STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. PUC-23-388

INDUSTRIAL ENERGY CONSUMER GROUP

Appellant,

v.

PUBLIC UTILITIES COMMISSION

Appellees.

ON APPEAL FROM
THE MAINE PUBLIC UTILITIES

REPLY BRIEF OF APPELLANT
Industrial Energy Consumer Group

April 3, 2024

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I. Introduction

The legal issue in this appeal is straightforward: did the Maine Public Utilities Commission ("PUC") impermissibly create and execute authority in violation of its statutory mandates? The answer is yes. The facts are complicated, and the PUC has essentially argued that factual complexity begets deference. Distilling the case to its legal core, however, it is clear that the PUC's rate design decision violated the body of rate design law that was explicitly preserved through electric industry restructuring and that deference is inappropriate. Compounding its fundamental legal error, the PUC violated the tenets of administrative law by basing its decision on no evidence or reasoning. The result can be nothing but arbitrary and capricious action.

The PUC implies without basis that rate design law somehow changed with the year 2000 restructuring of Maine's electric industry and that, apparently simultaneously, energy purchased from unregulated generators was no longer subject to the rate design principles applicable to other costs charged to ratepayers through T&D utility rates. Appellee PUC's Brief, page 17-20. Instead, with respect to NEB, the PUC has somehow acquired authority to create a "climate policy," to assert without any evidence that NEB creates benefits in accordance with that policy, to ascribe such benefits to all ratepayers equally without any evidence or reasoning, and to then allocate NEB costs to all ratepayers purely on the basis of energy in

accordance with those purported benefits. The PUC's decision in unlawful and warrants no deference from the Court.

II. Argument

A. Industrial Energy Consumer Group's Appeal is Not A Collateral Attack

The PUC incorrectly argues Industrial Energy Consumer Group's ("IECG") appeal of the PUC's allocation of Net Energy Billing ("NEB") above-market costs is an improper attempted relitigation of a "prior Commission decision." PUC Br. 28-30. That argument would mean, once the PUC decided how above-market NEB costs would be recovered and that decision was not appealed, for the rest of time only the Legislature could change that result, no matter how flawed the rates might be.

PUC decisions of a judicial nature do have *res judicata* effect. *See Quirion v. Pub. Utils Comm'n*, 684 A.2d 1294,1296 (Me. 1996) (citation omitted). Ratemaking, however, is different because it involves exercising the full legislative power delegated to the PUC. It is forward looking and sets rules until new facts justify a change. *See, e.g., Cent. Me. Power Co. v. Pub. Utils. Comm'n,* 395 A.2d 414, 434 (Me. 1978); *Portland v. Pub. Utils. Comm'n,* 656 A.2d 1217, 1221 (Me. 1995). Just as one legislature cannot bind its successors, the PUC cannot bind its successors in ratemaking matters. The PUC too recognizes that rates are forward-looking and not subject to *res judicata*. *Bangor Natural Gas,* Request for Approval of Rate Change, No. 2021-00024, Examiner's Report, 39-41 (Me. P.U.C. Dec. 7, 2021) ("Legislation

. . . looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind" (citations omitted)). Therefore, *res judicata* does not apply.

B. IECG's Appeal is Timely

The Public Advocate ("OPA") argues that the deadline for this appeal was August 4, 2023, 21 days after IECG withdrew its Petition for Reconsideration of the April 21, 2023 Order on July 14, 2023. OPA's argument ignores the actions of the PUC which legally extended the deadline for appeal to October 3.

In response to subsequent petitions for reconsideration filed by customers and generators, the Commission issued a Procedural Order on July 26, 2023, which stayed all procedural deadlines, and further asserted that issues left open would be decided later. Once the PUC issued the NOI in 2023-00230 on September 12, 2023, it did address the issues left open in 2022-00160. By opening a new docket to investigate matters left open in 2022-00160, as described in the Notice of Investigation ("NOI"), the PUC at that time fully decided and disposed of the entire rate design case in 2022-00160. This disposition rendered the rate design methodology adopted therein a final decision. *See Mechanic Falls Water Co. v. Pub. Utils. Comm'n*, 381 A.2d 1080, 1087 (Me. 1977) ("A final decision is one which

'fully decides and disposes of the whole cause leaving no further questions for . . . the Court.'"). The 21-day deadline for appeal, therefore, began to run from that date.

