by the General Court (via Chapter 5 of the 2022 New Hampshire Laws, more frequently referred to as House Bill 549, as signed into law in February 2022) and were likely to embroil the utilities and stakeholders in efforts that would needlessly divert resources from the development of the next Triennial Plan. *See* OCA Motion for Rehearing and/or Clarification (tab 8) filed on August 17, 2022. In denying this request, the Commission claimed the OCA “assume[d] a straw man version of the Commission’s Order of Notice” and stated there would be no “binding order of any kind.” Order No. 26,678 (September 7, 2022) at 4. According to Order No. 26,678, the purpose of IR 22-042 was “to engage stakeholders in an open, overarching, and collaborative process that is free of certain procedural constraints that exist in adjudicative dockets.” *Id.*

The OCA respectfully but emphatically suggests that what ensued thereafter in IR 22-042 has been anything but transparent, open, or collaborative. Without ever giving any indication that the Commission intended to publish a comprehensive white paper such as the Zelle Report, the Commission simply issued various “record requests”¹ and, at the request of the utilities, held a “Commission Attended Technical Session” on September 29, 2022. *See* Order No. 26,682 (September 12, 2022) at 2 (concluding that such an informal, non-transcribed event would be helpful in addressing questions related to “hardcoded and embedded formula inputs, formula flow across different tabs and columns in spreadsheets, and supporting source information”).

Among the most salient features of the Zelle Report is the absence of the names of any human beings anywhere in the document. At the January 18, 2023 meeting of the Executive Council, Chairman Goldner responded to a question by identifying “the Commission including the three Commissioners” as having “participated in the writing of the report.” Asked whether the Commission relied on any consultants to develop the document, Chairman identified “Zelle LLC” as having provided such assistance. The Executive Council approved a sole-source contract between the Commission and Zelle LLC on September 21, 2022, identifying Michael R. Zelle of Rollinsford as the sole partner, member, or manager of Zelle LLC. Among the deliverables referenced in the contract are “written reports summarizing the structure and design of energy efficiency measures which are components of the triennial energy efficiency plans reviewed by the Commission,” including “an analysis of the market assumptions and models utilized to evaluate the efficiency various measures” (*sic*).

¹ The term “record request” is misleading in this context. There is no “record” developed in a non-adjudicative proceeding such as IR 22-042. Historically, the term “record request” has referred to exhibits filed after the close of a hearing at the Commission’s request and as authorized by N.H. Code Admin. Rules Puc 203.30.

Invoices furnished to the OCA in response to a formal request pursuant to RSA 91-A (the Right to Know Law) indicate that through December 20, 2022 Mr. Zellem had devoted 153.5 hours of work under the contract to “[r]eviewing and summarizing reports, filings, data, and models related to the Energy Efficiency Plans.” Citing disclosure exemptions set forth in RSA 91-A:5, IX and RSA 363:17-c, the Commission refused to furnish drafts of the Zellem Report, leaving the public (including the OCA) unable to evaluate definitively the extent to which Mr. Zellem is the author of the Report and/or the extent to which the Report is the work of the Commissioners themselves. However, the available circumstantial evidence strongly supports an inference that Mr. Zellem is the lead author. According to the profile of Mr. Zellem available via the LinkedIn web site, Mr. Zellem served as a Senior Advisor to the Commission from July 2021 to June 2022 but presently resides in Geneva, Switzerland.

The point here is not to begrudge the Commission its ability to turn to a trusted former employee for assistance in drafting a document such as the “Report on Energy Efficiency Planning, Programming, & Evaluation.” The point, rather, is the participants in IR 22-042 had no idea that Mr. Zellem was performing this work, had no opportunities to interact with him, and had no chances to review or to critique his work. Policy analysis, when conducted in a vacuum, inevitably leads to flawed results. When such an analysis is conducted by (or at least on behalf of) a quasi-judicial decisionmaking body, the result is a travesty of due process and fundamental fairness – and the agency claiming the resulting pronouncements are simply offered for informational purposes (*see, e.g.*, Order No. 26,678 at 4, claiming that “an investigative docket is definitionally non-adjudicative”) does not make it so.

