

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

ELECTRIC AND GAS UTILITIES

2021-2023 Triennial Energy Efficiency Plan

Docket No. DE 20-092

**LISTEN COMMUNITY SERVICES' MOTION FOR
REHEARING, CLARIFICATION AND STAY OF ORDER NO. 26,553**

Pursuant to New Hampshire Code of Administrative Rules Puc 203.07, RSA 541:3, and RSA 541:5, LISTEN Community Services respectfully requests rehearing and clarification of Order No. 26,553 (Nov. 12, 2021) (the “Order”) issued by the New Hampshire Public Utilities Commission (“PUC”) in Docket No. DE 20-092. LISTEN also moves for a temporary stay of Order No. 26,553 and respectfully requests that the PUC reinstate the terms of Order No. 26,440 pending resolution of this matter. Through this motion, LISTEN joins the motion for rehearing, clarification and stay of Order No. 26,553 filed by the Settling Parties on December 10, 2021, and adopts the arguments made, the issues raised, and the relief requested by the Settling Parties for purposes of this motion.

The PUC should grant a temporary stay to avoid irreparable harm to low-income ratepayers that will result from the Order. New Home Energy Assistance (HEA) projects have been suspended indefinitely.¹ One of LISTEN’s clients recently called its staff because she is concerned that she will not be able to afford her heating bills during the winter now that her planned energy efficiency measures through the HEA program have been indefinitely postponed. Given the rising energy costs forecasted for this winter and the drastic impact Order No. 26,553

¹ Hoplamazian, Mara, *PUC decision creates uncertainty for low-income energy assistance programs*, NHPR (Nov. 23, 2021, 4:52 PM), available at <https://www.nhpr.org/nh-news/2021-11-23/puc-decision-creates-uncertainty-for-low-income-energy-assistance-programs> (accessed Dec. 9, 2021).

has had on the HEA program, the PUC should grant a stay to resolve the legal and practical issues raised by the Settling Parties and LISTEN. In support of this motion, LISTEN states as follows:

I. LISTEN Has Standing To File A Motion For Rehearing Pursuant To Puc 203.07 And RSA 541:3.

The New Hampshire Supreme Court has held that ratepayers and representatives of ratepayers have standing to challenge a PUC decision even if they were not a party to the administrative proceeding as long as they are directly affected by the decision. *Appeal of Richards*, 134 N.H. 148, 156-57 (1991) (holding that ratepayers are directly affected by rate decisions). LISTEN is a ratepayer and has participated in the statewide energy efficiency program. LISTEN greatly benefited from its participation in the program and hoped to take advantage of the program again in the future. Through its Housing Helpers and Heating Helpers programs, LISTEN provides critical support to individuals and families in the Upper Valley who are struggling to cover their housing and utility costs, especially the elderly and families with young children. Most of LISTEN's clients apply for energy efficiency services through their local Community Action Agency when they apply for Fuel Assistance benefits.

LISTEN and the low-income ratepayers that it serves have been directly affected by Order No. 26,553 because the Order has resulted in the suspension of new energy efficiency projects. The Order also reduces their opportunity to participate in the statewide energy efficiency programs because it drastically reduces the budget and seeks to fundamentally alter the structure of the Energy Efficiency Resource Standard (EERS). On information and belief, there is still a significant waitlist for the HEA Program that predates the suspension of the Program due to Order No. 26,553. At least one of LISTEN's clients was scheduled to receive energy efficiency measures through the HEA Program in early 2022, but her project has been

suspended indefinitely. She contacted LISTEN because she is concerned that she will not be able to afford her heating costs this winter as a result.

While LISTEN meets the requirements of Puc 203.07 and RSA 541:3 to file this motion as a ratepayer and a representative of ratepayers who have been negatively impacted by the Order, LISTEN also will be filing a petition to intervene as a full party in the docket.

II. LISTEN Adopts And Reiterates The Positions In The Settling Parties' Motion For Rehearing, Clarification And Stay Filed on December 10, 2021.

LISTEN adopts and reiterates by reference the legal arguments made, the issues raised, and the relief requested by the Settling Parties in their motion. In the interest of brevity, LISTEN does not set forth those arguments and issues herein. LISTEN also submits its motion to raise additional reasons why a motion for rehearing, clarification and stay should be granted based on the harmful impact the Order will have on low-income ratepayers.

