

STATE OF NEW HAMPSHIRE

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June 30, 2023

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

Re: Docket No. DE 23-XXX  
Electric and Gas Utilities  
2024-2026 Triennial Energy Efficiency Plan

To the Commission:

At page 3 of the Commission's Procedural Order of February 1, 2023 in Docket No. IR 22-042 (Investigation of Energy Efficiency Planning, Programming, and Evaluation), the Commission indicated that it would be keeping IR 22-042 open for the purpose of receiving "any additional comments and filings" related to ratepayer-funded energy efficiency until the commencement of the instant docket. Accordingly, on March 31, 2023, the Office of the Consumer Advocate ("OCA") filed a motion (tab 70) seeking the disqualification of all three members of the Commission from participating this adjudicative proceeding, which the Commission has now opened for the purpose of reviewing the 2024-2026 Triennial Energy Efficiency Plan jointly filed earlier today by the state's electric and gas utilities pursuant to RSA 374-F:3, VI-a(d)(5).

Although no objections to the disqualification motion were filed during the ten-day response period, *see* N.H. Code Admin. Rules Puc 203.07(e), the motion remains pending in IR 232-042. In the interest of clarity and to protect the OCA's right to obtain a ruling on the important issues raised in our March 31 pleading, I attach the motion to this letter and request that it be docketed for the Commission to address in this proceeding. In the opinion of the OCA, the period for objections to this motion has run and the issues raised in the motion are therefore ripe for resolution by the Commission.

Sincerely,

A handwritten signature in blue ink, appearing to read "DKreis", written over a white background.

Donald M. Kreis  
Consumer Advocate

Cc: Service List, via e-mail  
Attachment

**STATE OF NEW HAMPSHIRE**  
**BEFORE THE**  
**PUBLIC UTILITIES COMMISSION**

Electric and Gas Utilities

Investigation of Energy Efficiency Planning, Programming, and Evaluation

Docket No. IR 22-042

Motion for Disqualification of Commissioners  
with Respect to 2024-2026 Triennial Energy Efficiency Plan

NOW COMES the Office of the Consumer Advocate (“OCA”) and moves for the disqualification of Chairman Daniel C. Goldner, and Commissioners Pradip Chattopadhyay and Carlton Simpson, from consideration of the 2024-2026 Triennial Energy Efficiency Plan (“Triennial Plan”) that, by statute, must be filed on July 1, 2023 and addressed via an adjudicative proceeding. In support of this request, the OCA states as follows:

**I. Introduction and Background**

RSA 374-F:3, VI-a(d)(5), as adopted via Chapter 5 of the 2022 New Hampshire Laws (commonly referred to as “House Bill 549”), requires the state’s electric and gas utilities to file an energy efficiency plan for the years 2024 through 2026 with the Commission on July 1, 2023. The Triennial Energy Efficiency Plan must be “consistent with the system benefits charge and local distribution adjustment charges” described in RSA 374-F:3. VI-a(d)(2) and subparagraph 5 of

the statute requires the Commission to issue an order “approving or denying a joint utility request to alter program offerings no later than November 30, 2023.” In other words, the new Triennial Plan must comport with the limitations on funding via nonbypassable charges imposed by House Bill 549 and the Commission, in turn, must rule on the Triennial Plan to the extent it seeks changes to the currently offered ratepayer-funded energy efficiency programs. The utilities jointly administer these programs under the “NH Saves” trade banner.

House Bill 549 overrode in significant part a controversial order issued by the Commission on November 12, 2021 (Order No. 26,553 in Docket DE 20-092). *Inter alia*, Order 26,553, rejected the 2021-2023 Triennial Energy Efficiency Plan, expressed skepticism about the benefit-cost test applied to energy efficiency programs in New Hampshire (known as the “Granite State Test”), and indicated an intention to phase out ratepayer-funded energy efficiency during that triennium in favor of relying on market forces to drive any such initiatives.

It is the respectful contention of the OCA that the Commission’s actions with respect to ratepayer-funded energy efficiency since February 24, 2022 have reflected disagreement with the policy determinations in House Bill 549 and a resolve to effectuate the provisions of Order No. 26,553 despite the countervailing directives of the General Court. The OCA is further concerned that, concomitantly and relatedly, the three sitting members of the Public Utilities Commission have prejudged key issues that must be addressed via contested administrative proceedings before the agency beginning on July 1, 2023. This is a significant

problem and not a claim the OCA makes lightly given that “[t]he PUC, as an administrative agency, must act within the scope of its delegated powers.” *Appeal of Granite State Elect. Co.*, 121 N.H. 787, 792 (1981).

