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 LISTEN COMMUNITY SERVICES
PURSUANT TO RSA 541:6 and RSA 365:21
(NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION)

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Pursuant to RSA 541:6, RSA 365:21, and Rule 10 of the Rules of the New Hampshire Supreme Court, LISTEN Community Services ("LISTEN") appeals to this Court from Order No. 26,553 (the "Order") of the New Hampshire Public Utilities Commission (the "Commission"), dated November 12, 2021, and the Commission's Order on Rehearing of the Order (the "Rehearing Order"), No. 26,560, dated January 7, 2022. In support of this Petition, LISTEN states as follows:

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 Order and the Order on Reconsideration and the following documents are contained in the Appendix filed with this Petition:

Order of Notice Docket No. DE 20-092 September 8, 2020	Appendix, page 3
Order No. 26,553 on 2021-2023 Triennial Energy Efficiency Plan and Implementation of Energy Efficiency Programs (the "Order") November 12, 2021	Appendix, page 8
Order No. 26,560 Addressing Motions on the Composition of the Commission and Motion for Rehearing, Clarification, and/or Stay of Order No. 26,553 (the "Rehearing Order") January 7, 2022	Appendix, page 60

c. **Questions Presented For Review**

1. Is the Commission's failure to provide the parties with prior notice and opportunity to be heard on all of the issues decided by the Commission in its final Order dated November 12, 2021, which rejected the parties' proposed statewide 2021-2023 EERS Triennial Energy Efficiency Plan and accompanying Settlement Agreement, unreasonable, unjust, and unlawful, and a violation of the parties' rights to due process of law under the New Hampshire Constitution, RSA ch. 541-A and RSA 365:28?

2. The Commission's November 12, 2021 Order rejected its prior precedents and recent orders regarding the EERS and the energy efficiency programs. Was this rejection unreasonable, unjust and unlawful in the absence of evidence in the record to support such action, and in the Commission's failure to articulate compelling reasons for such a major departure from established EERS and energy efficiency policy and precedents?

3. Is the Commission's Order dated November 12, 2021, which will have a significant adverse impact on the low-income Home Energy Assistance program (HEA), a component of the parties' proposed 2021-23 statewide EERS and Triennial Energy Efficiency Plan, and which will negatively affect thousands of low-income customers who have been waiting for and rely on the HEA program to provide desperately needed energy efficiency services for their dwellings, unjust, unreasonable, and unlawful?

d. **Provisions Of Constitution, Statutes, Ordinances, Rules, And Regulations**

N.H. Const. pt. I, Art. 2	Appendix, page 140
N.H. Const. pt. I, Art. 15	Appendix, page 140
RSA 125-O:23	Appendix, page 141
RSA 365:28	Appendix, page 143
RSA 374:1	Appendix, page 144
RSA 374-F:3, V	Appendix, page 145

RSA 374-F:3, VI	Appendix, page 146
RSA 374-F:3, X	Appendix, page 147
RSA 378:37	Appendix, page 148
RSA 541-A:31	Appendix, page 149
RSA 541-A:35	Appendix, page 151

e. Provisions Of Insurance Policies, Contracts, Or Other Documents

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 December 10, 2021	Appendix, page 84
LISTEN Motion for Rehearing, Clarification, and Stay December 13, 2021	Appendix, page 127

f. Statement Of The Case

This is an appeal of the New Hampshire Public Utilities Commission's ("Commission") Order No. 26,553 dated November 12, 2021 (the "Order") (A.008[1]) on the proposed 2021-2023 Statewide Triennial Energy Efficiency Plan, as clarified by Order No. 26,560 dated January 7, 2022 (A.060). LISTEN Community Services ("LISTEN") specifically appeals on the basis that the Commission's November 12, 2021 Order was issued (1) without adequate notice to the parties of the issues to

[1] References to the Appendix to LISTEN Community Services' Notice of Appeal are cited as, for example, "A.001."

be reviewed by the Commission and without allowing the parties the opportunity to be heard on all the issues decided by the Commission in its final Order; (2) rejecting prior energy efficiency policy and Commission precedent without supporting evidence in the record and without articulating compelling reasons for doing so; and (3) without adequate basis for the changes to the Home Energy Assistance ("HEA") Program. Thus, the Order is unjust, unreasonable, and unlawful, and 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 and RSA 541-A:31.

