THE STATE OF NEW HAMPSHIRE
SUPREME COURT
No. _____

ELECTRIC AND GAS UTILITIES
2021-2023 Triennial Energy Efficiency Plan

PUC Docket No. DE 20-092

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

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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 20-092

ELECTRIC AND GAS UTILITIES

2021-2023 New Hampshire Statewide Energy Efficiency Plan

ORDER OF NOTICE

On September 1, 2020, Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty Utilities, New Hampshire Electric Cooperative, Inc., Public Service Company of New Hampshire d/b/a Eversource Energy, and Unitil Energy Systems, Inc. (collectively, the Electric Utilities), together with Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities and Northern Utilities, Inc. (collectively, the Gas Utilities) jointly proposed a 2021-2023 Statewide Energy Efficiency Plan (the Plan), which includes energy efficiency programs and related rates, for approval by the Commission. The Plan and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, will be posted to the Commission's website at: https://www.puc.nh.gov/Regulatory/Docketbk/2020/20-092.html.

Funding for the electric energy efficiency programs contained in the Plan is provided through a portion of the System Benefits Charge (SBC) paid by the Electric Utilities' customers and is supplemented by funds available through the Independent System Operator-New England's Forward Capacity Market and the Regional Greenhouse Gas Initiative. Funding for the natural gas energy efficiency programs proposed in the Plan is provided through a portion of the Local Distribution/Delivery Adjustment Clause (LDAC) paid by the Gas Utilities' customers. Any unspent funds from prior program years for both the Electric Utilities and Gas Utilities,

including interest, are carried forward to the following year's budget. The energy efficiency programs proposed in the Plan are designed to be consistently available to eligible customers across New Hampshire, subject to available budgets.

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) and Order No. 26,323 (December 31, 2019) (approving 2020 Update Plan and establishing process for development and submission of 2021-2023 Plan). The Electric Utilities propose three annual changes to the SBC, for effect on January 1 of each year between 2021 and 2023. The Gas Utilities propose three annual changes to the LDAC, which is reviewed by the Commission in each utility's annual Cost of Gas filing, for effect on November 1 of each year between 2021 and 2023. The proposed SBC and LDAC changes are intended to recover projected energy efficiency program costs, performance incentive costs, and for certain utilities, lost base revenues.

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. Each party has the right to have an attorney represent the party at the party's own expense.

Based upon the foregoing, it is hereby

ORDERED, that, consistent with Governor Christopher T. Sununu's Emergency Order #12, the Commission will hold a web-enabled remote prehearing conference, pursuant to

N.H. Admin. R., Puc 203.15, on September 14, 2020 at 10:30 am, at which each party will provide a preliminary statement of its position with regard to the Plan, proposed rates, and any of the issues set forth in N.H. Admin. R., Puc 203.15. Members of the public who wish to access the prehearing conference may do so by clicking here: https://www.puc.nh.gov/Regulatory/Calendar-Remote.html. **If you have any difficulty obtaining access to this remote event, please notify the Commission by calling (603) 271-2431 as soon as possible**. Parties will be provided with additional instructions prior to the prehearing conference; and it is

FURTHER ORDERED, that, immediately following the prehearing conference, the Electric Utilities and Gas Utilities, the Staff of the Commission, and any intervenors shall hold a web-enabled remote technical session to review the Plan; and it is

FURTHER ORDERED, that pursuant to N.H. Admin. R., Puc 203.12, the Electric Utilities and Gas Utilities shall notify all persons desiring to be heard at this hearing by publishing a copy of this order of notice on their websites no later than one business day after the date of issue. In addition, the Executive Director shall publish this order of notice on the Commission's website no later than one business day after the date of issue; and it is

FURTHER ORDERED, that consistent with N.H. Admin. R., Puc 203.17 and Puc 203.02, any party seeking to intervene in the proceeding shall file with the Commission a petition to intervene with copies sent to the Electric Utilities and Gas Utilities and the Office of the Consumer Advocate on or before September 9, 2020, such petition stating the facts demonstrating how its rights, duties, privileges, immunities, or other substantial interests may be affected by the proceeding, consistent with N.H. Admin. R., Puc 203.17. Pursuant to the secretarial letter issued on March 17, 2020, which is posted on the Commission's website at https://www.puc.nh.gov/Regulatory/Secretarial%20Letters/20200317-SecLtr-Temp-Changes-in-

Filing-Requirements.pdf, any party seeking to intervene may elect to submit this filing in electronic form; and it is

FURTHER ORDERED, that any party objecting to a petition to intervene make said objection on or before September 14, 2020.

By order of the Public Utilities Commission of New Hampshire this eighth day of September, 2020.

Debra A. Howland
Executive Director

Individuals needing assistance or auxiliary communication aids due to sensory impairment or other disability should contact the Americans with Disabilities Act Coordinator, NHPUC, 21 S. Fruit St., Suite 10, Concord, New Hampshire 03301-2429; 603-271-2431; TDD Access: Relay N.H. 1-800-735-2964. Notification of the need for assistance should be made one week prior to the scheduled event.

Service List - Docket Related

Docket#: 20-092

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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 20-092

ELECTRIC AND GAS UTILITIES

2021–2023 Triennial Energy Efficiency Plan

Order on 2021–2023 Triennial Energy Efficiency Plan and Implementation of Energy Efficiency Programs

O R D E R N O. 26,553

November 12, 2021

In this order, the Commission sets ratepayer-funded and utility-managed energy efficiency rates for 2021 through 2023 in aggregate at a level consistent with the previous Triennial Plan. The Joint Utilities shall identify energy efficiency programs that provide the greatest benefit per unit cost with the lowest overhead and administrative costs within the approved budget and file a program proposal for review and approval by the Commission. The Commission moves the funding requested for the Performance Incentive, over $20,000,000 in the Triennial Plan Proposal, from the Joint Utilities to the energy efficiency programs; and therefore to ratepayers.

As the Commission held at the outset of restructuring, "the most appropriate policy is to stimulate, where needed, the development of market based, not utility-sponsored and ratepayer-funded, energy efficiency programs."[1] The Proposal and Settlement before the Commission present a

[1] *Electric Utility Restructuring*, Order No. 22,875 at 79 (March 20, 1998)

stark contrast to those long-held tenets, instead proposing nearly $400,000,000 in entirely ratepayer-funded and utility-sponsored programs, placing an enormous burden on New Hampshire ratepayers. We view this Triennial Plan as an inflection point, with ratepayer-funded and utility managed energy efficiency programs peaking in 2020 and 2021 and returning to the intended transition to market-based energy efficiency after this triennium within the guidelines provided by the Legislature.

I. BACKGROUND AND PROCEDURAL HISTORY

On September 1, 2020, the following parties filed a proposal (the Proposal) for ratepayer funded energy efficiency programs for 2021, 2022, and 2023:

- The Electric Utilities:
  - Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty Utilities
  - New Hampshire Electric Cooperative, Inc.
  - Public Service Company of New Hampshire d/b/a Eversource Energy
  - Unitil Energy Systems, Inc.
- The Gas Utilities:
  - Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities
  - Northern Utilities, Inc.

The above-listed Electric Utilities and Gas Utilities are collectively referred to as the Joint Utilities.

The Office of the Consumer Advocate (OCA) notified the Commission of its participation in this docket on behalf of residential ratepayers. *See* RSA 363:28, II. Clean Energy New Hampshire (CENH), the Conservation Law Foundation (CLF), the Acadia Center, The Way Home, the Department of

Environmental Services (DES), and Southern New Hampshire Services each filed petitions to intervene. The Commission granted all petitions to intervene at the prehearing conference held on September 14, 2020. Hearing Transcript of September 14, 2020 at 11.

On December 3, the Joint Utilities, OCA, CLF, The Way Home, Southern New Hampshire Services, and CENH (collectively, the Settling Parties) filed a settlement agreement (Settlement Agreement) that called for approval of the 2021–23 Proposal with certain modifications. The Acadia Center and DES did not sign the Settlement agreement but filed letters in support. The Department of Energy (formerly Staff Advocates with the Commission) did not join the Settlement Agreement.

The Commission held hearings on the Proposal on December 10, 14, 16, 21, and 22. The Commission held the record open for responses to the Commission's record requests and the filing of Exhibit 25B. Hearing Transcript of December 22, 2020 (12/22/20 Tr.) at 141. Responses to the Commission's record requests and Exhibit 25B were filed on December 22.

On December 29, 2020, the Commission issued Order No. 26,440, maintaining the current System Benefits Charge (SBC) rates and structure of the existing energy efficiency programs until the Commission's issuance of its final order in this proceeding.

On February 19, 2021, the Commission issued Order No. 26,458, granting the motion of the OCA for rehearing of Order No. 26,415, which had declined to designate then Commission employees Elizabeth Nixon and Paul

Dexter as Staff Advocates pursuant to RSA 363:32. On rehearing the Commission granted the OCA's motion and designated Elizabeth Nixon and Paul Dexter as Staff Advocates pursuant to RSA 363:32, II.

The Proposal, Settlement, testimony, exhibits, and other docket filings, except any information for which confidential treatment is requested of or granted by the Commission, are posted at: https://www.puc.nh.gov/Regulatory/Docketbk/2020/20-092.html.

II. SUMMARY OF THE PROPOSAL FILED SEPTEMBER 1, 2020

A. Proposal Plan Targets and Budget

The Proposal significantly expands the programs and spending implemented in the prior plan. The Proposal increases Energy Efficiency (EE) program budgets as seen in the table below with 2018–2020 EE program budgets for comparison:

Table 1: Proposed Energy Efficiency Program Budgets				
	2021	2022	2023	Total
Electric	$93,582,000	$115,554,000	$141,692,000	$350,829,000
Gas	$12,038,000	$13,706,000	$16,137,000	$41,882,000

Exh *1.* at 32, Table 1-9; 1-10.

Table 2: 2018–2020 Energy Efficiency Program Budgets				
	2018	2019	2020	Total
Electric	$36,624,000	$46,911,000	$62,580,000	$146,115.000
Gas	$9,158,000	$10,029,000	$10,902,000	$30,089,000

Exh. 2 at 32-33, *Docket DE 17-136; Order No. 26,095 at 5 (January 2, 2018).*

1. Proposal Plan Funding

The Proposal seeks to fund electric and natural gas programs through different sources. Exh. 1 at 30–31. For the electric energy efficiency programs, funding is derived from: (1) a portion of the SBC, which is included on the

electric bills of all customers receiving delivery service from a participating utility; (2) a portion of the Regional Greenhouse Gas Initiative (RGGI) auction proceeds; and (3) proceeds obtained by the Electric Utilities from their participation in the regional Forward Capacity Market (FCM). *Id.* In addition, under the Proposal, any unspent funds from prior program years are carried forward to future years, including interest at the prime rate. *Id.*

The Proposal seeks to fund natural gas energy efficiency programs from a portion of the Local Delivery Adjustment Clause (LDAC), which is included on the bills of all gas utility customers, as well as from any unspent funds from prior program years, which are carried forward to future years including interest at the prime rate. *Id.*

The Proposal significantly changed how the SBC and LDAC charges are calculated, allocated, and set, and has increased proposed rates for each year of the proposal. Under the Proposal, the Joint Utilities seek to review actual sales and revenues each year to determine whether the rates approved by the Commission for the following year should apply for collection of the approved budget. *Id.* at 37. Based on this reconciliation, the Joint Utilities request to adjust the charges by up to 10 percent of the approved rate without the need for Commission approval. *Id.*

For the first time in the history of EE programs, the Proposal separates residential and commercial/industrial (C&I) EE program budgets for Electric Utilities and bases its proposed SBC rates applicable to those customer classes on their respective budgets. *Id.* at 38. Currently, the EE portion of the SBC

charge is uniform between customer classes, however, the overall SBC charges are not uniform among utility service territories. The utilities' proposed EE portion of SBC rates are laid out in the tables below:

Table 3: EE Portion of the Electric Utilities' SBC Rates (per kWh)					
		2020	2021	2022	2023
Eversource[2]	Residential	$0.00528	$0.00651	$0.00646	$0.00673
	C&I		$0.01029	$0.01498	$0.02062
Liberty[3]	Residential	$0.00528	$0.00568	$0.00864	$0.00922
	C&I		$0.00561	$0.00843	$0.01061
Unitil[4]	Residential	$0.00528	$0.00615	$0.00773	$0.00767
	C&I		$0.00867	$0.01070	$0.01333
NHEC[5]	Residential	$0.00528	$0.00838	$0.00873	$0.008530
	C&I		$0.00906	$0.01036	$0.01004

Exh. 4 at 8.

Table 4: EE Portion of the Gas Utilities' LDAC Rates (per therm)					
		2020	2021	2022	2023
Liberty[6]	Residential	$0.0640	$0.0831		
	Commercial	$0.0426	$0.0441		
Unitil[7]	Residential	$0.0613	$0.0994	$0.0985	$0.1203
	Commercial	$0.0266	$0.0367	$0.0509	$0.0704

B. Commercial and Industrial EE Programs

The Proposal has four ratepayer-funded C&I EE programs: the Small Business Energy Solutions Program; the Municipal Program; the Large Business Energy Solutions Program; and Eversource's Large Business Energy Rewards Request For Proposals (RFP) Program. Exh. 1 at 52–53.

[2] Exh. 1 at 38.
[3] Exh. 1 at 725.
[4] Exh. 17 at 19.
[5] Exh. 1 at 773.
[6] Exh. 1 at 853–54.
[7] Exh. 1 at 925.

1. Small Business Energy Solutions Program

The Small Business Energy Solutions Program is described as a "retrofit and new equipment & construction initiative" providing incentives and technical expertise to small businesses. *Id.* at 52. The proposed 2021–23 electric budget is $68,248,328, while for gas the proposed budget is $7,810,522. *Id.* at 65.

2. Municipal Program

The Municipal Program is described as providing "technical assistance and incentives to municipalities and school districts to help them identify energy-saving opportunities and implement projects." *Id.* at 52. The 2021–23 electric budget is proposed to be $5,871,702. *Id.* at 76. According to the 2021–23 Proposal, natural gas utilities also serve municipalities through the Small and Large Business Energy Solutions programs. *Id.* at 52.

3. Large Business Energy Solutions Program

The Large Business Energy Solutions Program is described as offering "technical services and incentives to assist large C&I customers who are retrofitting existing facilities or equipment, adding or replacing equipment that is at the end of its useful life, or constructing new facilities or additions." *Id.* at 53. The proposed 2021–23 electric budget is $105,736,654, while the proposed gas budget is $10,160,707. *Id.* at 89.

4. Eversource's Large Business Energy Rewards Program

Eversource's Large Business Energy Rewards RFP Program is described as encouraging "customers to propose energy efficiency projects through a

competitive solicitation process." *Id.* at 53. The 2021–23 budget for this encouragement is $17,781,164. *Id.* at 93.

C. Residential EE Programs

The Proposal has four Residential ratepayer funded programs: the ENERGY STAR© Homes Program; the ENERGY STAR© Products Program; the Home Energy Assistance Program (HEA); and the Home Performance ENERGY STAR© Program.

1. ENERGY STAR© Homes Program

The ENERGY STAR© Homes Program is described as providing incentives and contractor support for residential single-family and multi-family new construction homes. *Id.* at 97. The proposed 2021–23 electric budget for this program is $10,854,423, while the proposed gas budget for the same time period is $4,762,071. *Id.* at 118.

2. ENERGY STAR© Products Program

The ENERGY STAR© Products Program is described as helping residential customers overcome the extra expense of purchasing and installing ENERGY STAR-certified appliances, electronics, HVAC equipment and systems, hot water-saving equipment, and lighting. *Id.* at 97. The proposed 2021–23 electric budget for this program is $31,627,751, while the proposed gas budget is $4,906,684. *Id.* at 126.

3. Home Energy Assistance (HEA) Program

The HEA Program is described as being a fuel-neutral weatherization program designed to reduce energy use from both electric and gas appliances, lighting,

and HVAC systems. The proposed 2021–23 electric budget for this program is $69,854,034, while the proposed gas budget is $7,136,139. *Id.* at 137. Under the Proposal, the per-project incentive cap would be more than doubled from $8,000 to $20,000. In addition, the Proposal would allow exceptions to that increased cap. *Id.* at 130.

4. Home Performance ENERGY STAR© Program

The Home Performance ENERGY STAR© Program is described as providing "comprehensive energy-saving services at significantly reduced cost to customers' existing homes, and covers lighting improvements, space heating and hot water equipment upgrades, weatherization measures, and appliance replacements." *Id.* at 98. The 2021–23 proposed electric budget for this program is $29,062,551, while the proposed gas budget is $4,840,463. *Id.* at 148.

D. Active Demand Reduction programs

The proposed Active Demand Reduction (ADR) program is a ratepayer-funded program described as seeking "to reduce peak demand and capture benefits as quantified in the regional Annual Energy Supply Components ("AESC") study." *Id.* at 150. In the Proposal, program offerings include a residential Wi-Fi Thermostat offering from Eversource and Unitil Electric; a residential Battery Storage offering from Eversource; a C&I Load Curtailment from Eversource, Unitil Electric, and Liberty Electric; and a C&I Storage Performance offering from Eversource and Until Electric. *Id.* at 151. The 2021–

23 proposed budget for ADR programs is $626,372 for residential offerings, and $4,775,494 for C&I offerings. *Id.* at 157.

E. Behavioral-Based Strategies

The Joint Utilities describe Behavioral-Based Strategies as being designed to make customers aware of their energy consumption to empower and motivate them to adopt energy-efficient behaviors or technologies. *Id.* at 150. The proposed strategies include providing Unitil Electric and Gas customers and Liberty Electric and Gas customers Home Energy Reports (HERs), with energy consumption information and energy-saving information. Over the triennium, the total budget proposal for the electric HER program is $963,157, and the total budget proposal for the gas HER program is $651,850. *Id.* at 585. In addition, Eversource proposed a Customer Engagement Initiative, which is a behavioral-based marketing strategy encouraging energy efficiency measures through other residential program offerings. *Id.* at 159-164. Finally, Liberty Gas proposes performing aerial infrared mapping to provide a visual profile of heat loss to help drive customer behavior changes and program participation. *Id.* at 165. The proposed budget for Liberty's aerial mapping is $460,250 in 2021, $271,428 in 2022, and $262,884 in 2023. *Id.* at 861.