The first sign of these problems was the Commission’s decision to open Docket No. IR 22-042 on August 10, 2022. In its Order of Notice commencing IR 22-042, the Commission stated an intent to “examine the development of the 2024-26 plan,” IR 22-042 Order of Notice (tab 1) at 3, even though House Bill 549 simply instructed the utilities to file their plan on July 1 without any preliminary oversight by the Commission. The Order of Notice indicated the Commission would examine “the Granite State Test,” *id.*, even though House Bill 549 enshrined that test in statute. The Commission further stated that the investigation “will help inform whether changes to current energy efficiency programming, planning, performance incentives, and evaluation are warranted” and, if so, to “help inform how such changes will be pursued.” *Id.* at 2-3. Again, these are matters that were specifically addressed in House Bill 549, which instructed the utilities to develop their Triennial Plan and seek Commission approval of any proposed programmatic changes – a scope of inquiry far narrower than what the Commission announced in the IR 22-042 Order of Notice. The Commission then rejected the OCA’s motion for reconsideration of the Order of Notice and the approach announced therein, on the ground that the OCA had conjured a “straw man version” of the Order of Notice. Order No. 26,678 (September 7, 2022) at 4. The Commission described IR 22-042 as “definitionally non-adjudicative,” as a proceeding that would not “conclude . . . with

a binding order of any kind,” and as simply an effort “to engage stakeholders in an open, overarching, and collaborative process that is free of certain procedural constraints.” The OCA, the utilities, and a variety of other energy efficiency stakeholders participated in IR 22-042 on that basis, responding to the Commission’s information requests and participating in a “technical session” on October 12, 2022 at which the three Commissioners presided and of which there is a full transcript. *See* tr. 10/12/22 in IR 22-042 at tab 40. In his opening statement, Chairman Golder stated that

the investigation will not do any of the following: (1) frustrate the development of the next triennial plan; (2) result in any advisory opinion that we intend to have incorporated in that plan; or (3) dictate any new or modified inputs to the tests or testing formulae that the Joint Utilities will rely on developing the next plan.

*Id.* at 6, lines 12-19. Chairman Goldner also stated that the Commission “takes seriously” the admonitions in *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 465 (1984), “to be cautious about [Commissioners’] public statements and not to prejudge the merits of any current or future adjudication before us.” Tr. 10/12/22. at 10, lines 2-10.

The Commission did not keep faith with this promise from Chairman Goldner. Instead, late in the afternoon of January 13, 2023, at the beginning of a holiday weekend, the Commission issued a white paper entitled “Report on Energy Efficiency Planning, Programming, & Evaluation.” *See* IR 22-042 at tab 58. For the reasons explained by the OCA in its letter of January 31, 2023 (tab 62), and as recapitulated here, *infra*, the OCA refers to this document as the “Zellem Report.”

The contents of the Zellem Report, the circumstances surrounding its development and issuance, and certain public statements made by Chairman Goldner in the aftermath of the Zellem Report, form the basis of the instant motion for disqualification.

## II. Legal Standard

The Public Utilities Commission performs “important judicial duties.” *Parker-Young Co. v. State*, 83 N.H. 551, 556 (1929). Thus, the Commission is considered a “quasi-judicial” body and, as such, the agency must “comport itself accordingly.” *Appeal of Public Service. Co. of N.H.*, 122 N.H. 1062, 1074 (1982) (citations omitted). The General Court has recognized this explicitly, requiring each Commissioner to perform his duties “impartially and diligently,” to “[a]bst[ain] from public comment about a matter pending before the commission,” and to “[d]isqualify himself from proceedings in which his impartiality might reasonably be questioned.” RSA 363:12 at paragraphs II, IV, and VII.

