THE STATE OF NEW HAMPSHIRE
SUPREME COURT
No. 2022-____

ELECTRIC AND GAS UTILITIES
2021-2023 Triennial Energy Efficiency Plan

PUC Docket No. DE 20-092

APPEAL OF THE OFFICE OF THE CONSUMER ADVOCATE
PURSUANT TO RSA 541:6 and RSA 365:21
(NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION)

Donald M. Kreis
Bar No. 12895
Consumer Advocate
Office of the Consumer Advocate
21 South Fruit Street, Suite 18
Concord, New Hampshire 03301
603-271-1174

Amy Manzelli
Bar No. 17128
BCM Environmental & Land
Law, PLLC
3 Maple Street
Concord, New Hampshire 03301
603-225-2585

Anne M. Edwards,
Bar No. 6826
Associate Attorney General
Attorney General's Office
33 Capitol Street
Concord, New Hampshire 03301
603-271-3650

TABLE OF CONTENTS

Pursuant to RSA 541:6, RSA 365:21, and Rule 10 of the Rules of the New Hampshire Supreme Court, the Office of the Consumer Advocate (the "OCA") 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, the OCA states as follows:

I. PARTIES AND COUNSEL

Name and Counsel of Parties Seeking Review

Appellant:
Office of the Consumer Advocate
21 South Fruit Street, Suite 18
Concord, New Hampshire 03301

Counsel:
Donald M. Kreis
Bar No. 12895
Office of the Consumer Advocate
21 S. Fruit Street, Suite 18
Concord, New Hampshire 03301
603-271-1174
donald.m.kreis@oca.nh.gov

Amy Manzelli
Bar No. 17128
BCM Environmental & Land Law,PLLC
3 Maple Street
Concord, New Hampshire 03301
603-225-2585
manzelli@nhlandlaw.com

Anne M. Edwards,
Bar No. 6826
Associate Attorney General
Attorney General's Office
33 Capitol Street
Concord, NH 03301
603-271-3650
Anne.edwards@doj.nh.gov

Names and Addresses of Parties and Counsel

Parties:	Counsel/Representatives
Acadia Center 8 Summer Street Rockport, Maine 04856	**Jeff Marks** Acadia Center 8 Summer Street Rockport, Maine 04856
Clean Energy New Hampshire 54 Portsmouth Street Concord, New Hampshire 03301	**Elijah Emerson** Primmer Piper Eggleston & Cramer PC P.O. Box 349 Littleton, New Hampshire 03501
Conservation Law Foundation 27 North Main Street Concord, New Hampshire 03301	**Nicholas Krakoff** Conservation Law Foundation 27 North Main Street Concord, New Hampshire 03301
Energy North Natural Gas Corp. d/b/a Liberty Utilities 15 Buttrick Road Londonderry, New Hampshire 03053	**Michael Sheehan** Liberty Utilities 15 Buttrick Road Londonderry, New Hampshire 03053
New Hampshire Department of Energy 21 South Fruit Street, Suite 10 Concord, New Hampshire 03301	**Brian D. Buckley** **Paul Dexter** Department of Energy 21 South Fruit Street Concord, New Hampshire 03301
New Hampshire Department of Environmental Services 29 Hazen Drive Concord, New Hampshire 03301	**Rebecca Ohler** Department of Environmental Services 29 Hazen Drive Concord, New Hampshire 03301

Granite State Electric Corp. d/b/a Liberty Utilities 15 Buttrick Road Londonderry, New Hampshire 03053	**Michael Sheehan** Liberty Utilities 15 Buttrick Road Londonderry, New Hampshire 03053
New Hampshire Electric Cooperative, Inc. 579 Tenney Mountain Highway Plymouth, New Hampshire 03264	**Susan S. Geiger** Orr & Reno, P.A. 45 South Main Street Concord, New Hampshire 03301
LISTEN Community Services, Inc. 60 Hanover Street Lebanon, New Hampshire 03766	**Raymond Burke** New Hampshire Legal Assistance 117 North State Street Concord, New Hampshire 03301
Northern Utilities, Inc. d/b/a Unitil 6 Liberty Lane West Hampton, New Hampshire 03842	**Patrick H. Taylor** Unitil Energy Systems, Inc. 6 Liberty Lane West Hampton, New Hampshire 03842
Public Service Company of New Hampshire d/b/a Eversource Energy P.O. Box 330 Manchester, New Hampshire 03105	**Wilbur A. Glahn, III** McLane Middleton 900 Elm Street, 10th Floor Manchester, New Hampshire 03101
Southern New Hampshire Services, Inc. P.O. Box 5040 Manchester, New Hampshire 03108	**Ryan Clouthier** Southern New Hampshire Services, P.O. Box 5040 Manchester, New Hampshire 03108
Unitil Energy Systems, Inc. 6 Liberty Lane West Hampton, New Hampshire 03842	**Patrick H. Taylor** Unitil Energy Systems, Inc. 6 Liberty Lane West Hampton, New Hampshire 03842