I. Background Information

The Commission established New Hampshire's Energy Efficiency Resource Standard ("EERS") and the process for implementing it in Order No. 25,932 dated August 2, 2016 (the "Initial EERS Order") (UA.112[2]). As the administrators of the energy efficiency programs, the state's electric and natural gas utilities must "prepare the triennial EERS plans in collaboration with stakeholders and the EESE Board as Advisory Council." Initial EERS Order at 39-40 (UA.150-51). The Commission approved the first EERS triennial plan in Docket No. DE 17-136 for the calendar years 2018-2020. *See* Order No. 26,095 (Jan. 2, 2018) (UA.177). The utility companies filed updates to the 2018-2020 Plan for 2019 and 2020, which the Commission

[2] For convenience and to avoid voluminous, overlapping appendices, references to the NH Utilities' Appendix filed on February 4, 2022 in Docket No. 2022-0069 are cited as, for example, "UA.001."

approved in Order Nos. 26,207 (Dec. 31, 2018) (UA.198) and 26,323 (Dec. 31, 2019) (UA.237) respectively.

Recognizing the time and effort needed to develop a three-year plan, the Commission approved a framework for developing the second triennial plan early in the first triennium. *See* Order No. 26,207 at 2 (UA.199). This framework contemplated three studies that would produce recommendations to be reviewed and approved by the Commission "so that the results [could] be used in developing the second triennial plan." Order No. 26,207 at 8-9 (UA.205-06). The Commission ordered that one of the studies should examine New Hampshire's benefit-cost test to determine how to screen energy efficiency programs for cost effectiveness. After the study was completed, the Commission approved a new benefit-cost test, known as the Granite State Test, based on the recommendations of the working group that was tasked with conducting the study. *See* Order No. 26,322 (Dec. 30, 2019) (UA.218). The Commission stated unequivocally that it was adopting the Granite State Test "as the primary test for screening the cost effectiveness of investments in energy efficiency, effective January 1, 2021," the start of the second triennium. Order No. 26,322 at 16 (UA.233).

The parties and stakeholders then began the process of developing the 2021-2023 triennial plan in early 2020 pursuant to the framework approved by the Commission. This process was guided by an independent planning expert and included over twenty meetings with stakeholders to provide input to the utility companies about the plan. The parties relied on the Commission's decisions about the EERS framework, such as the appropriate benefit-cost test to use, when designing the next three-year

plan. On June 5, 2020, the utilities filed a letter requesting the Commission open a docket for consideration of the second triennial plan covering calendar years 2021-2023 (the "Proposed Plan"). *See* NH Utilities and Office of the Consumer Advocate (OCA) Joint Request to Open Docket and Schedule a Prehearing Conference dated June 5, 2020 *available at* https://www.puc.nh.gov/Regulatory/Docketbk/2020/20-092/INITIAL%20FILING%20-%20PETITION/20-092_2020-06-05_NHUTILITIES_EE_PLAN.PDF (last visited Feb. 7, 2022).[3]

The utility companies filed the Proposed Plan on September 1, 2020, and the Commission issued an Order of Notice on September 8, 2020, which stated:

> 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 (A.004) (emphasis added).

The Order of Notice did not state that the Commission planned to use the proceeding to reevaluate or modify the existing EERS paradigm. The Order of Notice also did not cite to RSA 365:28 or state that the

[3] The Commission opened Docket No. DE 20-092 in response to the joint request. The docket and all filings not subject to confidential treatment can be found online at https://www.puc.nh.gov/Regulatory/Docketbk/2020/20-092.html (last visited Feb. 7, 2022).

Commission was considering whether to “alter, amend, suspend, annul, set aside, or otherwise modify” any of its prior orders relative to the EERS framework. Therefore, the parties reasonably believed that certain fundamental issues about the EERS framework remained settled, such as the adoption of the Granite State Test effective January 1, 2021, pursuant to Order No. 26,322 (Dec. 30, 2019).

