STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-0203-INV

Investigation into the establishment of reduced rates for low-income residential ratepayers of Vermont electric utilities

VERMONT DEPARTMENT OF PUBLIC SERVICE COMMENTS IN REPONSE TO THE VERMONT PUBLIC UTILITY COMMISSION'S *ORDER CLARIFYING THE SCOPE OF THIS PROCEEDING AND REQUESTING INFORMATION*

On April 26, 2022, the Vermont Public Utility Commission ("Commission") issued its *Order Clarifying the Scope of this Proceeding and Requesting Information* ("Order Clarifying Scope") in the above-referenced proceeding. In the Order Clarifying Scope, the Commission (1) reviewed its authority under 30 V.S.A. § 218(e) to implement a statewide low-income proceeding, including a statewide funding mechanism; (2) requested information from Vermont's electric utilities; and (3) welcomed comments from the other non-utility participants in this case.

During the course of this proceeding, the Commission asked participants to opine on whether the Commission holds the authority to "create a statewide funding mechanism to extend bill assistance to all low-income customers" in the State of Vermont.[1] While a number of participants have expressed that a statewide funding mechanism would be the preferred method of providing low-income rate relief, the Vermont Department of Public Service ("Department"), Green Mountain Power Corporation ("GMP"), and other utilities agreed that 30 V.S.A § 218(e) does not provide the Commission with the necessary statutory authority for implementation of a low-income program with a statewide funding mechanism.[2] Participants cited the plain language

[1] *Investigation into the establishment of reduced rates for low-income residential ratepayers of Vermont electric utilities*, Case No. 20-0203-INV, Order of 9/28/21 at 3.
[2] *See* Case No. 20-0203-INV, Department Comments of 1/7/22 at 2; GMP Comments of 1/7/22 at 2; VEC Comments of 1/7/22 at 1.

of Section 218(e) as well as the Commission's Order in Docket 7535 ("Docket 7535 Order") wherein the Commission "analyzed 30 V.S.A. § 218(e) and concluded that 'Section 218(e) contains no language authorizing the [Commission] to draw upon the State's general fund or to otherwise order the electric utilities to pool their revenues for purposes of funding a "statewide" low-income rate program.'"[3] In its Order Clarifying Scope, the Commission appeared to reverse the ruling in the Docket 7535 Order and found it does, in fact, have jurisdiction to "order the implementation of a single, unified program" to assist low-income customers.[4]

The Department respectfully submits the following comments in response to the Commission's Order Clarifying Scope.

A. In Its Order Clarifying Scope, the Commission Misinterprets the Plain Language of 30 V.S.A. § 218(e).

The Department maintains, as does the Commission, that access to electricity is a vital tool necessary for a safe and healthy living environment.[5] As provided in the Department's January 7, 2022 comments and reiterated herein, a "statewide funding mechanism would theoretically be the preferred option for assisting low-income customers with their utility bills."[6] Unfortunately, a statewide funding mechanism for reduced rates is currently not an option pursuant to the plain language of 30 V.S.A. § 218(e).

In the Order Clarifying Scope, the Commission seemingly overturned an eleven-year-old precedent and found it has jurisdiction to create a single, statewide program to assist low-income

[3] Case No. 20-0203-INV, Order of 4/26/22 at 3-4; *see also Investigation into: (1) petition of AARP, for the establishment of reduced rates for low-income consumers of Green Mountain Power Corporation and Central Vermont Public Service Corporation; and (2) as expanded to possibly include general applicability to all Vermont retail electric utilities*, Docket 7535, Final Order of 7/22/2011 at 84.
[4] Case No. 20-0203-INV, Order of 4/26/22 at 4-5.
[5] Docket 7535, Final Order of 7/22/11 at 4.
[6] Case No. 20-0203-INV, Department Comments of 1/7/22 at 1.