Administrative Agency Appealed From:

New Hampshire Public Utilities Commission 21 South Fruit Street, Suite 10 Concord, New Hampshire 03301	**Daniel C. Goldner, Chairman** New Hampshire Public Utilities Commission 21 South Fruit Street, Suite 10

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

Copies of the Order and the Rehearing Order and the following documents are contained in the Appendix filed with this Petition:

Order of Notice September 8, 2020	Appendix, page 1
Proposed 2021-2023 New Hampshire Statewide Energy Efficiency Plan September 1, 2020	Appendix, page 6
Settlement Agreement on the 2021-2023 New Hampshire Statewide Energy Efficiency Plan December 3, 2020	Appendix, page 977
Order No. 26,440 Approving Short-Term Extension of 2020 Energy Efficiency Programs and System Benefits Charge Rate December 29, 2020	Appendix, page 1013
Order No. 26,553 on 2021-2023 Triennial Energy Efficiency Plan and Implementation of Energy Efficiency Programs (the "Order") November 12, 2021	Appendix, page 1020
Joint Motion for Rehearing, Clarification, and Stay December 10, 2021	Appendix, page 1072

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 1116

III. QUESTIONS PRESENTED FOR REVIEW

1. In rejecting the 2021-2023 Triennial Energy Efficiency Plan, as presented by the state's electric and natural gas utilities with the support of ratepayer interests and other stakeholders, did the Public Utilities Commission

    a. disregard the due process rights of the parties,
    b. amend, suspend, annul, set aside, or otherwise modify prior orders of the agency without providing statutorily required notice,
    c. fail to make necessary factual findings, make factual findings that lack record support, and make factual findings based on matters outside the record, and
    d. render a decision that was so lacking in reason as to be arbitrary, unreasonable, capricious, and constating an abuse of discretion?

2. Did the Commission err when, having rejected the 2021-2023 Triennial Energy Efficiency Plan, the Commission did not conduct a subsequent evidentiary hearing but, instead, decided, without providing notice to interested persons, that it would abandon the state's Energy Efficiency Resource Standard without regard to

    a. due process,
    b. the specific statute limiting the Commission's ability to repudiate prior decisions,
    c. established principles governing contested administrative proceedings, and
    d. basic notions of justness and reasonableness in decisionmaking?

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

V. PROVISIONS OF INSURANCE POLICIES, CONTRACTS, OR OTHER DOCUMENTS

VI. STATEMENT OF THE CASE

1. Introduction: The Commission Disregarded Fairness and Logic, Abandoning Energy Efficiency

Fairness and logic – or, in the parlance of applicable New Hampshire statute, the "just and reasonable" requirement of RSA 374:1 – are the fundamental

requirements of the Commission in its regulation of the state's electric and natural gas service. But, on November 12, 2021, the Commission disregarded all notions of fairness and logic when it decided, without advance warning and, indeed, in near-total disregard of the record before it, to abandon two decades of well-established progress, policy, and practice regarding an element of utility service that is of critical importance to the state's energy consumers. That element is energy efficiency – the sole component of electric and natural gas service whose fundamental purpose is saving customers money. Therefore, the Office of the Consumer Advocate, in its capacity as the designated representative of the state's residential utility customers pursuant to RSA 363:28, presents this appeal to the Court for its consideration.

Conceptually, energy efficiency is the process of obtaining more work (*e.g.*, light, heat, industrial output) per unit of energy consumed. Although adopting energy efficiency measures saves consumers money, there exist various well-recognized barriers to market transformation – *i.e.*, the adoption of energy efficiency measures in the retail marketplace as a compelling alternative to simply purchasing more energy supply.

2. The Commission Previously Championed Energy Efficiency

Accordingly, since 2002, and with the blessing of the Commission, the state's electric and natural gas utilities have offered a suite of energy efficiency programs to customers on a statewide basis. These programs are funded principally through charges on all customer bills that are non-bypassable – *e.g.*, they cannot be avoided by purchasing electricity from a non-utility supplier as is authorized under the 1996 Electric Industry Restructuring Act, RSA 374-F. The objective of these programs is to attain "market transformation" which is the condition in which consumers voluntarily invest in a particular energy efficiency measure because it is economically advantageous to do so without the addition of

a subsidy. Every state in New England has such a suite of programs that are paid for by customers and considered an aspect of the utility service they receive.

In 2016, the Commission enhanced New Hampshire's commitment to ratepayer-funded energy efficiency by adopting an Energy Efficiency Resource Standard ("EERS"). *See* Order No. 25,932 (2016) in the Commission's Docket No. DE 15-137. Previously, the Commission had simply approved program budgets and authorized commensurate adjustments to the applicable charges – the energy efficiency portion of the System Benefits Charge ("SBC") for electric customers and of the Local Distribution Adjustment Clause ("LDAC") for natural gas customers. Under the EERS, the objective is "all cost effective energy efficiency" meaning the establishment of energy savings goals first, budgets and charges second.