Following a prehearing conference and technical session held on September 14, 2020, the parties conducted discovery and submitted testimony between October 2020 and December 2020. The parties held settlement discussions on November 19 and 20, 2020 and filed a settlement agreement (the “Settlement Agreement”) signed or supported by all parties except Commission Staff[4] with the Commission on December 3, 2020. The NH Department of Environmental Services and the Acadia Center filed letters in support of the Settlement Agreement. The Commission conducted evidentiary hearings on December 10, 14, 15, 16, 21, and 22, 2020 to address the Proposed Plan as modified by the Settlement Agreement submitted on December 3, 2020.

Consistent with past practice, the parties requested that the Commission issue a final decision prior to January 1, 2021, so that the utilities could timely implement the Plan. However, on December 29, 2020, the Commission issued Order No. 26,440 granting an “extension of the

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[4] On July 1, 2021, the Commission Staff that appeared as a quasi-party in Commission proceedings was spun off from the Commission and, combined with the former Office of Strategic Initiatives, became the State’s new Department of Energy. *See generally* RSA Ch. 12-P. The Department of Energy entered a formal appearance in Docket No. DE 20-092, on July 23, 2021, as authorized by RSA 12-P:2, IV.

2020 energy efficiency program structure and System Benefit Charge rate beyond December 31, 2020," until a final order could be issued (UA.598). The Commission's final order was not issued until nearly eleven months later on November 12, 2021 (A.008). The Order denied the settling parties' request for approval of the proposed 2021-2023 energy efficiency plan; denied the Settlement Agreement that modified the Plan; overturned the EERS framework; and ordered significant changes to the funding and administration of energy efficiency programs in New Hampshire, including, but not limited to, rejecting the previously approved Granite State Test. *See* Order No. 26,553 (Nov. 12, 2021) (A.008).

The cumulative effect of the ordered changes is fundamentally a rejection and reversal of the state's energy efficiency policy – a policy developed by the Commission and stakeholders over many years. These changes were made without any notice to the parties that such aspects of the EERS framework and programs as established by past Commission orders were under review, and thus were made without opportunity for parties to present evidence and testimony on these issues. The parties to the proceedings and other parties directly affected by the Commission's Order timely filed motions for rehearing, clarification, and stay of the Order. Pursuant to RSA 541:3, RSA 541:5, and New Hampshire Code of Administrative Rules Puc 203.07, LISTEN filed a motion for rehearing, clarification, and stay of Order No. 26,553 on December 13, 2021 (A.127).[5]

[5] LISTEN initially asserted that it had standing to file its motion on behalf of itself and the low-income clients it serves because it and its clients were directly affected by the Order. *See Appeal of Richards*, 134 N.H. 148, 156-57 (1991) (holding that ratepayers are directly affected by rate decisions). However, since filing its motion, the Commission

On January 7, 2022 in Order No. 26,560 (the "Rehearing Order") (A.060), the Commission issued certain clarifications, granted rehearing to revise its determination on one issue (relative to the handling of carrying forward of overspent program funds into the subsequent year), but otherwise denied the pending rehearing motions.

II. The Commission's Failure To Provide The Parties With Prior Notice And Opportunity To Be Heard On All Of The Issues Decided By The Commission In Its Final Order Dated November 12, 2021 Is Unreasonable, Unjust, And Unlawful, And A Violation Of The Parties' Rights To Due Process Of Law Under The New Hampshire Constitution, RSA Ch. 541-A, And RSA 365:28.