Vermonters.[7] In doing so, the Commission relied upon the phrase "on its own motion" within Section 218(e), the language for which is as follows:

> Notwithstanding any other provisions of this section, the Commission, *on its own motion* or upon petition of any person, may issue an order approving a rate schedule, tariff, agreement, contract, or settlement that provides reduced rates for low-income electric utility consumers better to assure affordability. As used in this subsection, "low-income electric utility consumer" means a customer who has a household income at or below 185 percent of the current federal poverty level. When considering whether to approve a rate schedule, tariff, agreement, contract, or settlement for low-income electric utility consumers, the Commission shall take into account the potential impact on, and cost-shifting to, other utility customers.[8]

Specifically, the Commission stated that the Vermont Legislature "created two distinct pathways" allowing for its issuance of an order approving low-income electricity rates: (1) "on [the Commission's] own motion"; or (2) "upon petition of any person."[9] The Commission reasoned that "if a petition were a prerequisite to Commission action, then the phrase 'on its own motion' would be meaningless."[10] The Department respectfully submits that this reasoning is erroneous. First, the crux of the matter lies not with the phrase "on its own motion," but with the limited list of matters the Commission may approve within Section 218(e).[11] This finite list includes rate schedules and tariffs—which are, by definition, utility and utility-territory specific—and agreements, contracts, or settlements—all of which are, by definition, derived from the voluntary consent of the parties to such legal instruments.[12] Thus, the Commission lacks authority on its own motion to (1) order the institution of a funding mechanism for low-income rates that reaches beyond the territory of any one utility; or (2) order any utility to consent to any agreement,

[7] Case No. 20-0203-INV, Order of 4/26/22 at 4-5.
[8] 30 V.S.A. § 218(e) (emphasis added).
[9] Case No. 20-0203-INV, Order of 4/26/22 at 5; 30 V.S.A. § 218(e).
[10] Case No. 20-0203-INV, Order of 4/26/22 at 5.
[11] *See* 30 V.S.A. § 218(e).
[12] *See id*.

contract, or settlement directed at instituting or funding low-income rates beyond its own service territory. Moreover, the finite list in 30 V.S.A. § 218(e) does not include the phrase "statewide funding mechanism" or similar language—nor does it suggest broad discretion to add to said list. Accordingly, the Commission lacks the authority to implement such a program, and any funding mechanism for a low-income program(s) would need to occur on a utility-by-utility basis.[13]

Second, the record in Docket 7535 makes clear that the Commission's previous decision to acknowledge and respect the very limited jurisdiction that the Legislature conferred on the Commission in Section 218(e) is not a decision that reduced the phrase "on its own motion" to mere surplusage. In Docket 7535, AARP petitioned the Commission to order two utilities, CVPS and GMP, to implement a low-income rate program that AARP had designed.[14] The scope of the proceeding was expanded to include consideration of all Vermont electric utilities, but after discovery and hearings, the Commission declined to direct all utilities to implement the program design that served as the basis of AARP's petition.[15] Rather, *on its own motion*, and based on a robust evidentiary record, the Commission elected to order GMP and CVPS to either (1) develop low-income rate designs using the principles of AARP's proposal with additional adjustments; or (2) submit alternative program designs of their own making, within certain requirements.[16] The Commission subsequently approved the alternative program design submitted by GMP and CVPS.[17] This precedent amply demonstrates that there is a reasonable and meaningful construction of the statutory phrase "on its own motion" that countermands the Commission's basis for a new

[13] *See* Trybulski v. Bellows Falls Hydro-Elec. Corp., 112 Vt. 1 (1941) (noting that the Commission "has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted").
[14] Docket 7535, Final Order of 7/22/11 at 4.
[15] *See id*. at 7, 79, 82.
[16] *See* Docket 7535, Final Order of 9/6/12 at 9.
[17] *Id*. at 20–22.

conclusion eleven years later. To find that, in fact, the requisite jurisdiction does exist to order a statewide program, funded by ratepayer dollars collected by the utilities in their respective service territories, and then pooled for redistribution across the state, would seemingly render meaningless the rest of the statutory language. Likewise, such an interpretation would seem to disregard the boundaries of utility service territories and the fact that each utility is required by law to maintain just and reasonable rates that are based on the utility's specifically stated and documented cost-of-service.

