THE STATE OF NEW HAMPSHIRE
SUPREME COURT
No. ______________

ELECTRIC AND GAS UTILITIES

2021-2023 Triennial Energy Efficiency Plan

PUC Docket No. DE 20-092

APPEAL OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY; LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP., D/B/A LIBERTY; LIBERTY UTILILITIES (GRANITE STATE ELECTRIC) CORP. D/B/A LIBERTY UTILITIES; NEW HAMPSHIRE ELECTRIC COOPERATIVE, INC.; UNITIL ENERGY SYSTEMS, INC.; AND NORTHERN UTILITIES, INC.
PURSUANT TO RSA 541:6 AND RSA 365:21
(NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION)

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i. PRESERVATION OF ISSUES FOR APPELLATE REVIEW 45

Pursuant to RSA 541:6, RSA 365:21 and Supreme Court Rule 10, Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource" or the "Company"), Liberty Utilities (EnergyNorth Natural Gas) Corp d/b/a Liberty; Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty; and New Hampshire Electric Cooperative, Inc.; Unitil Energy Systems, Inc., and Northern Utilities, Inc., appeal to this Court from Order No. 26,553 of the New Hampshire Public Utilities Commission (the "Commission") dated November 12, 2021 (the "November Order") and the Commission's Order on Motions for Rehearing, Clarification and Stay, Order No. 26,560 dated January 7, 2022 (the "Rehearing Order").

a. PARTIES AND COUNSEL

1. Name and Counsel of Parties Seeking Review

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b. ADMINISTRATIVE AGENCY'S ORDERS AND FINDINGS SOUGHT TO BE REVIEWED

Copies of the November Order, the Order on Rehearing, and the Commission's September 8, 2020 Order of Notice are filed in the Appendix to this Notice of Appeal:

Commission Order of Notice Docket No. DE 20-092 September 8, 2020	Appendix, page 4
Commission Order on 2021-2023 Triennial Energy Efficiency Plan and Implementation of Energy Efficiency Programs Order No. 26,553, November 12, 2021	Appendix, page 9
Commission Order Addressing Motions on the Composition of the Commission and Motion for Rehearing, Clarification, and/or Stay of Order No. 26,553 Order No. 26,560 January 7, 2022	Appendix, page 61

c. QUESTIONS PRESENTED FOR REVIEW

1. RSA 541-A:31, III requires that all parties to an adjudicative hearing "shall be afforded" notice of "a short and plain statement of the issues involved." In Docket No. DE 20-092 (the "Docket"), which involved a request to the Commission to approve a Settlement Agreement concerning the 2021-2023 Triennial Statewide Energy Efficiency Plan (the "Proposed Plan"), the Commission noticed its intent to consider "issues related to proposed Plan programs" and how those Proposed Plan programs complied with enumerated statutes (the "Order of Notice.") Despite the focus of the Order of Notice on Proposed Plan programs, despite the fact that no party to the Docket presented any evidence on fundamental changes to the elements and framework of the New Hampshire Energy Efficiency Resource Standard ("EERS"), and despite the Commission never questioning or addressing such changes during the hearings in the Docket, in Order No. 26,553 (the "November Order"), the Commission completely eliminated or altered significant elements of the EERS, which it then affirmed in Order No. 26,560 (the "Rehearing Order") (together, the "Orders") by denying all motions for rehearing. Did the Commission violate RSA 541-A: 31 and due process by its failure to comply with the requirements of the statute, and its failure to provide adequate notice of the elimination and alteration of essential planning elements of the EERS?

2. By Order 25,932 issued August 2, 2016 (the “EERS Order”), the Commission established the EERS, a “framework within which the Commission’s energy efficiency programs shall be implemented,” and specifically evaluated and adopted planning elements of the EERS which included, among others: performance incentives for the utilities that encouraged exemplary program administration and therefore exemplary program performance to maximize energy efficiency; “Evaluation, Measurement & Verification” (“EM&V’) measures designed to achieve energy savings in a cost effective manner; the ability of utilities to carry forward budget balances to later program years; and a cost-benefit test critical to measuring the effectiveness of programs offered under the EERS, and which therefore determines the programs that are eligible to be offered. RSA 365:28 requires that the Commission provide notice and a hearing before modifying any order made by it. Without notice of its intent to do so, and without any evidence being presented by any of the diverse parties to the Docket, the November Order eliminated or substantially altered these planning elements of the EERS. Are the Commission’s Orders unjust and unreasonable for eliminating or altering these planning elements without proper notice, and unlawful due to the Commission’s failure to comply with RSA 365:28?

3. RSA 541-A: 31, III requires notice to the parties to an adjudicative proceeding so that they know what evidence is necessary to meet their burden of proof. Despite its failure to inform the parties that the planning elements of the EERS were up for reconsideration or

re-evaluation, the Commission concluded that the diverse parties to the Docket failed to meet their burden of proof with respect to the specific planning elements the Commission altered or eliminated. Based on their findings that the parties failed to meet a burden of proof they could not have reasonably anticipated, and therefore did not address, are the Commission's Orders unjust and unreasonable?

4. RSA 363:17-b requires that "[t]he commission shall issue a final order on all matters presented to it" and that the "final order shall include…[a] decision on each issue including the reasoning behind the decision." The November Order eliminated or altered specific planning elements of the EERS without record evidence supporting these conclusions, and without providing any bases for these decisions. Did the Commission act in an unlawful, unjust and unreasonable manner by failing to provide sufficient reasoning for its decisions?

d. PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES, RULES AND REGULATIONS

The constitutional provisions, statutes and rules involved in this case are:

RSA 125-O:23	Appendix, page 706
RSA 363:17-b	Appendix, page 708
RSA 365:28	Appendix, page 709
RSA 374-F:3, VI	Appendix, page 710

RSA 374-F:3, X	Appendix, page 712
RSA 374:2	Appendix, page 714
RSA 541-A:13	Appendix, page 715
RSA 541-A:31, III	Appendix, page 718
RSA 541-A:33, V	Appendix, page 720

e. PROVISIONS OF INSURANCE POLICIES, CONTRACTS OR OTHER DOCUMENTS

The following documents are contained in the Appendix filed with this Notice of Appeal:

Commission Order Establishing Guidelines for Post-Competition Energy Efficiency Programs Order No. 23,574 November 1, 2000	Appendix, page 85
Commission Order Approving Settlement Agreement in Docket No. 15-137 (Establishing the Energy Efficiency Resource Standard) Order No. 25,932 August 2, 2016	Appendix, page 112
Commission Order Approving Settlement Agreement 2018-2020 New Hampshire Statewide Energy Efficiency Plan Order No. 26,095 January 2, 2018	Appendix, page 177

Commission Order Approving 2019 Update Plan
Order No. 26,207
December 31, 2018 — Appendix, page 198