F. Energy Optimization

This proposed pilot program is described as minimizing "customers' total energy usage across all energy sources while maximizing customers' benefits" with a focus on conversions from gas heating systems to higher-efficiency heating systems consisting of cold climate air source heat pumps. *Id.* at 177.

The Joint Utilities claim the pilot is necessary to provide "a more comprehensive understanding and experience of the benefits of heat pumps to the electric system, as well as the impact on emissions from [greenhouse gases] and nitrogen and sulfur oxides." *Id.* Over the triennium, the total budget proposal for the Energy optimization Pilot is $1,492,259. *Id.* at 585.

G. Financing Mechanisms

The Proposal has multiple financing mechanisms, including low-interest, zero-interest, and on-bill mechanisms. For C&I programs, all utilities offer zero percent on-bill financing to certain customers, and facilitate the use of third-party financing options. Eversource and the NHEC also offer tariffs to municipal customers that allow municipalities to repay upfront costs through charges that are less than or equal to the customer's estimated savings. *Id.* at 55–56.

For Residential programs, each of the Joint Utilities proposes varying amounts of on-bill financing for the Home Performance program. *Id.* at 101. Additionally, each of the Joint Utilities partners with third-party lenders offering low-interest EE loans residential customers and zero-interest loans for moderate-income residential customers. *Id.* at 102–103.

H. Benefit/Cost Screening

Under the Proposal, the Joint Utilities propose using a new cost-effectiveness screening framework for the EE programs. The framework consists of a complicated series of tests; a primary test, called the "Granite State Test," and two secondary tests: the "Utility Cost Test," and the

"Secondary Granite State Test." *Id.* at 209–211. Energy benefits are evaluated using the "Avoided Energy Supply Cost" (AESC) study.[8] *Id.* at 44–45. The Joint Utilities propose to file an informational report with information on the results of the AESC study update in 2021, which may result in proposed program changes. *Id.*

I. Performance Incentive

Under the Proposal, the Joint Utilities propose ratepayer-funded performance incentives for themselves of up to 6.875 percent of actual program expenditures. *Id.* at 218. Over the triennium, the total budget proposal for the electric program performance incentives is $19,289,318, *id.* at 617, and the total budget proposal for gas program performance incentives is $2,303,525, *id.* at 621. Additionally, the Proposal asks to transition the ADR offerings from demonstration projects to full programs, and include a performance incentive component for achievement of ADR goals at 5.5 percent of actual expenditures, with a threshold for savings and benefits components of 65 percent and maximum performance incentive level of 125 percent. *Id.* Over the triennium, the budget proposal's cap for performance incentives related to the ADR program is $109,719 for Unitil Electric, *id.* at 792, $574,198 for Liberty Electric, *id.* at 701, and $902,775 for Eversource, *id.* at 633.

[8] The Commission notes that this study was not performed on a New Hampshire-specific basis and was, instead, performed across all New England States. An updated study is due to be released in 2021. *Id.* at 44–45.

J. Lost Base Revenue

The Proposal maintains the existing practice of allowing Joint Utilities that have not instituted decoupling to collect revenue lost due to decreased energy sales resulting from EE programs. *Id.* at 938–941. Electric utilities collect lost base revenue (LBR) as another component of the SBC, while gas utilities collect LBR as a component of the LDAC. NHEC does not collect LBR, and Liberty Electric only calculated a LBR charge for 2021, based on its intent to implement revenue decoupling in its general rate scheme. *Id.* The Joint Utilities proposed electric LBR rates for electric customers, per kWh, as follows:

Table 5: Joint Utilities' LBR Proposals

2021	Eversource	Liberty	Unitil
Residential	$0.00065	$0.00068	$0.00120
C&I	$0.00091	$0.00068	$0.00129
2022	Eversource	Liberty	Unitil
Residential	$0.00102	N/A	$0.00145
C&I	$0.00159	N/A	$0.00121
2023	Eversource	Liberty	Unitil
Residential	$0.00118	N/A	$0.00186
C&I	$0.00220	N/A	$0.00130

Id. at 938, Table 3.

K. Technical Reference Manual

The Joint Utilities created a Technical Reference Manual (TRM) that documents how the Joint Utilities propose to calculate savings from the installation of EE measures by providing methods, formulas, and assumptions for estimating energy, peak demand, and other resource impacts from EE measures. *Id.* at 241. In the Proposal, the Joint Utilities will update the TRM on an annual basis, and in advance of any program plan or update filing. *Id.* at

219. Updates would take into account savings assumptions, incorporate results from New Hampshire evaluations, identify changes in federal equipment standards, reference neighboring states' evaluations, and update relevant savings algorithms. *Id.* The Joint Utilities propose to update the TRM in coordination with the Evaluation, Measurement, and Verification (EM&V) Working Group. *Id.* at 220.

III. POSITIONS OF THE PARTIES

The Proposal and Settlement Agreement address an array of programmatic topics including: the proposed plan targets and budgets; changes to the SBC and LDAC rates; modifications to plan programs and pilots; utility performance incentives; evaluation, measurement and verification (EM&V); savings assumptions; recovery of lost revenue; plan updates, reporting requirements, and mid-term modifications; and stakeholder involvement in future planning and review. The Settling Parties supported the Joint Utilities' continuing role as the program administrator, continuation of existing programs, and a three-year planning cycle. The Acadia Center and Department of Environmental Services did not join the Settlement Agreement. However, they expressed their support for the submitted Settlement Agreement in written correspondence and/or at the hearing. Exh. 15 at 1-3; 12/22/20 Tr. at 56. Energy opposed the Settlement.

A. Plan Targets, Budgets, and Rates

1. Settlement Agreement

In the Settlement Agreement, the parties proposed electric energy savings targets of 4.5 percent of 2019 electric sales, which they estimate equates to cumulative annual MWh savings of 476,616 achieved from 2021–23. Exh. 14 at 4. The Settlement Agreement also proposes a gas energy savings target of 2.8 percent of sales, or an estimated 706,065 annual MMBtus from 2021–23. *Id.*

The Settlement Agreement modifies Eversource's budget as set forth in the Proposal from $272.5 million to $258.2 million by reducing the C&I budget by $17.6 million, increasing the residential sector budget by $7.4 million, and reducing the income-eligible program budget by $4.1 million. *Id.* at 5. The table below shows the SBC rates proposed by the Settling Parties in their Settlement Agreement, as compared to the rates initially proposed by the Electric Utilities.

Table 6: Proposal and Settlement Agreement SBC Rate Comparison (per kWh)

		2021		2022		2023	
		Proposal	Settlement Agreement[9]	Proposal	Settlement Agreement	Proposal	Settlement Agreement
Eversource[10]	Residential	$0.00866	$0.00986	$0.00898	$0.01070	$0.00941	$0.01185
	C&I	$0.01270	$0.01215	$0.01807	$0.01587	$0.02432	$0.01994
Liberty[11]	Residential	$0.00719	$0.00803	No rate proposed	$0.01014	No rate proposed	$0.01072
	C&I	$0.00712	$0.00836		$0.00993		$0.01211
Unitil[12]	Residential	$0.00885		$0.01068		$0.01165	
	C&I	$0.01146	$0.01145	$0.01341	$0.01340	$0.01613	$0.01612
NHEC[13]	Residential	$0.00838*	$0.00761*	$0.0087343*	$0.00848*	$0.008534*	$0.00825*
	C&I	$0.00906*	$0.00818*	$0.0103636*	$0.01050*	$0.010046*	$0.01000

* Rate reflects only the EE portion of the SBC rate.

[9] The Settlement Agreement requested 2021 rates be made effective as of January 1, 2021. Exh. 14 at 4
[10] Exh. 1 at 38, Exh 14 at 33.
[11] Exh. 1 at 725, Exh 25B at 1.
[12] Exh. 17 at 19, Exh 14 at 34.
[13] Exh. 1 at 773, Exh 14 at 35.

No Modifications to the LDAC rates proposed in the Proposal were included in the Settlement Agreement. Rather, the Settling Parties proposed that any necessary changes to account for collection adjustments or true-ups over the course of the 2021–23 triennium shall be filed for review and approval by the Commission. Exh. 14 at 13.

2. Energy

At the hearing, Energy expressed agreement with the Settlement's treatment of the funding structure, and with the requirement for Commission approval of any SBC or LDAC changes for over/under recoveries during the term. Exh. 8 at 32; Hearing Transcript of December 21, 2020 (12/21/20 Tr.) at 111–112.

Energy expressed concern that Eversource's C&I customers would experience rate and bill increases approximately twice that of other C&I customers. Exh. 8 at 35. Energy opined that the resulting C&I rates, with specific emphasis on Eversource's C&I Rate, would not be reasonable because they fail to embrace rate gradualism[14]. Energy further represented that the rates would not strike the proper balance between short-term impacts and long-term energy savings. 12/21/20 Tr. at 112–113, 127–128. Energy

[14] "Rate gradualism" is the concept of progressively changing rates over time to mitigate shock to customers that has been cited to by this Commission on multiple occasions. *See, e.g., Development of New Alternative Net Metering Tariffs,* Order No. 26,026 at 33 (June 23, 2017). Gradualism was embraced by all parties to the settlement agreement approved by Order No. 25,932, which contained the provision that "The Settling Parties agree that the savings goals balance the goals of capturing more cost effective energy efficiency and benefits to ratepayers with the goal of gradually increasing funding for efficiency while minimizing the impacts on all ratepayers." Exh. 1 at 8, Docket DE 15-137.

recommended revision of the customer budgets to better balance short-term rate impacts with the long-term goal of achieving cost-effective energy efficiency. Exh. 8 at 35. Energy also recommended that future SBC and LDAC rate changes should not be pre-approved. *Id.* at 36–37.

B. Program Changes

1. Settlement Agreement

The Settlement Agreement proposes adjustments to certain programs. Exh. 14 at 14. The Settlement Agreement increases by 1,200 the number of ratepayer-funded electric baseboard to heat pump conversions. *Id.* In advance of implementing the proposed Energy Optimization pilot, the Joint Utilities propose soliciting feedback through the proposed Stakeholder Advisory Council,[15] making an informational filing with the Commission, and to EM&V working group oversight. *Id.* Prior to offering any electric vehicle managed charging measure as a part of active demand management, under the Settlement Agreement, the Joint Utilities would solicit feedback through the Stakeholder Advisory Council and make an informational filing with the Commission. *Id.* For Eversource, the Settlement Agreement proposes shifting funds from its RFP program to the Large Business Energy Solutions program. *Id.* at 15.

[15] The Stakeholder Advisory Council proposal is discussed in greater detail in Section H-1 below.

2. Energy

Energy proposed changes to ADR weighting, stating that it should be deducted from the Value/Net Benefits component and not diminish the weighting of summer and winter peaks. Exh. 6 at 11. Additionally, Energy recommended the Joint Utilities develop and propose a performance incentive based on a percentage of shared savings associated with the ADR pilot to encourage the use of ADR resources to target monthly peaks. *Id.* at 12.

Regarding the HER program, Energy recommended an independent evaluation be included in the EM&V plan in 2021. Exh. 7 at 5. Regarding Liberty Gas's AIM program, Energy recommended ample implementation time for customers to learn about the program and opt out. *Id.* at 7. Energy noted that Liberty's aerial infrared mapping is not cost effective in its first year. *Id.* at 8.

Regarding the HEA program, Energy expressed concern about the significant increased spending limit per household from $8,000 to $20,000, recommending a new cap at $12,000. *Id.* at 10–11.

Energy also made recommendations relating to the Energy Optimization pilot, including that any customers installing heat pumps be included in the study so the relationship between reduced fuel use and increased electricity consumption can be evaluated. Energy recommended requiring the utilities to receive Commission authorization before moving from a pilot to a full program. Exh. 8 at 38. Regarding the ADR program, Energy recommended the utilities provide monthly peak load reduction data for pilots, that residential ADR

programs and C&I battery storage and thermal programs remain pilots, and that utilities be required to seek Commission approval to add new technologies (such as electric vehicles) to ADR programs. *Id.* at 39.

C. Performance Incentives

1. Settlement Agreement

The Settlement Agreement did not modify the performance incentive framework presented in the 2021–23 Proposal.

2. Energy

Energy expressed concern with the Proposal's performance incentive methodology. Exh. 6 at 5. Energy opposed changing the minimum threshold percentage requirement for the Lifetime Savings component, Annual Savings component, and the Value Savings component from 75 percent to 65 percent. *Id.* Energy also recommended the performance incentive specific to Eversource for the SmartStart Program be eliminated or phased out based on the maturity of the program and the potential for double counting of benefits. *Id.* at 13.

D. Evaluation, Measurement, and Verification

1. Settlement Agreement

The Settling Parties proposed that the Evaluation, Measurement, and Verification ("EM&V") working group authorized in connection with the 2018-2021 triennium should continue through 2023. Exh. 14 at 9. The Settling Parties stated the working group should consist of representatives of the Joint Utilities, Energy representatives, a consultant chosen by Energy (paid for out of EERS funds), and include a representative of other stakeholders as chosen by

the Stakeholder Advisory Council (which the Settlement Agreement recommends forming). *Id.* The EM&V working group would be require hiring a consultant that would guide, facilitate and help bring to consensus the entire working group. Hearing Transcript of December 14, 2020 (12/14/20 Tr.) at 22. In the event the EM&V working group is unable to reach consensus on any issues after consulting with the consultant, pursuant to the Settlement Agreement, any working group member could seek a Commission determination on a specific issue or refer policy matters (as opposed to technical matters) to the Stakeholder Advisory Council, which in turn could "address the issue as appropriate." Exh. 14 at 9.

2. Energy

Energy recommended the EM&V Working Group use its consultant to resolve any disputes between the stakeholders, and if they do not agree with the consultant's resolution, the Commission should resolve remaining disputes. Exh. 8 at 40. Energy supported the settlement provisions relating to the EM&V Working group, assuming Energy continues to have the right to supervise the billing of the EM&V consultant. 12/21/20 Tr. at 197–200. Energy supported the consultant's role in resolving non-consensus issues, but recommended the Commission not adopt the ten-day period proposed in the Settlement Agreement. *Id.*

E. Savings Assumptions

1. Settlement Agreement

The Settlement Agreement proposes a Non-Energy Impacts adder for the secondary cost-effectiveness test. Exh. 14 at 6. For natural gas utilities, the adder is for residential and C&I sectors. *Id.* For electric utilities, the adder would be 25 percent for the residential sector (excluding the income-eligible program), and 10 percent for the C&I sector. *Id.*

Net-to-gross adjustments are used to account for the fact that some customers would have implemented EE measures without incentives or make EE investments due to the influences of the program without directly participating in programs. The Settlement Agreement proposes applying a net-to-gross factor to C&I lighting of 94 percent in 2021, 89 percent in 2022, and 84 percent in 2023. *Id.* at 7. The EM&V working group would also be charged with identifying additional measures to which net-to-gross factors should be applied. *Id.*

Realization rates are used to account for the difference between predicted and actual energy savings. The Settlement Agreement proposes applying new realization rates to certain programs. Under the Settlement Agreement, realization rates would be set at 90 percent for C&I, custom large business, small business, and municipal program electric non-lighting measures; and 87 percent for C&I custom large business and small business program gas measures. *Id.* at 8. Additionally, a New Hampshire-specific C&I impact evaluation of the Large Business Energy Solutions program would be

completed by the end of the first quarter of 2022, and a C&I custom impact evaluation would be completed triennially. *Id.*

The Settling Parties propose applying the 2018 AESC values to 2021 and the 2021 AESC values to 2022 and 2023. *Id.* at 12. Under the Settlement Agreement, the Joint Utilities would file amended attachments and benefit cost models to account for the AESC update by September 1, 2021. *Id.*

2. Energy

For Non-Energy Impacts in the "Secondary Granite State Test," Energy recommended the gas utilities use a 15 percent adder for residential and C&I programs (excluding the low-income programs), and that the electric utilities use a 25 percent adder for residential programs (excluding the low-income programs) and a 10 percent adder for C&I. Exh. 8 at 31–32. At hearing, Energy expressed agreement with the settlement's treatment of non-energy impacts. 12/21/20 Tr. at 111–112.

Energy agreed with the Settlement Agreement's treatment of net savings assumptions, with an exception for a subset of C&I lighting. 12/21/20 Tr. at 129. Energy recommended incorporation of a net savings figure for C&I downstream lighting offerings, such as non-networked TLEDs, that is similar to the midstream lighting offerings. Exh. 8 at 22–23.

Energy recommended that a realization rate of 85 percent for C&I custom gas programs and 85 percent for C&I custom non-lighting electric programs be applied for planning purposes until the completion of the large C&I impact evaluation planned for 2021–23 can be completed. *Id.* at 24–25.

Energy recommended the Commission consider a transition to the use of industry standard practice (ISP) baselines, as informed by the results of the pending evaluation. Exh. 8 at 23. At hearing, Energy expressed agreement with the settlement's treatment of the pending ISP evaluation. 12/21/20 Tr. at 111–112.

Energy advocated for an evaluation of the HER and AIM programs. Exh. 7 at 13. Energy expressed support at hearing for the Settlement Agreement's treatment of the planned behavioral program evaluations. 12/21/20 Tr. at 111–112.

F. Lost Base Revenue

1. Settlement Agreement

The Settling Parties proposed a method for calculating planned and actual Lost Base Revenue (LBR) with six criteria. The utilities collecting LBR shall:

1) employ the terminology set forth in the LBR working group report of August 29, 2018;
2) adhere to a quarterly reporting requirement;
3) apply 100 percent of the calculated monthly savings using the paid date;
4) cease accruing lost base revenues in the first month following the effective date of any decoupling mechanism;
5) use the average distribution rate in effect at the time of the triennial plan filing, or as updated by Commission order during the term, for planning purposes, while using the actual rate in effect at the time of the reconciliation filing for reconciliation purposes; and
6) determine carrying costs on LBR over and under recoveries using the prime rate, compounded monthly.