Further, RSA 363:19 provides in relevant part that no commissioner may “sit upon the hearing of any question which the commissioner is to decide in a judicial capacity who would be disqualified for any cause.” RSA 21-G:22 states that executive branch employees in general “shall avoid conflicts of interest.” Concerning RSA 363:12, VII, the test is not whether a commissioner “subjectively has kept an open and neutral mind” but, rather, “whether facts exist for a reasonable person to question his impartiality.” *Appeal of Seacoast Anti-Pollution*

*League*, 125 N.H. 465, 471 (1984).<sup>1</sup> Applying the same standard in the context of the Code of Judicial Conduct, the New Hampshire Supreme Court has stressed that this test is “an objective one, that is, whether an objective disinterested observer, fully informed of the facts, would entertain significant doubt that justice would be done in the case.” *George v. Al Hoyt & Sons, Inc.*, 162 N.H. 123, 140 (2011) (quoting *Blevens v. Town of Bow*, 146 N.H. 67, 69 (2001)); see also *Lorenz v. New Hampshire Administrative Office of Courts*, 151 N.H. 440, 443 (2004) (in which the justices of the state’s highest court disqualified themselves from a proceeding in which they were called upon to “interpret and evaluate the conduct and statements of two of our current colleagues,” notwithstanding the belief of those justices that they could decide the matter fairly and impartially).

Members of the Public Utilities Commission are allowed to bring “preconceived views with respect to legal or economic policies” to their work on adjudicative proceedings. *Seacoast Anti-Pollution League*, 125 N.H. at 472. But in key respects they must still bring open minds to adjudicative proceedings. Specifically, “in recognizing the need for neutrality and impartiality and thus mandating disqualification where impartiality can reasonably be questioned, the legislature sought to avoid partiality concerning issues of fact involved in pending matters.” *Id.* (citation omitted). For the reasons explained *infra*, what we have here is a textbook example of the very sort of partiality that is impermissible under RSA 363:12, VII as interpreted by *Seacoast Anti-Pollution League*.

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<sup>1</sup> We overlook the non-inclusive language adopted by the Court in 1984 inasmuch as all three currently serving Commissioners are men.

### **III. Facts and Circumstances Requiring Disqualification**

Prior to the public release of the Zelle Report on January 13, 2023, the Commission gave no public indication of how or even whether the agency intended to conclude the investigative proceeding conducted as IR 22-042. A reasonable factfinder could determine that the Commission has, over the course of IR 22-042, waged an artful campaign to undermine and question the NH Saves programs while endeavoring to stop just short of anything that could be deemed prejudgment of sufficient magnitude to warrant disqualification. But the history of IR 22-042, the text of the Zelle Report, and certain public statements made about the Report subsequent to its issuance – considered in their totality – demonstrate that in the interest of justice and basic fairness this iteration of the Public Utilities Commission should not be allowed to determine the course of ratepayer funded energy efficiency for the 2024-2026 triennium.

#### **A. The Order of Notice**

In its Order of Notice, the Commission stated that its investigation “will help inform whether changes to current energy efficiency programming, planning, performance incentives, and evaluation are warranted; and, if such changes are warranted, to help inform how such changes will be pursued.” Order of Notice at 3. Accordingly, the Commission offered a list of specific topics that would be the subject of “inquiries” in IR 20-042:

1. The Granite State Test, Total Resource Cost Test, and Discount Rates;
2. Performance Incentive;



3. Impact on New Hampshire Economy;
4. Subsidized Services and Equipment;
5. Market Barriers;
6. Reporting on Spending by Category;
7. Reporting on Low-Income Program Offerings; and
8. Reporting made to other regional or regulatory organizations.

*Id.* These subjects are not matters of legal or economic policy; they are specific factual inquiries but, rather, “issues of fact” of the sort that required disqualification in *Seacoast Anti-Pollution League*. Although Chairman Goldner stressed at the prehearing conference that the Commission’s goal was “to learn, not to judge,” and would thus take care not to run afoul of *Seacoast Anti-Pollution League*,” the Zellem Report is a cavalcade of opinions about how the Commission intends to resolve issues of fact that will arise when the utilities submit their Triennial Plan on July 1.