Parties are entitled to due process in Commission proceedings. *See Appeal of Concord Steam. Corp.*, 130 N.H. 422, 428 (1988). RSA 541-A:31, III states 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 because it "affords the party an opportunity to protect the [party's] interest through the presentation of objections and evidence." *Appeal of Concord Steam Corp.*, 130 N.H. at 427–28. Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their

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granted LISTEN's petition to intervene in Docket No. 20-092 as a full party. Order No. 26,573 (Jan. 31, 2022) *available at* https://www.puc.nh.gov/Regulatory/Docketbk/2020/20-092/ORDERS/20-092_2022-01-31_ORDER-26573.PDF (last visited Feb. 6, 2022).

objections." *In re City of Concord*, 161 N.H. 169, 173 (2010); *see also Morphy v. Morphy*, 112 N.H. 507, 510 (1972) (notice to parties must be "reasonably calculated to give the . . . [parties] actual notice of the issue and the hearing."). In this case, the Commission 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 Commission 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 Commission modifies an order after notice and a hearing. *Id.*; *see also* RSA 365:28.

The Order of Notice clearly stated that the purpose of the proceeding was to review the proposed 2021-2023 Statewide Energy Efficiency Plan and to determine if the Plan was reasonable, cost-effective, and in the public interest. It also acknowledged that the utilities were seeking approval of the plan pursuant to "Order No. 25,932 (August 2, 2016) (approving establishment of an Energy Efficiency Resource Standard) and Order No. 26,323 (December 31, 2019) (approving 2020 Update Plan and establishing process for development and submission of 2021-2023 Plan)." Order of Notice at 2 (A.004). The Notice further stated that the Commission would review whether the "proposed rates are just and reasonable and *comply with Commission orders*." *Id*. (emphasis added). The Commission 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 Commission adopted the EERS in Order No. 25,932.

As a result, the parties presented evidence about the Proposed Plan and the programs but did not know they needed to defend the existing EERS structure as well as fundamental components of the EERS previously determined by the Commission in prior orders, such as the appropriate benefit-cost test to apply beginning January 1, 2021. In its Order about the Proposed Plan, the Commission concluded that the parties had not met their evidentiary burden with regard to several aspects of the Proposed Plan even though these issues were not noticed. However, a burden of proof does not exist for unnoticed matters.

The Commission's rejection of the Granite State Test is perhaps the most blatant example. The Commission approved the Granite State Test in Order No. 26,322 to take effect on January 1, 2021 (UA.218-22, 225-28, 233). The Commission ordered the study of the benefit-cost test in 2018 so there would be enough time to file a recommendation for the Commission to determine which benefit-cost test should be used to develop the 2021-2023 triennium plan. The benefit-cost test is a key component of the plan because it determines which energy efficiency measures and programs are cost-effective and thus worthy of investment. When the Commission initially approved the Granite State Test, it 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 (UA.225). The Commission then clearly stated it was adopting the Granite State Test "as the primary test for screening the cost effectiveness of investments in energy efficiency, effective January 1, 2021." *Id* at 16 (UA.233)

As a result, the utilities were obligated to apply the test in the Proposed Plan, and the stakeholders took this into account during the process to develop the Plan in the months prior to its filing. When the Commission opened the docket to review the Proposed Plan, the parties reasonably believed the decision to use the Granite State Test was a settled issue because the Commission unequivocally adopted the test for the 2021-2023 triennium and did not indicate it planned to reconsider the issue. Since the Commission did not provide any notice that it would reconsider the merits of the Granite State Test, the parties did not know that they had to resubmit evidence and redefend the recommendation to use the Granite State Test for a second time in less than one year. No party raised any concerns about the test or argued that it should not be the primary test during the hearings. In its Rehearing Order, the Commission stated it was not rejecting the Granite State Test altogether but was requiring the utilities to use both the Granite State Test and the previously used Total Resource Cost Test. Order No. 26,560 at 15 (A.077). However, the Commission did not indicate how the results of each test would be "compared" to one another or how they would be used to "validate the program choices" when determining cost effectiveness. *Id.* As a result, the parties do not know which target to aim for when developing programs, or how the Commission will make a determination when results differ between the two tests.

