STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

ELECTRIC AND GAS UTILITIES

2021-2023 Triennial Energy Efficiency Plan

Docket No. DE 20-092

Joint Motion for Rehearing of Order No. 26,513

NOW COME the Office of the Consumer Advocate ("OCA") and Conservation Law Foundation ("CLF"), parties to this docket, and move pursuant to RSA 541:3 and N.H. Code Admin. Rules Puc 203.33 for rehearing of Order No. 26,513, entered by the Commission in the above-captioned docket on September 1, 2021. In support of its motion, the OCA and CLF state as follows:

I. Background

Since January 1, 2018, New Hampshire has relied on an Energy Efficiency Resource Standard ("EERS") to govern the delivery of ratepayer-funded energy efficiency programs by the state's electric and gas utilities as administrators of the statewide "NH Saves" programs. *See* Order No. 25,932 (August 2, 2016) in Docket No. DE 15-137 at 1 (adopting the EERS "framework," noting that it "consists of three-year planning periods and savings goal as well as a long-term goal of achieving all cost-effective energy efficiency"); Order No. 26,095 (January 2, 2018)

in Docket No. DE 17-136 (approving initial EERS plan for effect on January 1, 2018); Order NO. 26, 207 (December 31, 2018) in Docket No. DE 17-136 (approving updated triennial plan for effect on January 1, 2019); Order No. 26,322 (December 30, 2019) in Docket No. DE 17-136) (approving newly developed "Granite State Test" as the screening framework for evaluating cost-effectiveness of ratepayer-funded energy efficiency programs)); and Order No. 26,323 (December 31, 2019) in Docket No. DE 17-136 (approving updated triennial plan for effect on January 1, 2020).

Consistent with the process that led to the development of the 2018-2021 triennial EERS plan, the program administrators relied on a stakeholder engagement process to assist them with the development of a proposed triennial plan for the years 2021, 2022, and 2023. Specifically, the Energy Efficiency and Sustainable Energy Board created pursuant to RSA 125-O:5-a appointed an EERS Committee that included representatives of each Program Administrator as well as other interested stakeholders, including representatives of the OCA and CLF. Assisted by consultants from the Vermont Energy Investment Corporation working under contract to the Commission, the EERS Committee began its work on developing the 2021-2023 triennial plan on November 4, 2019 and held 20 meetings culminating in agreement on plan parameters adopted by the Committee on August

10, 2020.[1]

Consistent with the parameters agreed to by the EERS Committee, the program administrators submitted their proposed triennial plan for approval of the Commission on September 1, 2020 and the agency opened the instant docket to consider the plan under its rules governing contested administrative proceedings. *See* Order of Notice (September 8, 2020) (Tab 16). Discovery and the submission of prefiled written direct and rebuttal testimony ensued. On December 3, 2020, the Program Administrators filed a Settlement Agreement into which they had entered with certain other parties, i.e., the OCA, CLF, Clean Energy New Hampshire, The Way Home, and Southern New Hampshire Services (Tab 42). Although not every party to the docket signed the Settlement Agreement, no party opposed it.[2]

The Commission conducted a hearing on the Settlement Agreement that began on December 10, 2020 and continued on December 14, 16, 21, and 22.[3] As was apparent at the hearing, the purpose of the Settlement Agreement was to address criticism lodged by non-parties that the savings goals and resulting program budgets reflected in the September 1, 2020 edition of the triennial plan

[1] Records of these meetings can be found on the Commission web site at https://www.puc.nh.gov/EESE%20Board/CommitteeMeetings.html. It is worth noting that because the NH Saves programs are entirely funded by ratepayers, as is the Office of the Consumer Advocate and what was, at the time, the Staff of the Public Utilities Commission, the bulk of the work of the EERS Committee was paid for by utility customers.

[2] The Staff of the PUC opposed the Settlement Agreement but the participating Commission employees were not a party. Rather, pursuant to Rule Puc 203.01, they were simply subject to the Commission's procedural rules "in the same manner and to the same extent as a party."