### **B. Authors and Provenance of the Zellem Report**

The Zellem Report is noteworthy for, among other things, 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 about the Zellem Report by identifying “the Commission including the three Commissioners” as having “participated in the writing of the report.”<sup>2</sup> Chairman

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<sup>2</sup> Asked whether the Commission relied on any consultants to develop the document, Chairman identified “Zellem LLC” as having provided such assistance. The Executive Council approved a sole-source contract between the Commission and Zellem LLC on September 21, 2022, identifying Michael R. Zellem of Rollinsford as the sole partner, member, or manager of Zellem LLC. Among the

Goldner identified the three PUC Commissioners as the principal authors of the Zelle Report during testimony before the Science, Technology, and Energy Committee of the House of Representatives on January 27, 2023, a representation confirmed by counsel to the Commission in a meeting held with counsel for the OCA on February 3, 2023.<sup>3</sup>

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. Zelle 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 Zelle Report, leaving the public

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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).

Regrettably, it must also be noted that Chairman Goldner offered an inaccurate statement to the Executive Council on January 18 about the nature of the Zelle 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.” A recording of the Executive Council meeting in question is available here: <https://www.sos.nh.gov/administration/governor-executive-council/meetings>. The colloquy with Chairman Golder begins approximately one hour and seven minutes into the recording. Other parties may speak for themselves; the OCA contends that the Zelle Report does not simply reflect back its views as expressed to the Commission in this or any other docket.

<sup>3</sup> The OCA acknowledges that, although we seek the disqualification of all three members of the Public Utilities Commission, we are entirely reliant on the statements of one Commissioner – Chairman Goldner – concerning the role of himself and his two colleagues. We have no choice but to rely on what is, in effect, hearsay evidence concerning Commissioners Chattopadhyay and Simpson. In the recent past, it has been considered the province of individual Commissioners to determine whether their disqualification is required by applicable law. *See, e.g.*, Order No. 26,561 (Jan. 7, 2022) (issued by Commissioner Chattopadhyay denying request to disqualify him). We acknowledge that such orders may reveal facts and circumstances of which we are not aware.

(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.<sup>4</sup> 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.

Given the available information, alongside the deliberate, discretionary withholding of a complete account, the OCA believes that (1) Mr. Zellem is the person who reviewed the IR 22-042 submissions and otherwise conducted research germane to the Zellem Report, (2) Mr. Zellem is responsible for preparing the initial draft of the report and is likely to have done so with the help of guidance from the Commissioners, and (3) the Commissioners, as principal authors of the document, are responsible for its content and have endorsed every word of the Zellem Report in

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<sup>4</sup> This information vacuum is the result of an affirmative decision by the Commission to create that vacuum. Section 5 of RSA 91-A provides agencies and other instrumentalities of government in New Hampshire with certain disclosure exemptions that are discretionary in nature. Courts apply a balancing test to determine whether application of these exemptions are warranted in the circumstances. *See, e.g., Provenza v. Town of Canaan*, 175 N.H. 121, 130 (2002) (“the court balances the public’s interest in disclosure against the government’s interest in nondisclosure against the government’s interest in nondisclosure”) (citation omitted). But the New Hampshire Supreme Court has never imposed the balancing test on agencies directly, and no provision of RSA 91-A precludes the Commission from making a discretionary decision to release all available information about the provenance of the Zellem Report. This is not a case in which any outside actor is seeking to force the Commission to withhold any information. *See id.* at 125-26 (leaving undecided the question of whether such an outside party would have standing to require nondisclosure under RSA 91-A and suggesting that the General Court clarify the statute); *but see Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979) (ruling that the federal Freedom of Information Act, on which RSA 91-A was based, is “exclusively a disclosure statute”).

RSA 363:17-c provides the Commission with an exemption from the RSA 91-A disclosure provisions in connection with “adjudicatory proceedings” and “investigations held pursuant to its authority under Title 33.” Since IR 22-042 is not an adjudicative proceeding, the Commission has relied on the exception for investigations to justify its decision to withhold documents that would shed light on the provenance of the Zellem Report. The OCA believes the Commission exceeded its investigative authority by conducting a wide-ranging policy inquiry as opposed to focusing on the acts or omissions of a utility or utilities. Thus, the “investigations” exception is not applicable. Even if it were, nothing precludes the Commission from waiving the exception in the circumstances in an effort to bolster public and ratepayer confidence in the impartiality of its decisionmaking process.

much the same manner as the person identified as the lead investigator on a scientific study is responsible for the resulting report even if the project relied on lab work and significant document drafting performed by research assistants. The Commission and its individual members are, of course, welcome to provide additional clarification since the agency has obviously chosen to withhold information that would be germane to this motion.