III. The PUC Unlawfully Reversed Years Of Precedent And Settled Issues In Violation Of Due Process, RSA 365:28, and the Doctrine of *Stare Decisis*.

The PUC process resulting in the issuance of the Order was fundamentally unfair, in violation of the procedural due process and statutory rights of LISTEN and its clients under Articles 2 and 15 of the New Hampshire Constitution and New Hampshire RSA 365:28. LISTEN's clients include individuals who were found eligible for and approved for the HEA Program, and who are now left without such assistance as they face the coming winter.

In this case, the PUC overturned years of precedent and set aside several prior orders without proper notice and an opportunity for interested parties to be heard on issues resolved in prior proceedings. For the PUC to modify an existing order, "the modification must satisfy the requirements of due process and be legally correct." *Appeal of Off. of Consumer Advoc.*, 134

N.H. 651, 657–58 (1991) (internal citation omitted). Due process is satisfied only if the PUC modifies an order after notice and a hearing. *Id.*; RSA 365:28.

When the PUC opened Docket No. DE 20-092, it was to review the proposed 2021-2023 Statewide Energy Efficiency Plan and to determine if the Plan is reasonable, cost-effective, and in the public interest. The Order of Notice specifically states that the PUC would review whether the “proposed rates are just and reasonable and *comply with Commission orders.*” The PUC did not provide any notice that the well-established structure of the EERS was at issue, and none of the parties advocated for a return to the framework that existed before the PUC adopted the EERS in Order No. 25,932 (Aug. 2, 2016) (the “Initial EERS Order”).

In was in this context that the parties and stakeholders proceeded. They spent two years developing the 2021-2023 Plan, which was an even more comprehensive process than the development of the 2018-2020 Plan. The public process to develop the 2021-2023 Plan was approved by the Commission.² It was the Commission that instructed stakeholders to develop a Plan consistent with the EERS framework and prior Commission orders. The stakeholders, which included representatives from the C&I and residential sectors, thus reasonably relied on prior EERS orders interpreting the applicable statutes when determining the Plan’s savings goals and program design. “[C]onsistency is a fundamental force in administrative law” and “the law requires an explanation for deviations from past practices.” 2 Admin. L. & Prac. § 5:67 (3d ed.).

In this case, Order No. 26,553 does not adequately explain why the Commission reversed years of precedent and adopted positions that were not advocated by any party. Now, after almost one year into the triennium, the PUC is requiring the parties to create a new plan under an

² See Settlement Agreement dated Dec. 13, 2018, Docket No. DE 17-136, *available at* https://www.puc.nh.gov/Regulatory/Docketbk/2017/17-136/LETTERS-MEMOS-TARIFFS/17-136_2018-12-13_EVERSOURCE_SETTLEMENT_AGREEMENT.PDF (accessed Dec. 9, 2021) and Order No. 26,207 (Dec. 31, 2018) (approving Settlement Agreement and the framework for developing the 2021-2023 Plan).

entirely different paradigm, one that contravenes Commission precedent. Such a significant departure after an undue delay is unlawful, unreasonable, and arbitrary and capricious. Nothing in the law, the underlying facts or conditions have changed to justify the reversal in precedent without just and compelling cause or due process of law.

For example, the Commission rejected the Granite State Test that it approved in Order No. 26,322 (Dec. 30, 2019) even though no party raised concerns about the Test or argued that it should be changed in Docket No. DE 20-092. Like the process for developing the 2021-2023 Plan, the Granite State Test was created pursuant to a Commission order that resulted in twenty-one months of public meetings and concluded with the filing of a comprehensive report and recommendation that was reviewed by the PUC. It is unclear whether or not the Commission also rejected the adoption of non-energy impacts (“NEIs”) when rejecting the Granite State Test. The Commission previously ordered that NEIs should be accounted for in the Total Resource Cost Test when evaluating the cost effectiveness of the HEA Program. Order No. 26,095, Docket No. DE 17-136 (Jan. 2, 2018); Order No. 26,207, Docket No. DE 17-136 (Dec. 31, 2018). This practice continued unchanged with respect to the low-income program when the Commission adopted the Granite State Test. *B/C Working Group Recommendations Regarding New Hampshire Cost-Effectiveness Review and Energy Optimization through Fuel Switching Study*, Docket No. DE 17-136 at 5 (Oct. 31, 2019) approved via Order No. 26,322 (Dec. 30, 2019).