The programs offered, pursuant to the EERS, operate under the "NHSaves" trade banner. The Commission directed the utilities to develop triennial energy efficiency plans, outlining the programs to be offered along with their costs and benefits with the first one taking effect on January 1, 2018. For the purpose of developing these plans, the Commission authorized a stakeholder collaboration process overseen by the Energy Efficiency and Sustainable Energy ("EESE") Board created by RSA 125-O:5-a. The initial collaborative process was a success and, after conducting an adjudicative proceeding, the Commission approved the 2018-2020 Triennial Energy Efficiency Plan via Order No. 26,095, entered on January 2, 2018. The utilities implemented the Plan and offered the NHSaves programs accordingly.

3. The Parties Expected Approval of the 2021-2023 Plan Until Eleven Months After It Started

As authorized by the Commission, development of the 2021-2023 Triennial Energy Efficiency Plan began in November 2019 via regular meetings of

the EERS Committee of the EESE Board, which included representatives of all of the utilities and a broad array of other stakeholders including the OCA. Undeterred by the arrival of the COVID-19 pandemic in early 2020, the EERS Committee held 20 afternoon-long meetings and, in August 2020, achieved consensus on savings goals and other program parameters for the 2021-2023 triennium. The agreed-to goals were the most aggressive ever adopted in New Hampshire and required substantial increases to SBC and LDAC charges over the course of the triennium, justified by the fact that all non-bypassable ratepayer costs would be cost-effective under a rubric explicitly adopted by the Commission via Order No. 26,322, in December of 2019. In other words, ratepayer benefits would exceed ratepayer costs.

The utilities filed their proposed 2021-2023 Triennial Energy Efficiency Plan ("2021-2023 Plan") on September 1, 2020, and the Commission opened Docket No. DE 20-092 to consider it. Pursuant to RSA 541-A and the Commission's procedural rules, N.H. Code Admin. R. Ch. Puc 200, there was an Order of Notice, a Pre-Hearing Conference, discovery, the submission of written direct testimony, and ultimately an evidentiary hearing that took place on December 10, 14, 16, 21, and 22, 2020. Just prior to these hearings, on December 3, 2020, the utilities and other stakeholders (including the OCA) entered into and submitted a Settlement Agreement, the chief purpose of which was to modify the proposed 2021-2023 Plan somewhat to address concerns that the savings goals were too ambitious and the proposed rates too high. No *party* raised such concerns, which were expressed on the record by the Staff of the Commission (which, pursuant to Rule Puc 203.01, participated in the proceeding as if it were a party).[1]

[1] On July 1, 2021, the Staff of the Commission (or, at least, that part of the Staff that appeared as a quasi-party in PUC 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

Consistent with the precedent set by the proceedings on the previous Triennial Plan, the settling parties requested a Commission order by December 31, 2020, so that the 2021-2023 Plan could be implemented in a timely fashion. Although the Commission did issue Order No. 26,440, on December 29, 2020, the Commission did not approve the 2021-2023 Plan. Rather, it directed the utilities to continue to operate the NHSaves programs pursuant to the budgets, rates, and program parameters that applied in 2020. The Commission indicated an intent to issue a full order, addressing the merits of the 2021-2023 Plan, within eight weeks.

4. The Commission's Rejection of the 2021-2023 Plan

The issuance of a full order within eight weeks of December 29, 2020, did not occur. Instead, fully 316 days into the triennium, on November 12, 2021, the Commission entered Order No. 26,553 (the "Order") rejecting the 2021-2023 Plan.

In fact, Order No. 26,553 went much further than that. Without explicitly saying as much, the Commission repudiated the entire EERS paradigm. The Commission did that by avowedly reverting to a policy perspective, dating from electric industry restructuring in the late 1990s, that the advent of competition in the sale of electricity would gradually make ratepayer-funded energy efficiency programs unnecessary. *See id*. at 1-2 and 27 (citing a PUC order from 1998 and referring to this perspective as a set of "long-held tenets").

Rather than simply reject the SBC and LDAC rates proposed in the 2021-2023 Plan, the Commission put the NHSaves programs on a retrograde rate path such that the 2020 rates would apply in 2021 (presumably in retrospective fashion somehow), the 2019 rates would apply in 2022, and the 2018 rates would apply in 2023. *Id*. at 36. The stated intent of this rate path is to "transition to market-based

---

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.

programs." *Id*. By "market-based" the Commission clearly meant programs that do not require the mandatory support of utility customers through charges that cannot be bypassed. This view is premised on the dubious assumption that energy efficiency can stand on its own, in the competitive marketplace, despite a century of advantages for supply-side options that are fully baked into the energy economy.

