STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Petition of Washington Electric Cooperative, Inc. ("WEC"), for approval of Rate Design Changes and a Change in Rate Schedules Pursuant to 30 V.S.A. § 225 and 226 effective June 17, 2019	)))))	Case No. 19-1270-TF

WASHINGTON ELECTRIC COOPERATIVE, INC.'S REPLY BRIEF

The Department's Initial Brief does not assert that WEC's proposed rate design is unjust or unreasonable or fails to meet any other applicable standard. Rather, the Department makes a policy argument. But its policy argument is premised on retroactive application of what does not exist: there is no policy that contradicts or conflicts with WEC's proposed rate design. The Department's effort to re-label its litigation position as a policy cannot substitute for the Department's failure to present evidence and argument that WEC's proposed rate design is unjust or unreasonable.

The Department's central argument is that:

> [W]here a rate design conflicts with <u>state policy</u> or is significantly out of sync with the utility's underlying cost-of-service, then rate stability should not be relied upon as justification to maintain that rate design. In other words, a poorly designed rate structure should not be maintained solely for the sake of rate stability. The Department's position is that rate designs that include inclining block rates contradict <u>state energy policy</u> . . . ."

Department's Initial Brief ("DIB") at 5 (emphases added).[1]

The "state energy policy" the Department relies on was not generated pursuant to 30 V.S.A. §§ 202a, 202b & 218(b). It is not written, there are no documents leading to its development and adoption, and it was not formulated until after WEC filed its Petition. Confirming the absence of such a policy, the Department did not provide any documents in response to WEC's discovery request asking it to "[p]lease produce all communications, <u>policies</u>, studies, data, memoranda, notes, information, and documents, including draft documents, related to the Department's decision to advocate for elimination of WEC's proposed inclining block rate." Exhibit WEC-10-PR-10 at p. 6 (response 5) (emphasis added). It made a general objection that producing the policy it now relies on, and the basis for that policy, would be unduly broad and burdensome. Making no mention of any policy, it then responded that:

> The Department relied upon all testimony, exhibits, and documents produced by WEC over the course of this proceeding. The Department also relied upon all documents specifically referenced in the Department's direct testimony. The Department further relied upon various documents which have been produced in response to specific requests throughout these interrogatories.

<u>Id;</u> see also <u>id</u>. at p. 5 (response 4 citing the 2016 CEP), Tr. at 97, lines 21-25 and 98, lines 1-5. When asked at hearing whether the Department has a written policy

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[1] The Department also acknowledges that rate stability is important. DIB at 5. Rate stability is at issue here only because of the impacts of the Department's overly complex recommendation, including a 60% increase in rate for low-use customers and a delay in the needed revenue from the customer charge, and rate increases that could result from other aspects of the Department's recommendation.

about eliminating inclining block rates, the Department's witness said "no." Tr. at 96, lines 15-17 (Potter). Likewise, when asked if he produced emails or memos on the development of this policy, Mr. Potter said "no." Id. at lines 22-25.

Mr. Potter explained the failure to produce any policy, or any substantial evidence behind it, by stating that "this is a Department position that we intend to take *in the future* when the opportunity such as these present themselves." Id. at 96, line 25 and 97, lines 1-2 (emphasis added). This future policy was formulated in reaction to WEC's Petition. Id. And when asked on redirect, Mr. Potter testified that this future policy was not vetted beyond the Department personnel responsible for its present litigation position. Id. at 97-98, 133-134; 30 V.S.A. § 202b(b) (establishing the public process for developing State energy policy).

The Department is attempting to convert its litigation position into authoritative "state energy policy." Such policy is not created behind closed doors in preparation for a hearing. See 30 V.S.A. § 202b. And, assuming the Department's litigation position is a policy, it cannot be retroactively applied to WEC's petition. SEC v. Chenery Corp., 332 U.S. 194, 202 (1947); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765-66 (1969). Further, the Department should not be allowed to now rely on what it failed to produce in discovery. See V.R.C.P. 37(b)(2)(B) (party failing to produce materials may be subject to order prohibiting that party from reliance on such materials).