Commission Order Approving Benefit Cost Working Group Recommendations
Order No. 26,322
December 30, 2019 — Appendix, page 218

Commission Order Approving 2020 Update Plan
Order No. 26,323
December 31, 2019 — Appendix, page 237

2021-2023 Triennial Energy Efficiency Plan
September 1, 2020 — Appendix, page 255

Transcript of hearing held 09/14/20 Prehearing Conference for Docket No. DE 20-092
October 5, 2020 — Appendix, page 487

Settlement Agreement on the 2021-2023 New Hampshire Statewide Energy Efficiency Plan
December 3, 2020 — Appendix, page 560

Approving Short-Term Extension of 2020 Energy Efficiency Programs and System Benefits Charge Rate
Order No. 26,440
December 29, 2020 — Appendix, page 594

Commission Order Reopening Record
Order No. 26,513
September 1, 2021 — Appendix, page 601

Joint Utility Motion for Reconsideration and Clarification of Order No. 26,513 September 16, 2021	Appendix, page 607
Commission Order of Suspension Order No. 26,520 September 21, 2021	Appendix, page 616
NH Utilities, Office of the Consumer Advocate, Clean Energy New Hampshire, Conservation Law Foundation; and Southern New Hampshire Services, Inc. Joint Motion for Rehearing, Clarification and stay of Order No. 26,553 December 10, 2021	Appendix, page 621
New Hampshire Department of Energy Motion for Rehearing and/or Clarification of Order No. 26,553 December 10, 2021	Appendix, page 664
LISTEN Community Services Motion for Rehearing, Clarification and Stay of Order No. 26,553 December 13, 2021	Appendix, page 686
Letter from Governor Sununu to the Commissioner of the Department of Energy December 14, 2021	Appendix, page 699
Business and Industry Association comments on Motion for Rehearing, Clarification and Stay of Order No. 26,553 December 14, 2021	Appendix, page 701
Op-Ed of Senator Shaheen in the Concord Monitor December 16, 2021	Appendix, page 703

f. STATEMENT OF THE CASE

1. Introduction

Approximately five and one-half years ago, the Commission issued the EERS Order, describing the establishment of an EERS as a "remarkable…product of extensive investigation by [Commission] Staff and collaboration between and among diverse groups of stakeholders." EERS Order at 64 (A. 175)[1] The Commission further stated that "[t]he framework that [the stakeholders]developed together and that we approve in this Order will move the State forward, toward specific annual savings goals to achieve objectives set out in the 10-year State Energy Strategy consistent with legislative objectives." *Id.* In the five plus years since the adoption of the EERS the Commission has not—until its recent November Order—revisited the appropriateness of the elements of the EERS.

Notwithstanding the substantive "framework" adopted by the EERS Order in 2016, and despite the Commission's recognition in its November Order that its authority to revise its prior orders requires that it provide adequate notice of its intent to do so, the November Order eliminated or substantially altered critical planning elements of the EERS framework as part of its rejection of the Proposed Plan as modified by the Settlement Agreement entered into by a broad array of parties (the "Settling Parties"). November Order at 28, 30 (A.036, 038); Rehearing Order at 9 (A.069).[2]

[1] References to the Appendix to this Notice of Appeal are cited as, for example, "A. 001."
[2] The parties to the proposed Settlement Agreement included Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty, New Hampshire Electric Cooperative, Inc., Public Service Company of New Hampshire d/b/a Eversource Energy, Unitil Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty, Northern Utilities Inc. (collectively the "NH Utilities"), the Office of the Consumer

The Commission rejected the Settlement Agreement without providing any notice to the Settling Parties that it intended to revisit or substantially revise the EERS Order or the planning elements of the EERS adopted by that Order.

The November Order concluded that the Settling Parties had not met their burden to prove the merit of the modified or eliminated planning elements, and had not met undefined "applicable standards" relating to these elements. In short, the Commission found that the Settling Parties failed to hit a target the Commission did not set. Indeed, the best evidence that notice was inadequate is that although the Settling Parties and the Commission Staff (now staff of the New Hampshire Department of Energy ("DOE")) discussed how to apply these planning elements to the programs within the Proposed Plan consistent with the Order of Notice in the Docket, the record amply demonstrates that during the hearings none of the Settling Parties addressed or considered the possible elimination or substantial alteration of these planning elements, nor did the Commissioners ask any questions indicating such a possibility. Furthermore, the Commission failed to provide any evidence in the record to support its findings, or sufficient reasoning for its decision, as required by RSA 363:17-b, III.

While the Commission is free to revise or reverse its orders, it must provide notice that it intends to do so, as required by RSA 541-A: 31, III and RSA 365:28. Whatever latitude administrative bodies might have in the precision of their notice, this case is not a close call. Nothing in the notice gave any indication that key planning elements of the EERS were

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Advocate, Clean Energy New Hampshire, the Conservation Law Foundation, the Acadia Center, The Way Home, and Southern New Hampshire Services. November Order at 2-3 (A. 010-011).

being questioned, and the record is devoid of evidence from which the Settling Parties would have been put on notice that the Commission intended to do so. The November Order and Rehearing Order—issued by a series of different Commissioners, the majority of whom did not participate in the hearings in this matter—are unjust and unreasonable and should be vacated by this Court.

2. Background

Following the directive of the Governor's Office of Energy and Planning in its ten-year State Energy Strategy to investigate the implementation of an EERS, the Commission's 2016 EERS Order established the current planning elements of the EERS to provide energy efficiency programming in New Hampshire, as well as the process for implementing the programs to be developed. The NHSaves energy efficiency programs provided via the EERS include monetary rebates and energy efficiency service offerings to commercial and industrial, residential, and low-income residential customer sectors. Proposed Plan at 40-173 (A.300-433). These programs are designed to lower both the energy bills of those who participate, and ultimately to lower the energy bills of all customers by reducing the amount of energy demand on the electric grid and on the gas distribution systems. As a result, the programs reduce the need to operate more expensive power sources during peak demand periods, slow the need for utility capital investments to maintain a reliable electric grid and safe pipeline system, and provide a host of additional non-monetary and non-energy related benefits. *Id.* at 7-10; 17-18 (A.267-270; A.277-278).