[3] At the time of this hearing, the Commission consisted of only two members: Chairwoman Dianne Martin and Commissioner Kathryn Bailey. The third Commissioner had resigned the previous month.

were too ambitious. This perspective found voice via letters submitted on November 10, 2020 and December 9, 2020 by the Business and Industry Association of New Hampshire; on December 7, 2020 by certain members of the New Hampshire House of Representatives, and on December 10, 2020 by a member of the New Hampshire Senate, *inter alia*.[4]

Consistent with the practice that had prevailed in Docket Nos. DE 15-137 and DE 17-136, the Program Administrators and other signatories to the Settlement Agreement requested a Commission order by December 31, 2020 so that the Program Administrators could implement the plan on its anticipated effective date of January 1, 2021. However, on December 29, 2020, the Commission entered Order No. 26,440, directing the Program Administrators to extend the NH Saves programs at their 2020 funding levels and to maintain the System Benefits Charge[5] rate that had applied in 2020. In Order No. 26,440, the Commission stated that these temporary measures would remain in effect "until a final order is issued in this proceeding," which the Commission stated it expected to be "issued within eight weeks." Order No. 26,440 at 4.

Apart from a procedural order on a tangential matter entered in February 2021, *see* Order No. 26,468 (February 19, 2021) (granting the OCA's requested

[4] This correspondence, as well as all letters received by the Commission either in support of or against the proposed triennial plan, is available at https://www.puc.nh.gov/Regulatory/Docketbk/2020/20-092.html.

[5] The System Benefits Charge, authorized by RSA 374-F:3, VI, is a non-bypassable charge used by electric utilities to fund energy efficiency programs and the Energy Assistance Program that helps income-eligible customers pay their electric bills.

designation of two PUC employees as "staff advocates" pursuant to RSA 363:32, II), the Commission took no further action until September 1, 2021. On that date, the Commission announced via Order No. 26,513 that it was reopening the record of this proceeding, that it would be using "a series of record requests in the next two weeks," Order No. 26,513 at 1, and that the agency would schedule "another hearing date to occur approximately two weeks after the receipt of complete responses to the record requests," *id.* at 3. The OCA and CLF seek rehearing pursuant to RSA 541:3 of these determinations.

II. Improper Record Requests

According to the Commission, the upcoming record requests are appropriate because "[n]ew commissioners must review the record before participating in the decision on a pending matter." *Id.* at 1. The Commission stated that Commissioner Goldner "has now completed his review of the record" but, because he "did not sit during the hearings and did not have the opportunity to ask questions," the record requests are necessary. *Id.*

This is unsustainably arbitrary, unreasonable, and capricious. *See, e.g., In re Chase Home for Children*, 155 N.H. 528, 532 (2007) (describing the "unsustainable exercise of discretion" standard) (citations omitted). From the fact that a new Commissioner must review the record before participating in a decision, and therefore the fact that Commissioner Goldner was required to read through transcripts and exhibits in order to rule in this docket, it does not follow that he

must now have an opportunity to pose written questions and expand the record. The Commission cites no authority for such a proposition and the movants are not aware of any.

Indeed, the Commission implicitly acknowledged that its announced intention to issue additional record requests is inconsistent with the applicable rule of the Commission, Puc 203.30. *See* Order No. 26,513 at 2 (waiving the provisions of Puc 203.30 "[t]o the extent the text . . . constrains the Commission's ability to reopen the record and schedule additional hearings"). The OCA and CLF do not contend that the Commission may never waive one of its rules; indeed, as the Commission notes, such waivers are explicitly authorized by Rule Puc 201.05. The problem, rather, is that the Commission in Order No. 26,513 has both misinterpreted Rule Puc 203.30 and misapplied the waiver standard set forth in Rule Puc 201.05.

According to the Commission, in applying Rule 203.30 the Commission must "consider the probative value of any new exhibit against the parties' right of cross-examination." Order No. 26,513 at 2. This is not correct. By its terms, Rule 203.30(c) states that the PUC must separately consider "[t]he probative value of the exhibit" and "[w]hether the opportunity to submit a document impeaching or rebutting the late filed exhibit without further hearing shall adequately protect the parties' right of cross examination pursuant to RSA 541-A:33, IV." In the present circumstances, the Commission had no way of considering the "probative value" of

responses to record requests (i.e., late-filed exhibits), and therefore should not have simply assumed their probative value, because those record requests have not yet been issued. Order No. 26,513 offers no explanation of why one Commissioner's non-presence at the five days of hearings requires the introduction of additional evidence, nor does the Commission opine on the probative value of such evidence, particularly given that the order states that the new Commissioner has reviewed the hearing transcripts and evidence of record.