Elimination of the NEIs would have an adverse impact on the HEA Program because the absence of NEIs would reduce the HEA benefit/cost ratios. That change could jeopardize the existence of the HEA Program in light of the Commission’s Order (at pages 47 and 48) that the Utilities identify (and presumably implement) only the EERS programs with the highest energy savings and lowest per unit costs going forward. The Commission should clarify whether NEIs

still apply to the HEA Program as they were calculated in the prior Total Resource Cost Test or whether NEIs were intended to be eliminated from the test in Order No. 26,553.

The Commission also rejected an increase to the cap on HEA projects even though all the parties recommended that the cap be increased. The disagreement among the parties was about the amount of the increase, but no one advocated that the cap should remain at \$8,000. The Commission staff (now staff of the New Hampshire Department of Energy, or “DOE”) testified that the cap should be increased to \$12,000. In Order No. 26,553, the PUC does not cite to any evidence that supports maintaining the cap at \$8,000, and could not, because the only evidence presented was in support of increasing the cap.

The doctrine of stare decisis disfavors such a reversal of precedent from this Commission. The doctrine, which is the idea that a ruling body will stand by yesterday’s decision, “commands great respect in a society governed by the rule of law.” *In the Matter of Blaisdell*, 174 NH 187, 188 (2021) (affirming a 4-part test applicable to overruling precedent). “Thus, when asked to reconsider a holding, the question is not whether we would decide the issue differently de novo, but whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed.” *Id.* (citations omitted). Here, there is no justification provided to overturn prior rulings and orders issued in this forum. The PUC acted unlawfully when it ignored its own precedent, without just and compelling cause, and without affording adversely affected parties with a prior opportunity to receive notice and be heard in this matter. The PUC further acted unlawfully when it failed to articulate a reasoned decision why it did what it did.

Additionally, it is unreasonable, unjust, and unlawful to overturn years of Commission precedent of interpreting the applicable statutes when the legislature has not interfered with the

Commission's interpretation of the statutes. *Cf. Appeal of Pub. Serv. Co. of New Hampshire (New Hampshire Pub. Utilities Comm'n)*, 141 N.H. 13, 22 (1996). While the legislature did amend RSA 374-F:3, VI so that it must approve future increases to the system benefits charge ("SBC"), it specifically exempted the 2021-2023 EERS Plan. Moreover, this amendment suggests that the legislature approves of the fundamental EERS framework since the statute specifically references the Initial EERS Order and requires that the utilities use 20% of the collected SBC funds for the low-income energy efficiency programs. *See* RSA 374-F:3, VI. If the legislature wanted to make further changes to the EERS framework as established by Order No. 25,932, it could have done so. Such a major departure from prior Commission precedent is not only unjust and unreasonable, but it contravenes the very purpose of the statutes that govern the HEA Program. The Order is also contrary to the principles of reliability, stability, and customer expectations regarding the energy efficiency programs and services that are in high demand.

IV. The PUC's Order Eliminates or Drastically Reduces The HEA Program By Requiring That The Utilities Only Pursue Programs With The Highest Energy Efficiency Savings, At The Lowest Per Unit Cost, Contrary to PUC Precedent And Statutory Requirements That The HEA Program Be Protected.

The legislature has declared that "it shall be the energy policy of this state . . . to maximize the use of cost-effective energy efficiency." RSA 378:37. The legislature has also recognized that the benefits of restructuring the electric utility industry should be equitably distributed and that it is important to serve low-income households in New Hampshire. *See* RSA 374-F:3, V, VI. Notably for low-income customers, "[u]tility sponsored energy efficiency programs should target cost-effective opportunities that may otherwise be lost due to market barriers." RSA 374-F:3, X; *see also* DR 96-150, Order No. 23,574 dated Nov. 1, 2000 at 17.