Hence, while staying within the confines of Section 218(e), the Commission may approve rate schedules, tariffs, agreements, contracts, or settlements on a utility-by-utility basis either by motion of any person or on its own motion.[18] What the Commission may approve "on its own motion" is restricted by the aforementioned limited list of items embedded in Section 218(e).[19] If the Commission, after its investigation in this proceeding, wishes to pursue a statewide program with an accompanying statewide funding mechanism, the Commission would need to seek specific authorization in the form of a legislative amendment to Section 218(e).[20]

B. The Legislative History of 30 V.S.A. § 218(e) Supports a Utility-by-Utility Funding Approach, as Opposed to A Statewide Funding Approach.

The legislative history of 30 V.S.A. § 218(e) further supports the notion that the Commission may not implement a statewide low-income funding mechanism for purposes of providing reduced rates to Vermonters. In response to Act 208 in 2006, the Commission engaged

[18] 30 V.S.A. § 218(e).
[19] The exclusive list under Section 218(e) stands in contrast to statutes where an enumerated list is followed by a more general "catch-all" term or where the list is non-exclusive. *See, e.g.*, Vermont Baptist Convention v. Burlington Zoning Bd., 159 Vt. 28, 30, (1992) ("The zoning ordinance defines "semi-public" use as including "churches, membership clubs and other non-profit operations.").
[20] There may be another avenue, as others have noted, in the form of an "agreement, contract, or settlement" among the relevant parties which establishes the necessary framework. *See* 30 V.S.A. § 218(e).

in a significant stakeholder process to "design a proposed electricity affordability program in the form of draft legislation."[21] The outcome of this stakeholder process included the "Electric Affordability Program: Report and Draft Legislation" ("Report"), which the Commission submitted to the Vermont Legislature in January of 2007. The Report outlined a statewide electricity assistance program as well as various funding options.[22]

The Senate Committee on Economic Development, Housing, and General Affairs then introduced Bill S.189, "An Act Relating to Affordable Electric Rates for Retired and Lower Income Vermonters," which largely mirrored the Commission's draft legislation found in the Report.[23] Bill S.189 was explicit in its purpose "to create a statewide electric bill payment assistance program," and it eventually passed out of committee and shifted to Senate Finance where further hearings were held.[24]

However, Bill S.189 never became law. Instead, "Senate leadership decided that [the] need [to assist] low-income electric customers could be met with a utility-by-utility program rather than a statewide program. They based this decision on knowledge that most states have utility based rate-payer funded programs that help low-income customers solely in the utility service area."[25] At the same time, the Senate Committees on Finance and Natural Resources were considering a House Bill, H.520, related to energy conservation and generation, with H.520 capturing Section

[21] 30 V.S.A. § 202c(a); *see also* VT. PUB. SERV. BD., ELECTRIC AFFORDABILITY PROGRAM: REPORT AND DRAFT LEGISLATION (2007).
[22] VT. PUB. SERV. BD., ELECTRIC AFFORDABILITY PROGRAM: REPORT AND DRAFT LEGISLATION (2007).
[23] *See* S.189, 2007 Gen. Assemb., 2007-2008 Sess. (Vt. 2007), http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/bills/intro/S-189.HTM&Session=2008.
[24] *Id.*; *see* Docket 7535, Philene Taormina, AARP ("Taormina") pf. at 4.
[25] *See* Docket 7535, Taormina pf. at 5.

218(e)'s language.[26] While the Legislature vetoed H.520 in June of 2007, it quickly resurrected Section 218(e)'s language and placed it in a similar Bill, S.209, which became law in 2008.[27]

In sum, the 2007 Vermont Legislature was presented with a comprehensive, standalone bill to enact a statewide low-income program (S.189), but instead of pursuing that approach, chose to insert Section 218(e)—a more limited enabling provision—into a larger energy bill that was under consideration at the time (H.520). While the larger bill did not pass, the Legislature ensured the language of Section 218(e) became law (through S.209).

Given the above, it is clear the legislative intent for Section 218(e) was to prompt a low-income electricity assistance program(s) with a utility-by-utility funding mechanism. If the Vermont Legislature meant for the Commission to pursue a statewide funding mechanism for low-income rates, the Vermont Legislature would have moved forward with the Commission's proposal in the Report and S.189—which it did not.