Exh. 14 at 10.

2. Energy

Energy highlighted inconsistencies in the approaches taken by different utilities in calculating LBR during the first month of a new measure's installation and recommended one-half of the calculated monthly savings be used consistently in such circumstances. Exh. 8 at 15–16. In cases where decoupling has not been implemented, Energy recommended installations installed prior to and during the test year should not be factored into the LBR. *Id.* at 16. Energy recommended that for planning purposes in calculating LBR the utilities use the distribution rate in effect at the time of the filing and for reconciliation purposes the utilities use the rates in effect for the installation period. *Id.* Energy recommended that the utilities use and apply the prime interest rate to the cumulative LBR balance. *Id.* Energy also incorporated recommendations made in an LBR working group report supporting the utilities plan to use average distribution rates calculated by sector and further recommended that for EE measures that increase electric energy usage be subtracted from LBR. *Id.* Last, Energy opined that ADR program results should not be included in LBR calculations because the purpose of the ADR program is to reduce peak load and shift load, not reduce distribution or customer peaks. *Id.* at 16–17.

G. Plan Updates, Reporting, and Mid-Term Modifications

1. Settlement Agreement

The Settlement contained modifications to the updating, reporting, and mid-term modification terms contained in the 2021–23 Proposal. Exh. 14 at 11.

As a preliminary matter, the Settling Parties state that Commission approval of the 2021–23 Proposal shall constitute the adoption of a plan for the entire three years. *Id.* The Settling Parties proposed that certain mid-term modification triggers and review and oversight by the Commission contained in the 2021–23 Proposal be removed and transferred to the Stakeholder Advisory Council. *Id.*

2. Energy

Energy recommended greater oversight by the Commission than the Settlement Agreement provides. Regarding planning structure, Energy recommended the utilities file with the Commission any changes to savings and cost-effective analysis based on recent studies or changes in assumptions, including filing updates resulting from the anticipated spring 2021 AESC study update within a few months of the completion of the study. Exh. 8 at 35–36. Energy further recommended that the utilities file annual updates to the cost-effectiveness analysis when assumptions change, and that the notification requirements remain the same as in the 2018–20 plan. *Id.* at 36–37. Lastly, regarding future planning, Energy recommended that the planning and stakeholder engagement structure used to develop plans and plan modifications should allow full and forthright participation of all potential participants in the litigated process, including Energy. *Id.* at 40. Energy recommended that the next three-year plan be proposed by April 1, 2022, and presented to the Commission no later than July 1, 2023. *Id.*

H. Planning and Review - Stakeholder Advisory Council

1. Settlement Agreement

The Settlement Agreement proposed a Stakeholder Advisory Council to serve as the stakeholder forum throughout the implementation of the 2021–23 Proposal and as the stakeholder forum associated with planning additional ratepayer-funded programs beginning in 2024. Exh. 14 at 15. The initial members of the Stakeholder Advisory Council would consist of a representative of each of the Joint Utilities, Commission Staff now with the Department of Energy, the Office of the Consumer Advocate, and each intervenor in Docket DE 20-092. *Id.* The Stakeholder Advisory Council would make decisions on leadership and operation by consensus, and admit new members under identified circumstances. *Id.* at 16. The Stakeholder Advisory Council would be require hiring an outside facilitator, contracted with by a utility for up to $150,000 per year, which cost would be recovered as an administrative EERS program expense and ultimately from ratepayers. *Id.* The Settlement Agreement establishes a timeline for the development of the ratepayer funding programs beginning in 2024, with a goal to present a final plan to the Commission in 2023, and, if an increase to the SBC charge is to be pursued, presentation of such increases to the Commission during the second half of 2022 for introduction at the legislature in 2023. *Id.*

2. Energy

Energy supported the proposed Stakeholder Advisory Council but noted that such groups have been overseen by the Commission in the past, and

recommended the Commission oversee the Council as a part of the instant docket. 12/21/20 Tr. at 146–147. Energy supported the hiring of an outside consultant. *Id.* at 147–148.

IV. COMMISSION ANALYSIS

Energy efficiency plays a role in reducing consumption of electricity and gas. However, as the Commission held at the outset of restructuring, "the most appropriate policy is to stimulate, where needed, the development of market based, not utility-sponsored and ratepayer-funded, energy efficiency programs." *Electric Utility Restructuring*, Order No. 22,875 at 79 (March 20, 1998). *See also,* Order 23,574 at 10-11 (November 1, 2000) ("[t]he benefits of a retail electric market will not be fulfilled without a competitive wholesale market and a vibrant, unsubsidized energy efficiency market"); Order 25,059 at 10 (December 31, 2009) ("a transition from utility-sponsored to market-based demand-side management programs is an important policy objective"). The Proposal and Settlement before us present a stark contrast to those long-held tenets, instead proposing nearly four hundred million dollars of ratepayer-funded energy efficiency that is entirely utility-sponsored.

As explained in greater detail below, the record presented in this docket does not establish by a preponderance of the evidence that the proposed increases are just, reasonable, and in the public interest. In fact, the record does not even establish by a preponderance of the evidence that the EE program spending and related rates at their current levels are just, reasonable and in the public interest. Based upon the record and applicable law, the

Commission cannot conclude that the 2021–2023 Triennial Energy Efficiency Plan Proposal of the Joint Utilities, as well as the Settlement Agreement filed by the parties relating to the approval of that Proposal is just, reasonable and in the public interest. Specifically, the Commission has determined that, under the standards laid out below, the Settling Parties have not met their burden to prove by a preponderance of the evidence that the Settlement Agreement or Proposal meet applicable standards with respect to (1) the proposed EE program spending and resulting rate increases, (2) benefit-cost testing, (3) the LBR calculation, (4) the Performance Incentives, (5) the year-to-year budget carryforwards, (6) HEA program caps, (7) Behavioral Strategies, (8) EM&V, (9) the proposed Stakeholder Advisory Council, and (10) Commission oversight of the programs. The Commission, therefore, rejects the Settlement Agreement and Proposal in their entirety other than as specifically set forth herein and directs the Joint Utilities to prepare and submit a proposal of EE programs ("Program Proposal") including only programs that are consistent with this order.

A. Standard of Review

We review EERS triennial plans for conformity with the laws underlying the establishment of an EERS. The Commission has historically relied upon its authority in RSA 374:2 (public utilities to provide reasonably safe and adequate service at just and reasonable rates); RSA 378:7 (Commission required to determine and fix the utility's just and reasonable or lawful rates); RSA 378:28 (permanent utility rates shall only include a just and reasonable return on

plant, equipment, or capital improvements which the PUC finds are prudent, used, and useful); RSA 374:1 and RSA 374:4 (Commission required to keep informed of utilities' operations and their provision of safe and adequate service); RSA 374-F:3, X (restructured electric market should "reduce market barriers to investments in energy efficiency and provide incentives for appropriate demand-side management and not reduce cost-effective customer conservation" and "utility sponsored energy efficiency programs should target cost-effective opportunities that may otherwise be lost due to market barriers"); RSA 378:38 (electric and natural gas utilities are required to file least cost integrated resource plans); RSA 378:39 (utilities required to prioritize energy efficiency and other demand-side management resources when supply or resource options have equivalent financial costs). *See* Order No. 26,095 at 17 (January 2, 2018).

The applicable standard of review for a settlement agreement, pursuant to N.H. Admin. R., Puc 203.20(b), is whether the settlement results are just and reasonable and serve the public interest. Because it must review any settlement agreement for compliance with this standard, the Commission's role is distinct from that of the adjudicator in typical civil litigation. Even when all parties join a settlement agreement, the Commission cannot approve it without independently determining that the results comport with the applicable underlying standards. *EnergyNorth Natural Gas Inc. d/b/a National Grid NH*, Order No. 25,202 at 18 (March 10, 2011). Underlying standards in this matter include RSA 374-F:3, VI; RSA 374-F:3, X; RSA 125-O:23; and RSA 374:2.

When the Commission rejects a settlement agreement, it may order the settling parties to renegotiate those provisions that fail to meet the standard, or it may reach its own conclusion as to those matters and issue a final order pursuant to RSA 363:17-b.

Legal basis for EERS Framework

RSA 374-F:3, VI, requires benefits for all consumers, and authorizes the SBC in furtherance thereof:

> Restructuring of the electric utility industry should be implemented in a manner that *benefits all consumers equitably and does not benefit one customer class to the detriment of another*. Costs should not be shifted unfairly among customers. A nonbypassable and competitively neutral system benefits charge applied to the use of the distribution system *may* be used to fund public benefits *related to the provision of electricity*. Such benefits, *as approved by regulators*, may include, but not necessarily be limited to, programs for low-income customers, energy efficiency programs. . . [P]rior approval of the New Hampshire general court shall not apply to the energy efficiency portion of the system benefits charge if the increase is authorized by an order of the [public utilities] commission to implement the 3-year planning periods of the Energy Efficiency Resource Standard framework established by commission Order No. 25,932 . . .

(Emphasis added). Order No. 25,932 (August 2, 2016) is a 65-page order that establishes an EERS "framework within which the Commission's energy efficiency programs shall be implemented" Order No. 25,392 at 1. Among other things, Order 25,392's framework requires the Commission's advance approval of program spending. *Id.* at 59. It further requires that such spending will only be approved to the extent that it is just, reasonable, and least cost. *Id.*

RSA 374-F:3, VI gives the Commission broad discretion regarding approval of the benefits to be provided by the SBC, including energy efficiency

programs. This statutory framework and the Commission's subsequent orders clearly establish the Commission's regulatory role in approving any proposed EERS programs. Regardless of any agreement that may be reached by the parties to a Commission proceeding, RSA 374-F:3, IV requires an independent review by the Commission to ensure that proposed programs are just, reasonable, and least cost. Order 25,392 identified both avoided energy supply and cost-effectiveness tests to inform whether the total costs of energy efficiency are less than the costs of supply. *Id.* at 50–51.

RSA 374-F:3, X, provides specific guidance relating to energy efficiency:

> Restructuring should be designed to *reduce market barriers* to investments in energy efficiency and provide incentives for appropriate demand-side management and not reduce cost-effective customer conservation. Utility sponsored energy efficiency programs *should target cost-effective opportunities that may otherwise be lost due to market barriers*.

(Emphasis added). RSA 125-O:23, directs that certain RGGI auction proceeds be used for specific low-income and municipal energy efficiency programs, with the remainder to all-fuels energy efficiency programs "distributed among residential, commercial, and industrial customers based upon each customer class's electricity usage to the greatest extent practicable." RSA 374:2, requires that all charges demanded by a utility be just, reasonable, and lawful.

Finally, the Commission has long held that gradualism is "an important principle in sound ratemaking." *Dev. of New Alternative Net Metering Tariffs &/or Other Regul. Mechanisms & Tariffs for Customer-Generators*, Order No.

26,029 at 53 (June 23, 2017); *accord Hampstead Area Water Co.*, Order No. 24,626 at 8 (May 26, 2006).

B. Application to the Proposal and Settlement Agreement

We find that the Settling Parties failed to establish that the 2021–23 Proposal as modified by the Settlement Agreement: 1) provides benefits to all consumers and does not benefit one customer class to the detriment of another pursuant to RSA 374-F:3, VI; 2) is consistent with Order 25,932's substantive framework; 3) reduces market barriers consistent with RSA 374-F:3, X; 4) has fuel-neutral energy efficiency programs that are evenly allocated among residential and C&I customer classes pursuant to RSA 125-O:23; and 5) results in just, reasonable and lawful charges under RSA 374:2 that are least cost and in the public interest. We therefore reject the Settlement Agreement and Proposal as set forth herein.

We are mindful of the policy goals of the statutory requirements, including RSA 374-F:3, X, summarized and elaborated by the Commission in Order 23,574 (November 1, 2000). In that order, the Commission cited to order 22,875 for the propositions that:

> The most appropriate policy is to stimulate, where needed, the development of market-based, not utility sponsored and ratepayer funded, energy efficiency programs, a principle that the Legislature incorporated into RSA 374-F.
>
> […]
>
> We believe that efforts during the transition toward market-based DSM programs should focus on creating an environment for energy efficiency programs and services that will survive without subsidies in the future.

Order 23,574 at 10-11 (November 1, 2000). We agree that "the benefits of a retail electric market will not be fulfilled without a competitive wholesale market and a vibrant, unsubsidized energy efficiency market." *Id.* at 11.

The evidentiary record in this matter established that residential electric non-participant utility customers will not receive economic benefits commensurate with the costs they would be required to pay. Exh. 4 at 37, 39, 43. Non-participant small C&I customers are, similarly, not expected to see benefits commensurate with the costs they would be required to pay. *Id.* at 38, 40, 44. The large difference in proposed SBC rates for residential and C&I customers highlights the fact that C&I customers fund programs that produce the majority of lifetime kWh savings, while residential customers fund a suite of programs that do not produce the same economic benefits to ratepayers.[16] This appears to be due in part to the residential suite of programs containing all fuel-neutral EE programs, where most of the projected benefits do not relate to electric energy consumption.[17] Exh. 1 at 28, Table 1-4.

The evidentiary record in this matter also fails to establish that the suite of EE program offerings is least cost. The Joint Utilities do not demonstrate the selected energy efficiency programs were evaluated on a similar basis to supply-side resources or market purchases. Rather, the market potential study

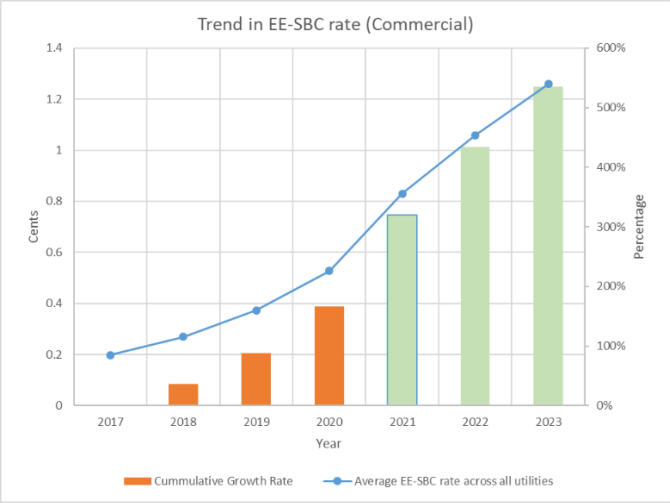
[16] *See* Exh. 1 at 584 (Proposal's residential program budget of $141,398,758 projected lifetime savings of 741,591,853 kWh, as compared to Proposal's C&I program budget of $179,856,684 projected lifetime saving of 5,631,884,304 kWh).
[17] Pursuant to RSA 125-O:23, RGGI auction proceeds are directed to low-income fuel neutral programs, such as HEA

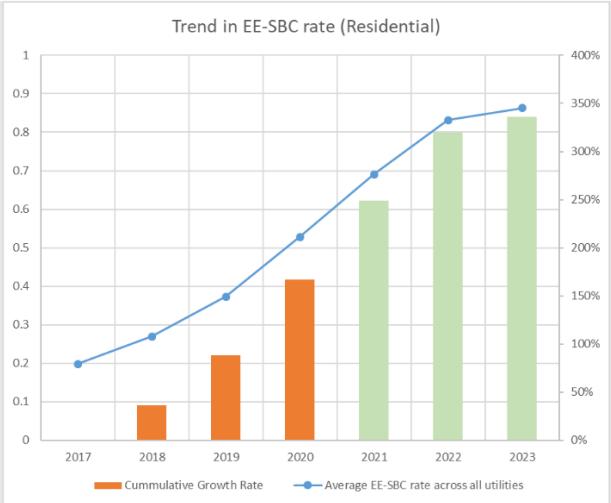
required Order 25,932 to be utilized in the Joint Utilities' future Least Cost Integrated Resource Plans was introduced into evidence as a part of Exhibit 36, and was referenced during testimony multiple times for the proposition that higher savings scenarios would occur under higher spending modes. Hearing Transcript of 12/10/20, a.m., at 60, 78–79, 82; 12/16/20 Tr. at 67, 76–77. Because 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, we find that the least cost showing requirement in from Order 25,392's framework has not been adequately demonstrated, and that the market potential study does not, on its own, justify an escalation in EE programing.

C. Application to EE Portion of SBC rates

We have carefully reviewed the proposed spending plans and the modeling assumptions provided in support of the proposed nearly $400,000, 000 in spending. As Energy pointed out, the transition to an EERS in 2018 resulted in rapidly increasing budgets and rates with significant rate impacts to ratepayers. *See* Exh. 8 at 10. In 2017, the Energy Efficiency portion of the SBC charge was 0.198 cents/kWh. Upon implementation of the EERS, in 2018, the rates jumped to 0.275 cents/kWh, .373 cents/kWh in 2019, and 0.528 cents/kWh in 2020, a 167% increase in only 3 years. In the current Proposal, the proposed rates surge further to 1.259 cents/kWh for C&I customers and

.863 cents/kWh for residential customers by 2023, representing cumulative 536% and 336% increases since 2017, respectively.[18]





We find that such drastic increases, unequally allocated between rate classes, are not reasonable and are inconsistent with the principle of gradualism in ratemaking. The Settling Parties have, moreover, failed to show that these increases provide equitable benefits to all consumers. The focus and intent of RSA Ch. 374-F and least cost planning is the minimization of consumer costs for energy supplies and services. *See Appeal of Algonquin Gas Transmission,* 170 N.H. 763, 774 (2018) ("Pursuant to its plain language, and reading the statute as a whole, we discern that the primary intent of the legislature in enacting RSA chapter 374-F was to reduce electricity costs to consumers.")

[18] The EE portion of the SBC charge was same across all utilities until 2020. The proposed Triennial EE portion of the SBC charges are for the first time different across the electric utilities. The noted 2023 EE portion of the SBC charges is the simple average of the EE portions of the SBC charges proposed by the electric utilities in the Proposal as modified by the Settlement Agreement. The cumulative growth rates for the 2021-23 Triennial years are shown in green bars to differentiate them from growth rates that are historical.