The Commission also criticized the benefit/cost test it previously approved in late 2019 (referred to as the "Granite State Test") as "overly dependent upon subjective factors such that any desired outcome could potentially be obtained from its application." *Id*. at 39. While the Commission did not preclude continued use of this test, which focuses on benefits and costs to all ratepayers (as opposed to program participants), the Commission indicated a preference for a "fully objective and understandable measure of the cost-effectiveness of the proposed programs." *Id*. The Commission identified the previously employed "Total Resource Cost Test", which focuses more broadly on all costs and benefits, as the preferred one.

Order No. 26,553 directed the utilities to stop collecting performance incentive payments. *Id*. at 40–42. The significance of this startling and unanticipated directive cannot be overstated. New Hampshire law does not *require* utilities to offer energy efficiency programs. In administering NHSaves, the utilities are essentially working hard to encourage their customers to buy *less* of their product – a counterintuitive proposition for an investor-owned firm to say the least. Although the utilities are made whole for fixed-cost revenue lost to energy efficiency programs, *see id*. at 40–41 (discussing the collection of "lost base revenue"), utilities invest no capital via the NHSaves programs and have no basis for earning a return on investment as they would in a conventional cost-of-service ratemaking scenario. Accordingly, since the advent of ratepayer-funded energy efficiency, the Commission has authorized shareholder incentive payments

via the SBC and LDAC charges based on specific program metrics (chiefly, savings achieved). The Commission, nevertheless, concluded on November 12 that because the utilities recover administrative costs and lost base revenue, they are "sufficiently compensated." *Id*.

A critical component of any program of ratepayer-funded energy efficiency is Evaluation, Monitoring, and Verification ("EM&V"). Without EM&V, determining whether the NHSaves programs are actually accomplishing anything would be pure guesswork. The utilities, therefore, conduct impact and process evaluations, and review similar evaluations conducted elsewhere, to assure themselves, their regulators, and their public that the programs are not a waste of money. Nevertheless, the Commission found that EM&V spending had reached an "unreasonable" level, required such spending to be "significantly reduced," and directed that "all EM&V work" must be completed by December 31, 2022, and cease thereafter. *Id*. at 46.

All of the determinations described above are problematic in their own right. They become more so when one considers the almost complete lack of citations to record evidence, and the dearth of reasoned analysis as to how such record evidence supports the facts found and the conclusions rendered, and that no persons were provided notice or any opportunity to be heard on these issues.

5. The Commission's Order Has Spurred All Manner of Actions

Accordingly, pursuant to RSA 541:3, a group of parties (all six of the NHSaves utilities, the OCA, Clean Energy New Hampshire, Conservation Law Foundation, and Southern New Hampshire Services) timely filed a joint rehearing motion on December 10, 2021. The joint rehearing motion also sought certain clarifications as well as a stay of the Order. The Department of Energy filed its own motion for rehearing and/or clarification on the same date. Meanwhile, the nonprofit organization Clean Energy New Hampshire, joined by several energy

efficiency contractors, the New Hampshire Housing Authorities Corporation, and the Town of Hanover, sought to block the Order by filing a lawsuit in Merrimack County Superior Court. *See* Order of December 27, 2021 in *Clean Energy NH v. State of N.H. Pub. Utils. Comm'n* (Merrimack Cty., Docket 217-2021-CV-00692) (denying injunction request and directing those aggrieved by the Order to seek relief in this Court). Governor Sununu issued a letter criticizing the Order in light of its "operational complications for New Hampshire's energy efficiency programs" and supporting the Department's rehearing motion.

In Order No. 26,556, entered on December 14, 2021, the Commission suspended a limited number of filing requirements (bearing a deadline of December 15, 2021) for the utilities, but otherwise declined to stay the effect of its November 12 Order. In particular, the Commission reaffirmed that the rate reductions imposed for effect on January 1, 2022, would remain in effect. Finally, via Order No. 26,560, entered on January 7, 2022, the Commission issued certain clarifications as requested by the utilities, granted rehearing to revise its determination on one issue (relative to the handling of carrying forward unexpected program funds into the subsequent year), but otherwise denied the pending rehearing motions.

6. Conclusion

When the Commission rejected the 2021-2023 Plan, it erred by acted unlawfully in disregarding due process, repudiating past policy determinations, ignoring and/or misapprehending the record before it, and making rulings that do not reflect the requisite justness and reasonableness. It further erred by acted unlawfully when, having rejected the 2021-2023 Plan, instead of conducting a subsequent evidentiary hearing, it decided, without providing notice to interested persons, that it was abandoning 20 years of well-established energy efficiency policy without regard to due process, a specific statute limiting the Commission's ability to repudiate prior decisions, established principles governing contested

administrative proceedings, and basic notions of justness and reasonableness in decisionmaking.

VII. JURISDICTIONAL BASIS FOR APPEAL

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

VIII. A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE CORRECT INTERPRETATION OF STATUTES AND NEW HAMPSHIRE SUPREME COURT PRECEDENT. 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.