C. The Energy Efficiency Charge is Distinguishable from a Statewide Low-Income Funding Mechanism.

The background and important policy objectives underlying this docket invite comparisons to the successful statewide efficiency programs administered by Vermont's Energy Efficiency Utilities ("EEUs") and funded through pooled resources. Indeed, as the Commission has noted in this proceeding, "[distribution] utilities have been using a legislatively authorized on-bill charge

[26] *See Committee Meetings by Bill: H.0520*, Vt. Gen. Assembly, http://www.leg.state.vt.us/database/leghist/LegHistBillResults.cfm?Session=2008&Bill=H.520&ReportType=C&SortOrder=D (last visited June 3, 2022); H.520, 2007 Gen. Assemb., 2007-2008 Sess. (Vt. 2007), http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/bills/passed/H-520.HTM&Session=2008.
[27] *See* S.209, 2008 Gen. Assemb., 2007-2008 Sess. (Vt. 2008), http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/acts/ACT092.HTM&Session=2008; Docket 7535, Taormina pf. at 5.

and pooling mechanism for many years for the Energy Efficiency Charge."[28] The essential goal of statewide low-income assistance can be summed up in much the same way as that of statewide efficiency programs: to harness greater resources for the benefit of ratepayers in all service territories. However, where there is a multifaceted statutory scheme in place which broadly enables the implementation of efficiency programs, the same cannot be said for low-income assistance. With Section 218(e) as the sole reference point, it is the Department's view that the Commission's authority to create a statewide funding mechanism for low-income assistance is on very different footing from its authority to establish the Energy Efficiency Charge. This conclusion can be reached by looking not only at the current enabling statutes for EEUs and the Energy Efficiency Charge, but also at the provisions in place when the Commission first examined its jurisdiction to approve and fund statewide efficiency programs.

Under current law, 30 V.S.A. §§ 209(d)(2) and (3) explicitly authorize the Commission to (1) appoint EEUs to deliver programs across the various Vermont electric utility service territories; and (2) establish an energy efficiency charge on customer bills to be deposited into a centralized Electric Efficiency Fund.[29] This clear delegation by the Legislature stands in stark contrast to the language of Section 218(e), which—as previously explained above—grants only the authority to approve "a rate schedule, tariff, agreement, contract, or settlement that provides reduced rates for low-income electric utility consumers." Nonetheless, it is important to note that explicit authority under Section 209(d) did not exist when the Commission first found it had jurisdiction to order the funding of statewide efficiency programs and EEUs.

---

[28] *Investigation into the establishment of reduced rates for low-income residential ratepayers of Vermont electric utilities*, Case No. 20-0203-INV, Order of 9/28/21 at 2.

[29] *See* 30 V.S.A. §§ 209(d)(2), (3) ("In addition to its existing authority, the Commission may establish . . . a volumetric charge to customers for the support of energy efficiency programs . . . .").

In 1997, the Commission opened a proceeding to investigate an energy efficiency plan proposed by the Department which contemplated programs administered by a statewide EEU.[30] In January of 1999, the Commission issued its Final Order in Phase I of that proceeding, which found that Section 209(d) (as it existed then) provided "the necessary statutory authority to approve the energy efficiency programs proposed by the Department; to order their implementation by a [Commission]-approved energy efficiency utility; and to order Vermont's distribution utilities to fund the programs."[31] At that time, Section 209(d) read as follows:

> The public service department and all gas and electric utility companies are encouraged to propose, develop, solicit and monitor energy efficiency and conservation programs and measures. Such programs and measures may be approved by the [Commission] if it determines they will be beneficial to the ratepayers of the companies after such notice and hearings as the board may require by order or by rule.[32]

In reaching its conclusion, the Commission noted that the plain language of Section 209(d) "encourage[d] [the Department] to propose programs and measures that [would] be beneficial to utility ratepayers and authorize[d] the [Commission] to approve them after notice and hearing."[33] The Commission also found that the authority to approve efficiency programs necessarily included the authority to provide for their funding. However, the Commission's analysis hinged on a comparison with another provision of Title 30, Section 218(b), which was enacted by the Legislature at the same time.[34] Section 218(b) stated:

> The department of public service shall propose, and the [Commission] through the establishment of rates of return, rates, tolls, charges or schedules shall encourage the implementation by electric and gas utilities of energy-efficiency and load

[30] *See Investigation into the Department of Public Service's proposed energy efficiency plan*, Docket 5980, Order of 1/19/99 at 5, 7.
[31] Docket 5980, Order of 1/19/99 at 48.
[32] Docket 5980, Order of 10/1/97 at 2.
[33] Docket 5980, Order of 1/19/99 at 48.
[34] *See id*. at 48-49.