Similarly, the Initial EERS Order established that "[r]igorous and transparent [Evaluation, Measurement, and Verification] is essential to a successful EERS, to ensure that the efficiency programs actually achieve planned savings in a cost-effective manner." Initial EERS Order at 61 (UA.172). This fundamental principle of the EERS framework was never

contested by a party or questioned by the Commission in the time since the Initial EERS Order was issued. Nonetheless, the Commission decided to completely eliminate Evaluation, Measurement, and Verification (EM&V) without warning. Since the Commission took this action without any notice, the parties were not heard on this issue.

Even though the Commission alleges it did not modify any existing orders (*see* Order No. 26,560 at 11 (A.070)), the November Order also reversed rates previously approved by the Commission in Order Nos. 26,095, 26,207, and 26,323. The Commission previously held that the rates in the 2018-2020 EERS Plan were just and reasonable. *See* Order Nos. 26,095 (UA.177), 26,207 (UA.198), and 26,323 (UA.237). There was nothing presented in the record of the proceeding that is the subject of this appeal that demonstrated a change in circumstances which would support the conclusion that the 2018-2020 rates have become unjust or unreasonable. The Commission never provided any notice that those previously approved rates would be at issue in this new proceeding, and therefore, no party presented evidence about the 2018-2020 rates or discussed whether the Commission should reverse course to unwind those rates.

The parties did not know that the Commission was considering these and other issues until the Commission issued its Order on November 12, 2021. The Commission did not circulate the Order to the parties as a proposed order or otherwise provide the parties with an opportunity to submit comments or briefs in response to the Commission's concerns and the drastic changes in the Order.

Because the Commission issued a final Order ruling on unnoticed issues, it deprived the parties of the "fundamental requirement of the constitutional right to be heard," and therefore, the Order is unlawful. *See Appeal of Concord Steam Corp.*, at 427; *see also* RSA 365:28 (requiring Commission to provide "notice and hearing" before setting aside or modifying previous orders). The November 12, 2021 Order should be reversed, and this Court should remand this case to the Commission with instructions that the Commission approve the Proposed Plan as modified by the Settlement Agreement.

III. The Commission's Rejection of the Proposed 2021-2023 EERS Plan And Accompanying Settlement Agreement In Order No. 26,553 Effectively Reversed Years Of Prior Energy Efficiency Precedents And Recent EERS Orders; Such A Major Departure From Commission Precedents, Without Supporting Evidence And Without Compelling Justification, Is Unreasonable, Unjust, And Unlawful.

The Commission rejected the Proposed Plan and ordered significant changes to the 2021-2023 energy efficiency programs in its Order without identifying any material changes to the underlying facts, laws, policies, or conditions that would warrant such drastic changes to the statewide energy efficiency programs and reversal of the EERS. The Commission disregarded its own precedents and recent orders regarding energy efficiency and the EERS without articulating any compelling reason for doing so, other than to reduce rates as much as possible in the short term.

The Commission's significant shift in energy efficiency policy and complete reversal of the EERS framework undermines customer understanding, acceptance and reliance on current energy efficiency programs, programs which have been steadily growing and expanding to

address customers' needs for service over the years. The Commission's abrupt and significant changes to the direction of energy efficiency policy and programs is contrary to regulatory principles of program consistency, stability, and incremental change. The sudden reversal of twenty years of prior precedent with respect to the provision of needed energy efficiency programs and services is not something that should be undertaken lightly by a tribunal, and the Commission erred in doing so.

"[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.). The Commission's Order diverges substantially from the principle of administrative consistency through its reversal of the EERS framework and through its significant departure from precedent that the parties reasonably relied on when developing the Proposed Plan and Settlement Agreement. The Administrative Procedures Act requires decisions in contested adjudicative proceedings to include "findings of fact and conclusions of law, separately stated." RSA 541-A:35. The Commission is obligated "to set forth its methodology and findings fully and accurately in order that this court may undertake meaningful judicial review of its methods, findings and order." *Legislative Utility Consumers' Council v. Public Service Co.*, 119 N.H. 332 (1979). However, many of the changes to prior Commission precedent included in Order 26,553 were made without the necessary findings and methodology to explain the Commission's rationale for implementing the changes. Instead, the Commission's Order concluded that the settling parties had failed to meet their evidentiary burden, often on issues for which no notice had been provided as discussed *supra*. *See* Order No. 26,553 at 27-28 (A.034-35)

(concluding settling parties failed to meet evidentiary burden of year 2020's spending levels, previously approved in Order No. 26,323 (Dec. 31, 2019)). Therefore, many of the instances where Order No. 26,553 reversed prior Commission decisions and directives were so ordered without any testimony or supporting evidence.