IX. GENERAL CONCERNS

This appeal is not an attempt to cause the Court to opine on the merits of ratepayer-funded energy efficiency programs. Rather, this appeal presents the Court with an important opportunity to clarify what an administrative agency must do – what sort of notice it must provide, what formalities it must observe, what sort of record it must create, what factfinding it must undertake, and what degree of coherent and rational explanation it must provide – when reversing course and repudiating longstanding policy choices previously made by the agency. Although the Commission gave the parties the impression it was following the contested case procedures required under the Administrative Procedure Act, *see* RSA 541-A:31, it actually claimed midway through the proceeding that it was not obliged to do so because the Commission was exercising "quasi-legislative" rather than "adjudicative" authority. *See* Order No. 26,415 (October 8, 2020) at 7 (denying OCA's motion to designate two Commission employees as advocates pursuant to RSA 363:32 so as to prohibit them from *ex parte* contact with commissioners).

The Commission eventually walked back this determination on the ground that it was "expedient" and conducive to a "fair and orderly resolution" to apply contested case procedures to the instant docket, but it did not do so until nearly two months *after* the hearings had concluded. *See* Order No. 26,458 (February 19, 2021) at 4 (granting OCA rehearing motion). The Commission never actually admitted that this is a contested case within the meaning of the Administrative Procedure Act and, consistent with this disregard for the principles governing administrative adjudication, the Order the Commission produced after a hearing (and nearly 11 months of ensuing post-hearing silence) was almost entirely devoid of citations to record evidence. Those citations that do appear bear little, if any, logical connection to the findings and determinations actually made.

This would be troubling enough if the Commission had confined itself to deciding the issue raised in the utilities' original petition as duly described in the agency's Order of Notice: whether to approve the proposed 2021-2023 Plan. Instead, without giving any prior indication of its intent to do so, the Commission repudiated all of its decisions on the subject of ratepayer-funded energy efficiency from 2015 (when it opened docket IR 15-072 to consider its staff's "straw proposal" for EERS) right through the end of 2019.

As an administrative agency, the Commission is not bound by its own precedent. *See Appeal of Public Service Co. of N.H.*, 141 N.H. 13, 22 (1996) (PUC may adopt "a new paradigm based on changing concepts of what the public good requires"). But neither is the Commission free to reverse itself without providing parties an opportunity to explain why such a reversal of policy choices would be inappropriate and improvident, as it has done here.

X. SPECIFIC BASES OF ERROR

1. Due Process

"At its most basic level, the requirement to afford due process forbids the government from denying or thwarting claims of statutory entitlement by a procedure that is fundamentally unfair." *Appeal of Mullen*, 169 NH 392, 397 (2016) (citation omitted). In the context of an administrative proceeding, the Court balances three factors: "(1) the private interest that is affected; (2) the risk of erroneous deprivation of that interest through the procedure used and the probable value of any additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens brought about by additional procedural requirements." *Id*. (citations omitted).

The due process violation here occurred when the Commission ruled without warning on issues far beyond the issue before it of whether to approve the 2021-2023 Plan and essentially determined that ratepayer-funded energy efficiency should be phased out over the three years in question and, presumably, thereafter. In its Rehearing Order, the Commission concluded that the parties were on full notice of the scope of the proceeding because the presiding officer began the first day of hearings (three months after the commencement of the proceeding, obviously after discovery and the submission of written direct testimony) by stating that "[w]ere [sic] here this morning in Docket DE 20-092 regarding the 2021 to 2023 Statewide Energy Efficiency Plan." Rehearing Order at 8. This is a facially inadequate justification.

2. RSA 365:28

New Hampshire law explicitly authorizes the Commission to change its mind – within limits. Pursuant to RSA 365:28, "[a]t any time after the making and

entry thereof, the commission may, after notice and hearing, alter, amend, suspend, annul, set aside, or otherwise modify any order made by it." As noted, *supra*, the Commission gave no advance notice whatsoever that it intended to amend, suspend, annul, set aside, and modify essentially every order it has issued on the subject of ratepayer-funded energy efficiency since 2015. *See* Order of Notice issued on March 13, 2015 in Docket No. IR 15-072) (opening an investigative proceeding to consider PUC Staff "straw proposal" on an Energy Efficiency Resource Standard); Order of Notice issued on May 8, 2015 in Docket No. DE 15-137 at 1 (opening an adjudicative proceeding "to establish an Energy Efficiency Resource Standard"); Order No. 25,932 issued on August 2, 2016 in Docket No. DE 15-137 at 45-65 (including 20 pages of analysis explaining why the PUC was establishing an EERS that included *inter alia* performance incentives, robust EM&V, and stakeholder engagement process, noting at page 64 that EERS establishment "will move the State forward" and was "a significant step toward addressing the business community's concerns about remaining competitive in today's economy"); Order No. 26,095 issued on January 2, 2018 in Docket No. DE 17-136 at 18 (approving the 2018-2020 Triennial Energy Efficiency Plan as "meet[ing] the requirements of the 2016 EERS Order [i.e., Order No. 25,932)" and "consistent with applicable law, including the least cost integrated planning requirements promoting energy efficiency"); Order No. 26,207 issued on December 31, 2018 in Docket No. DE 17-136 (approving an update of the three-year plan for effect in 2019); Order No. 26,322 issued on December 30, 2019 in Docket No. DE 17-136 at 9 (approving the new Granite State Test for benefit/cost screening, noting that it would "improve energy efficiency program screening by placing a greater emphasis on the utility system impacts," *i.e.*, costs recoverable from all ratepayers and would thus "more appropriately target those measures and programs that lower utility system costs, minimizing disparate treatment of program participants and non-participants"); Order No. 26,323 entered on December 31, 2019 in Docket No. DE 17-136 at11