### **C. The Zelle Report's Cornucopia of Prejudgments about the 2024-2026 Triennial Energy Efficiency Plan**

Substantively, the Zelle Report is rife with controversial and, indeed, incorrect determinations. But these determinations are typically and cleverly hidden in plain sight – i.e., they are stated as self-evident truths rather than as controversial propositions newly adopted by the Commission.

#### **1. Maximizing Return on Investment**

For example, as noted by Attorney Matthew J. Fossum in the detailed critique of the Zelle Report he filed on January 26, 2023 (tab 60) (“Fossum Memorandum”),<sup>5</sup> the Commission described itself as “responsible for assuring that EE [i.e., energy efficiency] investments return the maximum benefits for all classes of customers.” Fossum Memorandum at 3, quoting Zelle Report at 1. Mr. Fossum observed that despite years of involvement in the development of EE

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<sup>5</sup> Mr. Fossum made this filing in his individual capacity, but it is noteworthy that he is a former employee of (in chronological order) the Public Utilities Commission, Eversource, and Unitil. During his tenure with the two utilities, he served as regulatory counsel and appeared frequently in Commission proceedings, including many that concern ratepayer-funded energy efficiency. He was thus in a position to review the Zelle Report with the eyes of an expert and it is to his great credit that he undertook such a careful effort to do so and to document his findings.

programming in New Hampshire, he was "not aware of any such requirement in New Hampshire law." Neither are we.

Similarly, Mr. Fossum noted that the Zelle Report deems "critical" (on the path to market transformation) a "shift" to "ensure that ratepayer-funded EE investments generate the greatest possible return." Fossum Memorandum at 3, quoting Zelle Report at 2. Regardless of whether such a "shift" is good policy and consistent with applicable law (propositions with which the OCA disagrees), the focus on "greatest possible return" is a break with prior approaches to energy efficiency and is the sort of pronouncement that prejudices issues that will arise during the adjudication of the upcoming Triennial Plan. Even if the utilities opt to reflect this "shift" in the plan they ultimately file, the problem is not cured because other parties are likely to argue that "cost effective" rather than "greatest possible return" should guide what programs and measures are and are not suitable for inclusion in the Triennial Plan. Mr. Fossum speculated that the Commission's new "greatest possible return" objective "exists solely to provide a basis for the Commission to reject future EE program proposals, even cost-effective ones, on the basis that they do not generate a sufficient, undefined, level of return." Fossum Memorandum at 3. Deployed prior to the submission of the Triennial Plan, this is precisely the sort of partiality that requires disqualification under the *Seacoast Anti-Pollution League* standard.

## 2. Benefit-Cost Analysis

The Zelle Report's discussion of benefit-cost testing is, if anything, even more troubling. As noted, *supra*, the Commission ridiculed as subjective and opaque the very Granite State Test ("GST") the agency itself approved in 2019 after a working group operating under the agency's aegis undertook careful efforts to develop the test in light of the applicable New Hampshire public policy. The General Court responded by enshrining the GST in statute via House Bill 549. As Mr. Fossum noted, for purposes of the upcoming Triennial Plan "[i]f the submitted plans conform to and are supported by the GST, that should end the Commission's analysis." Fossum Memorandum at 4. But, via the Zelle Report, the Commission continues to take aim at the Granite State Test, contending that "[t]he statutory tests used to determine cost-effectiveness of New Hampshire's EE programing are unique to the State, do not appear to align with industry norms regarding symmetrical balancing of costs and benefits, and are primarily based on predictions, not observational data." Zelle Report at 1.<sup>6</sup> As explained by the OCA's

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<sup>6</sup> Although it is not clear, the OCA believes this reference to "tests" is an oblique allusion to the fact that the Granite State Test is statutorily the "primary test, with the addition of the Total Resource Cost test as a secondary test." *See* RSA 374-F:3, VI-a(d)(4). The subtle implication of the Zelle report's reference to "tests" is that both tests play a significant role in determining which programs and measures are deemed cost-effective. This subtly perpetuates a misapplication of the relationship between the two tests, similar to the approach the Commission described in its 2022 order on the 2022-2023 energy efficiency plan that replaced the rejected 2021-2023 Triennial Plan. *See* Order No. 26,621 (Apr. 29, 2022) at 24 (characterizing the Legislature as having mandated a secondary test "in situations where the cost-benefit ratios have significant variance" as determined by under each test). In reality, the secondary test should only apply in one of two situations: when a measure or program is not cost effective under the Granite State Test but is desirable for some other reason, or the measure or program is only marginally cost effective under the GST.