Equally important, there is no record support for the Department's argument that WEC's proposed rate design "conflicts with" or "contradicts" state policy promoting beneficial electrification. To the contrary, Mr. Potter conceded that WEC's proposed rate design is designed to promote beneficial electrification and agreed that WEC is moving in the right direction. Tr. at 95-96, lines 15-25 and 1-14; Potter pf at 3, lines 11-15. The Department simply believes its proposal "will send better price signals for strategic electrification." DIB at 2. The dispute here is limited only to the increment of how far WEC should go. Tr. at 95-96, lines 15-25 and 1-14; Potter pf at 3, lines 11-15.

Likewise, there is no legal support for the Department's *post-hoc* attempt to recast its litigation position as authoritative and generally-applicable state energy policy deeming that "rate designs that include inclining block rates contradict state energy policy." DIB at 5. As explained on pp. 20-21 of WEC's initial brief, this "policy" is flatly contrary to 30 V.S.A. § 218(b).

Further, retroactive application of the Department's new-found policy cannot substitute for evidence and argument that WEC's proposed rate design is somehow unjust or unreasonable. The Department makes the generic and theorical argument that inclining block rates pose a barrier against investment in electric transportation, heating, and the replacement of fossil-fuel fired appliances, and create an incentive to fuel-switch. DIB at 4. But the Department presented no evidence, analysis or argument specific to WEC's proposed rate design.

On the other hand, WEC presented evidence that only 3% of WEC's members use 100kWh/month or less, 97% will benefit from the lower tail block rate, and 58% will benefit from lower overall rates. Exhibit WEC-6-PR-6 (histogram). WEC's extensive membership outreach also demonstrated that the proposed design will promote displacement of fossil fuels with renewable electricity. Richards rebuttal pf at 5-6. As a practical matter, it is difficult to imagine that WEC's significantly narrowed initial block could encourage any fuel switching. Actual consumer outreach demonstrates that it will not. Id. Indeed, Mr. Potter acknowledged that WEC's proposed design can send a different price signal than that of an inclining block rate designed to promote conservation. Tr. at 113-114, lines 10-25 and 1-7.

The Department tries to ground its litigation position in actual policies that promote renewable energy. DIB at 4. As the Department conceded at hearing, none of these actual policies recommend either the elimination of inclining block rate structures or asking the Legislature to amend State energy policy set forth in 30 V.S.A. § 218(b).[2] Tr. at 108, line 21-22; 115, lines 11-21, Exhibits WEC-X-15 & WEC-X-17; 30 V.S.A. § 218(b).

The Department also asserts that "'utilities should be encouraged to be innovative when it comes to seeking solutions to climate change.'" DIB at 3 quoting Tariff filing of Green Mountain Power Corp., Case No. 18-0974-TF, Order of 12/21/18 at 18. WEC appreciates efforts to assure further, balanced innovation. However, the Department is holding WEC not only to an inappropriate "policy," but to a higher standard. WEC's electricity is 100% from renewable sources. The same

[2] The Department also makes the out-of-context statement that: "As the Department's witness noted under cross-examination, the CEP establishes that 'customers should always retain the right to choose a flat rate.'" DIB at 5, quoting Transcript at 108 (Potter). The CEP allows customers to opt for a flat rate in lieu of a smart rate. Exhibit-X-17 at 226 (2016 CEP). WEC is exempt from offering smart rates because it does not have the AMI capabilities to implement smart rates. Id.

cannot be said for the great majority of Vermont utilities. WEC is also the only electric utility that provides weatherization incentives as part of its Tier III program, and other innovative measures such as peak load controls. To be clear, WEC's purpose here is to promote greater use of its 100% renewable electricity while continuing to promote efficiency. WEC is already ahead of the curve and fully intends to continue its pursuit of innovation that best serves its members.

In conclusion, the Department's policy argument is not tied to an applicable legal standard. Even if applicable, its policy argument lacks merit. Whether to abolish inclining block rates as inconsistent with state energy policy is a decision to be made by the Legislature – not the Department. 30 V.S.A. §§ 202a & 218(b). Were it up to the Department, this policy would have to be transparently developed with stakeholder input and applied prospectively. See 30 V.S.A. § 202b(b)-(e). It cannot be launched by surprise and applied to an already pending Petition. WEC respectfully requests that the Commission approve its proposed rate design.

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WASHINGTON ELECTRIC
COOPERATIVE, INC.

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