(approving an update of 2018-2020 energy efficiency plan for effect in 2020, reviewing for consistency with Order Nos. 25,932 approving EERS concept and Order No. 26,095 approving the initial Triennial Plan, as well as "the law underlying the establishment of an EERS").

In its Rehearing Order, the Commission rejected this argument regarding RSA 365:28 summarily, concluding that "no prior orders were modified or altered" and the Commission simply "reviewed changes to prior approved energy efficiency plans." Rehearing Order at 11. Notably, the Commission did not specify which "prior approved energy efficiency plans" it was using as the comparator. The claim that "no prior orders were modified or altered" does not withstand scrutiny, particularly given that the series of 2015-2019 Orders, cited *supra*, were rife with prospective determinations intended to guide the utilities and other stakeholders in developing future triennial plans. The Commission switched from an EERS paradigm, in which savings derived from energy efficiency were so desirable that the goals should be established first and the requisite rates developed later, to one in which energy efficiency as a component of utility service should be gradually phased out as unnecessary. This is not a situation in which the Orders entered from 2016 through 2019 remain "unchanged and in effect" so as to render RSA 365:28 inapplicable. *Appeal of Office of the Consumer Advocate*, 148 N.H. 134, 137 (2002); *cf. Appeal of Public Service Co. of N.H.*, 141 N.H. 13, 21 (1996) (deeming RSA 365:28 applicable to changing service territory boundaries).[2]

3. Adequacy of Factual Findings

The Administrative Procedure Act requires a decision in a contested adjudicative proceeding to include "findings of fact and conclusions of law,

[2] It is noteworthy that *in this very proceeding*, the Commission invoked RSA 365:28 as the basis for a decision postponing the deadline for submission of the 2021-2023 Plan as established in the prior proceeding by which the Commission considered the 2018-2020 Triennial Plan, making the ruling on a *nisi* basis in case interested persons requested a hearing to consider the propriety of the extension. *See* Order No. 26,375 (June 30, 2020) at 3.

separately stated." RSA 541-A:35. The purpose of this requirement is "to provide [the] Court with an adequate basis on which to review the agency's decision." *Appeal of Rye School District*, 173 N.H. 753, 765 (2020) (citation and internal brackets omitted). To be sustainable on appeal, factual findings of an administrative agency must be "supported by competent evidence in the record." *Appeal of Keith R. Mader 2000 Revocable Trust*, 2021 WL 4700446 at *3 (N.H. Supreme Ct., Oct. 8, 2021); *Appeal of Preve*, 172 N.H. 385, 401 (2019); *Appeal of Northern Pass Transmission, LLC*, 172 N.H. 385, 401 (2019).

In its Order, the Commission did not acknowledge its obligation to ground its decisionmaking in factual findings. Rather, the Commission concluded that the proponents of the 2021-2023 Plan had failed to meet their evidentiary burden, not just as to proposed spending levels, but even as to the current ones previously approved for 2020. *See* Order at 27-28. The Commission stated that "the record does not contain direct comparisons of cost of energy savings to supply alternatives, or information on how the program portfolios were maximized to achieve economic benefits." Assuming *arguendo* that such direct comparisons are necessary as a matter of New Hampshire law, the Commission simply ignored the record evidence about the size and basis for projected energy savings. On issue after issue, the Commission simply told the 2021-2023 Plan proponents that they had not made an adequate evidentiary showing, often on issues for which there was not adequate notice as discussed *supra*. Specifically, the Commission, without reference to record evidence, determined that: (a) the Settling Parties had not demonstrated "benefits to all consumers" or the lack of benefiting one customer class to the detriment of another, (b) they had not demonstrated that the 2021-2023 Plan was consistent with the previously approved EERS framework, (c) they had not demonstrated a requisite reduction in market barriers, (d) they had not proposed "fuel neutral efficiency programs that are evenly allocated" across customer classes, (e) they had not proposed just and reasonable rates, and (f) they

had not proposed rates that were "least cost and in the public interest." *Id*. at 32. Although the Commission embellished this laundry list of deficiencies later in the Order, these determinations are not grounded in record evidence and, in effect, attempt to cloak a lack of factfinding in a claim that proponents of the Settlement had failed to make their case.