The PUC has long acknowledged the importance of low-income energy efficiency programs as well. *See, e.g.*, DG 02-106, Order No. 24,109 (Dec. 31, 2002) 87 NH PUC 892 at 897-99. For example, the Commission has a well-established policy that provides special protection to the low-income programs by prohibiting the transfer of low-income funds without prior Commission approval. *See, e.g.*, DG 02-106, Order No. 24,109 (Dec. 31, 2002), 87 NH PUC 892 at 899 (“low income program budgets are dedicated and those budgets cannot be siphoned away to other programs”). The PUC has recognized that “well-designed, statewide [low-income] programs could help to alleviate the apparent persistence of ‘undesirable market conditions.’” DR 96-150, Order No. 23,574 (Nov. 1, 2000) at 17. In Docket No. DE 17-136, Roger D. Colton submitted pre-filed direct testimony explaining that the market barriers affecting the low-income programs “persist at the same or increased levels” in 2018 compared to eighteen years ago when the Commission cited the conditions in support of adopting low-income programs. *See* Docket No. DE 17-136, Pre-Filed Direct Testimony of Roger D. Colton (“Colton Testimony”) dated Nov. 2, 2018 at Bates 14-16. Mr. Colton further explained that large waiting lists in the HEA Program and data about low-income households in New Hampshire demonstrated that the need for low-income energy efficiency was high and the demand was great. *See* Colton Testimony dated Nov. 2, 2018 at Bates 12, 17-18, 21-22.

The Commission should grant LISTEN’s motion for rehearing to give the parties an opportunity to provide testimony about the current need, especially considering the devastating economic impact of the COVID-19 pandemic on low-income households. The 2021-2023 Plan as modified by the Settlement Agreement would have served twice as many low-income households compared to the number served in 2018-2020. Testimony of Kate W. Peters, Transcript of hearing held Dec. 16, 2020 at 198-201. Eversource, on behalf of the Settling

Parties, testified that this was especially important because low-income customers have higher energy burdens than non-low-income households, which means they spend a larger percentage of their household income on utility costs.³ Testimony of Kate W. Peters, Transcript of hearing held Dec. 16, 2020 at 198-201. The low-income energy efficiency program has been recognized nationally as an exemplary program⁴ and is critical in the state’s efforts to reduce energy costs for all New Hampshire ratepayers. The resulting savings help families afford other daily necessities like food and medicine. In addition, studies have shown that energy efficiency programs not only promote more affordable utility service in the long run, but also lead to safer and more comfortable homes and to improvements in health outcomes.

The Commission arbitrarily decided to reverse its prior decisions and reduce the HEA budget over time without hearing any testimony about the current demand for the Program and the market barriers unique to low-income ratepayers. This is not only unreasonable and unlawful, but it is contrary to the goals of the EERS and New Hampshire public policy, which direct the utilities to pursue *more* energy efficiency. When the Commission approved the creation of the EERS, it approved an increase in the budget for the HEA Program because “low income customers face greater hurdles to investment in energy efficiency than other customer [sic].” Order No. 25,932 at 64. The Commission found that the increase in the budget was “appropriate in order to comply with legislative directives and to reduce energy consumption for those customers who need it most.” *Id.* Since the Commission issued Order No. 25,932, the legislature amended RSA 374-F:3, VI to further *increase* the HEA budget.

³ Utility customers in New England have the second highest rate of household energy insecurity in the country. See U.S. EIA, *Residential Energy Consumption Survey* (2015), available at <https://www.eia.gov/consumption/residential/> and U.S. EIA, *Residential Energy Consumption Survey* (2015) Table HC11.1: Household energy insecurity, available at <https://www.eia.gov/consumption/residential/data/2015/hc/hc11.1.xlsx>.

⁴ The New Leaders of the pack: ACEEE’s Fourth National Review of Exemplary Energy Efficiency Programs, January 2019, available at <https://www.aceee.org/research-report/u1901> (accessed Dec. 9, 2021).

The increases to the HEA budget were part of a long-term goal, agreed to by parties and stakeholders and approved by the Commission, to achieve “all cost-effective energy efficiency” in New Hampshire through the EERS. *See* Order No. 25,932 at 1, 16, 55. This long-term goal was reiterated in the New Hampshire 10-Year Energy Strategy. NH Office of Strategic Initiatives, *New Hampshire 10-Year Energy Strategy*, April 2018 at 39.