There has been no showing in the proceeding below of any material changes to the underlying facts, applicable law, program conditions or administration that laid the foundation for the twenty years of precedents the Commission overturned in Order No. 26,553. This is especially so where the parties, the utilities and their customers have developed a reliance over the years on ongoing ratepayer funded energy efficiency programs. Overturning these carefully thought-out precedents and programs will result in special hardships to those who are waiting for and rely on these important energy efficiency programs. This Court should reverse the Commission's Order and remand with instructions for the Commission to approve the proposed 2021-2023 EERS Proposed Plan as modified by the Settlement Agreement.

IV. The Commission's Order, Which Will Have A Significant Adverse Impact On The Low-Income HEA Program And Which Will Negatively Affect Thousands Of Low-Income Customers Who Have Been Waiting For And Rely On The HEA Program To Provide Desperately Needed Energy Efficiency Services For Their Dwellings, Is Unjust, Unreasonable, And Unlawful.

The record in this case shows that due to the Commission's failure to timely approve and fund programs for the 2021 program year, some energy efficiency programs, including the low-income HEA Program, had to be put on hold and waiting lists created. As a result, planned low-income HEA

energy efficiency jobs could not be undertaken, and needed energy efficiency services could not be provided.[6] As a result of the Commission's Order, far fewer low-income energy efficiency jobs will be completed in 2022 and 2023. The Commission's unjust and unlawful Order subjects LISTEN and the low-income clients LISTEN serves to substantial and irreparable harm relating to the Order's impact on the low-income HEA energy efficiency program.

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. In Order No. 26,207 (Dec. 13, 2018), the Commission approved a settlement agreement that required the utilities to carry forward any unspent funds in the low-income programs to future years without displacing or reducing a future year's budget. Order No. 26,207 at 7 (UA.204). The settlement agreement and order clearly state that "this provision will be binding on the parties with regard to subsequent triennial plans." *Id*. Even though the order does not say it would also be binding on

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[6] *See* Joint Utilities Program Status Update (Apr. 1, 2021) *available at* https://www.puc.nh.gov/Regulatory/Docketbk/2020/20-092/LETTERS-MEMOS-TARIFFS/20-092_2021-04-02_NHUTILITIES_PROGRAM_STATUS_UPDATE.PDF (last visited Feb. 4, 2022); Joint Utilities Program Status Update (June 11, 2021) *available at* https://www.puc.nh.gov/Regulatory/Docketbk/2020/20-092/LETTERS-MEMOS-TARIFFS/20-092_2021-06-11_EVERSOURCE_NHSAVES_STATUS_REPORT.PDF (last visited Feb. 7, 2022); *see also* 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 (last visited Feb. 7, 2022).

the Commission, the Commission has never questioned this practice since it issued Order No. 26,207 and did not give the parties notice that it was reconsidering this practice in its review of the Proposed Plan for 2021-2023.

This practice to carry forward unspent HEA funds was based on the special protections that the Commission has put in place for low-income programs in orders dated as early as 2000 and 2002. *See* Order No. 24,109 (Dec. 31, 2002), DG 02-106, 87 PUC 892, 899 *available at* https://www.puc.nh.gov/Regulatory/Orders/2002ORDS/24109g.pdf (last visited Feb 7, 2022) (prohibiting the transfer of funds out of the low-income program to other programs without the prior approval of the Commission); July 6, 1999 Report of the Energy Efficiency Working Group to the Commission in DR 96-150 *available at* https://www.puc.nh.gov/Electric/96-150%20%20NH%20Energy%20Efficiency%20Working%20Group%20Final%20Report%20(1999).pdf (last visited Feb. 7, 2022), adopted in part by Order No. 23,574 (Nov. 1, 2000) (UA.085) (exempting the low-income program and customer education programs from always having to meet or exceed the 1.0 cost benefit screening test). Some of the low-income funding is also protected by statute. RSA 374-F:3, VI requires that "no less than 20 percent of the portion of the funds collected for energy efficiency shall be expended on low-income energy efficiency programs." Therefore, if the utilities do not spend at least 20% of the funds collected through the system benefits charge in a given program year, they must carry those funds forward to a subsequent program year to meet this requirement.