Regrettably, the Commission compounded the procedural problems we describe here when the Chairman offered a misleading statement to the Executive Council on January 18 about the nature of the Zellem Report. Asked by one of the Councilors whether the Commission had strayed “out of its lane,” Chairman Goldner replied that the report contained “no findings.” “All we were doing,” he told the Executive Council, was “reporting on what the utilities and what the other participants had told us in the process . . . we were just returning that information back to the public so that the public could see what we had heard and the way we heard it.”

The OCA vehemently disagrees with this characterization. The Zellem Report ignores most of the information provided by the utilities, the OCA, and other stakeholders in IR 22-042. An objective reading of the PUC document would support a conclusion that the agency is, via the clever deployment of inference, attempting to advance a policy agenda that ignores both recent legislative directives and the longstanding consensus of stakeholders that favors maintaining robust NH Saves programs.

Moreover, the comments previously filed by Attorney Fossum and the energy efficiency utilities, as well as the memo attached to this letter, provide ample evidence of how the Zellum report is *inconsistent* with the information provided by the participants in this docket *See, e.g.*, Fossum Comments at 3 (noting that the Zellem Report advocates for “ensuring that EE investments return the maximum benefits for all classes of ratepayers, a requirement not imposed by New Hampshire law); *id.* at 4 (describing the Zellem Report’s criticism of the statutorily mandated Granite State Test for cost-effectiveness); *id.* at 4-5 (noting that the Zellem report “speculates” that in the absence of consensus concerning the definition of market barriers, “current programs

might be reevaluated for their prudence if or when those items are studied in the future,” a conclusion that “appears to exist solely for the Commission to justify rejecting future proposals (and/or cost recovery) for failing to meet a standard that does not exist”); *id.* at 5 (noting the Zelle Report’s “clear implication that the cost effectiveness of [income-qualified energy efficiency programs] is in question”); Utility Comments at 3 (criticizing the Zelle Report’s conclusion that the Granite State test “do[es] not appear to align with industry norms” and are “primarily based on predictions, not observational data”); *id.* (noting the utilities’ disagreement with the Zelle Report’s conclusion that it is “not clear whether market barriers cause cost-effective opportunities to be lost or can be reduced by the State’s EE programming”). In other words, to the extent Chairman Goldner’s statement to the Executive Council was correct – that the Zelle Report contains “no findings” – it is because the Report relies on innuendo whose purpose is clearly to pave the way for future curtailment if not outright rejection of the Triennial Plan to be submitted in July.

Well before issuing the Zelle Report, the Commission cited its statutory authority to conduct investigations as the basis for conducting the proceeding docketed as IR 22-042. *See* Order of Notice at 2 (citing RSA 365:5, :15, and :19; RSA 374:4 and :7; RSA 374-F:4, X) (referring to these statutes as “other investigatory authorities” in addition to certain prior Commission orders). It is axiomatic that the Commission cannot create authority for itself by simply citing its prior orders. *See* OCA Motion for Rehearing and/or Clarification (tab 8) at 4 (quoting *Appeal of Public Service Co. of New Hampshire*, 122 N.H. 1062, 1066 (1982) (“[t]he PUC is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute”)).

We previously argued, to no avail, that by opening this proceeding the Commission was exceeding the investigative authority it invoked in the Order of Notice. Rejecting these concerns, the Commission ruled that exercising its investigative “authorities” provides “a means for the Commission to stay informed of the Joint Utilities’ energy efficiency program management, planning, and to assess compliance with laws and other authorities . . . thereby honing the Commission’s inquiry in its adjudicative dockets and enabling efficient, expeditious decisions[.]” Order No. 26,678 at 5.

No reasonable reader could conclude that the Zelle Report is simply the benign result of vigilant agency efforts to “stay informed” about how utilities manage or plan energy efficiency programs or about the extent to which utilities comply with applicable law. Rather, the Zelle Report is a policy document that takes exception to (and implicitly reflects an intention to supersede) previous policy determinations of the Commission and in some instances the General Court in such areas as cost-benefit analysis, discount rates, benefit maximization (the issue identified by Mr. Fossum), market transformation, and the appropriateness of programs specific to income eligible customers.