consultants in their written response to the Zelle Report, such a claim is both “misleading” and “incorrect.” OCA Response to Zelle Report (tab 62) at 2. For present purposes, it suffices to note that the Commission has prejudged a key issue (the manner in which to screen programs and measures proposed in the upcoming Triennial Plan) and has done so in a manner that is, at best, straining against an explicit legislative directive. Parties to adjudicative proceedings at the Public Utilities Commission are entitled to decisionmakers who will faithfully and fairly apply their legislatively delegated powers, not decisionmakers who appear hostile to the directives of the General Court.

As already explained by the OCA and its consultants, the notion that the Granite State Test relies on predictions and observational data is simply wrong. “The Zelle report seems to be conflating the *application* of cost-effectiveness tests (which requires inputs that could be based on observational data or predictions), with the applicable *definition* of cost effectiveness embedded in the tests (which does not require any inputs at all).” OCA Response at 2 (emphasis in original). It is certainly possible for the OCA and other parties to build a factual record that refutes the Zelle Report’s erroneous characterization of how the Granite State Test works. But these parties cannot lawfully be required to do so before adjudicators who have already made judgments about such key questions.

### **3. The Role of Market Transformation**

Another example of a predetermination that is hiding in plain sight is, as further noted by Mr. Fossum, the Commission’s stated intention via the Zelle

report to “evaluate the prudence of current and future incentives and programs to transform the market and continuously reduce barriers.” Fossum Memorandum at 4-5; Zellem Report at 17. Mr. Fossum observed that “this conclusion 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,” i.e., prudence in seeking to overcome market barriers. Fossum Memorandum at 5.

#### 4. Discount Rates

Of particular concern to the OCA is the Zellem Report’s approach to discount rates. As the Zellem Report correctly notes, this is a significant issue indeed because “discounting future net-benefits to a present value provides a means to evaluate projects that have different measure lives on an equal footing.” Zellem Report at 6. In other words, it is appropriate to apply a discount rate when assessing the benefits and costs of energy efficiency initiatives because, to the extent these benefits and costs are incurred in the future their value is lower when compared to the same benefits and costs incurred in the present. The importance of this issue is exacerbated by the fact that, while the benefits of ratepayer-funded energy efficiency roll out over time, *all* of the costs are incurred up front via the SBC and LDAC charges on electric and gas bill, respectively.<sup>7</sup> Supply-side investments by utility shareholders are amortized; energy efficiency investments funded by ratepayers are not.

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<sup>7</sup> “SBC” is an abbreviation for “system benefits charge” and “LDAC” stands for “local distribution adjustment charge.” Both are nonbypassable volumetric charges that are, as of last year, enshrined in statute. *See generally* RSA 374-F:3, VI-a and, especially, paragraph (d)(2) (containing explicit instructions as to the calculation of both charges).



It is possible to deem essentially all energy efficiency measures as not-cost effective, under the Granite State Test or otherwise, by arbitrarily applying an inappropriately high discount rate. The last page of the Zelle Report helpfully offers a list of programs that would no longer be cost effective under a “[h]ypothetical” approach of applying the utilities’ WACC (weighted average cost of capital) as the applicable discount rate. *Id.* at 27. According to the Zelle Report, “most states rely on WACC as the discounting factor when measuring long term impacts.” *Id.* at 11; *see also id.* at 10 (characterizing the WACC as “the preferred discount rate in most states in the US”). Later in the report, the use of the WACC as the appropriate discount rate is described as particularly “apt” in the context of the Granite State Test given its non-reliance on participant impacts. *Id.* at 13.

As noted by the OCA’s consultants at Synapse Energy Economics, the analysis of discount rates in the Zelle Report “focuses entirely on an out-of-context reference” in the National Standard Practice Manual (“NSPM”). *See* OCA Response at 8. A product of the National Energy Screening Project, the NSPM is a comprehensive and generally applicable framework for assessing the cost-effectiveness of distributed energy resources (including energy efficiency). As such, it provides the underlying basis for the Granite State Test (“GST”) and, given that Tim Woolf of Synapse Energy Economics was the lead author of the NSPM the observations as well as the lead author of our critique of the Zelle Report, Mr. Woolf’s expert opinions are worthy of being assigned a high degree of credibility.