Prior to the EERS, energy efficiency programs were evaluated annually almost on an *ad hoc* basis, a process that created some limitations on how the programs could be offered. Following the adoption of the EERS—the overall goal of which is the achievement of all cost effective energy efficiency—energy efficiency goals are established for a three-year, or triennial period, and a triennial plan is produced containing programs that will achieve those goals, allowing for greater reach and overall effectiveness of the programs than could be provided by single year plans. Budgets are designed to achieve selected overall energy savings goals using a number of planning elements (some of which are detailed below) that support operations and foster the effectiveness of the programs. *Id.* at Chapters 10-11; pages 201-226 (A. 461-486). Each program must separately demonstrate its cost effectiveness—inclusive of the costs of these planning elements in the budget for each program—with the result that for every dollar the program costs, it creates more than a dollar's worth of benefits. The planning elements are used to design the triennial program plans so that all programs within the triennial plan are cost effective, and so that the plan will achieve the energy efficiency savings goals for the triennial period. Put another way, the EERS program structure and planning elements are used to develop the specific programs comprising the triennial plans that will achieve the energy efficiency goals for those three years. The Commission then reviews and decides whether to approve these plans.

Two years after the 2016 issuance of the EERS Order, the Commission approved the first EERS triennial plan, with an implementation period of calendar years 2018-2020. *See* Order No. 26,095

(January 2, 2018) (A.177). That first triennial plan was updated for each of the years 2019 and 2020 and approved by the Commission in Order Nos. 26,207 (December 31, 2018) (A.198) and 26,323 (December 31, 2019) (A.237), respectively.

As mentioned above, the EERS Order did not define the specific energy efficiency programs to be offered in New Hampshire. Instead, it established a framework for how those energy efficiency programs would be offered by including planning elements that had already proven effective in the administration of the programs. The EERS Order enshrined the following elements within the EERS framework, each of which had already been proven to lead to programmatic success: performance incentives for the utilities that were designed to encourage "exemplary performance in program administration;"[3] the requirements of a cost/benefit test designed to ensure that programs will be cost effective;[4] rigorous evaluation, measurement and verification ("EM&V") criteria for determining the ongoing effectiveness of programs;[5] and budget requirements creating the ability to carry forward unspent funds to later program years[6] (these specific elements of the EERS are sometimes collectively referred to as the "Unnoticed Issues").

Since being adopted in the EERS, the provision and inclusion of these long-standing planning elements have not been challenged in any

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[3] EERS Order at 60 (A.171).

[4] "The Commission's oversight, and the requirement that all programs meet a cost-effectiveness test that projects greater benefits than costs over the life of the measures, ensures that the programs and spending of ratepayer funds are just, reasonable, and least cost." *Id.* at 51 (A.162).

[5] *Id.* at 61 (A.172).

[6] *Id.* at 40; *see also* Commission Order No. 23,574 at 25 (A.109).

proceeding or Commission order. While the application of some elements within programs have experienced minor adjustments in past proceedings, their existence as core components in the EERS has never been at issue, and they are fundamental to the continuation of energy efficiency programs in New Hampshire. Each of the Unnoticed Issues significantly impacts the efficacy of the programs within the Proposed Plan, and are used to design, operate and ensure the success of the programs, but they do not constitute the programs themselves. The question of whether to continue the existence of the Unnoticed Issues does not pertain to approving a plan and its programs, but rather *how to design a plan*. The November Order eliminated or substantially altered each of these elements.

On September 1, 2020, Public Service Company of New Hampshire d/b/a Eversource Energy; Unitil Energy Systems, Inc.; Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty; Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty; Northern Utilities, Inc.; and New Hampshire Electric Cooperative, Inc. (the "NH Utilities") collectively filed the Proposed Plan. The Proposed Plan was for the second triennial period for calendar years 2021-2023, and was developed in a nearly year-long collaborative stakeholder process. The stakeholders included the NH Utilities, advocates of residential and low-income customers, clean energy and energy conservation organizations, and representatives of state agencies.

The Commission opened the Docket, and issued the Order of Notice on September 8, 2020. After briefly summarizing how triennial plans are funded under the EERS, the Notice stated:

> The Electric Utilities and Gas Utilities seek approval of the Plan in accordance with ***Order No. 25,932*** (August 2, 2016) (approving establishment of an Energy Efficiency Resource Standard) [EERS Order] and ***Order No. 26,323*** (December 31, 2019) (approving 2020 Update Plan and establishing process for development and submission of 2021-2023 Plan). . . . The filing raises, *inter alia*, issues related to ***whether the proposed Plan programs*** offer benefits consistent with RSA 374-F:3, VI; ***whether the proposed Plan programs*** are reasonable, cost-effective, and in the public interest consistent with RSA 374-F:3, X; ***whether the proposed programs*** will properly utilize funds from the Energy Efficiency Fund as required by RSA 125-O:23; and whether, pursuant to RSA 374:2, the Electric Utilities and Gas Utilities' proposed rates are just and reasonable ***and comply with Commission orders***.

Order of Notice at 2 (emphasis added) (A.005).

The Order of Notice did not state that the instant proceeding would reevaluate or modify the existing EERS paradigm, nor did it state that the Commission would be re-evaluating planning elements of the EERS that had been supported consistently by years of Commission orders, or that the Commission was considering the elimination or substantial alteration of those planning elements. Rather, all that the Order of Notice stated was that the Proposed Plan, programs, and rates would be evaluated for how they *comply* with Commission orders.

A prehearing conference took place on September 14, 2020. The Commission granted the intervention requests of Conservation Law Foundation, Clean Energy New Hampshire, the Department of Environmental Services, The Way Home, Acadia Center, and Southern New Hampshire Services. At no time during the prehearing conference did any party, the Commission (now DOE) staff, or any Commissioner raise or

discuss potential for elimination of the planning elements comprising the Unnoticed Issues.[7]

The parties then convened for a technical session and agreed upon a procedural schedule to govern the remainder of the Docket, which the Commission approved. Discovery ensued, and Commission staff, the Office of the Consumer Advocate ("OCA"), and the several intervenors filed testimony on October 29, 2020. Further discovery was conducted on this testimony, and rebuttal testimony was filed by the NH Utilities, the OCA, Clean Energy New Hampshire, and DOE staff on December 3, 2020.

Settlement discussions were held on November 19 and 20, 2020, and the Settlement Agreement, signed or supported by all parties to the proceeding (except DOE staff), was submitted to the Commission on December 3, 2020. The Settlement Agreement included some adjustments to the Proposed Plan, but largely recommended its approval as initially proposed. The Commission conducted evidentiary hearings on December 10, 14, 16, 21, and 22, 2020, before then Commissioner Kathryn Bailey and then Commission Chair Dianne Martin. The hearings, without objection, exclusively addressed the Proposed Plan and its programs as modified by the Settlement Agreement. No evidence was presented concerning the possible elimination of the Unnoticed Issues.

The Settling Parties requested a final decision prior to the January 1, 2021 effective date of the Proposed Plan. But on December 29, 2020, in lieu of a final order in this Docket, the Commission issued Order No. 26,440, granting an "extension of the 2020 energy efficiency program

[7] Transcript of Prehearing Conference for Docket No. DE 20-092 held 09/14/20 (A.487).

structure and System Benefit Charge rate beyond December 31, 2020," until a final order could be issued. The Commission estimated a final order would follow within eight weeks; however, no final order was issued during that timeframe. Order No. 26,440 at 4-5 (A.597-598).