One key determination does *appear* to be grounded in the evidentiary record, but this proves to be illusory. The Commission determined that "[t]he evidentiary record in this matter established that residential electric non-participant utility customers, and their small commercial counterparts will not receive economic benefits commensurate with the costs they would be required to pay." *Id*. at 33, citing Exhibit 4 at pages 37, 38, 39, and 43. But, the referenced pages of Exhibit 4 are simply graphs of the utilities' estimates of the impact of the proposed energy efficiency charges on the bills of residential customers without any data about the corresponding economic benefits, however great or small. The Commission correctly cited record evidence for the proposition that fuel-neutral energy efficiency programs, proposed to be offered to residential electric customers, were expected to achieve most of their savings via fuels other than electricity, but relied on this evidence to make a factual finding that has no support in the record: that residential customers would, under the 2021-2023 Plan, "fund a suite of programs that do not produce the same economic benefits to ratepayers" as those provided to commercial and industrial customers." *Id*.[3]

The next reference to record evidence correctly identifies places in the hearing transcripts where various witnesses stated that an energy efficiency market potential study, also of record as part of Exhibit 36, stated that "higher [energy]

[3] Footnote 16 on page 33 of the Order simply refers to provisions of the 2021-2023 Plan (of record as Exhibit 1) demonstrating that a greater percentage of energy savings projected for achievement by commercial and industrial electric customers would come directly from reduced consumption of electricity. This sheds no light whatsoever on whether customers receive economic benefits commensurate with the costs they would be required to pay.

savings scenarios would occur under higher spending modes." *Id*. at 34. But, the Commission neither credits nor discredits this factual assertion; rather, it cites these pieces of record evidence in the course of making a completely unrelated finding that "[t]he evidentiary record in this matter . . . fails to establish that the suite of [energy efficiency] program offerings is least cost." *Id*. at 33.

The remainder of the Order contains almost no references to record evidence and, indeed, none that relate to the Commission's rejection of certain key terms of the 2021-2023 Plan. No record evidence supports the Commission's dismissal of the benefit-cost test, which the Commission itself approved in 2019, *see id*. at 39, through its findings that: performance incentives are "no longer just and reasonable and in the public interest" in the context of ratepayer-funded energy efficiency, *see id*. at 41; year-to-year budget carryforwards "result in ratepayer funds being held without commensurate benefits accruing to ratepayers in a timely manner, *see id*. at 42; it would not be just and reasonable to increase from $8,000 to $20,000 the cap on energy efficiency whole-house retrofits for low-income customers, *see id*. at 43; and it would be inappropriate to reduce "regular oversight" of the programs by the Commission, *see id*. at 44. The policy discretion that the General Court has lodged with the Commission, and to which the Court traditionally defers, cannot excuse such a rampant failure to rely on record evidence in an adjudicative proceeding.

4. Arbitrary and Capricious Decisionmaking

If accepted, this appeal squarely provides the Court with an opportunity to clarify the degree to which New Hampshire law requires reasoned decisionmaking from an administrative tribunal when it undertakes an adjudicative proceeding. Although, quite appropriately, the Court has historically been deferential to agencies like the Commission in light of their expertise, the Court will intervene when an administrative decision is "so lacking in reason as to be arbitrary, unreasonable, or capricious, or to constitute an abuse of discretion." *Day v. New*

Hampshire Retirement Sys., 138 N.H. 120, 127 (1993) (citation omitted); *cf*. *Appeal of Union Tel. Co*., 160 N.H. 309, 341 (2010) (citations omitted) (the Court will generally defer to the Commission's balancing of "competing economic interests").

This case is not one in which the Commission was tasked with balancing competing economic interests; every single party – representing the interests of utility shareholders, utility customers, and others with intervenor status – was united in seeking approval of the 2021-2023 Plan. Rather, this is, regrettably, that rare occasion when the Commission has stepped beyond discretionary policy choices and into the realm of unjustness and unreasonableness. The most egregious example is the Commission's abrupt elimination of performance incentive payments for the utilities as discussed at pages 40-42 of the Order. The Commission ruled that such payments are "no longer just and reasonable and in the public interest" because the utilities are already "sufficiently compensated" through recovery of administrative costs and lost fixed-cost revenue. *Id*. at 41-42. The Commission apparently mistakenly believed that by "eliminating the cost, management, administration, and complexity of the Performance Incentive, the benefits will accrue to the ratepayer" as evidenced by the Commission's directive that the utilities must "spend this money on energy efficiency programming." But, as explained in the joint rehearing motion, there is no fund of performance incentive money that can be redirected into programs because, in rejecting the 2021-2023 Plan, the Commission fixed SBC/LDAC rates that eliminate any such revenue stream.