As already noted above, the Commission is obligated under RSA 374-F:3, VI to conduct its own independent analysis of EE programs, regardless of what the parties may have agreed to. Because the Settling Parties have failed to demonstrate by a preponderance of the evidence that their proposed increases are reasonable, just, and in the public interest, the Commission authorizes energy efficiency program spending at an overall level consistent with the 2018–20 Plan. While the overall level of the 2021–23 plan will be similar to the 2018–20 plan, consistent with the Commission's longstanding preference for gradualism in ratemaking, the rates set by the Commission below will descend gradually year-on-year until they return to a reasonable level, and transition toward market-based programs following the schedule laid out below.

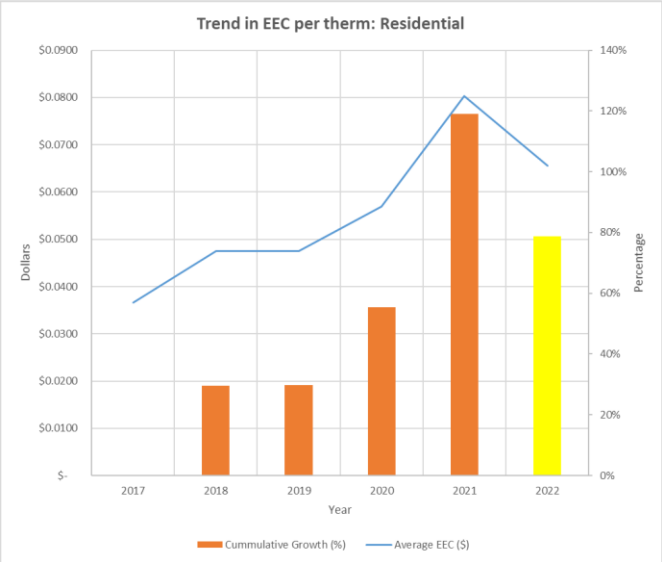
In addition, the Settling Parties failed to establish that the proposed different SBC rates for residential and C&I rate classes are appropriate, and do not unreasonably benefit one class at the expense of the other. As a result, the Commission sets maximum SBC rates that are the same across residential and C&I rate classes, as has always been the case. The Commission hereby sets the maximum Energy Efficiency portion of the SBC rate for all rate classes to 0.528 cents/kWh in 2021, 0.373 cents/kWh in 2022 and 0.275 cents/kWh in 2023. To the extent any of the Joint Utilities lack sufficient Commission-approved programs to fund with SBC rates, they shall reduce their charged SBC rates accordingly.

D. Application to EE Portion of LDAC rates

The LDAC rates in the 2021–23 Proposal were implemented pursuant to Order Nos. 26,419 (October 30, 2020), 26,420 (October 30, 2020), and 26,421 (October 30, 2020) before hearings began in this matter, subject to reconciliation following a decision here. The Joint Utilities asserted in the 2021–23 Proposal that "the LDAC rate itself is considered and approved in Liberty Gas's and Unitil Gas's utility-specific cost-of-gas filings." 2021–23 Proposal at 37. We disagree with the Joint Utilities' assertion that the EE portion of the LDAC is considered and approved in cost-of-gas filings. Cost of Gas proceedings are expedited dockets with a primary purpose of reviewing changes to commodity costs. The utility request and ultimate determination by the Commission regarding the EE portion of the rates is made in this docket. A reduction to LDAC charges in this docket could be reconciled through subsequent cost-of-gas filings. We note that the EE charge (EEC) within the LDAC is traditionally updated in COG filings for effect on November 1 of each year, therefore EEC rates are not implemented on a calendar year basis.

The average LDAC rates across utilities, while not rising as rapidly as the SBC rates, still shows high growth from 2017, cumulatively 79% for Residential and 80% for C&I since 2017.[19]

[19] The yearly figures in the graphs are the simple averages of the EECs for EnergyNorth and Northern for the respective years. The 2022 figures are shaded in yellow as they represent proposed EECs by the Gas Utilities for effect November 1, 2021, in DG 21-130 and DG 21-131.



As with the SBC rates, we find that such large increases are not supported by the record, are not reasonable, and are inconsistent with the principles of gradualism in ratemaking.

Keeping in line with the established principles of just and reasonable rates, including gradualism, the Commission sets the maximum EE portion of the LDAC rate for the Gas Utilities at a level consistent with the prior Triennial Plan. We set the rates for December 1, 2021 through October 31, 2023, on a downward trend to more reasonable rates. Beginning December 1, 2021, the maximum EE portion of LDAC rates for the Gas Utilities is hereby set at $0.0476 per therm for Residential customers and $0.0326 for C&I customers. Beginning Nov 1, 2022, the maximum EE portion of LDAC rates for the Gas Utilities are set at $0.0475 per therm for Residential customers and $0.0258 for C&I customers. To the extent either of the Gas Utilities lack sufficient Commission-approved programs to fund with LDAC rates, they must reduce their charged LDAC rates accordingly.

E. Benefit-Cost Testing

The Commission finds 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. Further, the Granite State Test and its growing complexity cannot be expected to be reasonably understood by the general public. At the level of spending that is contemplated, the ratepayers are entitled to a fully objective and understandable measure of the cost-effectiveness of the proposed programs. Going forward, including for identification of programs to be submitted in the Program Proposal as directed by this order, the Parties are therefore also required to calculate and report benefit-cost using the Total Resource Cost (TRC) test that was historically used until the Granite State Test was recently established.

F. Lost Base Revenue

The Commission has weighed the evidence presented by the Settling Parties and by Energy with respect to LBR and finds that, as the Settling Parties agree, the utilities collecting LBR should apply consistent methods for calculating planned and actual LBR. We note that the Settlement Agreement incorporates several of Energy's recommendations,[20] and we approve those

[20] Exh. 14 at 10 lists six methods the Settling Parties agree to implement to calculate planned and actual LBR: "(1) employ the terminology set forth in the LBR working group report of August 29, 2018 to ensure that the methods used for actual LBR collections are consistent, (2) continue to file quarterly reports with the Commission, using a consistent format, (3) apply 100 percent of the calculated monthly savings using the paid date, which is on average two months after the install date, to account for the fact that not all installations are made on the first day of each month; (4) cease accruing lost base revenues in the first month following effective date

provisions of section F of the Settlement Agreement that are not inconsistent with Energy's recommendations, and further direct that LBR should: (1) include consistent calculation of LBR during the first month of a new measure's installation based on one-half of the calculated monthly savings; (2) where LBR is collected following a rate case where decoupling is not implemented, installations prior to and during the test year should not be factored into the LBR; (3) relating to average distribution rates used in calculating LBR, the distribution rate in effect at the time of the filing should be used, and for reconciliation purposes, the utilities should use the rates in effect for the installation period; (4) set and apply the prime interest rate to the cumulative LBR balance; (5) be consistent with the utilities plan to use average distribution rates calculated by sector; (6) discount "found revenues" from EE measures that increase electric energy usage, and (7) ADR program results should not be included in the LBR calculation as the purpose of that program is to reduce peak load and shift load, not reduce distribution or customer peaks.

G. Performance Incentives

The Commission initially allowed performance incentives on a *temporary* basis for:

> …utility-sponsored programs that would either not be provided by the market or programs that will help the

of any decoupling mechanism approved by the commission, (5) use the average distribution rate in effect at the time of the triennial plan filing, or as updated by Commission order during the term, for planning purposes, while using the actual rate in effect at the time of the reconciliation filing for reconciliation purposes, and (6) determine carrying costs on LBR over and under recoveries using the prime rate, compounded monthly."

> transition to non-subsidized energy efficiency programs. The utility must demonstrate that the program for which it seeks incentive payments offers customers extraordinary benefits and will enhance the move toward either non-subsidized DSM programs or market-based energy efficiency. These benefits should be over and above what would accrue to ratepayers with prudent utility management.

Order No. 23,574 at 20 (November 1, 2000). Upon reviewing the record, the Commission has determined, taking into account the implementation of rate mechanism options including Decoupling, LBR, and LRAM, as well as the maturity of programs that yield measurable savings, that Performance Incentives are no longer just and reasonable and in the public interest in the context of ratepayer funded EE.

Because the parties have not demonstrated that the existing Performance Incentives meet the applicable standards, including RSA 378:7, 378:28, 374-F:3, and 378:39, we order that the Performance Incentives be eliminated effective December 31, 2021. We direct that the Performance Incentive funding that would have otherwise accrued to the utilities shall be redirected in its entirety to fund additional Energy Efficiency programs. As indicated in the 2021–23 Proposal, the original performance incentive budget for this triennium was in excess of $20,000,000, we therefore expect this directive to result in significant increased funding for EE programs. As indicated above, the utilities already receive LBR. LRAM, or Decoupling, and receive administrative costs[21]

[21] Internal utility costs associated with program design, development, regulatory support, and quality assurance (including employee labor, benefits, expenses, materials, and supplies); external costs associated with program administration (including contractors and consultants used in support of program design, development, regulatory support, and quality assurance);

and are thus sufficiently compensated. As a result of eliminating the cost, management, administration, and complexity of the Performance Incentive, the benefits will accrue to the ratepayer.

H. Year-to-Year Budget Carryforwards

Year-to-year 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. We therefore do not agree with the Settling Parties that benefits accrue to the public by its continuation. In fact, quite the opposite, year-to-year budget carryforwards result in ratepayer funds being held by Joint Utilities instead of being returned to the ratepayer.[22]

Where the actual amount collected is greater than the amount spent during any given year, the difference shall be returned to the ratepayer via bill credit by March 31 of the following year, where there is not a specific statutory obligation to carry forward funds. The Utility's shall submit a report in the instant docket by March 31 following the program year showing any carryforward. If the Utility has spent more than the budget, or actual amount

service costs such as technical audits, employee and contractor labor to install measures, expenses, materials, and supplies; internal implementation services costs associated with delivering programs to customers (including labor, benefits, expenses, materials, and supplies); marketing, advertising, trade shows, toll-free numbers, and NHSaves website costs; and evaluation costs for EM&V activities including labor, benefits, expenses, materials, supplies, consultants, contractors, and tracking systems. Exh. 1 at 33.

[22] We note the Joint Utilities' rebuttal testimony states that uniform funding rates between sectors and utilities would likely result in larger annual carryforwards. S*ee E*xh.13 at 17. Any increased likelihood of potential carryforwards resulting from more uniform EE charges does not displace our conclusion that ratepayer funds should be returned to ratepayers in a timely manner.

collected, in any program year, whichever is less, the cost shall be borne by the Utility's shareholders.

I. HEA Program Caps

The HEA program is currently capped at $8,000 per project. The Proposal seeks not only to increase that cap to $20,000 per project, but also to allow for exceptions to the cap. The Settling Parties have not shown by a preponderance of the evidence that such an increase is just and reasonable as is required of all EE program spending. Moreover, exceptions to this cap will result in unequal benefits to program participants. These proposed changes cannot be considered just and reasonable and are therefore rejected.

J. Behavioral-Based Strategies

The parties failed to meet their burden with respect to the aerial heat mapping program. The Parties may propose cost effective consumption data provision programs to be funded through the EE program when they resubmit their proposed programs, but those programs may not include the aerial mapping program.

K. Program Oversight

Since the establishment of the EERS program, Commission oversight has been key to "ensur[ing] that the programs and spending of ratepayer funds are just, reasonable, and least cost." Order No. 25,932 at 59. It is, moreover, the Commission's ultimate duty to determine whether utility rates and charges are just, reasonable, and lawful. RSA 374:2, Puc 103.01(d). As explained below, the

Commission is not permitted to abdicate its statutory responsibility for oversight as requested.

The Proposal and Settlement Agreement propose significantly reducing regular oversight by the Commission despite requesting a massive rate increase and significant additional burden to the ratepayers. This proposal is not reasonable. In light of the significant ratepayer funding provided in the current plan and approved by this order, a reduction in oversight is not reasonable or appropriate. The Commission will, therefore, continue to directly oversee the implementation of the 2021–23 plan and related programs to ensure they are just, reasonable, lawful and cost-effective, including a detailed review of administrative costs, requiring that any proposed pilot program receive Commission Approval to commence, and further requiring that any existing pilot program receive Commission approval to transition to a regular program. With respect to the 2021 AESC update and the Technical Reference Manual updates, we direct the Joint Utilities to file a copy of any AESC update released in 2021 into the instant docket.

We find the expenses associated with the NHSaves program to be of particular concern. The Proposal lists six categories of expenses: 1) Internal Administrative costs; 2) External Administrative costs; 3) Customer Rebates and Services; 4) Internal Implementation Services; 5) Marketing; and 6) Evaluation. Exh. 1 at 33. The sum of administrative costs ($9,549,829), implementation services ($22,138,735), marketing ($10,718,460), and EM&V ($15,892,143) totals $58,299,167, more than 15 percent of total expenses.

Exh. 2 at 352. Ratepayer funding spent on these expenses reduces funding for EE programs that directly benefit ratepayers.

The Commission will closely monitor the total of these expenses and costs going forward to ensure such costs are kept to a minimum. To that end, the Joint Utilities shall file annually, by March 31, financial information for the prior calendar year for the Commission to review the programs. The Joint Utilities shall provide calculations on program expenditures, broken down by categories including, but not limited to, internal administrative costs, costs associated with external consultants, and costs paid to subsidiaries. Additionally, in the same filing, the Joint Utilities shall provide calculations on the corresponding dollar savings per unit of energy estimated to have been produced by each program during the prior program year. This information shall be broken out by participating and non-participating ratepayers, by ratepayer class (Residential or Commercial & Industrial). The calculations on savings should be for gross savings, with the expenditures on each program listed separately. With the filing, the utilities shall provide all supporting documentation, in live excel formats, on the discount rates used each year to model these savings going forward, the estimated future prices of energy, as well as any additional assumptions used in these calculations. Finally, the Utilities shall include a written narrative for each of the calculations, explaining what market barriers would prevent the funding of each program if the EE portion of the SBC did not fund them.

L. Evaluation, Measurement, and Verification

The Settling Parties proposed that the EM&V working group and related spending authorized in the 2018 through 2020 Plan should continue through 2023. Exh. 14 at 9. We note that spending related to EM&V has risen to an unreasonable level of nearly $16 Million dollars. Exh. 2 at 352. According to the Proposal, this spending includes any studies identified by the EM&V Working Group and the Strategic Evaluation Plan, the AESC Study, ISO certification of utility demand resources, third-party consultants, updating and maintaining the TRM, program research, professional associations, utility tracking system upgrades and maintenance, quarterly and annual reporting, program modeling software, and other miscellaneous spending. Exh. 1 at 234. The EM&V working group shall submit a plan, including scope and cost, for review and approval to the Commission in advance of any costs being incurred related to EM&V during this triennium. We require spending to be significantly reduced in any EM&V proposal for 2022 and for all EM&V work to be completed by Dec 31, 2022.

M. Stakeholder Advisory Council

With respect to the specific request for the Commission to authorize a Stakeholder Advisory Council, we note that the EESE Board and its EERS stakeholder group currently fill this role. We understand that one of the reasons for the request to create the Council related to distinctions between roles of Commission Staff and other stakeholders in the development of EERS proposals and ongoing evaluation of program implementation. The concerns

regarding roles have been eliminated by the creation of the Department of Energy. Further, the EESE Board was created by the Legislature. The Commission will not supplant its role and authority here. We also note that while the majority of costs come from the C&I sector in the Proposal and Settlement Agreement, the Stakeholder Advisory Council as proposed does not have a single C&I representative proposed. Accordingly, we find that the need for and structure of the proposed Stakeholder Advisory Council is not supported by the record and we therefore do not approve the request.

N. Other matters

The Proposal and Settlement Agreement contain only ratepayer-funded programs, despite the clear mandate in 374-F:1, I to "harness the power of competitive markets," and 374-F:3, X to remove market barriers. We also note that the EERS framework included a requirement that private funding be pursued and utilized to the greatest extent possible. Order 25,932 at 58. The Joint Utilities' Program Proposal must include programs that are not solely ratepayer funded, programs that reduce market barriers, and a benefit/cost analysis using both GST and TRC.

The Joint Utilities and stakeholders shall calculate annual budgets for the remainder of the 2022 and 2023 triennium based on the rates established herein. In so doing, the Joint Utilities are directed 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, taking care to ensure statutory compliance with the specific directives

contained in RSA 125-O:23 and submit that Program Proposal to the Commission for review and approval. The Joint Utilities Program Proposal shall include, in live spreadsheet formats, all calculations relied upon, including the discount rate utilized, to determine which programs provided the greatest energy efficiency savings at the lowest per unit cost. These Program Proposals shall be filed by December 15, 2021.