The OPA relies on *Harris Baking Co. v. Mazzeo*, asserting that the PUC's July 26 Procedural Order was a final order that positively closed all issues in 2022-00160. Appellee OPA's Brief, page 5; 294 A.2d 445 (Me. 1972). In *Harris*, the Court held that "relief from a final judgement, does not authorize . . . the reinstatement" of procedural time limits. *Harris*, 294 A.2d, at 451. In the case below there was no final judgment until September 12.

Finally, it is notable that the PUC itself has not raised any timeliness issue regarding IECG's Notice of Appeal, which stated IECG's position that the September 12, NOI rendered the PUC's rate design decision in 2022-00160 to be a final decision on that date. Record Appendix, page 32-33. IECG assumes that the PUC considered its actions to have tolled the appeal period to October 3.

C. The PUC's Allocation of Costs Among Customer Classes is Unlawful, Unsupported by any Evidence, and Arbitrary and Capricious.

Relying on its own invention of a "climate benefit" rate design thesis, the PUC concludes without any connective analysis or evidence that (1) NEB was created solely to reduce climate emissions, and (2) NEB benefits all ratepayers in proportion to their consumption of electricity and therefore allocates NEB above-market costs among classes based solely on electricity consumption. These conclusions are

wholly unsupported and unreasoned, resulting in the arbitrary and capricious class allocation based solely on energy. The case should be remanded to the PUC to conduct a lawful analysis of allocation of costs among classes.

Specifically, the "climate benefit" thesis is neither required nor explicitly or implicitly allowed by any statute and has not been adopted through a PUC rule. PUC orders stating the thesis describe neither its legal nor factual bases. The thesis is merely repeated. Further, the use of the thesis to drive rate design violates several statutes which, separately and together, mandate rate design be based on cost causation to seek economic efficiency. This rate design principle underpinned rate design prior to electric industry restructuring in 2000 and is expressly mandated to continue by 35-A M.R.S. §§ 3208(7), 3209(1). Cost-based rate design and economic efficiency are core to a body of law that includes the statues and case law described below. The vitality of cost-based rate design and economic efficiency cannot be questioned.[1]

Armed with that knowledge that the PUC had battled for decades to reduce ratepayer costs by seeking economic efficiency through increasingly cost-based rates, the Legislature decreed that the relative fairness reached by the PUC should not be altered in regard to stranded and other costs. The statutes enacted before, as

[1] Furthermore, § 3209(1) eliminates any debate about whether NEB creates "stranded costs" by its use of the words "stranded and other costs." Whatever NEB may be, it is covered by Section 3209.

part of, and after electric restructuring show the Legislature valued the effort and result and mandated that the rate design principles be maintained. The PUC's decision does not even mention the mandate or the statutes, let along apply their principles in a reasoned rate design analysis.

The Court's most recent articulation of principles for review of PUC rate design decisions, *Off. of Pub. Advoc. v. Pub. Utils. Comm'n*, provides essential guidance for analyzing the PUC's decision. 2023 ME 77, 306 A.3d 633. The decision recites the basics of deference (*i.e.*, if ambiguity then defer to a reasonable interpretation), even discussing the particular deference afforded to the PUC in the context of "choosing among various ratemaking techniques or methodologies." *Id.* at ¶ 8 (citations omitted). Notably, however, the decision confirms that such ratemaking deference is warranted only "provided [the techniques and methodologies] are reasonably accurate." *Id.* (citing *Indus. Energy Consumer. Grp v. Pub. Utils. Comm'n*, 2001 ME 94, 773 A.2d 1038 (emphasis added).

Applying the basic deference principles here confirms the legal infirmity of the PUC's position. While the PUC certainly has "expert judgment" with respect to complicated rate design matters, that expert judgement was entirely abandoned here, resulting in a methodology of utterly unknown accuracy. There is no way for the Court or any ratepayer to know or to find out how accurate it is. Accuracy is not one of its objectives.