As for protecting the cross-examination rights secured to parties via RSA 541-A:33, IV, the question pursuant to this provision of the Administrative Procedure Act is whether cross-examination is necessary for "a full and true disclosure of the facts." The Commission appears to overlook any RSA 541-A:33, IV issues by noting that it will convene a hearing at some to-be-determined date in the near future, but there is no way of knowing at this point whether the requirements of RSA 541-A:33, IV could be satisfied without discovery or some other measures calculated to protect the due process rights secured to parties via the Administrative Procedure Act. The Commission claims that "by scheduling an additional hearing, the Commission ensures the parties' right of cross examination . . . is protected." Order No. 26,513 at 2. This assertion simply cannot be squared with the Commission's declaration elsewhere in the Order that nothing will be "relitigated" and the record cannot extend "beyond the scope of the Commissioners'

post-hearing record requests."

Moreover, the Commission overlooks the fact that Rule 203.30 lacks a *requirement* that parties respond to record requests; rather, paragraph (a) of the rule simply allows the Commission to "authorize" such submissions in appropriate circumstances. Historically, the Commission has relied on Rule Puc 203.30 to allow parties to supplement the record when a witness is unable at hearing to answer a question whose answer can easily be determined in a non-controversial fashion, thus allowing the creation of a complete record. Here, the Commission is taking the rule into uncharted territory, apparently claiming the right to commence an 'overtime' phase of contested administrative proceedings – one whose parameters and respect for due process are, at best, unknown. This appears to be so far beyond what the Administrative Procedure Act contemplates that there is no mention of such a possibility anywhere in RSA 541-A.[6]

Indeed, the Commission has misapplied the plain requirements of Rule Puc 201.05. To waive a rules requirement pursuant to Puc 201.05, the Commission must make two separate determinations under paragraph (a) of the rule: (1) that the waiver "serves the public interest" and (2) that the waiver "will not disrupt the

[6] The only possible exception is RSA 541-A:34, which covers the situation in which "a majority of the officials of the agency who are to render the final decision in a contested case have not heard the case or read the record." According to this provision of the Administrative Procedure Act, any ruling on the merits in such circumstances must be rendered in the form of a "proposal for decision," which parties may then challenge via "briefs and oral argument." Although not directly applicable here, RSA 541-A:34 suggests the Legislature generally intended via the Administrative Procedure Act to protect the rights of parties in circumstances that deviate from the traditional post-hearing path to a merits order.

orderly and efficient resolution of matters before the commission." Puc 201.05 then provides specific guidance on what is required to meet the "public interest" test – either or both of two situations: "[c]ompliance with the rule would be onerous or inapplicable given the circumstances of the affected person" or "[t]he purpose of the rule would be satisfied by an alternative method proposed." In the circumstances of this case, rather than compliance with the rule, it is indeed the rules *waiver* adopted by the Commission that would be onerous for the signatories to the Settlement Agreement inasmuch as they have already suffered a delay of nearly nine months and now confront the specter of even more delays – the effects of which are manifestly real, palpable, and significant.[7]

[7] *See, e.g.*, the status report filed by the NHSaves program administrators (i.e., the utilities) on June 11, 2021 (tab 72), which states*, inter alia*:

> The uncertainty surrounding the final budgets for Program Year 2021 is having particular impact on the residential programs, where we are seeing high customer interest and participation. Customers have been placed on waitlists for certain programs experiencing high demand, offerings and incentives have been adjusted in the Products program, and weatherization contractors need more information regarding current and future workload in order to make important business decisions regarding hiring and equipment investments.

See also the program status update filed by the program administrators on June 15, 2021 (tab 74), which states at page 2 that

> It is increasingly difficult to manage programs', vendors' and customers' expectations in the absence of approved program goals or budgets for 2021-2023. Further, the temporarily approved SBC rates (2020 funding level) are insufficient to achieve 2020 electric savings goals given significant changes to savings assumptions vetted by the EM&V Working Group and documented in the 2021 Technical Reference Manual. It is also increasingly difficult to effectively manage programs and provide accurate messaging to customers regarding future availability of program incentives. Several new program offerings proposed in the 2021-2023 Plan have each passed time-sensitive deadlines to move forward this year, and thus have been deferred indefinitely.