Based upon the foregoing, it is hereby

ORDERED, that the Joint Utilities' request for approval of the proposed 2021–2023 New Hampshire Statewide Energy Efficiency Plan is hereby DENIED; and it is

FURTHER ORDERED, that the Settling Parties' request for approval of the 2021–2023 New Hampshire Statewide Energy Efficiency Plan as modified by that Settlement Agreement, is hereby DENIED as set forth herein; and it is

FURTHER ORDERED, that the System Benefits Charge rates established as set forth herein above are hereby approved for 2021, 2022, 2023; and the Energy Efficiency Portion of the LDAC rates established herein are hereby approved for effect December 1, 2021 and November 1, 2022, respectively; and that the Utilities shall file annotated and clean versions of their compliance tariffs within 30 days of this order, and it is

FURTHER ORDERED, that the Utilities collecting LBR shall recalculate their LBR rates in accordance with the Energy methodology adopted in this order, and it is

FURTHER ORDERED, that the Joint Utilities shall file their updated 2021 Energy Efficiency budgets, as well as their 2022 and 2023 Energy Efficiency budgets using the rates established in the body of this order, and shall include all program and cost items larger than $500,000 in live spreadsheets, by December 15, 2021; and it is

FURTHER ORDERED, that for approval of 2022 EE program spending, the Joint Utilities shall submit their Program Proposal within the proposed budget as set forth herein above, including proposed spending by program and each program's corresponding benefit/cost calculations, in live spreadsheets as outlined in this Order, by Dec 15, 2021; and it is

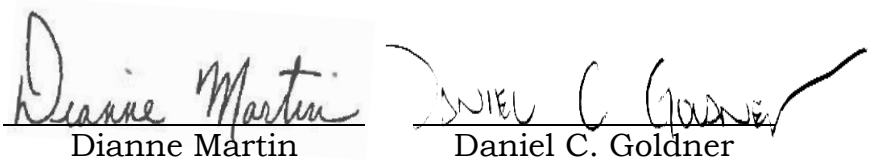
FURTHER ORDERED, that the Joint Utilities shall file annually, by March 31, financial information for the prior calendar year adequate for the Commission to review budgeted verses actual funding, budgeted verses actual spending, including each program and overhead expenditures, and corresponding program energy savings, as outlined in this order, using summary tables and live spreadsheets; and it is

FURTHER ORDERED, that carryforwards are eliminated except where there is a specific statutory obligation to carry forward funds: and it is

FURTHER ORDERED, that the Joint Utilities shall submit program oversight filings by March 1 of each calendar year as discussed in the body of this order; and it is

FURTHER ORDERED, that the EM&V Working Group shall submit a plan as described herein above in advance of incurring any EM&V costs, as discussed in the body of this order.

By order of the Public Utilities Commission of New Hampshire this twelfth day of November, 2021.



Dianne Martin
Chairwoman

Daniel C. Goldner
Commissioner

Service List - Docket Related

Docket# : 20-092

Printed: 11/12/2021

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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 20-092

ELECTRIC AND GAS UTILITIES

2021–2023 Triennial Energy Efficiency Plan

Order Addressing Motions on the Composition of the Commission and Motions for Rehearing, Clarification, and/or Stay of Order No. 26,553

O R D E R N O. 26,560

January 7, 2022

I. Introduction

This order consolidates and addresses a series of motions filed by parties to this docket, following the Commission's issuance of Order No. 26,553 (November 12, 2021) on the 2021–2023 Triennial Energy Efficiency Plan. Among other things, Order No. 26,553 established energy efficiency rates for the System Benefits Charge and Local Delivery Adjustment Charge, rejected the proposed settlement and energy efficiency plan that would have cost New Hampshire ratepayers nearly $400 million over the course of the triennium, and discontinued the utility performance incentive and carryforward beginning January 1, 2022. The order further required the utilities to file new budgets and program proposals consistent with the Commission's order.

The various moving parties in this case have filed motions for rehearing and clarification of numerous aspects of Order No. 26,553, a request for a full commission and appointment of a special commissioner, and a motion for disqualification of one of the Commissioners. The utilities have provided the required budgets, and the Commission grants an extension until March 31, 2022, for submission of a new energy efficiency program proposal.

The Commission's specific rulings on these motions follow. Of particular note, however, the parties' motions for rehearing are premised, in significant part, upon a characterization of Order No. 26,533 as *reducing* the energy efficiency budget. Contrary to that characterization, *see, e.g.*, *LISTEN Cmty. Servs.'s Mot. for Reh'g*, at 2, when comparing the budget for the 2021–23 Triennium to 2018–2020 Triennium, the rates established in Order No. 26,533 will result in an *increase* of $4–8 million in energy efficiency program funding.[1] Also, when comparing 2021 to 2020, Order 26,533 results in an estimated increase of $4 million in program funding.

For these, and the other reasons explained in greater detail below, the parties' requests for rehearing and reconsideration are hereby denied, in part.

II. Procedural History

a. Background

On November 12, 2021, the Commission issued Order No. 26,553 (Order 26,553 or Order), addressing the 2021–2023 New Hampshire Statewide Energy Efficiency Plan and implementation of energy efficiency programs for the remainder of the 2021–2023 triennium. That Order set out a detailed history of the proceedings in this docket. Among other directives, Order 26,553 established energy efficiency System Benefit Charge (SBC) and Local Delivery Adjustment Charge (LDAC) rates for the remainder of the 2021–2023 triennium. Order 26,553 also modified aspects of the structure and oversight of the energy efficiency programs as proposed (Plan or

[1] Based on the Joint Utilities Dec 15, 2021 filing, the Commission estimates $180 million for gas and electric programs in the 2021–2023 Triennium compared to $176 million for the 2018–2020 Triennium budget. When the 2022–2023 Triennium gas and electric programs are compared to the 2018–2020 actuals of $172 million, the increase in program spending is approximately $8 million. The Commission used 5.12% to estimate the 2021 plan year performance incentive payment.

Proposal) by the Settling Parties,[2] and required further filings from the energy efficiency program administrators on the programming to be implemented in 2022 and 2023.

b. Post-Order Filings

On December 3, 2021, Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty and Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty filed a motion for immediate stay and, in the alternative, clarification of Order No. 26,553.

On December 6, 2021, the Commission issued an expedited order clarifying that, because the specifics of programming were not finalized by Order 26,553, the Joint Utilities could continue to rely on Order No. 26,440 (December 29, 2020) for authority to continue offering previously authorized energy efficiency programming until programming for 2022 and 2023 is finalized.

On December 10, 2021, the New Hampshire Electric Cooperative, Inc.; 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; and Northern Utilities, Inc. (together, the "Joint Utilities") filed a Motion for a Full Commission and Appointment of Special Commissioner(s).

On December 10, 2021, the Joint Utilities, the Office of the Consumer Advocate (OCA); Clean Energy New Hampshire; Conservation Law Foundation; and Southern New Hampshire Services (altogether, the "Joint Movants") filed a motion for rehearing,

[2] The Settling Parties to the Plan consisted of Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty Utilities, New Hampshire Electric Cooperative, Inc., 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 Utilities, Northern Utilities, Inc., the Office of the Consumer Advocate, Conservation Law Foundation, The Way Home, Southern New Hampshire Services, and Clean Energy New Hampshire

clarification, and stay of Order No. 26,553 pursuant to RSA 541:3 (Joint Movants' Motion).

On December 10, 2021, the New Hampshire Department of Energy (Energy) filed a motion for rehearing and/or clarification of Order No. 26,553 pursuant to RSA 541:3 (Energy Motion).

On December 13, 2021, LISTEN Community Services (LISTEN) filed a motion for rehearing, clarification, and stay of Order No. 26,553, and joining the Joint Movants' Motion. LISTEN also filed a letter stating that it joined the Joint Utilities' request for a Full Commission and Appointment of Special Commissioner(s). Due to the similarity between LISTEN's motion and that of the Joint Movants, the Commission finds it administratively efficient to assume without finding that, for the purposes of this order, LISTEN is a "person directly affected" by the Order pursuant to RSA 541:3.

On December 14, 2021, the Commission issued Order No. 26,556. Order 26,556 suspended a number of filing requirements relating to programming while the Commission fully considered the motions for rehearing, clarification and/or stay of Order 26,553. Order 26,556 also reaffirmed the expedited order issued December 6, 2021.

On December 14, 2021, Commissioner Chattopadhyay filed a memorandum into the instant docket disclosing his prior affiliation with the Office of the Consumer Advocate and stating that he determined that mandatory disqualification was not required under any of the applicable statutory standards.

On December 15, 2021, the Joint Utilities made compliance filings in this docket consisting of overall budgets for energy efficiency programming for each year of the 2021–2023 triennium pursuant to Order 26,553. These budget proposals,

estimating revenues based on the rates established by the Order, show an overall increase to the budget as compared to the budgets approved for the first triennium of the Energy Efficiency Resource Standard of between $4-8 million in energy efficiency funding.

On December 17, 2021, the Office of the Consumer Advocate filed a Motion for Disqualification of Commissioner Chattopadhyay.

Order 26,553, Order 26,556, the various motions, and other docket filings, with the exception of any information for which confidential treatment is requested of or granted by the Commission, are posted at: https://www.puc.nh.gov/Regulatory/Docketbk/2020/20-092.html.

III. Motion for Disqualification of Commissioner Chattopadhyay

a. Position of the Office of the Consumer Advocate

The OCA requested that either the Commission, or Commissioner Chattopadhyay individually, disqualify Commissioner Chattopadhyay from further participation in the instant matter.

b. Commission Analysis

Concurrently with this order, Commissioner Chattopadhyay issues a separate order denying the OCA's motion for his disqualification.

IV. Motion for a Full Commission and Appointment of Special Commissioner(s)

a. Positions of the Parties

The Joint Utilities, joined by LISTEN, requested a full Commission pursuant to RSA 363:17. The Joint Utilities posited that due to the significance of the issues presented in this docket and the risks associated with proceeding with two commissioners, including a possible deadlock or an unforeseen event that disqualifies one commissioner, that a full Commission is necessary going forward.

In addition, the Joint Utilities requested that the Commission apply to the Governor and Executive Council under RSA 363:20 for the appointment of one or two Special Commissioners, one who is an attorney licensed to practice law in New Hampshire to substitute for Commissioner Simpson, and a second Special Commissioner if Commissioner Chattopadhyay recuses himself.

b. Commission Analysis

As noted above, Commissioner Chattopadhyay has not recused himself in this matter; therefore, a majority of the Commission is present to issue this order and a majority of this Commission intends to be available for any future actions or proceedings in this matter.[3] In addition, pursuant to RSA 363:20, the Commission applied to the Governor for the appointment of a special commissioner to replace Commissioner Simpson in this matter. The request for a special commissioner is an additional step to ensure that either majority of the Commission or a full Commission will be available for any future actions or proceedings in this matter.

V. Motions for Rehearing and/or Clarification of Order No. 26,553

a. Positions of the Parties

i. Rehearing and/or Stay

The parties seeking rehearing and/or Stay of Order 26,553 have presented five distinct arguments: 1) that notice in this matter was inadequate; 2) that certain changes to program administration and oversight are retroactive in nature; 3) that a perceived departure from precedent is unreasonable; 4) that the Commission

[3] We note that a request for the full commission pursuant to RSA 363:17 is not a request for three commissioners, but a request for a quorum of the commission to preside over a matter, rather than a single commissioner or designee. *See* RSA 363:17 ("No hearing . . . shall be held or conducted *by a single commissioner* if any party whose interests may be affected shall . . . file a request in writing that the same be held or conducted *by the full commission, or a majority thereof*.") (emphasis added); *see also In re Bell Atl. N.H.*, Order No. 23,179 at 3 (Mar. 30, 1999), *In re Pub. Serv. Co. of N.H.*, Order No. 17,222 at 10 n.9 (Sept. 21, 1984).

misapplied or failed to cite to applicable legal standards; and 5) that the Order lacked evidentiary support. The Commission addresses in its analysis, below, these five arguments and the specific theories raised by the parties.

ii. Clarification

In addition to or in the alternative to moving for rehearing, the Joint Movants, joined by LISTEN and separately by Energy, seek clarification of certain aspects of the Order. Each request for clarification is summarized and addressed by the Commission, below.

b. Commission Analysis

i. Rehearing and/or Stay

The Commission may grant rehearing for "good reason" if the moving party shows that an order is unlawful or unreasonable. RSA 541:3; RSA 541:4; *Rural Tel. Cos.*, Order No. 25,291 (November 21, 2011); *see also Pub. Serv. Co. of N.H. d/b/a Eversource Energy*, Order No. 25,970 at 4-5 (December 7, 2016). A successful motion must establish good reason by showing that there are matters that the Commission "overlooked or mistakenly conceived in the original decision," *Dumais v. State*, 118 N.H. 309, 311 (1978) (quotation and citations omitted), or by presenting new evidence that was "unavailable prior to the issuance of the underlying decision," *Hollis Tel. Inc.*, Order No. 25,088 at 14 (April 2, 2010). A successful motion for rehearing must do more than merely restate prior arguments and ask for a different outcome. *Pub. Serv. Co. of N.H.*, Order No. 25,970, at 4–5 (citing *Pub. Serv. Co. of N.H.*, Order No. 25,676 at 3 (June 12, 2014); *Freedom Energy Logistics*, Order No. 25,810 at 4 (September 8, 2015)).

1) Adequacy of Notice

The statutory standard for notice in an adjudicative proceeding is found in RSA 541-A:31, III. RSA 541-A:31, III requires notice consisting of, among other things: (1) a statement of the legal authority under which the hearing is to be held, (RSA 541-A:31, III(b)); (2) a reference to the particular sections of the statutes and rules involved, ((RSA 541-A:31, III(c)); and (3) a short and plain statement of the issues involved ((RSA 541-A:31, III(d)). The notice provided in this matter included references to RSA 374-F:3, VI (which incorporates by reference Order No. 25,932 and its framework of authorities); RSA 374-F:3, X; RSA 125-O:23; and the just and reasonable standard applicable to rates and charges under RSA 374:2.

The various objections to the notice provided by the Commission are unavailing and do not state good cause for rehearing. The September 8, 2020, notice in this matter was broad and included whether proposed Plan programs were reasonable, cost-effective, and in the public interest, as well as whether the proposed rates are just and reasonable and comply with Commission orders. Additionally, the hearings in this matter were not limited to consideration of the settlement agreement filed by certain parties, as noted at the outset of hearings by then Chairwoman Martin. Hearing Transcript of December 10, 2020, morning session, at 8 ("We're here this morning in Docket DE 20-092 regarding the 2021 to 2023 Statewide Energy Efficiency Plan."). *See also*, Order of Notice dated September 8, 2020 ("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.").

The Joint Movants' attempt to apply RSA 365:28 as a separate notice requirement is equally unpersuasive. RSA 365:28 relates to amending or modifying past Commission orders and requires notice commensurate to that provided in the original proceeding. The Order at issue here addressed requests for Commission action in this matter, entered new directives establishing rates and setting guidelines, and established procedures for future energy efficiency programming going forward. It did not amend or modify a past Commission order and RSA 365:28, therefore, does not apply.

To the extent that the parties' motions may be read to assert a deficiency of *constitutional* due process, no such process is due here. A party claiming a violation of constitutional due process rights must, as a threshold matter, show a fundamental right or liberty interest at stake. *In re R.H.*, 174 N.H. 332, 364, (2021); *Petition of Bagley*, 128 N.H. 275, 280, (1986). The various arguments relating to due process do not establish that a fundamental right or liberty interest in future ratepayer-funded energy efficiency programming exists, or that the requested rates or a presently effective rate are constitutionally protected. As such, we decline to further address any constitutional due process arguments.

2) Applicability of Order 26,553

We do not agree that the Order unlawfully made retroactive changes to programming components, including in the areas of evaluation, measurement and verification (EM&V) activities, performance incentives, carryforwards, or benefit cost testing. The Order made no retroactive changes to these aspects of ongoing energy efficiency programming in New Hampshire. The Order clearly states that performance

incentives are to be eliminated prospectively, effective December 31, 2021, *see* Order at 41; that carryforwards are to be eliminated prospectively and following reporting to the Commission, *see* Order at 42; that EM&V work is to be phased out over the course of 2022 with new expenses to be approved by the Commission, *see* Order at 46; and that the changes to benefit cost testing are to be applied prospectively to the new programming filings required by the Order. *See* Order at 39.

We do not agree with the Joint Movants' arguments that carryforwards should be continued. Requiring annual reconciliation ensures accountability for ratepayer funds, that benefits flow to ratepayers in a timely manner in exchange for their contributions, and that the Commission meets its duties as a regulator.

With respect to overspending carryforwards, however, we find that the Joint Movants have stated good cause for rehearing because NHEC does not have shareholders and the Joint Movants' argument that the rates could potentially be confiscatory was not addressed in the Order. We therefore order that, in the event NHEC, a member-owned utility, has an overspending carryforward, it shall file an explanation by April 30th following the applicable plan year that outlines the circumstances that led to the overspending and a verified statement that it will not use future SBC funds to cover the deficit. For investor-owned utilities, overspending carryforwards shall be addressed under a prudency standard on a case-by-case basis following the 2021 and 2022 plan years. In the event that an investor-owned utility incurs an overspending carryforward as identified in the March 31 annual filings required by the Order, that utility may file a separate explanation and cost recovery proposal by April 30th following the plan year. The explanation and cost recovery proposal shall be subject to an adjudicative proceeding and will be assessed under traditional prudence standards.

3) Applicability of Prior Orders

We do not agree that the arguments relating to the applicability of prior orders support rehearing. With respect to the arguments that the judicial doctrine of *stare decisis* applies or that the Commission violated RSA 365:28, both miss the mark. The doctrine of *stare decisis* does not apply because the Commission is an administrative agency vested only with statutory authorities and is "not disqualified from changing its mind...." *Appeal of Pub. Serv. Co. of N.H.*, 141 N.H. 13, 22, (1996) (quoting *Good Samaritan Hosp. v. Shalala,* 508 U.S. 402, 417, (1993)).

RSA 365:28 is a specific statutory authority relating to the alteration of past Commission orders and bears no relation to issuing a decision on the merits within a properly noticed adjudicatory proceeding. Here, the parties have proposed significant changes to prior approved energy efficiency plans, and the Commission's order is based on an adjudicative review and hearing on those proposed changes. To the extent that LISTEN's argument under RSA 365:28 can be read to dispute the Commission's interpretation of past orders, the result is the same as the analysis relating to the Joint Movants' arguments that the Commission misinterpreted legal standards, *infra*, and is unavailing. The Commission issued an order rejecting a new proposal based on its interpretation of the applicable standards, and no prior orders were modified or altered.