The first step in a deference analysis is to identify the statute (or rule) and assess its ambiguity. Here, there is no statute or rule to assess. The "climate policy" of NEB appeared out of thin air, with only a passing and unspecific citation to the Maine Climate Council. Moreover, the record is devoid of any PUC interpretation, analysis, or explanation of a statute or rule that provides the authority for rate design based on climate policy. The only attempt is the PUC's conclusory statement that it has "clear and unambiguous authority to consider climate policy when designing rates" through 35-A M.R.S. § 103-A. PUC Br. 20. While this statement itself, in a vacuum with no other analysis, is legally deficient on its face, it is all we can analyze.

Section 103-A states that "[i]n executing its duties, powers and regulatory functions . . . the commission, while ensuring system reliability and resource adequacy, shall facilitate the achievement by the State of the greenhouse gas emissions reduction levels." The plain language requires the PUC to facilitate the achievement of the State's statutory goals to reduce climate emissions to certain levels by specified dates. *See* 38 M.R.S. § 576-A.[2] Critically, however, § 103-A does not (1) say or imply anything about rate design, (2) repeal or partially negate any existing rate design statutes, or (3) empower the creation and application of "policies" that are independent of other statutes or rules.

[2] The section reasonably would encourage the PUC to vigorously use the authority in 35-A M.R.S. § 3210-C and its progeny to purchase renewable energy and then do a transparent accounting of the emissions reductions attributable to its actions.

Because of what § 103-A does not say, we are left to analyze the impact of the PUC's apparent § 103-A rate design authority on other statues and existing rate design precedent to determine whether § 103-A is ambiguous and whether the PUC's interpretation is reasonable. With respect to existing statutes, the IECG has pointed to the Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. § 2601 *et. seq*, the Electric Rate Reform Act ("ERRA"). 35-A M.R.S. § 3152, and certain provisions 35-A M.R.S. §§ 3201 to 3217 ("Restructuring Act"). IECG has also discussed seminal cases applying these statutes and their cost-based rate design focus. *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) ("1985 Order"); *Me. Pub. Utils. Comm'n*, Investigation of Cent. Me. Power Co.'s Revenue Requirements and Rate Design (Phase I), No. 97-580, Order (Me. P.U.C. Mar. 19, 1999) ("1999 Order"). Each of these deserves brief attention again, through the lens of a deference analysis and with the understanding that the Legislature intentionally required the preservation of the existing substantial and historic body of rate design law in the Restructuring Act. §§ 3208(7), 3209(1).

Section 3209(1) states: "The design of rate recovery for the collection of transmission and distribution costs, stranded costs and other costs recovered pursuant to this chapter must be consistent with existing law, as applicable." The Legislature also instructed that "[t]he commission may not shift cost recovery among

customer classes in a manner inconsistent with existing law, as applicable." § 3208(7). These commands are elemental because they make the body of existing rate design principles applicable to NEB unless the Legislature directs otherwise. When the Legislature enacted this framework, it was aware of the statutes, rules, and precedent regarding rate design and sought to specifically preserve that body of law, including the over two decades worth of PUC responses to laws seeking economic efficiency, lower costs, and greater fairness in the allocation of all costs, including above-market costs and purchased power costs.

Thus, the current post-restructuring legislative framework on rate design effectively incorporates PURPA, ERRA, and the case law applying those statutes. PURPA required every state to consider adopting cost causation rate design. The 1985 Order describes that the PUC's role in rate design is "to consider the standards set forth in [PURPA] and to determine the policies and the cost of service methods to be used in setting rates for CMP." S.A. at 4. Moreover, the 1985 Order states that the "legal principles governing" the proceeding are contained in both PURPA and ERRA. S.A. at 4.

The PUC describes ERRA as providing a governing "policy basis" that "coincides in most major respects with PURPA." S.A. at 7. The ERRA continues to require "the PUC to relate transmission and distribution rates more closely to the costs of providing transmission and distribution service." § 3152(1)(A).The ERRA

also continues to require the PUC to "set rates to the extent practicable to achieve economic efficiency." 35-A M.R.S. § 3153-A(4). Economic efficiency necessarily requires consideration of cost.

The PUC and OPA might argue that the ERRA pertains only to the rates of T&D utilities, and that NEB costs and other purchased power are not T&D utility activities after electric restructuring. But the costs of NEB and other purchased power are recovered from ratepayers through the PUC-approved T&D utility rates. *See* 35-A M.R.S. §§ 301, 3208, 3209. The origin or ownership of the generation is irrelevant. There were T&D utility power purchases before restructuring as the 1985 Order itself proves.