Order No. 26,553 does not adequately explain why the Commission reversed years of precedent, ignored the HEA budget requirement in RSA 374-F:3, VI, and adopted positions that were not advocated by any party. 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 (UA.175). 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 in 2016, the legislature amended RSA 374-F:3, VI to further *increase* the HEA budget. Such a significant departure from the Commission's precedent without an explanation grounded in evidence presented to the Commission is unlawful, unreasonable, and arbitrary and capricious. Nothing in the law, the underlying facts or conditions have changed to justify this reversal. Instead, the reversal occurred without just and compelling cause or due process of law.

The Commission's Order also rejected, without citing to record evidence, the recommendations of all parties (including DOE Staff) that the individual HEA project cap be increased from its current level of $8,000 per job. *See* Order 26,553 at 8-9, 18, 43 (A.015-16, 025, 050). All parties recognized that $8,000 is often insufficient to address the energy efficiency needs for many low-income homes and presented evidence to support an increase. The settling parties recommended an increase of up to $20,000, when necessary. *See Id*. at 8-9 (A.015-16). The DOE Staff recommended an increase to $12,000. *Id*. at 18 (A.025). The Commission ignored this

evidence and ordered that the low-income cap should remain at $8,000 per job because the parties allegedly failed to meet their burden to justify any increase. *See Id*. at 43 (A.050). The Commission's conclusory statements did not provide any analysis of the parties' evidence. The Commission also failed to cite to any evidence that supports maintaining the cap at $8,000, and could not have done so, because the only evidence presented was in support of increasing the cap.

The Commission's rejection of the recommendations to increase the project cap further undermines the HEA Program by effectively leaving efficiency savings unrealized. The record in this case shows that the need for low-income HEA services is great and the demand is high, resulting in waiting lists, delays, and harm to low-income customers who are relying on the HEA program.

The Order 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. 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* Order No. 23,574 at 17 (UA.101).

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" (A.054) 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 at 64 (UA.175). Application of this directive to the HEA Program risks elimination of the program. This type of directive never applied to the HEA Program because of the nature of the low-income sector and its unique market barriers that do not exist in other residential or commercial and industrial 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, denying LISTEN and other parties their due process rights.

The Commission's Order also imposes the requirement that the utilities must transition "to the greatest extent possible" to non-ratepayer funded, market-based energy efficiency programs. Order 26,553 at 47 (A.054). The Order makes no exception for the low-income programs. A purely market-based approach ignores the Commission's long-standing recognition of the multitude of market barriers facing low-income consumers. Such disregard could spell the effective end of the low income HEA programs when combined with the Commission's further directive that the utilities must identify and prioritize the most cost-effective energy efficiency programs for the 2022 and 2023 program years. Order No. 26,553 at 1, 47-48 (A.008, 054-55).

Order No. 26,553 as clarified by Order No. 26,560 will have a dramatic effect on the capacity and viability of New Hampshire's low-

income HEA energy efficiency program. As the Commission's decisions on the changes to the HEA program were made without adequate notice to the parties, without hearing evidence or testimony on the various issues, and without adequate rationale or explanation for the changes, the Commission's Order is unjust, unreasonable, and unlawful.

g. <u>Jurisdictional Basis for Appeal</u>

This Court has jurisdiction to hear this appeal pursuant to RSA 541:6 and RSA 365:21.

h. <u>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 Interpret A Law Of Importance To The Citizens Of New Hampshire, And Clarify An Issue Of General Importance In The Administration of Justice</u>