4) Application of Statutory Standards

We find the arguments relating to the application, interpretation, or perceived omission of statutory standards are unpersuasive and do not state good cause for rehearing. In the Order, although the Commission focused on those areas where it determined the Plan proponents did not meet their burden, it did not neglect to identify or consider any applicable statutory standards. With respect to the policy

statements raised by the Joint Movants (under RSA 378:37 and regarding the State's 10-year energy strategy), neither was functionally omitted because both are covered by the statutory standards contained in RSA 374-F:3, X ("Utility sponsored energy efficiency programs should target cost-effective opportunities….") and RSA 378:38, which specifically incorporates the policy contained in RSA 378:37, were cited to in the Order at 29. The Joint Movants also failed to show that they were prejudiced by a lack of citation to these sources because the Commission applied these same standards from another source. Moreover, even if prejudice were shown, the lack of supply side and renewable energy comparisons in the context of this proceeding make citation to the least cost planning subchapter of RSA 378 unavailing. *See* RSA 378:39. The second policy document cited by the Joint Movants merely reiterates that the policy of this state is to maximize cost-effective energy efficiency. Page 10 of the 2018 10 Year Energy Strategy at 12[4] sets a policy nearly identical to that contained in RSA 378:37, namely to "Maximize cost-effective energy savings." The citation to page 39 of the 10-year policy is unavailing, as it is followed on page 40 with a policy statement that "New Hampshire should continue to coordinate and develop energy efficiency programming to achieve cost effective savings." The Order does not disturb the current role of the Energy Efficiency & Sustainable Energy Board to coordinate energy efficiency programing, nor does it reduce the funding to the NHSaves programming over the course of the 2021–2023 Triennium when compared to the 2018–2020 Triennium. As shown by the Joint Utilities' budgetary filings on December 15, 2020, the rates established by the Order actually increase revenues for energy efficiency programming

[4] Available at https://www.nh.gov/osi/energy/programs/documents/2018-10-year-state-energy-strategy.pdf (last accessed Dec. 22, 2021).

by $4–8 million dollars during the 2021–2023 Triennium when compared to the 2018–2020 Triennium.

We also find no error in the Order's conclusion that, under *Appeal of Algonquin Gas Transmission*, 170 N.H. 763, 774 (2018), the overarching purpose of the statute here is met. (*See, e.g.,* RSA 374-F:1, I "The most compelling reason to restructure the New Hampshire electric utility industry is to reduce costs for all consumers of electricity by harnessing the power of competitive markets"). With respect to the various arguments that the Commission misapplied or failed to apply applicable least cost planning standards, we apply the same interpretation used in *Algonquin*, and conclude that RSA 378:37-40's overarching purpose is to meet energy needs at the "lowest reasonable cost."

We find the argument that the Commission invented a least-cost requirement in Order 25,932 to be misguided. The legal framework to establish and finance energy efficiency measures is premised in large part on the least-cost statutory framework. *See Order 25,932* at 47–49. Order 25,932 relied on evidence that compared the cost of energy efficiency to delivered energy, *id.* at 51, granted utilities authority to spend only to the extent that the Commission finds such spending to be just, reasonable, and least-cost, *id.* at 59, and contained only two ordering clauses, one of which related to least-cost planning and a supply side modeling study, *id.* at 65. We further note that in closing arguments on this matter, then Staff of the Commission explicitly argued that the Commission should issue an order that "better adheres to the concepts of least-cost planning and just and reasonable rates, as the statutes provide." Hearing Transcript of December 22, 2020 at 97. No party went on to argue that the Proposal was least-cost or refuted the argument that least-cost principles applied or were not properly balanced.

Simply put, the regulatory scheme does not require the Commission to approve programming or set rates as presented, without modification, and the Joint Movants' arguments do not make a showing that the Commission's rejection of the Plan and Settlement Agreement was unlawful or unreasonable.

5) Evidentiary Support

The various objections to the Order based on arguments that the Commission failed to adequately weigh the evidence are not persuasive and do not establish good reason for rehearing. The objections do not present new evidence, but rather restate evidence that the Commission weighed, and request a different result. Such arguments are not a basis to grant rehearing. *See Public Service Co. of N.H.*, Order No. 25,970, at 4–5.

6) Stay

Finally, the parties sought a stay of the Order pending the outcome of their motions before the Commission. Because this order resolves all pending motions, no stay is required. The motions for a stay of the Order are, therefore, denied as moot.

ii. Clarification

We have reviewed the motions and find various requests for clarification to be reasonable and appropriate. We address those requests as follows:

1) The Joint Movants request clarification relating to the definitions of "commensurate" and "equitable" benefits. Energy also requests clarification relating to the allocation of budgets between customer sectors and programs.

We clarify that unless specifically overruled by the Order, previous standards established by Commission order still apply. With respect to ensuring that equitable and commensurate benefits are available to all ratepayers under the rates established by the order, the Joint Utilities should focus on demonstrating that average customers

will see a long-term reduction in bills over the life of the energy efficiency measures they are paying for. Diminishing returns associated with increasing any incentive level should also be addressed in a meaningful way so that programming portfolio can be maximized and all ratepayers will see tangible benefits over the lifetime of the energy efficiency measures. The analysis relating to denial of rehearing based on the statutory standards discussed above should be considered together with this clarification.

2) Both the Joint Movants and Energy request clarification on the implementation of the benefit-cost tests.

We reiterate that the Total Resource Cost (TRC) test is to be performed in addition to the Granite State Test (GST) so that the results of the GST can be compared to the results of the TRC test. *See* Order at 47 (directing that programming proposals must include "a benefit/cost analysis using both [the Granite State] and [Total Resource Cost]" tests). The Commission will review the assumptions and results of both tests in order to validate the program choices.

3) The Joint Movants and Energy request clarification regarding the Commission directive that EM&V spending is to be "significantly reduced" in the program proposal, and to be completed by the end of 2022, with emphasis on EM&V activities being necessary to participate in the ISO New England forward capacity market.

The Order is unequivocal that EM&V shall be phased out by the end of 2022. However, we 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 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.

4) The Joint Movants request clarification of the concept of "found revenues" as used in the order relating to Lost Base Revenue.

The Commission adopts the definition of "found revenues" as articulated by then Commission Staff in Exhibit 8 at Bates page 16, namely that "found revenues" are derived from measures that increase energy usage, such as with the energy optimization program.

5) The Joint Movants request clarification of how performance incentive budgets are to be "redirected" to energy efficiency programs.

No clarification is needed, this is an argument of semantics. The result of the Order is that no part of the budget going forward will be directed to performance incentives. As a result, the overall percentage of the budget going toward direct ratepayer benefits through energy efficiency measures will increase.

6) Joint Movants request clarification on what threshold criteria for programs or proposals would meet the just and reasonable standard.

The just and reasonable standard is broad and encompasses multiple factors, however a proposal consistent with the guidance and directives in the instant order, with the statutory requirements relating to low-income programming, and with the rates established in the Order, would meet the just and reasonable standard in this instance.

7) The Joint Movants request clarification as to whether the prior Commission requirement for the electric utilities to produce at least 55% of their savings as kWh savings still exists.

The Commission clarifies that the Order did not modify this requirement.

8) The Joint Movants state that non-electric and non-gas savings are not referenced in the Order, and that clarification is needed on how to value these savings, particularly in light of the concerns relating to benefit-cost testing.

The Commission clarifies that the GST and TRC tests both quantify non-electric and non-gas savings, and those tests should be used to demonstrate quantifiable

savings that are not a direct economic benefit to ratepayers. Direct economic benefits should be clearly separated and distinguished from non-direct economic benefits so that these are visible to the general public.

9) The Joint Movants request clarification as to what constitutes a program that would qualify under the Commission's definition of "not solely ratepayer funded".

The Plan proponents made no showing whatsoever that they pursued separate government funding, grant funding, non-profit partnerships or funding, voluntary tariff offerings, or any other conceivable source of funding other than the status quo of direct or indirect ratepayer funding. At the very least, the Plan proponents must show that they exhausted all practical options to procure funding from sources other than ratepayers. *See* Order No. 25,932 at 58 ("Private funding should continue to be used to the greatest extent possible to fund the EERS programs"); *see also* RSA 125-O-a, I(j) (the Energy Efficiency & Sustainable Energy Board shall "[i]nvestigate potential sources of funding for energy efficiency…").

10) The Joint Movants state that clarification is required as to the criteria to be applied to determine the lowest per-unit cost, and what criteria should be used in evaluating which programs will qualify as the lowest per-unit cost.

The Commission refers the Joint Movants to the previous clarifications regarding quantifiable economic benefits accruing to ratepayers. In addition, modeling that demonstrates that energy efficiency is a least-cost option compared to supply-side alternatives, including renewable energy sources, should be applied in the evaluation of programs for lowest per-unit costs. As in previous clarifications, the GST and TRC tests shall be applied in order to choose programs that have the best return on investment.

11) The Joint Movants state that the reference to "Dollar savings per unit of energy estimated to have been produced" is unclear with respect to whether this refers to the inverse of a utility's cost to save each unit of

energy or if it is something new. Energy also seeks clarification relating to the treatment of the 2021 Avoided Energy Supply Costs Study.

The Commission clarifies that "avoided" costs should be evaluated, as opposed to "produced." The Joint Utilities should use the updated 2021 AESC figures in the calculation of avoided costs in future proposals for programming.

12) The Joint Movants request clarification regarding the second portion of the requirement that savings be "broken out by participating and non-participating ratepayers, by ratepayer class."

The Joint Utilities shall continue to provide modeling similar to that provided in Exhibit 4 Attachment M to demonstrate savings broken out by participating and non-participating ratepayers, and by ratepayer class.

13) The Joint Movants seek clarification on what constitutes appropriate administrative and overhead costs in light of the Commission's concerns expressed in the order that more than 15 percent of program costs were allocated to administration and overhead.

The Order points out that $58.3 million in administration costs were included in the Proposal. The Commission would expect that the administration costs, implementation services, and marketing costs would be reduced proportionally from the initial Proposal to the updated programming proposal, with EM&V reduced much more significantly due to the phasing down of EM&V.

14) The Joint Movants seek clarification on the calculation of "gross savings" required by the order. Energy also requests clarification of the use of gross and net savings figures.

Although the Commission requires gross savings to be reported, we allow the Joint Utilities to choose between net or gross savings[5] when developing the Program Proposal, so long as assumptions are fully disclosed. The utilities are free to use EM&V and other tools for internal evaluation and to provide the Commission with

[5] In the context of the calculations requested, gross savings are the lifetime total savings in dollars, using a stated discounted cash flow. Net savings uses the gross savings in dollars and subtracts the discounted cash flow cost

useful information derived from these tools. The Commission will use GST and TRC tests for the program evaluation.

15) The Joint Movants seek clarification whether the carryforward requirement applies to HEA funds.

Unless statutorily authorized, the programs shall not carry forward fund balances year-to-year, as discussed herein.

16) The Joint Movants seek clarification whether 2021 carryforward balances should be calculated in the aggregate or that balances be shown for each sector.

The Commission clarifies that 2021 carryforward balances should be calculated in the aggregate for each utility by taking actual 2021 revenues and subtracting the actual 2021 spending.

17) The Joint Movants state that the Order's reference to RSA 125-O:23 is misplaced, and that further clarification is needed regarding whether the Commission intends for the NH Utilities to utilize RGGI funds in a manner that is different from the Proposed Plan.

The Commission clarifies that it does not intend for the Joint Utilities to utilize Regional Greenhouse Gas Initiative (RGGI) funds, as allocated by the Department of Energy, in a manner that is different from that contained in the Proposed Plan.

18) The Joint Movants seek clarification on how NHEC should treat overspent amounts, and Energy seeks clarification on the impacts of budgetary overspends and forecasted versus actual revenues.

Consistent with the determination on rehearing above, any overspending of budgets by the NHEC will trigger a filing requirement. Because the NHEC does not have shareholders and is not otherwise rate regulated, it is free to use an alternative rate mechanism to recoup overspent budgets without relying on system benefits charge (SBC) revenues.

With respect to Energy's request, overspending occurs when actual costs are greater than actual revenues, and underspending occurs when actual costs are less

than actual revenues. The Commission expects the utilities to closely monitor actual revenues across all sources, including FCM and RGGI, and adjust program budgets and costs throughout the year. The level of uncertainty in both revenues and costs decreases month by month, from January to December, as more revenues and costs are booked, allowing the utilities to tailor their spending profile to the actual revenues.

19) The Joint Movants state that the NH Utilities that have lost base revenue ("LBR") will require a hearing to set that rate, and the last approved LBR will remain in place until a hearing can be held, or an order nisi issued.

The Commission clarifies that the utilities that have LBR shall file any proposed rate change by March 31, 2022.

20) Finally, the Department of Energy requests clarification on the process for the parties' review of the new Program Proposal.

Although expeditious implementation of new programming is important, we agree that a revised schedule for the submission of the new Program Proposal is appropriate following the suspension of filing deadlines pursuant to Order No. 26,556 and the clarifications issued herein. We also acknowledge Energy's request to incorporate further process related to the development and filing of a new program proposal. We therefore direct the Joint Utilities to confer with the parties in this matter and file a proposed procedural schedule by January 21, 2022. The proposed procedural schedule should result in submission to the Commission of a Program Proposal for the remainder of the 2021–2023 triennium no later than March 31, 2022, for effect May 1, 2022 upon Commission approval. The Program Proposal filing shall include a detailed budget containing all program and cost items greater than $500,000 in live spreadsheets, and proposed spending by program and each program's corresponding benefit/cost calculations in live spreadsheets as outlined in the Order. If the proposed procedural schedule is not assented to by all parties, objections to the proposed procedural schedule shall be filed no later than January 28, 2022.

VI. Conclusion

Based upon the foregoing, it is hereby

ORDERED, that the Joint Utilities' motion for a full commission and appointment of special commissioner(s) is GRANTED IN PART to the extent that a special commissioner has been requested to replace Commissioner Simpson, and otherwise DENIED; and it is

FURTHER ORDERED, that the Joint Movants' motion for rehearing, clarification, and stay of Order No. 26,553 is GRANTED IN PART to the extent the Commission has reheard issues relating to carryforwards and issued numerous clarifications, as discussed in the body of this order, and is otherwise DENIED; and it is

FURTHER ORDERED, that the Department of Energy's motion for rehearing and/or clarification of Order No. 26,553 is GRANTED IN PART to the extent the Commission has reheard issues relating to carryforwards and issued numerous clarifications, as discussed in the body of this order, and is otherwise DENIED; and it is

FURTHER ORDERED, LISTEN Community Service's motion for rehearing, clarification, and stay of Order No. 26,553 is GRANTED IN PART to the extent the Commission has reheard issues relating to carryforwards and issued numerous clarifications, as discussed in the body of this order, and is otherwise DENIED; and it is

FURTHER ORDERED, that the Joint Utilities shall file an EM&V proposal related to ongoing participation in the ISO-NE forward capacity market as discussed herein no later than March 1, 2022; and it is

FURTHER ORDERED, that the utilities collecting lost base revenue shall file for any necessary rate changes no later than March 31, 2022; and it is

FURTHER ORDERED, that the Joint Utilities shall file a procedural schedule relating to the submission and evaluation a new Programming Proposal by the deadlines established herein above, but in any case, a new Program Proposal shall be filed no later than March 31, 2022.

By order of the Public Utilities Commission of New Hampshire this seventh day of January, 2022.

Daniel C. Goldner
Chairman

Pradip K. Chattopadhyay
Commissioner

Service List - Docket Related

Docket# : 20-092

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STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

ELECTRIC AND GAS UTILITIES

2021-2023 Triennial Energy Efficiency Plan

Docket No. DE 20-092

MOTION FOR REHEARING, CLARIFICATION AND STAY

OF ORDER NO. 26,553

Pursuant to New Hampshire Code of Administrative Rules Puc 203.07, RSA 541:3, and RSA 541:5, New Hampshire Electric Cooperative, Inc.; 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; and Northern Utilities, Inc. (collectively, the "NH Utilities"); the Office of the Consumer Advocate ("OCA"); Clean Energy New Hampshire; Conservation Law Foundation; and Southern New Hampshire Services (altogether, the "Moving Parties") respectfully request rehearing and clarification of Order No. 26,553 (November 12, 2021) (the "Order") issued by the New Hampshire Public Utilities Commission (the "Commission") in the instant docket.

The Order changed the previously-approved framework for energy efficiency plans without notice, without giving the Moving Parties the opportunity to demonstrate the merits of that framework, without being anchored to evidence in the record, and without regard to the impact such dramatic and sudden changes will have on the the NH Utilities, utility customers, energy efficiency contractors and vendors, and other stakeholders. To allow time for the Commission's consideration of the Moving Parties' request for rehearing and clarification, the Moving Parties

also request that the Commission: temporarily stay the Order[1]; suspend or extend the December 15, 2021 compliance filing requirements; and temporarily reinstate the terms of Order No. 26,440, pending resolution of this matter. A temporary stay is warranted and appropriate because the Order institutes a drastic, disruptive effect on the NH Utilities' 2021 energy efficiency projects without notice or sufficient due process. The Moving Parties respect the authority of the Commission. However, the Moving Parties also share a fundamental concern that there are several elements of the Order that are not based on sound legal processes and principles, and implementation of many of the directed changes are immediately and significantly harmful to the businesses that offer energy efficiency services in New Hampshire, and the customers that benefit from those programs. Over 10,000 New Hampshire residents work in the energy efficiency sector, and some of the businesses where they are employed have already announced they will have to lay workers off in response to the Order. Some of these businesses are facing permanent closure given the Order's terms. These are real, significant and immediate harms that will occur due to the terms of the Order. For these reasons, the Moving Parties respectfully request that the Commission stay the Order pending resolution of the issues in this Motion.

In addition to the many foundational changes to New Hampshire's Energy Efficiency Resource Standard ("EERS") program, there is lack of clarity regarding implementation of the Commission's directives for the 2022 and 2023 EERS program plans due to numerous ambiguities contained in the Order. Also, there are issues raised within the Order that will require other, further action by the Commission as part of its rehearing and clarification. Therefore, in light of the notice and due process deficiencies and the drastic changes that have been ordered, the Moving Parties

[1] In light of the December 6, 2021, order in this docket denying Liberty's motion to stay, Liberty does not participate in the request for a stay articulated here, although Liberty continues to believe a stay is appropriate.

request that the Commission grant a temporary stay pending resolution of the issues raised herein. In support of this Motion, the Moving Parties state as follows:

I. BACKGROUND AND PROCEDURAL HISTORY

The Commission established New Hampshire's EERS and the process for implementing it in Order No. 25,932 (August 2, 2016) (the "Initial EERS Order"). The implementation process requires the state's electric and natural gas utilities, as administrators of the programs offered to the public to meet the EERS, to "prepare the triennial EERS plans in collaboration with stakeholders and the EESE Board as Advisory Council." Initial EERS Order at 39-40. In Docket No. DE 17-136, 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). The 2018-2020 Plan was updated for each of the years 2019 and 2020 and approved by the Commission in Order Nos. 26,207 (December 31, 2018) and 26,323 (December 31, 2019), respectively.