On September 1, 2021, nine months after the conclusion of the hearings and the issuance of Order No. 26,440—during which time Commissioner Bailey had completed her term and left the Commission, and a new Commissioner, Daniel Goldner (who did not participate in the hearings) began his term—the Commission issued Order No. 26,513, proposing to reopen the record for a two-week series of "post-hearing record requests" to add additional evidence to the record and without specifying what that evidence would be. Order No. 26,513 at 1-2 (A.601-602). On September 16, 2021, the NH Utilities moved for rehearing of this order on several due process grounds, including that the record requests were not anchored to the record. On September 21, 2021, without further explanation, the Commission suspended Order No. 26,513 and issued Order No. 26,520, closing the record as of that date (A.616).

On the evening of November 12, 2021, nearly eleven months after the close of hearings, the November Order was issued. The Order was signed by Commissioner Daniel Goldner and Chair Martin (whose resignation from the Commission became effective the day the November Order was issued).

3. The November Order

The November Order denied the NH Utilities' request for approval of the Proposed Plan and rejected the Settlement Agreement. Relevant to this Appeal, the November Order went far beyond the limited issues in the

Order of Notice to rule on issues that neither the Settling Parties, the Commission staff, nor the Commission had addressed by entering any evidence into the record. As discussed above, the Commission eliminated or substantially altered the Unnoticed Issues—four key planning elements of the EERS—without any prior indication that it was even considering such fundamental changes to the EERS structure. Thus, beyond merely rejecting the Proposed Plan and Settlement Agreement, the Order extended beyond their scope, and beyond the noticed scope of the proceeding.

Notwithstanding the total absence of any reference to these elements in the Order of Notice, the Commission determined that "the Settling Parties ha[d] not met their burden to prove by a preponderance of the evidence that the Settlement Agreement or Proposal meet applicable standards" with respect to each of the planning elements the November Order eliminated. November Order at 28 (A.036). With respect to the specific Unnoticed Issues, the November Order:

- Altered the criteria upon which programs are screened and selected for implementation by rejecting the Commission's previously adopted and approved cost/benefit test, *i.e.* the "Granite State Test." In 2019, the Commission had specifically approved that test for application to the programs in the Proposed Plan to determine their cost effectiveness—the standard with which energy efficiency programs are evaluated and approved. Order No. 26,322 (December 30, 2019) at 9 (A.226). As a result, all of the programs in the Proposed Plan had been designed to demonstrate cost effectiveness using that test;

- Completely eliminated performance incentives for the NH Utilities administering energy efficiency programs. Performance incentives are a standard practice in energy efficiency programming (whether administered by utilities or privately) and allow utilities to earn revenue in the event of the exceptional management and success of the energy efficiency programs, which "put[s] efficiency investment on equal footing with other earnings opportunities for the [NH] Utilities." EERS Order at 60 (A.171);
- Eliminated the ability to carry forward any over-collection and under-collection of funds for application to the budgets in the following program year, required utility shareholders to bear the cost of any overspending of program budgets, or any under collection from lower revenues than planned based on sales forecasts made in advance of the program year, and also required any over-collection or underspending to be reimbursed to customers in March of the following year. November Order. at 42-43 (A.050-051). The carry-forward application to budgets allows for the continuity of program offerings and for the reliability in the marketplace for customers and contractors; and
- Reduced EM&V costs in 2022 and terminated EM&V entirely as of December 31, 2022. *Id.* at 46 (A.054). This work is essential to effective program design and operation, and required for securing certain funding for the programs.

In taking these actions, the Commission concluded that "the Settling Parties have not met their burden to prove by a preponderance of the evidence that the Settlement Agreement or Proposal meets applicable standards with respect to" each of these elements of the EERS. *Id.* at 28 (A.036). But the Commission did not articulate or otherwise explain these "applicable standards."

The planning elements comprising the Unnoticed Issues were not listed in the Order of Notice or in any other document providing notice of the scope of the proceeding, as required by RSA 541-A:31, III(d). Likewise, the four statutes referenced in the Order of Notice did not provide notice of the Commission's actions and could not reasonably have been interpreted as providing such notice. RSA 374-F:3, VI pertains to unreasonable cost shifting between customer classes and the ability of the Commission to *increase* the funding for programs for the 2021-2023 period. RSA 374-F:3, X directs the utilities to pursue cost effective energy efficiency, as was offered in the Proposed Plan. RSA 125-O:23 establishes the energy efficiency fund. And RSA 374:2 requires all utility rates to be just and reasonable. None of these statutes, even by reference, includes the Unnoticed Issues. But even if they did, the notice provision of RSA 541-A:31, III nonetheless requires a statement of both the legal authority *and* a short and plain statement of the issues involved, not one or the other. The Order of Notice satisfied neither requirement of the statute.

On December 10, 2021, the NH Utilities, together with the Office of Consumer Advocate, Clean Energy New Hampshire, the Conservation Law Foundation, and Southern New Hampshire Services, jointly filed a Motion

for Rehearing, Clarification and Stay of the Order (the "Motion").[8] The parties to the Motion specifically raised the lack of notice under RSA 541-A:31 and the violation of due process, contending that no party could have been aware that the Commission was considering eliminating or altering elements of the EERS (including the Unnoticed Issues), and that the lack of notice limited the evidence before the Commission, as no party knew to submit such evidence. Motion at 8-14 (A.634-638). The Motion further argued that as a result of insufficient notice, the Commission could not properly assign or evaluate any burden of proof regarding those issues. The Motion also argued that the statutes cited in the Order of Notice provided no notice of the Commission's actions. *Id.* at 14-18 (A.634-638). Finally, the Motion contended that the Commission's Order failed to provide sufficient reasoning as required by RSA 363:17-b, and was not based on sufficient evidence in the record. No party objected to the Motion.

The Rehearing Order denied all motions for rehearing and provided certain clarifications of the November Order.[9] Rehearing Order at 7-14 (A.067-074). The Commission found the arguments concerning notice to be "unavailing" because "notice in this matter was broad" and thus apprised parties of the specific issues included in the November Order. *Id* at 8

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[8] The NH Utilities and other Settling Parties were not the only interested parties to file a motion for rehearing. The New Hampshire Department of Energy (formerly the Commission staff, and the only party that opposed the Settlement Agreement) also filed a motion for rehearing, as did community advocate organization LISTEN. The Business Industry Association also filed comments to the docket in support of the NH Utility motion for rehearing (A.664; A.686; and A.701).