Another equally troubling example of unjust and unreasonable decisionmaking is the Commission's decision to curtail spending on Evaluation, Measurement, and Verification in 2022 and to eliminate it altogether thereafter. *See* Order at 46. Although EM&V has long been considered a critical component of ratepayer-funded energy efficiency programs, both in New Hampshire and in

every other state where there are such programs, one could assume *arguendo* that the Commission could make a policy choice to the effect that all of this research and analysis is unnecessary. But, what the Commission cannot do is contradict itself within the same Order. In its discussion of benefit-cost testing, the Commission observed that "the ratepayers are entitled to a fully objective and understandable measure of the cost-effectiveness of the proposed programs." *Id*. at 39. However, in eliminating EM&V, the Commission is ending the objective data as to the savings achieved by ratepayer-funded energy efficiency which is precisely the reason for EM&V efforts.

Further, the Commission, without explanation or elaboration, accused the utilities, the OCA, and the other parties that supported the 2021-2023 Plan at the hearing of seeking to have the Commission "abdicate its statutory responsibility for oversight" so as to assure that rates are just and reasonable. *Id*. at 43-44 (referring to "a reduction in oversight"). This is the quintessence of irrational and inexplicable decisionmaking inasmuch as the proponents of the 2021-2023 Plan, and certainly not the state's ratepayer advocate, requested no such thing.[4]

Finally, the Commission based its rejection of the 2021-2023 Plan, in part, on a determination that the utilities did not "demonstrate the selected efficiency programs were evaluated on a similar basis to supply-side resources or market purchases." *Id*. at 33. This is a true statement in factual terms – and, indeed, as suggested *supra*, the reason is that the Commission did not put anyone on notice,

---

[4] It is possible the Commission was referring to something it described in the portion of the Order dedicated to summarizing the positions of the parties. At page 25, the Commission noted that the Settling Parties "proposed that certain mid-term modification triggers and review and oversight by the Commission contained in the 2021-2023 Proposal be removed and transferred to the Stakeholder Advisory Council" that would have been created pursuant to the Settlement Agreement. Order at 25. But, none of these provisions attempted to limit the Commission's right to act *sua sponte* to investigate program modifications or, indeed, any matters deliberated by the Stakeholder Advisory Council. *See* RSA 365:5 (vesting both the Commission and the Department of Energy with authority "to investigate or make inquiry . . as to any rate charged or proposed or as to any act or thing having been done, or having been omitted or proposed by any public utility"); RSA 374:3 (vesting both the Commission and the Department of Energy with "the general supervision of all public utilities").

either prior to or during the hearings, that it would be imposing such a new analytical framework. Apart from that, in the context of the "unjust and unreasonable" standard, the Commission failed to provide any semblance of a coherent explanation for why energy efficiency expenditures that are cost effective (in the sense of yielding to all ratepayers savings that are in excess of costs) must also prove they are cheaper than supply-side investments. The Commission stated that such a "least cost showing requirement in from[sic] Order 25,932's framework" had "not been adequately demonstrated." *Id*. at 34. But that Order, approving the concept of an Energy Efficiency Resource Standard, did not impose such a requirement as a condition of approving EERS-related expenditures.[5]

[5] What the Commission *did* say in its 2016 order adopting the EERS concept – in *dicta* – is that it considered energy efficiency (and the EERS in particular) to be critical to the least-cost integrated resource planning (LCIRP) that utilities must undertake pursuant to RSA 378:37 *et seq*. Order No. 25,932 at 63. This is correct and the LCIRP statute says as much. *See* RSA 378:38, II (requiring submission of least-cost integrated resource plans that assess "demand-side energy management programs, including conservation, efficiency improvement, and load management programs"). But, to the extent utilities are failing to assess energy efficiency adequately in such plans, that is completely beyond the scope of the questions that were pending in the original EERS docket or, indeed, in the present case.

XI. PRESERVATION OF ISSUES FOR APPELLATE REVIEW

Each issue raised in this appeal has been presented to the Commission by the Office of the Consumer Advocate, via the Joint Motion for Rehearing, Clarification and Stay dated December 10, 2021, and has been properly preserved for appellate review.

Respectfully submitted,
OFFICE OF THE CONSUMER ADVOCATE
By its Attorneys,

Dated: January 26, 2022

Donald M. Kreis
Bar No. 12895
Consumer Advocate
Office of the Consumer Advocate
21 South Fruit Street, Suite 18
Concord, New Hampshire 03301
603.271.1174
donald.m.kreis@oca.nh.gov

Amy Manzelli
Bar No. 17128
BCM Environmental & Land Law,PLLC
3 Maple Street
Concord, New Hampshire 03301
603-225-2585
manzelli@nhlandlaw.com

Anne M. Edwards
Bar No. 6826
Associate Attorney General
Attorney General's Office
33 Capitol Street
Concord, New Hampshire 03301
603-271-3650
Anne.edwards@doj.nh.gov

CERTIFICATE OF SERVICE

I hereby certify that consistent with Supreme Court Rule 26 and Supplemental Supreme Court Rule 18, on January 26, 2022, I served the foregoing Notice of Appeal electronically and by conventional service to those parties listed above in Section a.2. of this notice.

Dated: January 26, 2022 Donald M. Kreis