The upshot of the PUC's application of PURPA and ERRA in the 1985 Order was to codify the principle of rate design based on cost causation to seek efficiency. The PUC continued to apply the guiding principles of PURPA and ERRA in the 1999 Order, stating "costs should be allocated in a manner consistent with the reasons they were incurred. Because stranded costs are generation-related, it is appropriate to allocate them on the basis of a mix of energy and capacity." S.A. at 204-05. The result of the PUC's principled analysis (spanning 150 pages) was to allocate the stranded costs of generation (Seabrook nuclear power plant) purchased by CMP through a reasonable weighting of components: 75% on energy and 25% on demand or capacity. S.A. at 115 (discussing the applicable principles of cost-

based rates, cost-causation, economic efficiency, equitable apportionment, and acceptability/stability) and 204 (approving the 75%/25% weighted allocation).

Returning to deference, the question is whether § 103-A is ambiguous, and if so, whether the PUC's interpretation of § 103-A (that it contains distinct climate policy ratemaking authority) is reasonable. To answer both questions affirmatively, the Court would need to overlook that § 103-A's plain language says nothing about rate design and the NEB statutes and rules saying nothing about climate policy, *and also* agree that § 103-A nonetheless provides an implied independent basis for the PUC to create from whole cloth the climate policy for the unrelated NEB statutes and rules. Next, the Court would need to square the apparent § 103-A climate policy rate design authority with all other existing statutes, which are not expressly impacted by the plain language of § 103-A. Did § 103-A, though silent itself on rate design, repeal by implication those statutes which facially address rate design, including the provisions of the Restructuring Act that expressly preserve pre-restructuring rate design law? Or did § 103-A modify those statutes to some unknown extent and authorize the PUC to determine the extent in a specific rate design case? Finally, to defer to the PUC's approach, the Court would also have to accept that § 103-A, in light of its relationship to other rate design statutes that focus on cost, such as the ERRA, granted the PUC permissive authority to not only perform special climate rate design, but to do so in a manner that abandons cost and

economic efficiency in lieu and a novel "benefits" approach. IECG respectfully suggests that deference to the PUC in this instance would turn the theory of deference inside out.

Perhaps leading to the inescapable conclusion that deference is not warranted here, the PUC's decision also suffers fatal deficiencies of administrative law, namely that it is unsupported and unreasoned and therefore arbitrary and capricious. Even assuming that § 103-A could be a legitimate basis to allocate NEB stranded costs on the basis of climate benefits, the PUC leaps straight from such hidden authority to the conclusion that all ratepayers obtain a climate benefit from NEB and therefore all ratepayers should pay equally for NEB based 100% on energy and 0% on demand or capacity. Assuming, arguendo, that the purported climate benefits exist (there is no record evidence or analysis on this point), the PUC did not even attempt to meet its obligation to connect the dots to create a reasoned allocation. For example, the PUC did not identify and quantitatively or qualitatively describe climate benefits. It did not determine who receives them and in what amounts. And it did not establish the relationship, if any, of the climate benefits to electricity consumption.

Ratepayers are not a homogenous group. They include residential customers, small commercial customers, and large industrial customers. Energy sophistication varies among customers, with some being keenly attuned to making rational decisions based on the price signals contained in their rates. Ratepayer decisions

may be about lowering costs, but also to support environmental goals such as reducing emissions. Additionally, consumption patterns among ratepayers differ wildly, with some using massive amounts of electricity nearly 24x7, and others using less strategically during certain seasons or times of the day. The unsubstantiated conclusion that all ratepayers obtain the same climate benefit from NEB approaches absurdity. Given that nearly all generators participating in NEB are solar-powered, providing only instantaneous power to ratepayers consuming electricity during the day, it is undeniable that ratepayers whose consumption disproportionately occurs during night or winter experience different NEB impacts. Perhaps worst, the effect of the PUC's unlawful allocation would be to weaken whatever price signals exist for ratepayers, leading to irrational and potentially destructive decisions with respect to cost and emissions.