[9] The Rehearing Order was issued by a third composition of the Commission, consisting of now Commission Chair Daniel Goldner and new Commissioner, Pradip Chattopadhyay (who neither sat for the hearings nor signed the November Order). A third Commissioner, Carleton Simpson, had been seated on the Commission, but recused himself from the underlying proceeding due to his recent employment with one of the NH Utilities.

(A.068). According to the Commission, it was sufficient for it to provide notice that it would apply the previously mentioned statutes, and would consider whether the Proposed Plan programs were "reasonable, cost effective, and in the public interest," and that together these constituted "broad notice" sufficient to constitute a "short and plain notice of the issues involved" under RSA 541-A:31, III (d). Without any analysis, the Commission simply repeated the language of the Order of Notice and cited an introductory statement at the hearings by Chair Martin that "[w]e're here this morning in Docket DE 20-092 regarding the 2021 to 2023 Statewide Energy Efficiency Plan," as though mere oral reference to a consideration of the Plan provided notice that the Commission might make fundamental changes to the planning structure under which it was developed. Remarkably, with respect to due process concerns, the Commission contended that for due process to apply, the parties would have had to assert a "fundamental right or liberty interest in future ratepayer-funded energy efficiency programming," and it therefore "decline[d] to further address any constitutional due process arguments." Rehearing Order at 9 (A.069).

Concerning the arguments that the Commission's November Order was inconsistent with its prior orders, the Commission addressed a strawman argument that *stare decisis* does not apply to administrative orders. *Id.* at 11 (A.071). No party raised this issue. Rather, as the Commission recognized, the issue raised by the parties was whether the changes were made in a "properly noticed adjudicative proceeding." *Id.* (A.071). The Commission found that the moving parties had failed to show that they were prejudiced by a lack of citation to specific statutes because it

had noticed the "same standards from another source" without identifying how that other source constituted a "specific reference to the particular sections of the statutes and rules involved," so as to comply with RSA 541-A:31, III (c). *Id.* at 12 (A.072). With no explanation, the Commission ruled that objections to the November Order based on the Commission's failure to address evidence "are not persuasive." *Id.* at 14 (A.074).

Finally, as part of its clarifications, the Commission tried to address and remedy some of the Unnoticed Issues. Addressing one of the elements—overspending carryforwards—the Commission granted partial rehearing, ruling that for investor-owned utilities, overspending carryforwards would need to be adjudicated according to a prudence review in a separate administrative proceeding. *Id.* at 10 (A.070). The Commission did not address instances of underspending carryforwards. The Rehearing Order also found that the language in its November Order concerning "significant" reductions in EM&V work clearly meant that EM&V would be phased out by the end of 2022, but then went further to "clarify that *where verification activities are required to maintain funding streams and regulatory compliance*, the Joint Utilities shall provide, for Commission review and approval, a plan [for EM&V] that includes required tasks and costs for each such task. Reasonable, supported estimated consulting costs and contractor costs shall be provided, as well. This plan and analysis shall be provided no later than March 1, 2022." *Id.* at 15 (emphasis added) (A. 075). The Commission thus eliminated EM&V and then reauthorized it in the very next sentence, clarifying nothing.

The Rehearing Order purported to clarify the cost/benefit test issue by stating that *both* the Granite State Test and Total Resource Test must be

used in assessing a cost-benefit analysis, without specifying how this was to be done, or how the two different tests would be weighted in Commission analysis to determine which programs would qualify for offering. *Id.* at 15 (A.075). The Commission's "clarification" on this issue provided no practical remedy or clarity. The purpose of applying a cost/benefit test is so that programs can be analyzed for cost effectiveness prior to submission and so that only cost-effective programs are proposed to the Commission. Since only cost effective programs qualify for offering through NHSaves, the lack of clarity on this issue will create significant confusion for the NH Utilities in their submission of future proposals, and could lead to a drastic reduction of program offerings should the Commission choose to reject any number of programs based on an opaque analysis using both cost/benefit tests.

This appeal follows.

g. JURISDICTIONAL BASIS FOR APPEAL

RSA 541:6 and RSA 365:21 supply the jurisdictional basis for this appeal.

h. A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE CORRECT INTERPRETATION OF STATUTES AND A NEED FOR NEW HAMPSHIRE SUPREME COURT GUIDANCE ON THIS ISSUE. ACCEPTING THE APPEAL PROVIDES AN OPPORTUNITY TO CORRECT PLAIN ERRORS OF LAW, CORRECTLY INTERTPRET A LAW OF IMPORTANCE TO THE CITIZENS OF NEW HAMPSHIRE, AND CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE

This case presents an important opportunity for the Court to provide guidance on, and to repair a clear error regarding a pivotal issue in New Hampshire administrative law as it affects regulated entities as well as all parties to an adjudicative docket. This Court has recognized that proper notice in an administrative proceeding is essential. Lack of proper notice, whether that notice is overly broad (a concept the Commission relied on in this Docket), vague, or otherwise insufficient, erodes the purpose of the administrative process. If parties cannot know what issues are to be considered (as RSA 541-A: 31, III requires), what evidence needs to be presented, and thus what burden of proof they must meet, they cannot protect their rights, or the rights of those they represent. RSA 541-A:31 and the Due Process Clauses of the State and Federal Constitutions require nothing less. And a fair process is vitally important in the case of regulated entities like the NH Utilities because they have no other forum in which to address their claims. Without some certainty of what is at issue, the conduct of a regulated business is exceedingly difficult.

Since the Commission acted in an adjudicative role in the Docket, it was required—both by RSA 541-A:31 and as a matter of constitutional due process—to provide adequate notice of the issues it intended to address and of the statutes applicable to those issues. Yet here, the November Order addressed issues that were not remotely related to the Commission's Order of Notice. In doing so, the Commission engaged in a wholesale restructuring of the EERS framework, thereby ignoring years of its own orders. The difference between what was noticed in this case, and what was decided, is so extreme as to constitute a plain error of law.

The Commission's Order of Notice focused entirely on whether *programs* within the Proposed Plan "offer[ed] benefits consistent with RSA 374-F:3, VI," were "reasonable and cost-effective, were in the public interest," and "would properly utilize funds from the Energy Efficiency Fund." Order of Notice at 2 (A.005). Put simply, the Order of Notice addressed issues relating to the specific programs of the Proposed Plan. This made sense, as the purpose of the Docket was to review the Proposed Plan, not to re-evaluate and restructure the entire EERS framework. Nothing in the record of the Docket, or during the December 2020 hearings, suggested otherwise.

Yet eleven months after the hearings closed, with no new notice, and with no new testimony, the Commission decided that it would revisit and rework essential elements of the EERS structure that had been approved by the Commission just five years earlier and reaffirmed without issue or cause for concern each year since.[10] Ignoring the EERS Order, the

[10] "[W]e review . . . for conformity with the 2016 EERS Order and the First Triennium Order, and the law underlying the establishment of an EERS." Order 26,323 at 11 (A.237).