I. The Commission Erred in its Determination of What Process Is Due.

Although the Commission appears to have a different perception about what constitutes effective notice of the issues to be decided in a proceeding, its obligations to provide notice is well established by this Court and required by statute. *See* RSA 541-A:31, III; *Appeal of Concord Steam Corp.*, at 427–28; *City of Concord*, 161 N.H. at 173; *Morphy*, 112 N.H. at 510. The Commission's September 8, 2020 Order of Notice falls short of the stator notice requirement and of due process. The record and motions for rehearing show that no party was aware that the Commission was considering the major changes that it adopted in its Order of November 12, 2021. The record is also clear that the Commission never provided the

parties with notice or an opportunity to be heard on any of the major issues it decided in the Order. Further, as the Commission made clear in its Rehearing Order, it was too late for the parties to try to address these issues in their rehearing motions. All of this points to a classic denial of due process of law.

II. This Appeal Presents the Opportunity to Clarify Issues of General Importance in the Administration of Justice.

In answering the question of what constitutes adequate notice to parties in Commission proceedings, this Court can clarify the due process rights of all future parties to proceedings before the Commission. The record demonstrates that the EERS plans were built upon existing policies established by the Commission and relied on the direction and guidance the Commission provided in prior orders. Allowing Order No. 26,533 to stand would create regulatory uncertainty where every aspect of Commission-administered programs such as the EERS plans would have to be fully relitigated in every docket addressing those programs, lest a party be denied the opportunity to present evidence and be heard before the Commission decides to make changes to those programs. This would not only create a significant administrative burden for the utilities but would also make it difficult for smaller, less well-funded parties such as LISTEN from intervening effectively in future dockets.

The record demonstrates that the Commission's Order attempts to drastically change the EERS programs in many ways without supporting evidence, contrary to the requirements in RSA 541-A:31, VIII and RSA 541-A:35. The Commission also failed to articulate compelling reasons for

such a radical change and major departure from prior precedents and EERS orders. Such action is unlawful, unreasonable, and arbitrary and capricious.

III. Accepting This Appeal Would Protect LISTEN and its Clients from Substantial and Irreparable Injury.

As a result of the Commission issuing Order of November 12, 2021 without adequate notice and opportunity for the parties to be heard, LISTEN and the low-income clients it serves have been subject to substantial and irreparable harm relating to the Order's impact on the HEA Program. Far fewer low-income energy efficiency jobs will be undertaken in 2022 and 2023 due to the denial of requested funding by the Commission in its Order.[7] Moreover, other aspects of the Commission's Order impose additional limitations on the HEA Program that limit program efficacy. Program disruptions and the deliberate setting of conservatively low job production goals will cause significant harm to the HEA Program and to low-income customers who rely on that program to meet their energy efficiency needs.

The Commission's Order imposing the requirement that the utilities must transition "to the greatest extent possible" to non-ratepayer funded, market-based energy efficiency program makes no exception for the low-income programs and could spell the effective end of the HEA programs, when combined with the Commission's further directive that the utilities must identify and prioritize the most cost-effective energy efficiency programs for the 2022 and 2023 program years.

[7] *See* footnote 6 *supra* at 22.

The Commission's Order ignoring the recommendations of all parties to increase the individual project budget cap for low-income HEA projects from its current level of $8,000 per job undermines the effectiveness of the HEA programs by leaving efficiency savings unrealized and limits the pool of potential low-income homes that may be served by the program.

The Commission's Order, as it affects the HEA Program, will cause unnecessary and irreparable harm to thousands of low-income households who rely on the HEA Program.

i. Statement of Preservation of issues for Appellate Review

NHLA certifies that every issue specifically raised has been presented to the administrative agency, the NH Public Utilities Commission, and has been properly preserved for appellate review by properly filed pleadings before the Commission. Specifically, NHLA raised each issue subject to this appeal in a timely filed Motion for Rehearing.

Respectfully submitted,
New Hampshire Legal Assistance

/s/ Raymond Burke

Dated: February 7, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 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.

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Dated: February 7, 2022

/s/ Raymond Burke

Raymond Burke, Esq.