> management measures which will be cost-effective for the utilities and their customers on a life cycle cost basis.[35]

While Section 209(d) was silent on the question of implementation, the Commission observed that Section 218(b) specifically contemplated efficiency measures to be implemented by electric utilities.[36] The position of many utilities in the proceeding was that Section 218(b), together with utility planning requirements under Section 218c, limited the Commission's authority to approving programs for implementation only by utilities in their individual service territories.

The Commission disagreed, finding that both Section 209(d) and Section 218(b) provided for proposals from the Department. The Commission reasoned that "[i]t would be a duplication of effort for the Legislature to enact two statutes, at the same time, and have *both* statutes allow the [Department] to propose programs and yet *require* . . . that implementation under both statutes must be done only by distribution utilities."[37] Under principles of statutory interpretation, the Commission declined to adopt a reading that would render Section 209(d) superfluous. Therefore, it concluded that "the Legislature has authorized two, compatible approaches for the [Commission] to approve energy efficiency programs," with Section 218(b) allowing for programs designed to be implemented by utilities "through traditional ratemaking techniques" and Section 209(d) allowing for programs that "are beneficial to ratepayers, whether or not implemented by individual distribution utilities."[38] Shortly after the Commission's decision, the Legislature amended Section 209(d) to include the additional authority now found under Sections 209(d)(2) and (3).

In the case of energy efficiency, whether one looks at the statutory scheme as it existed in January of 1999 or as it exists now, the Department submits that the Legislature has provided

[35] Docket 5980, Order of 10/01/97 at 3.
[36] Docket 5980, Order of 1/19/99 at 48.
[37] *See id*. at 48 (emphasis in original).
[38] *Id.* at 49.

several different broad pathways to implement beneficial programs.[39] Today there is explicit authority to establish a statewide efficiency funding mechanism, and in 1999 the same authority was found in Section 209(d)'s general language—informed by the surrounding context of a robust statutory framework. By contrast, in the case of low-income assistance, the Legislature has specifically authorized the Commission to approve "rate schedule[s], tariff[s], agreement[s], contract[s], or settlement[s] that provide[] reduced rates for low-income electric utility consumers." This finite list of options under Section 218(e) does not suggest the same discretion to create a new statewide funding mechanism—particularly in the absence of additional statutory guidance akin to that found in the efficiency context.

D. Conclusion

Reduced rates for low-income Vermonters are imperative for health and safety. Though the Commission, in its Order Clarifying Scope, found it has the authority to "order the implementation of a single, unified [low-income rate] program," it has not yet affirmatively done so and is still investigating all potential avenues toward such. Should the Commission, after careful consideration of all options, decide to pursue a low-income program with an accompanying statewide funding mechanism, the Department respectfully submits that the Commission must first seek authority from the Legislature as—for the reasons set forth in the Department's above comments—30 V.S.A. § 218(e) does not currently delegate this authority to the Commission.

Thank you for the opportunity to comment on this matter. Please contact the undersigned counsel with any questions.

---

[39] *See id.* at 52 ("§§ 209(d), 218(b), and 218c are best interpreted as providing concurrent, alternative approaches for the acquisition of cost-effective energy efficiency resources. . . ."); *see also* 30 V.S.A. §§ 209(d)(1)-(3), 218(b), and 218c.

Dated at Montpelier, Vermont this 10th day of June, 2022.

VERMONT DEPARTMENT OF PUBLIC SERVICE

By: Erin C Brennan

Erin C. Brennan, Esq.
112 State Street
Montpelier, VT 05620
(802) 522-6301
erin.brennan@vermont.gov