Commission looked to orders issued more than 20 years ago to declare that EERS programs should be "market based, not utility-sponsored and ratepayer funded." November Order at 27 (A.035).[11] As part of this significant and unexpected change in the focus and purpose of the Docket, the Commission effectively unwound 20 years of evolution of energy efficiency and dismantled key components of the EERS established in 2016.

The extent to which the November Order came as a surprise and resulted in a fundamental change to the EERS is evidenced by the array of parties that opposed it in seeking rehearing and clarification, and that are appealing to this Court. It is an unusual circumstance in which utilities, the OCA, environmental groups— and even the DOE, the agency to which the Commission is administratively attached—all seek rehearing of a Commission order without objection. But that is what happened here. It is

[11] The Commission's November Order misinterpreted the Restructuring Act, which does not treat energy efficiency as an aspect of electric service to be transferred to the competitive market (as the Legislature mandated for supply-side resources) but rather, as among certain "public benefits" the Commission is authorized to approve for recovery via the non-bypassable System Benefits Charge. See RSA 374-F:4, VI (the section of the Restructuring Act's "interdependent policy principles" per RSA 374-F:1, III, which purpose is to secure "Benefits for All Consumers"). The General Court was plainly instructing the Commission to safeguard and promote these benefits alongside, and in addition to, what were presumed to be the rate-lowering effects of competition among energy providers. This amounts to an implicit recognition that energy efficiency yields benefits to customers that are not necessarily captured via near-term rate relief because those benefits are more long term in character. The Commission explicitly recognized that "[w]hile rates may increase slightly for all customers in the short-term in order to recover the cost of an EERS, customer bills will decrease when their energy consumption decreases are reflected in reduced grid and power procurement costs." EERS Order at 57 (A.168.)

equally unusual that several of those same diverse entities appeal to this Court.[12]

While this Court does not, and should not, accept cases based on the amount of controversy a decision engenders, the makeup of the parties challenging the Commission's November Order and Rehearing Order demonstrate that the issues in this Appeal are of importance to the citizens of this State. A program that was described by the Commission in 2016 as "remarkable" and as "mov[ing] the State forward, toward specific annual savings goals to achieve objectives set out in the 10-year State Energy Strategy consistent with Legislative directives" should not be substantially undercut or dismantled without a fair opportunity for all stakeholders in that program to offer evidence addressing or opposing that action. Accordingly, this Court should accept this appeal to correct the Commission's errors relating to this significant issue of public concern.

Failure to comply with RSA 541-A:31 and to afford Due Process

The discussion in the Statement of the Case above explains the complete disconnect between the Commission's Order of Notice and its November Order. This Court has recently reaffirmed "[t]hat a governmental tribunal must utilize fair procedures is elemental; and it is well-established that due process guarantees apply to administrative agencies." *Appeal of Pelmac Industries, Inc*., 2021 WL 4783944 (N.H.

[12] Indeed, both Governor Sununu and Senator Shaheen urged the Commission to reconsider. *See* letter from Governor Sununu to the Commissioner of the Department of Energy dated December 14, 2021, and Senator Shaheen's Op-Ed in the Concord Monitor, December 16, 2021 (A.699 and A.703).

Supreme Ct., Oct. 13, 2021) at *11 (citation omitted). More specifically, with respect to the fairness of notice by the Commission, the Court has "long recognized that "[w]hile due process in administrative proceedings is a flexible standard…the [Commission] has important quasi-judicial duties, and we therefore require the [Commission's] 'meticulous compliance' with the constitutional mandate where the agency acts in its adjudicative capacity, implicating private rights, rather than in its rule-making capacity." *Appeal of Concord Steam Corp.,* 130 N.H. 422, 428 (1988) (internal citations omitted). No such compliance occurred here, meticulous or otherwise.

As discussed above, RSA 541-A:31, III requires that "all parties shall be afforded an opportunity for an adjudicative proceeding after reasonable notice," and that such notice shall include "[a] short and plain statement of the issues involved." This notice requirement is central to due process in administrative proceedings as "[a] fundamental requirement of the constitutional right to be heard . . . that affords the party an opportunity to protect the [party's] interest through the presentation of objections and evidence." *Appeal of Concord Steam Corp.,* at 427-428. To be clear, the NH Utilities do not contend that every possible topic of discussion that could be discussed at any point in an administrative proceeding needs to appear in the Order of Notice. Yet whatever flexibility the statute recognizes, the notice in this instance cannot possibly be considered sufficient under the statute.

In this case parties to the Docket and their counsel, representing a variety of different stakeholders ranging from utility companies to environmental advocates, plainly did not construe the Order of Notice as

indicating that the Commission intended to revisit and rework central elements of the overall EERS framework. As clear evidence of that fact, no evidence was presented on those matters during five days of hearings, and the Commissioners sitting at the hearings did not ask questions concerning the elimination or alteration of these Unnoticed Issues. If, for example, the Commission had given notice that it intended to eliminate performance incentives as part of its review of the Proposed Plan, the NH Utilities or other parties would have—and could have—offered evidence of how such incentives have contributed to the increase of energy efficiency. After all, as the Commission noted in the EERS Order, "[t]he Commission has used performance incentives successfully…to encourage utility investment in energy efficiency." EERS Order at 60 (A.171). Yet no such evidence was introduced, and the Commission did not forewarn that these incentives were being evaluated or were in danger before it eliminated them.

Although the Commission cited to RSA 541-A:31, III in the Rehearing Order, it failed to abide by its terms which, among other things, requires that the notice be "reasonable." A generalized citation to statutory authority is insufficient to reasonably satisfy due process, and patently insufficient to satisfy the definition of notice in the statute. At a minimum, there must be a plain statement of the issues involved in the proceeding—one that notifies the parties of the issues the Commission intends to address and on which they must satisfy some burden of proof, in addition to the law to be applied to the proceeding. Taking the Order of Notice in the Docket on its face, the scope of the issues involved was limited to the reasonableness, cost effectiveness, and the public interest of the programs proposed within the Proposed Plan, and the rates as they were explained in

the Proposed Plan. These two particular references do not create "broad notice" of each and every issue the Commission might later believe applies to energy efficiency programs or their funding and clearly do not indicate that the Commission intended to review essential elements of the EERS and program development for possible changes or elimination. If anything, the notice limits the scope of the Commission's inquiry to the issues plainly listed.