These reports are now three months old and, therefore, the uncertainties and program administration difficulties described by the utilities have obviously been exacerbated by the further passage of time.

This waiver does not serve the public interest because it appears to cast to one side the outcome that every single party favored, that no party opposed, and is the only outcome the record in its present form supports. The planned record requests most assuredly would "disrupt the orderly and efficient resolution" of this docket because there is no reason, much less a well-articulated and sufficient reason, to supplement a record that complete was as of December 22 of last year. That certain outside commentators, who did not participate in Docket No. DE 20-092, dislike the only outcome the present record supports should not be confused with the objective of resolving contested cases in an orderly and efficient manner.

III. Improper Hearing and Improper Hearing Parameters

Even assuming the Commission's announcement that it will issue additional record requests could be sustained, the separate determinations about the to-be-scheduled hearing are also arbitrary, unreasonable, and capricious. According to Order No. 26,513, the Commission "does not intend to re-litigate this matter for itself" and is not issuing "an invitation for the parties to propound additional exhibits beyond the scope of the Commissioner's post-hearing record requests, or to seek to relitigate this matter."

As a matter of logic, there cannot be any purpose to the upcoming hearing other than for the Commission to "relitigate this matter for itself," doing so in light of changes to its roster of commissioners. The record in its present form – deemed complete as of December 22, 2020 – supports no result other than settlement

approval, so the receipt of any additional evidence can only amount to "relitigation." Demanding that the parties respond to record requests, and then appear at hearing purely to answer questions from Commissioner Goldner, without any opportunity to respond via rebuttal or otherwise, stretches even the flexible notions of due process that apply in the context of administrative proceedings well beyond their breaking point. *See, e.g., Appeal of Mullen*, 169 N.H. 392, 397 (2016) ("At its most basic level, the requirement to afford due process forbids the government from denying or thwarting claims of statutory entitlement by a procedure that is fundamentally unfair" . . . . and "[f]undamental fairness requires that government conduct conform to the community's sense of justice, decency, and fair play") (citations omitted). In the administrative context, [t]he requirements of due process are flexible and call for such procedural protections as the particular situation demands." *Id.* (citations omitted). Here, via the hearing parameters set forth in Order No. 26,513, the Commission has jettisoned procedural protections altogether.

What process is due the parties in this situation? The Commission, and perhaps ultimately the New Hampshire Supreme Court, must balance three factors: "(1) the private interest that is affected; (2) the risk of erroneous deprivation of that interest through the procedure used and the probable value of any additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens brought about by additional procedural requirements." *Appeal of Mullen*, 169 N.H. at 397 (citations omitted); *see also*

Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (adopting these factors as a matter of federal constitutional law). Here, the private interests are significant indeed; the Program Administrators are seeking permission to spend nearly $400 million over three years in a manner that will have sufficient effects on the local economy and on ratepayers (by, the OCA contends, ultimately saving them well beyond the amounts spent by the utilities and charges to customers). The risk of erroneous deprivation of the interests of the parties advanced by implementing the triennial plan as proposed are significant; in the confusion and uncertainty that will be engendered if Order No. 26,513 is implemented as written, there will be no way for the parties to know whether the views of non-parties have been outcome-determinative. Finally, the government – i.e., here, the Commission – has no cognizable interest here because any fiscal and administrative burdens are the result of the agency's decision not to rule by the end of 2020 as requested or, indeed, within the eight weeks promised by the Commission in late December.

IV. Conclusion

For the foregoing reasons, the Commission must grant rehearing of Order No. 26,513 and must retreat from its stated intention of reopening the record on its own motion via the issuance of record requests and its demand that the parties appear for an additional hearing.

WHEREFORE, the Office of the Consumer Advocate and Conservation Law Foundation respectfully request that this honorable Commission:

A. Grant rehearing pursuant to RSA 541:3 of Order No. 25,516, and

B. Grant such further relief as the interests of justice require..

Sincerely,

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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.

Donald M. Kreis