On June 5, 2020, the NH Utilities that have jointly administered New Hampshire's energy efficiency programs since 2001 filed a letter requesting the Commission open a docket for consideration of the second Energy Efficiency Triennial Plan covering calendar years 2021-2023 (the "Proposed Plan"). In that letter, the NH Utilities and the OCA requested that a prehearing conference be scheduled before September 1, 2020 "so that the docket will be ready to proceed without delay once the final draft triennial plan for 2021-2023 is submitted to the Commission." Letter of Jessica A. Chiavara, Esq. to Executive Director Howland, (June 5, 2020). The widely held expectation was that the Commission would conduct an adjudicative proceeding in accordance with RSA 541-A:31, as the Commission had done in prior energy efficiency dockets. In addition, the expectation was that the Commission would complete the process by December

31, 2020 to allow for timely implementation of the second EERS triennial plan, as had occurred in connection with the first triennial plan in Docket No. DE 17-136.

On June 5, 2020, the NH Utilities also submitted a motion to amend Order 26,207 to extend the submission date for the second triennial plan (DE 17-136, Motion to Amend Order 26,207 (June 5, 2021)). By Order No. 26,375 (June 30, 2020), the Commission granted the motion and extended the deadline for filing the second triennial plan to September 1, 2020.[2] The Commission relied on RSA 365:28 for authority to extend the deadline previously adopted in Order No. 26,207 (December 31, 2018). RSA 365:28 provides that the Commission may, after notice and hearing, "alter, amend, suspend, annul, set aside, or otherwise modify any order made by it."[3] In its order extending the July 1, 2020 deadline, the Commission noted that the agency's authority to change earlier determinations is "limited only in that the modification must satisfy the requirements of due process and be legally correct." Order No. 26,375 at 3, citing *Appeal of Office of Consumer Advocate*, 134 N.H. 651, 658 (1991).

The NH Utilities filed the Proposed Plan on September 1, 2020, after a nearly year-long stakeholder collaboration process that entailed over 20 meetings with diverse interests represented. The Commission issued an Order of Notice on September 8, 2020, which, after briefly summarizing how triennial plans are funded under the EERS, 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

[2] According to the Commission, the reason for an additional two months to submit the second triennial plan as compared to the initial triennial plan was that "under the circumstances created by the COVID-19 pandemic, [the NH Utilities] and other stakeholders required additional time to understand market impacts, develop goals and tailor a program and plan structure to account for the pandemic." Order No. 26,375 (internal quotation marks omitted).

[3] RSA 365:28 exempts from this requirement any prior Commission order that was "made under a provision of law that did not require a hearing and a hearing was, in fact, not held."

> 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).

The Order of Notice expressly recognized that unspent funds from prior years' energy efficiency programs, including interest, "are carried forward to the following year's budget." *Id.* The Order of Notice did not state that the Commission was considering abandoning that long-standing practice or that the Commission planned to use the instant proceeding to reevaluate or modify the existing EERS paradigm. Nor did the Order of Notice invoke RSA 365:28, or otherwise indicate that the Commission was considering the possibility of altering, amending, suspending, annulling, setting aside, or otherwise modifying any of its prior orders relative to the establishment or funding of the EERS. Consequently, no change to the established framework or funding of the EERS was noticed as part of this docket.

The docket proceeded through the steps outlined in RSA 541-A:31 applicable to contested administrative proceedings conducted by the Commission.[4] A prehearing conference took place as scheduled on September 14, 2020, at which 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. The parties convened for a technical session immediately after the prehearing conference and agreed upon a procedural schedule to govern the remainder of the docket, which the Commission approved by secretarial letter on September 17, 2020. Discovery ensued, and Commission staff (now staff of the New Hampshire Department of Energy, or "DOE"), OCA, and several intervenors

[4] In its order denying a motion by the OCA and other parties to designate staff advocates, the Commission ruled that it was performing quasi-legislative or legislative functions in this docket, rather than adjudicative functions. DE 20-092, Order No. 26,415, at 7 (October 8, 2020). The Commission later reconsidered this determination and decided to treat the entire proceeding as adjudicative. DE 20-092, Order No. 26,458, at 4 (February 19, 2021).

filed testimony on October 29, 2020. Further discovery was conducted on this testimony, and rebuttal testimony was filed by the NH Utilities, OCA, Clean Energy New Hampshire, and the then-staff of the Commission on December 3, 2020. Settlement discussions were held on November 19 and 20, and a settlement agreement (the "Settlement Agreement") signed or supported by all parties (except Commission staff) was submitted to the Commission on December 3, 2020. The Department of Environmental Services submitted a letter indicating support for "the efficiency targets and programs proposed in the Settlement Agreement." Letter from Craig A. Wright, Director of the Air Resources Division of the Department of Environmental Services to Debra A. Howland (December 4, 2020). Acadia Center filed a letter in support of the Settlement Agreement on December 10, 2020.

The Commission conducted evidentiary hearings on December 10, 14, 15, 16, 21, and 22, 2020. The hearing took place before the two commissioners then in office – Chairwoman Dianne Martin and Commissioner Kathryn Bailey – and, without objection, exclusively addressed the Proposed Plan as modified by the Settlement Agreement submitted on December 3, 2020.

Although the parties requested a final decision prior to the January 1, 2021 effective date of the Proposed Plan, this did not occur. 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 structure and System Benefit Charge rate beyond December 31, 2020," until a final order could be issued. At that time, the Commission estimated issuance would follow within eight weeks. Order No. 26,440 at 4-5. However, the Order took considerably longer than eight weeks and was issued nearly eleven months later on November 12, 2021. The Order denied the NH Utilities' request for approval of the proposed 2021-2023 New Hampshire Statewide Energy Efficiency Plan; denied the Settlement Agreement that modified the Plan; and ordered significant

changes to the funding and administration of energy efficiency programs in New Hampshire, including, but not limited to:

- Progressively reducing the energy efficiency portion of the system benefits charge ("SBC") and local delivery adjustment charge ("LDAC");
- Rejecting the Granite State Test that had been recently adopted by the Commission for purposes of cost-benefit analysis of energy efficiency programs;
- Revising the calculation of lost base revenue;
- Eliminating performance incentives for the utilities administering energy efficiency programs;
- Eliminating the ability to carry forward an over-collection and requiring utility shareholders to bear the cost of an under-collection;
- Reducing evaluation, monitoring, and verification (EM&V) costs in 2022 and terminating EM&V effective December 31, 2022; and
- Altering the criteria upon which programs are screened and selected for implementation.

For the reasons set forth herein, the Order is inconsistent with New Hampshire law, including but not limited to contravening rights secured to parties by virtue of the New Hampshire Constitution. In particular, the Order is arbitrary and unreasonable because the modifications made to the EERS framework established in prior Commission orders are instituted without notice, due process or record substantiation. Given the seriousness of these omissions, the Moving Parties respectfully request that the Order be immediately stayed pending clarification, reconsideration and rehearing of the issues set forth herein.

II. LEGAL STANDARD

Pursuant to RSA 541:3 and 541:4, a party may move for rehearing of a Commission order within 30 days of the order by specifying every ground upon which it is claimed that the order is unlawful or unreasonable. The Commission may grant rehearing or reconsideration where a party

states good reason for such relief. *Public Service Company of New Hampshire*, Order No. 25,361 (May 11, 2012) at 4. Good reason may be shown by identifying specific matters that were overlooked or mistakenly conceived by the deciding tribunal, or by identifying new evidence that could not have been presented in the underlying proceeding. *Id*. at 4-5. Within 30 days of the filing of a motion for rehearing, the Commission must grant, deny, or suspend the order or decision complained of pending further consideration, and the suspension may be upon such terms and conditions as the Commission may prescribe. RSA 365:21.

III. REQUEST FOR REHEARING/RECONSIDERATION

A. Failure to Provide Adequate Notice as Required by Law

As the New Hampshire Supreme Court 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. Supreme Ct., Oct. 13, 2021) at *11 (citation omitted). Both utilities and their customers are entitled to due process in Commission proceedings.[5] The Court has consistently held that "[w]hile due process in administrative proceedings is a flexible standard, this court long has recognized that the PUC has important quasi-judicial duties, and we therefore require the PUC'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*

[5] The movants are aware that, in *Appeal of the Office of the Consumer Advocate*, 148 N.H. 134 (2002), the Court concluded that residential utility customers did not have a due process right to a hearing when the Commission approved an amendment to a previously approved special contract under RSA 378:18. Although the Court suggested that several federal district courts and some state jurisdictions have declined to recognize "a utility customer's due process property interest in the setting of utility rates," *id*. at 139 (citations omitted), the Court did not go that far as a matter of New Hampshire constitutional law. The lack of a property interest among utility customers when the Commission considers a previously approved special contract – a very narrow regulatory inquiry -- does not mean customers enjoy no due process rights in the circumstances of the instant case where customers have an interest not just in their rates but also in their access to energy efficiency programs that provide desirable services and save them money.

Corp., 130 N.H. 422, 428 (1988) (internal citations omitted). 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.

As noted above, the Order of Notice in this docket delineated the following issues to be considered:

> [I]ssues 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.

As the Order of Notice plainly states, the issues to be covered in the proceeding related exclusively to the Proposed Plan (which was ultimately amended by the Settlement Agreement) pending before the Commission for consideration. In addition, the Order of Notice expressly recognized that the NH Utilities were seeking approval of the EERS Plan "in accordance with 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)." *Id.*

The Order of Notice is devoid of any indication that the Commission intended to revisit any of the principles established in its prior EERS orders or to restructure the EERS framework or any of its component parts. Nor did the Order of Notice provide any notice that the reasonableness

of existing SBC or LDAC rates were under consideration. In keeping with the actual scope of the notice, none of the parties (including the Moving Parties) presented evidence on matters embedded in the existing EERS structure such as the general appropriateness of performance incentives (Order at 40-41); the carrying forward of budgets from one year to the next or reconciling overspending the budgets in the same manner (Order at 42-43); justification of which benefit/cost test to apply (Order at 39); whether to continue to fund EM&V work (Order at 46); the reasonableness of the approved rates for 2018-2020 (Order at 27); and the requirement that the NH Utilities pursue private funding and/or funding derived from sources other than ratepayers (Order at 47).

The Moving Parties did not offer evidence on any of these issues because none of these issues were noticed and, as a result, there was no burden on the Moving Parties to do so. Therefore, contrary to the findings set forth in the Order, the Moving Parties did not fail to meet a burden of proof on any of these issues. A burden of proof does not exist for unnoticed matters. Because the Commission's ruling on unnoticed issues deprived the Moving Parties of the "fundamental requirement of the constitutional right to be heard," the Order is unlawful. *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).

Determining the appropriate benefit-cost tests is one example of the issues decided by the Order that fall outside the scope of issues noticed or heard in this proceeding. The Moving Parties presented no evidence on which benefit-cost test to use, because the Granite State Test and secondary tests were just recently adopted by the Commission in 2019. In Order No. 26,322 issued December 30, 2019, 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. The Commission further found 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." Order No. 26,322 at 9. Given these recent pronouncements, the NH Utilities were obligated, by Commission order, to apply the Granite State Test and secondary tests when evaluating programs for inclusion in the Proposed Plan. Relying on Order No. 26,322, the NH Utilities applied the Commission-approved tests to all programs in the Proposed Plan. Because there was no notice (as required by RSA 365:28 and fundamental due process principles) that benefit-cost tests adopted by the Commission in 2019 would be revisited in this docket, or that the old Total Resource Cost Test would be reinstated, the Order's rejection of the Granite State Test is unlawful and unreasonable.

Another example is the Order's elimination of "carryforwards," which eliminates the ability to reconcile costs and revenues. Order at 49. Because the reconciling component of the SBC rate, which requires the carryover of over and underspending from year to year, was not noticed as an issue to be decided in this docket, the Moving Parties had no opportunity to present evidence on the reasonableness of it. If the reconciling component of the SBC rate had been properly noticed as an issue to be reviewed by the Commission in this docket, the Moving Parties could have explained the routine nature of reconciling budget underspending and overspending, including the fact that energy efficiency programs necessarily over- and under-recover their related projected costs, and why this aspect of the rate is necessary and appropriate for administering the energy efficiency programs that by their nature carry over from month to month and year to year. Instead of identifying this issue for adjudication in this docket, the Order of Notice actually

acknowledged the long-standing practice of carrying forward unspent funds from a prior program year to the following year's budget. Order of Notice at 1-2.

In light of this acknowledgement in the Order of Notice, and the lack of notice as required by RSA 365:28 and fundamental due process principles, there was no reason for the Moving Parties to address the carryforward issue during the proceedings – as there was no reason to think that the long-standing practice would be considered and abandoned by the Commission. Moreover, as the Order was issued only six weeks prior to the conclusion of the 2021 program year, even if the structural modifications to the EERS could somehow be viewed as lawful, they can only apply *prospectively* beginning no sooner than January 1, 2022, and cannot apply retroactively to 2021. Decisions of the Commission that modify existing tariffs and approvals previously rendered by the Commission cannot lawfully apply on a retroactive basis. *See Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980)("'it is a basic legal principle that a rate is made to operate in the future and cannot be made to apply retroactively…'")(internal citation omitted).

As for EM&V work, the Initial EERS Order established 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." Initial EERS Order at 61. This general premise had not been subject to any dispute, either by a party or by the Commission itself, in the five years since the Initial EERS Order was issued. However, the Order upends the funding for, and scope of, EM&V work by requiring that EM&V spending be "significantly reduced" for 2022, and completed by December 31, 2022. Order at 46. Because the Moving Parties were not notified of or heard on the issue of whether EM&V work should continue throughout the triennium, the Order is unlawful and unreasonable.

Also, while the amount of, and formula for, the calculation of performance incentives has been debated, the existence and application of such incentives has not been in dispute since before the establishment of the EERS. The Initial EERS Order explicitly details the ways that performance incentives encourage the utilities to "pursue exemplary performance in program administration and delivery and to put efficiency investment on an equal footing with other earnings opportunities available" (Initial EERS Order at 60), and this application of those incentives has not once been disputed by the Commission or any party appearing before it. Every order since the Initial EERS Order has reiterated this standard. Order Nos. 25,932 at 60, 26,207 at 14, and 26,323 at 10. Because performance incentives were neither disputed nor noticed, and because performance incentives have been an undisputed component of the EERS since its inception, the Order's elimination of performance incentives is unlawful and unreasonable. Again, as referenced above with respect to the reconciling component of the SBC rate, the Order was issued six weeks prior to the conclusion of the 2021 program year, and therefore should not apply to 2021. The Commission's decisions cannot lawfully modify previously approved tariffs or prior approvals of the Commission on a retrospective basis; the Commission's decisions must have prospective effect. *See Appeal of Pennichuck Water Works*, 120 N.H. at 566.

Lastly, without proper notice, the Order reverses rates previously approved by the Commission. *See* Order Nos. 26,095; 26,207; 26,323. Specifically, the rates approved in the 2018-2020 EERS plan were found to be just and reasonable by the Commission in Order No. 26,095. There is nothing in the record, nor in the Order, showing a change in circumstances justifying any conclusion that the rates pertaining to the 2018-2020 EERS plan have become unjust or unreasonable and would justify a regressive rate trajectory unwinding those rates. No change in

circumstance was discussed or presented on the rates for 2018-2020 and no notice was ever provided that those rates would be at issue in this proceeding.

Accordingly, for the reasons set forth above, the unnoticed elements of the Order are unlawful and unreasonable, and should be reconsidered. The parties to the docket were not afforded appropriate notice and opportunity to be heard on those issues as is required by fundamental due process principles applicable to the Commission's decision-making in an adjudicatory proceeding.

B. Misapplication of Legal Standards

The Order explicitly relies on a number of statutes and standards to frame the Commission's authority to determine whether the Settlement Agreement and Proposed Plan with its component parts are just, reasonable and in the public interest. In addition to the statutes cited, the Order also specifically acknowledges the authority of the Initial EERS Order, stating that this prior decision, along with RSA 374-F:3, VI, establishes the legal basis for the EERS framework. Order at 30. The Order goes on to say that "[t]his statutory framework ***along with the Commission's subsequent orders*** clearly establish the Commission's regulatory role in approving any proposed EERS programs." Order at 31. In addition to the errors in statutory application described below, the Order invokes and selectively quotes the Initial EERS Order and written decisions that precede it, disregarding substantially all of the Initial EERS Order's reasoning, and wholly ignoring the Commission's subsequent orders relating to the development and implementation of the EERS and the plans that execute it. This departure from years of Commission precedent is unreasonable (particularly without notice or due process), and directly contravenes the Order's own premise for establishing the Commission's regulatory role in relation to the EERS programs. Because the Order misinterprets the statutory mandates and legal standards

applicable to the Proposed Plan and Settlement Agreement, the Order must be reconsidered in light of the statutory and legal authority discussed below.

As an initial matter, the Order omits any reference to, or acknowledgement of, RSA 4-E:1, requiring the State to adopt a 10-year energy strategy ("State Energy Strategy"), and within which the Legislature required "consideration of the extent to which demand-side measures including efficiency … can cost-effectively meet the state's energy needs, and proposals to increase the use of such demand resources to reduce energy costs and increase economic benefits to the state." RSA 4-E:1, II. The 2014 version of the State Energy Strategy acknowledges that "the State must set specific efficiency goals and metrics to measure progress" and concludes that the Commission should do so by opening a proceeding to establish "energy efficiency ***savings goals*** based on the efficiency potential of the state, ***aimed at achieving all cost-effective efficiency***." 2014 New Hampshire State Energy Strategy, Executive Summary at ii (emphasis added).[6] Consistent with that directive, in 2015 the Commission opened Docket No. DE 15-137,[7] which commenced a year-long process that resulted in the development and establishment of the EERS with the Initial EERS Order, issued directly pursuant to the mandate of the State Energy Strategy by creating, "a policy that sets specific targets or goals for energy savings, which utility companies serving New Hampshire ratepayers must meet" that is "consistent with the [] legislative mandate to consider energy efficiency a first-priority supply resource." Initial EERS Order at 2, 56.