Moreover, issuance of the Zelle Report is inconsistent with the legislation that created the Department of Energy and transferred certain Commission functions to that agency. The legislation in question is the 2021 “budget trailer” bill (commonly referred to as HB2), Chapter 91 of the 2021 New Hampshire Laws. Section 187 of HB2, codified as RSA 12-P:2, II, states that the purpose of the chapter creating the Department was “to improve the administration of

state government by providing *unified direction of policies*, programs, and personnel *in the field of energy and utilities*, making possible increased efficiency and economies from integrated administration and operation of the various energy and utility related functions of the state government” (emphasis added.). The Department is tasked with preparing the state’s ten-year energy strategy and, in so doing, determine “[t]he role of energy efficiency, demand response, and other demand-side resources in meeting the state’s energy needs.” RSA 12-P:7-a, II. It is the responsibility of the Department, and not the Commission, to make “recommendations for policy changes and priorities necessary to ensure the reliability, safety, fuel diversity, and affordability of New Hampshire’s energy sources,” including “the extent to which demand-side measures including efficiency, conservation, demand response, and load management can cost effectively meet the state’s energy needs.” *Id.* at paragraph II. In contrast to the Commission, which is constituted pursuant to RSA 363:1 as an “independent agency,” the Commissioner of the Department of Energy is “responsible to the governor, the general court, and the public” for discharging the above-referenced responsibilities as well as the Department’s other functions, RSA 12-P5, I.

In short, the Department of Energy is the policy oracle and the Public Utilities Commission’s job is to conduct administrative adjudications where the law requires them. Both agencies are tasked with keeping informed about what the state’s utilities are actually doing, but the Commission’s role is comparable to that of a court.

None of the above is intended suggest that the issues raised by the Zelle Report are unworthy of public discussion. We do not shrink from such opportunities – we welcome them, when offered in an appropriate forum and in a manner that is consistent with due process and fundamental fairness. The Zelle Report, reasonably understood, reflects a doubling down on the change of course announced by the Commission in November 2021 when the agency rejected the 2021-2023 Triennial Energy Efficiency Plan and announced an intention to phase out ratepayer-funded energy efficiency altogether. *See* Order No. 26,553 (Nov. 12, 2021) at 2 (“We view this Triennial Plan as an inflection point, with ratepayer-funded and utility managed energy efficiency programs peaking in 2020 and 2021 and returning to the intended transition to market-based energy efficiency after this triennium”). The Commission is allowed to change its mind on matters within its jurisdiction previously decided via adjudication, but only “after notice and hearing.” RSA 365:28. And, of course, the Commission is never free to flout explicit legislative direction, as it has done here in derogation of House Bill 549, as codified as RSA 374-F:3, VI-a(d) (superseding much of Order No. 26,553 and requiring *inter alia* the continued use of the Granite State Test as the primary measure of cost-efficiency).

Unfortunately, the Zelle Report is now the proverbial bell that cannot be unrung. Its erroneous and misleading analysis – the result of work that appears to have been performed largely if not entirely on a different continent, without any input from, much less collaboration with, stakeholders with (in many instances) decades of experience in energy efficiency – is something the OCA cannot in good conscience ignore. Accordingly, we have directed our consultants at Synapse Energy Economics to draft the attached substantive critique of the Zelle Report. As noted by the authors, Synapse Energy Economics was directly and extensively involved in the development of the Granite State Test and the underlying National Standard Practice Manual. As such, Synapse is perhaps the nation’s foremost expert on cost-benefit analysis both in New

Hampshire and around the nation. The Commission and the public should therefore consider the Synapse analysis appended here as reflecting the views of the OCA.

Especially in a time of soaring energy costs, the Office of the Consumer Advocate steadfastly maintains that energy efficiency programs are essential components of the service provided to customers by our state's electric and gas utilities. We also believe deeply that utility regulation should be conducted in this state in a manner that is consistent with established regulatory principles and procedural norms whose purpose is to assure fairness and good order. It appears, to our regret, that the Public Utilities Commission does not share these views. Thank you, nevertheless, for the opportunity to express those views here.

Sincerely,

A handwritten signature in blue ink, appearing to read "DKreis", written in a cursive style.

Donald M. Kreis
Consumer Advocate

cc: Service List (via e-mail)
Attachment