Order No. 26,553 eliminates or drastically reduces the HEA Program even though the Commission has long held that the Program is important and does not have to screen as cost-effective given the nature of the low-income residential sector. *See e.g.*, Order No. 23,574, *In Re Elec. Util. Restructuring*, 85 N.H.P.U.C. 684 (Nov. 1, 2000) (holding that low-income programs and educational programs could still be approved by the Commission even if they do not surpass a 1.0 benefit/cost ratio when discussing the *Report to the New Hampshire Public Utilities Commission on Ratepayer-Funded Energy Efficiency Issues in New Hampshire*, July 6, 1999); Order No. 25,932 (recognizing that low-income customers face “greater hurdles” to investment in energy efficiency and increasing the low-income budget is “appropriate to comply with legislative directives and to reduce energy consumption for those customers who need it most,” citing to RSA 374-F:3).

The Commission’s directive in Order No. 26,553 “to identify the programs which provide the greatest energy efficiency savings at the lowest per unit cost with the lowest overhead and administrative costs for further implementation” will have the greatest negative impact on the most vulnerable population who the Commission previously stated are “those customers who need [energy efficiency] the most.” *See* Order No. 25,932. Application of this directive to the HEA program could effectively eliminate it. This type of directive never applied to the HEA program because of the nature of the low-income sector and the unique market barriers that do

not exist in other residential or C&I programs. Moreover, the Commission issued this directive without any notice that it would be considering a fundamental paradigm shift and without hearing evidence about the HEA waitlists or the current market barriers in the HEA Program. This amounts to a violation of LISTEN's due process rights as articulated in paragraph III above.

In addition, the Order's apparent directive to shift the funding paradigm from ratepayer funded energy efficiency programs to market based, privately funded programs could result in defunding the HEA program altogether. While it is unclear what the Commission intended, a purely market-based approach ignores this Commission's long-standing recognition of the multitude of market barriers facing low-income consumers.

Instead of increasing funding for the HEA programs, the Commission's Order may result in effectively defunding or in significantly reduced funding for the low-income programs. On page 47 of the Order, the Commission noted that in order to harness the power of competitive markets, the EERS framework includes a requirement that private funding be pursued and utilized to the greatest extent possible. The Commission then ordered that the Joint Utilities' Program Proposal going forward must include programs that are not solely ratepayer funded. It is unclear exactly what the Commission envisions by this pronouncement, but it appears to be the beginning of a significant paradigm shift towards privately funded market-based energy efficiency programs. This could result in a significant reduction in funding for the low-income HEA programs. This paradigm change, however, ignores the past recognition by the Commission that low-income customers have little or no discretionary income and face almost insurmountable market barriers, and are thus effectively shut out of the private market. At its worst, the Order could mean the effective end of low-income energy efficiency programs.

Therefore, the Commission should grant LISTEN's motion for rehearing, clarification and stay of Order No. 26,533.

WHEREFORE, LISTEN respectfully request that the Commission:

- A. Grant rehearing of the issues identified in the Settling Parties' Motion dated December 10, 2021 and in this Motion for the reasons set forth in both motions, which are that the Commission's decision is not in accordance with New Hampshire law; is the product of a proceeding that was not properly noticed as required by law; is based on misapplied legal standards and prior Commission decisions; and rendered conclusions that are unsupported or contradicted by the evidentiary record;
- B. Provide clarification of the issues identified in the Settling Parties' Motion dated December 10, 2021 and in this Motion, that arise from the Order and impact the NH Utilities' December 15, 2021 compliance filing requirement;
- C. Grant a temporary stay of the Order's December 15, 2021 filing requirement, pending the clarification of the aforementioned issues and resolution of this matter;
- D. Reinstate the terms of Order No. 26,440, extending the 2020 SBC rates and program structure pending the resolution of the above-mentioned requests; and
- E. Grant any such further relief as may be just and reasonable.

Respectfully submitted,
LISTEN Community Services
Through its attorney
New Hampshire Legal Assistance

Date: December 13, 2021

By:

A handwritten signature in blue ink, appearing to be 'R. Burke', written over a horizontal line.

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