The Commission cannot avoid the requirement of fair notice by contending (as it did in the Rehearing Order) that a "broad notice" can encompass anything that might be raised in a docket. Rehearing Order at 8 (A.068). A notice broad enough to allow the Commission to consider any matter it chooses is no notice at all, and is directly contrary to the requirement of RSA 541-A:31, as well as principles of fundamental fairness. Nor can the Commission rely on an opening statement at the hearings at the conclusion of the Docket that the Docket would consider "the 2021-2023 Statewide Energy Efficiency Plan." *Id*. This very general statement proves the insufficiency of the Order of Notice; all the parties knew was that a specific plan was to be addressed, not that the fundamental underpinnings of the EERS would be reconsidered. The opening statement at the conclusion of a docket noticed for a specific purpose cannot serve to render the notice meaningless, nor did this statement address anything more than the Order of Notice did.

Under the Commission's position in the Orders, parties in every Commission proceeding could be blindsided at the hearing by being required to address issues beyond the scope of the written notice on which discovery had not been taken, and on which testimony had not been

prepared. And in the absence of a properly noticed issue to be decided, no party could have effectively presented evidence on it, and the record would necessarily be insufficient to decide such an issue. Such a result is unjust and unreasonable.

In summary, no fair reading of the Order of Notice put the parties to the Docket on notice that the Commission would consider and rule upon the Unnoticed Issues. This failure of notice has caused immediate harm to the NH Utilities and the energy efficiency programs they administer, and if repeated, will make operating regulated businesses unpredictably risky by not knowing what is at stake in any given docket. Accordingly, this Court should accept this appeal and vacate the Commission's November and Rehearing Orders.

The Commission failed to support its findings on the Unnoticed Issues

The errors in the November and Rehearing Orders concerning each of the Unnoticed Issues may be traced directly to its failure to provide proper notice. As discussed above, since there was no proper notice, the Settling Parties did not produce evidence on the continuation, alteration, or elimination of these Unnoticed Issues. Yet the Commission based its November Order on the Settling Parties' alleged failure to satisfy their burden of proof that the "Settlement Agreement or Proposed Plan me[t] applicable standards with respect to [each of these Issues.]" November Order at 28 (A.036).

Not surprisingly, since the Commission failed to identify any such burden of proof, the November and Rehearing Orders also failed to

adequately explain the reasoning behind the Commission's decision on each of these Unnoticed Issues, as required both by RSA 363:17-b ("A final order shall include…A decision on each issue including the reasoning behind the decision") and RSA 541:31, VIII ("Findings of fact shall be based exclusively on the evidence and on matters officially noticed in accordance with RSA 541-A:33, V"). This was plain error, and for each of the issues below the November and Rehearing Orders are arbitrary and unreasonable, and thus should be vacated by this Court and remanded to the Commission for proper notice and reconsideration in an appropriate adjudicative docket.

The Cost/Benefit Test:

Programs to be included in any triennial plan are screened and selected for implementation by a cost/benefit test. In the EERS Order, the Commission indicated that it had "consistently imposed a cost effectiveness test," and that such tests "ensure benefits to all customers." EERS Order at 51, 57 (A.162, A.168). The use of a specific cost/benefit test, the "Granite State Test," was recently approved by the Commission at the end of 2019 in Order No. 26,322, where the Commission noted that the "cost-effectiveness framework was informed by an extensive review of state policies as defined by statute, interpreted by Commission precedent, and guided by the state energy strategy." Order No. 26,322 at 8 (A.225). The Commission further found in that Order that use of the Granite State Test "will improve energy efficiency program screening by placing a greater emphasis on the utility system impacts than our current [Total Resource Cost] test." *Id*. at 9 (A.226). Given these recent pronouncements, the NH Utilities were directed and obligated to apply the Granite State Test when evaluating

programs for inclusion in the Proposed Plan, and to use that test to determine cost effectiveness of programs to develop the Proposed Plan. The NH Utilities did so, evaluating every program in the Proposed Plan by using the Granite State Test.

Without notice that it was reevaluating the Granite State test or the Total Resource Cost test, and without citation to the record, the Commission found that "the 'Granite State Test' is overly dependent upon subjective factors such that any desired outcome could potentially be obtained from its application. As such, it cannot be solely relied upon for benefit-cost testing." Order at 39 (A.047). The Commission did not explain what these "subjective factors" were, or why they required the use of a different test. At rehearing, the Commission "clarified" that both the Granite State Test and the historical "Total Resource Cost Test" should be used, without indicating whether either test should be favored or how the Commission was to balance those tests in the future to calculate cost effectiveness.

Cost/benefit tests are the guiding principle of the programs. They establish the criteria and formula to determine which programs are cost effective (for every dollar in cost, there is greater than one dollar in benefits), and therefore which programs are eligible to be offered. They also help demonstrate which programs are most cost effective, and therefore which should be favored when trying to allocate the limited budget available.

Performance Incentives:

In the EERS Order, the Commission indicated that performance incentives were used to "encourage utility investment in energy efficiency"

and provided a "reasonable incentive to pursue exemplary performance in program administration and delivery and to put efficiency investment on an equal footing with other earnings opportunities available to the Joint Utilities." EERS Order at 60 (A.171). During the hearings in the 2016 EERS Docket, Commission staff described these incentives as having played a "vital role" in earlier efficiency programs (*id.* at 30) and another party described them as "essential to maximizing investment in efficiency and demand-side resources." *Id.* at 32 (A.143). As a result, the EERS Order maintained the continuation of performance incentives and adopted these incentives as part of the EERS framework. *Id.*

In deciding to eliminate performance incentives in the November Order, the Commission misstated the decision of a prior order, Order No. 23,574 (November 1, 2000) (A.085) as making these incentives temporary. November Order at 40-41 (A.048-049). As an initial matter, Order No. 23,574 did not make such a finding. But even if it had, since the issuance of that Order in 2000, the Commission has repeatedly supported performance incentives as beneficial for encouraging exemplary program administration—and by extension exemplary success of the programs—and therefore consistently approved their inclusion as a planning element for delivering energy efficiency programs in New Hampshire. EERS Order at 60 (A.171); Order 26,323 at 10 (A.246).

As support for the Commission's elimination of these incentives, the November Order references rate mechanisms unrelated to those incentives, stating that "taking into account the implementation of rate mechanism options…Performance incentives are no longer just and reasonable and in the public interest in the context of ratepayer funded EE." November Order

at 41 (A.049). Because the issue was not noticed, the parties did not address the Commission's referenced rate mechanisms nor whether they related—if at all—to performance incentives.[13] The only discussion relating to performance incentives at any point in the Docket was the debate between the parties to the Settlement Agreement and Commission Staff on whether to lower the threshold at which performance incentives could be achieved. Transcript of prehearing conference at 71-72 (A.557-558). No party to the Docket, and no Commissioner, questioned whether to completely eliminate these incentives. Accordingly, the Commission's decision is not supported by record evidence.