D. The Preemption of Maine's Net Energy Billing Rates is Properly Before the Court; Justice Requires a Decision.

The PUC and OPA contend IECG's preemption argument is not properly before the Court because the issue was not litigated at the PUC. However, the interests of justice will be most efficiently served by the Court considering the fully ripe preemption issue. In this regard, IECG notes OPA's acknowledgment of the likelihood that NEB is preempted. OPA Br. 6-10.

IECG urges the Court to consider the unique circumstances of the legislative imposition of NEB. The Legislature left no discretion as to structure, roles of

implementing utilities, rates to be paid or ability to limit the number of NEB projects or otherwise mitigate the total cost to ratepayers.

The PUC's captive role regarding NEB is amplified by the PUC's preemption policy: "[U]ntil a court of competent jurisdiction holds that this Commission is preempted from deciding whether a transmission project satisfies the requirements of [§ 3132], the Commission will, per our statutory duty, follow the directives of the Maine Legislature." *Me. Pub. Utils. Comm'n*, Investigation into Maine Electric Utilities Transmission Planning Standards and Criteria, No. 2011-00494, Order (Me. P.U.C. Feb. 22, 2013). Thus, there was small probability that the PUC would give a preemption claim more rigorous analysis than it gave in its glancing[3] analysis of *Hughes v. Talen Energy Marketing, LLC*. *See* PUC Br. 24, 27 (citing 578 U.S. 150, 166 (2016)).

The consequent harm to Maine ratepayers is enormous. The ratepayer "need" here is clear; huge NEB cost increases now arrive annually.[4] The PUC cannot act;

[3] The PUC's analysis is glancing at best because the Supreme Court's permissible state encouragement of renewables conspicuously did not, as the PUC implies, include the legislative setting of above-market rates tied to wholesale market rates to determine amounts to be recovered from ratepayers, as Maine has done. That rate is prohibited as "tethered" to the federal wholesale market rate.

[4] Making the Commission's "interpretation" even less reasonable are the real-world impacts of NEB. The OPA on March 15, 2024, filed with the PUC a report by London Economics International, LLC that estimates annual 2024 NEB costs to Maine ratepayers to be over $330 million. *Me. Pub. Utilities Comm'n*, Public Utilities Commission Amendments to Net Energy Billing Rule Ch. 313, No. 2023-00284, OPA Comments in Response to Amended notice of Rulemaking Attachment (Me. P.U.C. Mar. 15, 2024). For context, CMP reported to the PUC that its total T&D utility revenues were $349 million in 2022, with Versant similarly reporting $124 million in revenues in 2023. See Versant Power Annual Report Utility Financial, Tracking No. ARUF-2024-00164; CMP Annual Report Utility Financial, Tracking No. ARUF-2023-00251

the Legislature has repeatedly refused to act except on the fringes of harm. That leaves this Court. The Court could act. *See Chretien vs. Chretien*, 2017 ME 192, 170 A.3d 260.

The Court's authority is particularly powerful in matters appealed from the PUC. Uniquely, nonfinal decisions of the PUC may be appealed to the Court as "additional court review." 35-A M.R.S. § 1320(5). Pursuant to § 1320(8), the Court may direct the PUC to complete the record, consider any change to its decision, and report the case to the Court. This mechanism is entirely appropriate where a substantial legal issue exists, the harm is great and cannot be reversed, and the legal issue inevitably will return to this Court once more. *Parker v. Dept. of Inland Fisheries and Wildlife*, 2024 Me. 22, ¶ 11, __ A.3d __.

III. CONCLUSION

IECG continues in its request that the Court find the Commission's Order regarding allocation of NEB- costs to class based on kWh to be unlawful, as lacking in legal and reasonable basis, unsupported by substantial evidence and contrary to preemptive federal law, declare the Order to be vacated, and remand to the Commission with instructions to immediately restore the allocation to class previously in place prior to the April 21, 2023 Order and to timely determine and implement a new allocation which is just and reasonable and consistent with the decision of this Court.

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CERTIFICATE OF SERVICE

I, Anthony W. Buxton, hereby certify that on this 3rd day of April, 2024, caused two (2) copies of the foregoing Brief of Appellant to be served on counsel for Appellee and the other Appellees by first-class mail, postage prepaid upon, and provided a courtesy copy by electronic mail to, the following:

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