Here, his conclusion about the discussion of discount rates in the Zelle Report is that it ignores key aspects of the NSPM and misinterprets others, *en route* to “the conclusion that the WACC is the appropriate discount rate for the GST.” OCA Response at 8. This gives the appearance of a deep-seated hostility to the very notion of ratepayer-funded energy efficiency inasmuch as, ultimately, no empirical evidence drives the choice of a discount rate in this context – so, a policymaker who views NH Saves as desirable will seek to apply a small discount to future benefits and a hostile regulator will do the opposite. Utilities devote none of their own capital to the ratepayer-funded NH Saves programs, so applying their cost of capital in this context is an arbitrary but very revealing choice. Thus the discussion of this subject in the Zelle Report is a conclusive sign of unacceptable prejudgment.

### **5. Low-Income Energy Efficiency**

The last example of a predetermination hiding in plain site within the Zelle Report is the discussion of the Home Energy Assistance program that is available to income-eligible customers. As noted in the OCA Response, the Zelle Report “does not directly criticize these programs. Instead, it attempts to indirectly put these programs in a negative light.” OCA Response at 10. Specifically, Table 8 at page 21 of the Zelle Report “implies that some of the [Home Energy Assistance] programs are not cost effective without this adder” – i.e., without an adder used “as a proxy for the economic benefit of weatherization.” *Id.*; Zelle Report at 20-21. As noted in the OCA Response, “there is no basis, no justification provided, for subtracting

these benefits” – the value to the overall economy of abating poverty through weatherizing the dwelling places of poor people – “from the analysis.” OCA Response at 10. As with the Commission’s ongoing, expressed aversion to the Granite State Test, this apparent hostility to income-eligible energy efficiency programs is inconsistent with a clear directive of the General Court. *See* RSA 374-F:3, VI-a(c) (“No less than 20 percent of the portion of the funds collected for energy efficiency shall be expended in low-income energy efficiency programs”). As such, it is further disturbing evidence that the Commission has prejudged matters it must consider during the adjudication of the next Triennial Energy Efficiency Plan.

#### **IV. Conclusion**

The Office of the Consumer Advocate acknowledgea that the relief requested in this motion is significant, consequential, and potentially unprecedented. We do not make a request such as this lightly. Nevertheless, it is the emphatically held view of the Office of the Consumer Advocate that, particularly during an era in which electricity and natural gas rates have soared into the realm of unaffordability for many residential ratepayers in the Granite State, ratepayer-funded energy efficiency is a critical element of the service these utilities provide to customers. The General Court and the Governor have agreed, by virtue of having enacted House Bill 549. This enactment overrode the policy reversal adopted by the Commission on November 12, 2021, and yet the Zellem Report issued in January of this year unambiguously paints a portrait of a Public Utilities Commission straining against legislative choices with which it disagrees. The publicly disclosed

information about the provenance of the report directly implicates all three Commissioners in a document that not only reflects this policy strain but also communicates series of prejudgments about issues that are central to the future of ratepayer funded energy efficiency in New Hampshire. And all of the above occurs at a time when New Hampshire is losing ground on energy efficiency in relation to its neighbors while remaining the regional laggard at a time when other states are leveraging energy efficiency to enhance their economic competitiveness and attractiveness to incoming workers. *See* S. Subramanian *et alii*, 2022 State Energy Efficiency Scorecard, American Council for an Energy Efficient Economy (2023) at xi.<sup>8</sup> From the perspective of the residential ratepayers whose interests the Office of the Consumer Advocate represents, this is an unacceptable situation.

WHEREFORE, the OCA respectfully requests that this honorable Commission:

- A. Enter one or more orders determining that Chairman Goldner and Commissioners Chattopadhyay and Simpson are disqualified from participating in the adjudicative proceeding in which the Commission will review the 2024-2026 Triennial Energy Efficiency Plan, and

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<sup>8</sup> The referenced document is available at <https://www.aceee.org/research-report/u2206>.

B. Grant such further relief as shall be necessary and proper in the circumstances.

Sincerely,



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March 31, 2023

Certificate of Service

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



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Donald M. Kreis