Budget Carryforwards:

Historically, funding is set at an approved budget level and when the funding for certain programs is not fully spent in a given year, the remaining amount has been carried into the following year, where the money can be used to pay for programs in that year. The Order of Notice expressly recognizes that "[a]ny unspent funds from prior program years…including interest, are carried forward to the following year's

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[13] As the parties stated in their Joint Motion for Reconsideration, "the rate mechanisms cited by the Commission, namely decoupling, LBR and the LRAM, are all variations of the same rate reconciliation mechanism that allows the NH Utilities to recover the portion of the revenue lost to energy efficiency, which the Commission has already determined is just and reasonable in the course of a utility rate case. The purpose of those mechanisms is not to compensate the utilities for exemplary performance, or to incentivize their participation in the EERS, but rather to assure the utilities have a reasonable opportunity to achieve recovery of the revenue requirements that the Commission has determined are appropriate for the utility to collect to conduct their business." Joint Motion for Reconsideration at 24 (A.644). The Commission previously articulated this same principle: "[t]he LRAM [which recovers LBR] is not designed to increase the revenues recovered by the utilities, and lost revenues are not considered a cost for the purpose of the cost/benefit test used to assess efficiency programs in the Core or within the EERS. Specifically, without the LRAM, or a change in the way rates are designed today [such as with decoupling], the utilities may lose revenue that the Commission has already determined in the utility's rate case is just and reasonable for them to recover." EERS Order at 59 (A.170).

budget." Order of Notice at 1-2 (A.004-005). Any overspending on a program is noted and addressed through a budget adjustment in the following year. Carrying forward the funding in this manner in order to reconcile it in the following year assures that there is a sufficient amount of money to prevent disruption of the programs, and that money collected to support energy efficiency projects actually goes to support projects that yield benefits to all customer sectors, even if they are not completed within a calendar year.

Without notice, without citing to any support in the record, and without providing any rationale, the Commission arbitrarily eliminated the ability to spend to an approved budget and carry forward any over or underspent amounts into future years. The issue of the *size* of the budgets (and hence the rates to be charged to fund the programs) was the most highly contested issue during the Docket. But there was no discussion at the hearing of whether to change how the budgets are managed, and no record evidence on which to base the Commission's decision to eliminate carryforwards.

The only explanation offered for this action in the November Order was a statement that such budget carryforwards "do not properly balance the ratepayer's interest in paying the lowest rates possible because they result in ratepayer funds being held without commensurate benefits accruing to ratepayers in a timely manner." November Order at 42 (A.050). The Commission did not explain what it considered to be the "proper balance" or "commensurate benefit," or why returning by each March any budgeted funds not spent by the previous December accrues benefits to customers in a "timely manner" as opposed to using those funds for

uninterrupted programming and benefits. The return of funds to customers each March that are otherwise dedicated to continuous energy efficiency programing based on an arbitrary calendar cutoff date runs counter to the purpose of reconciling budgets to offer continuous programming and will disrupt program offerings each calendar year. The decision to return these otherwise dedicated funds is wholly arbitrary and directly impairs program offerings.

Evaluation, Measurement and Verification:

During the 2016 EERS hearings, the Commission stated that its staff "considers EM&V a vital part of a successful EERS program, for program transparency and credibility." EERS Order at 37 (A.148). The Commission included EM&V in the EERS framework, concluding that "[r]igorous and transparent EM&V is essential to a successful EERS to ensure that the efficiency programs actually achieve planned savings in a cost-effective manner." *Id*. at 61 (A.172). The value of EM&V work is plain; without a means to evaluate and verify the cost effectiveness of the NHSaves programs, the utilities, other stakeholders, and the public have no way of knowing whether energy efficiency is in fact working. No party to this Docket discussed or recommended the elimination of EM&V funding (*id*. at 19 (A.130). The Commission nevertheless eliminated this valuable part of the EERS framework.

The November Order devoted one paragraph to EM&V, stating that "EM&V has risen to an unreasonable level" and the Commission required "spending to be significantly reduced in any EM&V proposal for 2022." *Id*. at 46 (A.157). The Commission did not explain why spending was "unreasonable," what "unreasonable" meant in this context, or what

constituted a “significant” reduction, but in the Rehearing Order clarified that “significant” meant a sharp decrease leading to elimination, and that this “vital” program was to be “phased out by the end of 2022.” Rehearing Order at 15 (A.075).

There was no evidence presented in the record on the issue of whether to continue EM&V and no explanation for why it should be eliminated. The Commission acknowledged the parties’ recommendations regarding the EM&V budget, but those recommendations were the sum of the record evidence on the issue, and certainly did not provide a basis for eliminating the program. Eliminating EM&V fundamentally alters the ability to evaluate the effectiveness of programs, and will likely lead to the reduction or possible termination of multiple programs.[14]

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The Commission’s Orders decided the Unnoticed Issues absent notice that they would be addressed, based on a failure to meet an unknown burden of proof, based on a record that contained no evidence supporting the Commission’s orders, and without providing adequate reasoning. The November Order drastically and negatively impacts the structure of the EERS which, in turn, is detrimentally impacting the energy efficiency programs. If the Commission wanted to completely transform the entire

[14] In their Motion for Reconsideration, the NH Utilities pointed out that the elimination of EM&V significantly impacts the ability of the utilities to provide programs as well as secure funding from the Forward Capacity Market, and requested clarification on whether the Commission intended to eliminate this funding source. The Commission’s response clearly demonstrates that it not only failed to notice the issue, but it did not understand the issue it was deciding. First, the November Order eliminates all EM&V and then proceeds to contradict itself in the Rehearing Order by reiterating its “unequivocal” direction to phase out EM&V while at the same time directing the utilities to design a budget and plan for it to the extent that EM&V secures funding. *See* Rehearing Order at 15 (A.075) No regulated utility can operate in such an environment.

framework of the EERS from a utility-sponsored and ratepayer funded energy efficiency program to a market-based program, it was required to inform all mandatory and potential parties of that fundamental shift, and to do so when it opened the Docket and issued the Order of Notice.

While this Court often defers to the Commission's expertise, it is not required to do so in a case where the Commission acts in an arbitrary and unreasonable manner. This is such a case. This Court should accept this appeal to address these errors.

i. PRESERVATION OF ISSUES FOR APPELLATE REVIEW

Each issue raised in this appeal has been presented to the Commission by the NH Utilities in the Motion for Reconsideration, Clarification and Stay dated December 10, 2021, and has been properly preserved for appellate review.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY

By its attorneys,

Dated: February 4, 2022 By: /s/ Wilbur A. Glahn, III

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2022, I served the foregoing Notice of Appeal and accompanying Appendix on e-filing participants by filing electronically through this Court's electronic filing system, and by conventionally serving on non e-filing participants.

/s/ Wilbur A. Glahn, III
Wilbur A. Glahn, III