The Order, however, does not mention savings goals that would provide targets toward which the NH Utilities would strive as the State Energy Strategy directs the Commission to do,

[6] The State Energy Strategy is set forth at: https://www.nh.gov/osi/energy/programs/documents/energy-strategy.pdf.

[7] Docket No. DE 15-137 followed an earlier investigative docket, Docket No. IR 15-072, where the Commission received "unanimous support for the Commission's establishment of an EERS at this time, under existing statutory authority, to advance a policy of energy-efficiency as a least-cost-supply resource for electric and natural gas utilities." May 8, 2015 Order of Notice in Docket No. DE 15-137, at 2.

nor does the Order account for the goal of achieving energy efficiency as a cost effective, first-priority resource. Rather, the Order selectively invokes RSA 374-F and *Appeal of Algonquin Gas Transmission*, 170 N.H. 763, 774 (2018), to suggest that a focus on "reducing electricity costs for customers" takes priority over the goals of the EERS, in reaching the unfounded determination that the SBC and LDAC rates supporting the programs proposed in the Settlement Agreement were unjust and unreasonable. The Order sets arbitrary rates without articulating guidance for savings goals. Order at 35, 38.

In so doing, the Commission 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, treats energy efficiency 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." Initial EERS Order at 57.

This, in turn, accounts for the previous determination of the Commission that all energy efficiency programs administered by the NH Utilities must "meet a cost-effectiveness test that

projects greater benefits than costs *over the life of the measures*, ensur[ing] that the programs and spending of ratepayer funds are just, reasonable, and least cost." Initial EERS Order at 59 (emphasis added). Using an equation for cost-effectiveness – the well-established formula for determining when program benefits outweigh costs, and thus when such expenditures reflect just, reasonable and least cost spending of customer funds – mirrors the legislative statement of the state's energy policy in RSA 378:37 to "maximize the use of cost-effective energy efficiency." Notwithstanding that the Legislature's energy policy statement expressly requires maximizing the use of cost-effective energy efficiency, the Order *makes no reference to it*. This oversight alone constitutes good cause for rehearing.

Further, the Least Cost Integrated Resource Plan statute, RSA 378:38 *et seq*, and the least cost principles enshrined therein necessitate that rate increases and short-term bill impacts be evaluated in context. But the Order arbitrarily finds that "[b]ecause 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 . . . the least cost showing requirement in from [*sic*] Order 25,392's framework has not been adequately demonstrated." Order at 34. As a first matter, no such "direct comparisons" have ever been required in connection with the EERS and were not noticed as being at issue in this proceeding. Moreover, a focus on such direct comparisons is unreasonable as it eliminates any consideration of the cost-effectiveness of the programs on their own merits, which is the more accurate least cost showing requirement the Commission endorsed in Order No. 25,932 and a standard that reasonably and correctly focuses on whether the programs provide long-term savings compared to the cost of supply alternatives, consistent with the State's energy policy as well as the requirements of least cost planning in RSA 378:37-:40.

This is why the Commission previously found in the Initial EERS Order that the demonstration of cost-effectiveness justifies a determination that increases to the SBC rate are lawful and appropriate:

> Failing to increase the funding to support higher savings goals at this time not only fails to provide the Joint Utilities' customers with viable and proven options for energy at least cost, but also fails to capture other benefits for customers. 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***.

Initial EERS Order at 58-59 (emphasis added).

The record in this case thoroughly demonstrates the cost-effectiveness of programs in the Proposed Plan according to the Commission-approved benefit-cost testing model and applicable law. The Order, therefore, should be reconsidered to apply the proper legal standards to the record in this manner.

C. Decisions Unsupported by, and Contradicting, Record Evidence

Beyond the failure to apply the proper legal standards and the failure to provide proper notice, the Order also overlooks, misunderstands, or misapplies relevant and undisputed facts in the record. Because many of the issues decided in the Order lack record support or are contradicted by the record, these issues must be reconsidered.

In contrast to the Order at issue, the Initial EERS Order illustrates the importance and weight that should be given to the year-long effort that goes into the stakeholder process and development of triennial plans submitted to the Commission, as well as the year-long effort of developing the administrative record for the docket when reaching a final decision on a plan, even in the face of rate increases:

> [O]ur approval of the Settlement Agreement's rate increases is based on a record developed over the course of a year following a year-long investigation by the Staff

> of EERS potential, both of which were contributed to by numerous experienced and knowledgeable stakeholders and experts. Also, we note in making our decision, the support of the Settlement Agreement by the diverse parties, including the Consumer Advocate, The Way Home, and others. The record and support by parties with diverse interests, along with the customer protection measures built into the EERS framework, as described below, give us confidence that any short-term rate impacts will be outweighed by the benefits to customers, the grid, and the New Hampshire economy.

Initial EERS Order at 54.

Similarly, development of the Proposed Plan and Settlement Agreement took a total of two years' effort from diverse stakeholders who subsequently developed the evidentiary record on the Settlement Agreement considered by the Commission. The Order, however, makes a number of decisions that do not rely on the Proposed Plan, the Settlement Agreement, or any other material in the record, despite the Commission's clear statement (indicated above) that a lengthy stakeholder process yields meaningful record evidence.

Equitable Benefits

For example, the Order concludes the Moving Parties failed to demonstrate that the rates in the Proposed Plan provide equitable benefits to all consumers, and therefore there is no showing that the rates are just, reasonable or in the public interest. Order at 35. However, this conclusion lacks sufficient reasoning as required by RSA 363:17-b. In support of its conclusions, the Order refers to RSA 374-F:3, VI, which states in relevant part: "Restructuring of the electric utility industry should be implemented in a manner that benefits all consumers equitably and does not benefit one customer class to the detriment of another. Costs should not be shifted *unfairly* among customers."[8] Aside from citing this statute regarding restructuring, the Commission provides no

[8] The only cost shifting within the energy efficiency programs is a portion of the C&I revenues that go to help fund the Low Income programs. All remaining C&I funds strictly fund C&I projects and all residential funds strictly fund residential projects, including a similar portion directed to the Low Income programs. *See* Exhibit 1, part 1, Bates page 32.

further reasoning for the conclusion in the Order rejecting the proposed rates as unequitable in the Proposed Plan as modified by the Settlement Agreement. This finding, therefore, is lacking in support and fails to acknowledge that the statute prohibits only *unfair* cost shifting, which requires equitable—not equal—benefits to customers.

Commission precedent in the Initial EERS Order, relied upon by the Order, also supports the conclusion that equitable benefits are distinguishable from inequitable benefits resulting from unfair cost shifting, as follows:

> While the cost benefit tests ensure benefits to all customers, it is true that those who participate in efficiency programs are likely to benefit most. They will receive immediate benefits from bill reductions, improved comfort, and higher home or business value. Those advantages are in addition to the utility system benefits enjoyed by all customers. In return, however, customer participants must invest time and take full advantage of financial incentives or technical assistance, and they often must pay additional out-of-pocket expenses. ***Non-participating customers enjoy the benefits from load and system improvements***.

Initial EERS Order at 57 (emphasis added).

The Initial EERS Order details how these differentiated benefits result in just and reasonable rates that are in the public interest, even for non-participants. Conversely, the Order at issue here fails to address to any extent how the rates in the Proposed Plan, as modified by the Settlement Agreement, are just and reasonable -- although the Proposed Plan demonstrates in detail that benefits of the programs, while different for participants compared with non-participants, inure to all customers consistent with the principle of ensuring equitable benefits and avoiding unfair cost shifting. The Order's sole reference to the record on this issue concludes that certain non-participant customers will not see "commensurate" benefits to the costs they would pay, without ever defining what the Commission now believes "commensurate" benefits would be. Order at 33. The portions of the record cited by the Commission support only a determination that

costs and benefits are different for participants than non-participants, but such differences have never served as the defining characteristic of what is equitable in relation to implementation of the energy efficiency program. Thus, the Order unreasonably omits any rationale for the conclusion that the rates in the Proposed Plan do not result in equitable benefits. *See* Order at 33, 35.

The Proposed Plan took an extra measure in its purpose to assure equitable benefits, which was disregarded and misconstrued by the Commission in its decision. This is the advent of different SBC rates for C&I (commercial and industrial) and residential customers. The Order interpreted this change as unequitable based solely on the fact that C&I programs produce more kWh savings than their residential counterparts. Order at 33. In reality, the different rates are entirely justified and appropriate because the C&I program participants will be the ones directly benefiting from the kWh savings generated by the programs. Although kWh savings provide indirect benefits to all customers, the differentiated rates between customer sectors address the fact that C&I customers receive more direct benefits than residential customers. Exhibit 1, part 1, Bates pages 40-41. Therefore, C&I customers pay a greater proportion of the total SBC funds collected.

The Order overlooks this record support and mistakenly applies this fact to reach the conclusions that the proposed rates are not commensurate with benefits and that the benefits to customers are not equitable. Without any acknowledgement of the relationship of utility rates to the program funding and direct customer benefits, the Order cannot support a finding that the rates in the Proposed Plan are not just, reasonable and in the public interest. Rehearing, therefore, is warranted.

In fact, although the proposal to establish different SBC rates for the residential and C&I customers was introduced for the first time in the Proposed Plan, the natural gas utilities have had

Commission-approved, differentiated LDAC rates between the two customer classes since the inception of the energy efficiency programs. The Order also sets different natural gas rates for the two customer classes, and while the Order largely holds the maximum rate per therm steady for residential customers between the second and third year of the term, it mandates a 21 percent reduction in the LDAC rate for C&I customers without citing to any evidence to support the differential treatment. Order at 38.

Performance Incentives

Similarly, the Order does not support the elimination of performance incentives for the NH Utilities with citations to the record or sufficient reasoning. The Order erroneously asserts that the Commission authorized performance incentives only on a temporary basis, relying on Order No. 23,574 which was issued in 2000 to establish guidelines for post-competition CORE energy efficiency programs.[9] However, there is nothing in the cited order that establishes performance incentives as temporary.

Rather, Order No. 23,574 explains that performance incentives, as a new feature at that time, would require close ongoing scrutiny to ensure they continue to meet the standard for offering the incentives and balance interests of shareholders and customers. More importantly, the only authority relied upon in the Order for elimination of the performance incentives beyond this misinterpreted reference to Order No. 23,574 is a passing reference to various statutes that have only indirect bearing on any incentives. *See* Order at 41 (listing RSA 378:7, 378:28, 374-F:3, and 378:39). There is no reasoning that explains the basis for the Commission's revisionist history of Order No. 23,574, nor does the Order provide any explanation or reference to the record in support

[9] The CORE programs were the utility-administered energy efficiency programs preceding the adoption of the EERS.

of the conclusion that the Moving Parties "have not demonstrated that the existing Performance Incentives meet the applicable standards." Order at 40.

Additionally, though the Order refers to Order No. 23,574, the standard for authorizing performance incentives has been further refined in the 21 years since that order was issued. In fact, contrary to the Order's conclusion eliminating Performance Incentives, a Performance Incentive Working Group met for months at the direction of the Commission in Docket No. DE 17-136, and that Working Group was led by then-PUC staff. The Working Group issued a final report recommending the existing Performance Incentive framework and explaining why Performance Incentives are important and serve to motivate the pursuit of all cost-effective energy efficiency. The Commission subsequently approved the recommended Performance Incentive framework, providing further evidence of Commission support for the provision of Performance Incentives, as opposed to the elimination thereof.[10]

As the Initial EERS Order explained, performance incentives are designed to motivate utilities "to pursue exemplary performance in program administration and delivery and *to put efficiency investment on an equal footing with other earnings opportunities available*." Initial EERS Order at 60 (emphasis added). This description is consistent with the concern of Order No. 23,574 to "balance the interests of shareholders and customers," yet this objective is inexplicably abandoned in the instant Order with respect to performance incentives. Although energy efficiency programs funded chiefly via the SBC and LDAC charges do not implicate a utility's interest in earning a reasonable return on investment, the Commission has consistently sought a kind of symmetry by giving utility shareholders a reason to deploy excellent and effective energy

[10] The report was filed in Docket No. DE 17-136 and can be found here: https://www.puc.nh.gov/EESE%20Board/EERS_WG/20190913-EERS-WG-PI-FINAL-REPORT.pdf

efficiency programs that corresponds to earnings in supply-side investments that are bolstered by excellent and effective utility management. By eliminating performance incentives, the Commission is treating energy efficiency differently than other utility investments on which the utility can earn a return, contrary to more recent and current Commission precedent. *See*, Order Nos. 25,932 at 60, 26,207 at 14, and 26,323 at 10. Passing reference to a decision from 2000 regarding post-competition energy efficiency programs, and overlooking more recent and relevant Commission precedent regarding EERS, undermines the findings in the Order and falls substantially short of meeting the requirements for a final decision under RSA 363:17-b.

The Order justifies its conclusion to eliminate performance incentives by stating that "taking into account the implementation of rate mechanism options including Decoupling, lost base revenue ("LBR"), and the lost revenue adjustment mechanism ("LRAM"), as well as the maturity of programs that yield measurable savings . . . Performance Incentives are no longer just and reasonable and in the public interest in the context of ratepayer funded EE." Order at 41. This conclusion – which is not supported by any reference to the record – misinterprets the purpose of those rate mechanisms by mistakenly conflating them with the purpose of performance incentives. 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, 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. This is described in the Initial EERS Order:

> The 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.

Initial EERS Order at 59.

Although the existence of LRAM/LBR and revenue decoupling is a factor in determining the level of performance incentives, they should be treated as completely separate from the offering of performance incentives, as the two mechanisms have distinctly different purposes. One is to make the utilities whole from a loss to their existing revenue requirement due to conservation and the implementation of energy efficiency; the other is to spur exemplary execution of the energy efficiency programs—consequently, maximizing all cost-effective energy efficiency—by providing an incentive that corresponds to the investment returns that are available to utilities in connection with supply-side investments and the rates supporting those investments. *Id*.

In fact, the Performance Incentive Working Group recognized that utility performance incentives more than pay for themselves in improved design and implementation of energy efficiency programs.[11] The Order's assertion that the LRAM/LBR and decoupling sufficiently compensate the NH Utilities so that performance incentives are no longer warranted mistakes the purpose and intent of each mechanism and does not in any way justify the removal of either. In light of this evident confusion of the purpose and intent of revenue decoupling, LRAM/LBR and performance incentives, and in light of the absence of any adequate justification in the Order for

[11] See Performance Incentive Working Group report, discussed in footnote 7, supra, filed to Docket No. DE 17-136: https://www.puc.nh.gov/EESE%20Board/EERS_WG/20190913-EERS-WG-PI-FINAL-REPORT.pdf[12]

[12] The Order of Notice in the instant docket acknowledges that "unspent funds from prior program years for both the Electric Utilities and Gas Utilities, including interest, are carried forward to the following year's budget." Order of Notice at 2.

elimination of performance incentives (in addition to the matter not being properly noticed), reconsideration is warranted.

Finally, the Order directs that the eliminated performance incentive budget be "redirected" to the energy efficiency programs. Order at 41. This directive misconceives the manner in which performance incentives are budgeted and earned. As a result of the Order, there is no budget to redirect, as the Settlement Agreement and Proposed Plan were rejected, along with the corresponding budgets. The EERS directs savings goals to be set first; then budgets; and lastly, rates are set based on those goals. By setting the rate first, there are no budgets or funds to redirect from one place to another.

Budget Carryforward and Overspend

The Order's elimination of the process regarding program budget carryforward and overspending was also not noticed for the proceeding and must be reconsidered as well, as it is contrary to precedent and policy[12] and unsupported by the record. The lack of notice that the Commission was going to review the carryforward issue constitutes sufficient grounds for reconsideration on its own; however, the lack of record support or reasoning for the decision also requires rehearing. Without citing to the record or providing rationale, the Order concludes that "[y]ear-to-year 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." Order at 42. In addition to these deficiencies, the Order fails to explain what the Commission means by "lowest rates possible" and "timely manner." The Order provides no citation to any order, statute, or other authority for the premise

[12] The Order of Notice in the instant docket acknowledges that "unspent funds from prior program years for both the Electric Utilities and Gas Utilities, including interest, are carried forward to the following year's budget." Order of Notice at 2.

that the "lowest rates possible" is the appropriate bar for setting the SBC, and the movants are unaware that "just and reasonable" has ever been defined in this way in New Hampshire. Furthermore, that is not how the SBC, a legislatively authorized rate, is set.

The SBC rate was explicitly authorized by RSA 374-F:3, VI to collect funds to pay for energy efficiency programs which, as articulated via state policy and approved in the Initial EERS Order, should be used to support the pursuit of all cost-effective energy efficiency. The SBC rate is designed pursuant to overall savings goals the programs are to achieve. Carrying forward underspent budgets does not "withhold" funds from customers and, in so finding, the Commission has apparently misunderstood the effect of this practice. Essentially, as with any enterprise (including government agencies and programs) that operates according to a budget, some amount of carryover is a practical necessity if the enterprise is to avoid the kind of service interruptions that an absolute and strict adherence to annual budgeting conventions would require. Notably, the Commission cites no evidence of record to suggest that the NH Utilities have been unreasonably "withholding" unspent SBC and/or LDAC revenue via the budget carryforward process.

Eliminating carryforward of underspent budgets draws an arbitrary line based on the calendar year, when the practical reality of program performance and spending does not differentiate between dollars carried forward from March to April any more than it does December to January. As should be self-evident, the energy efficiency programs do not start and stop annually to assure that no projects or project costs carry from one year to the next. Likewise, it would be inappropriate to treat the funding for programs in this manner. The Order does not cite any authority or policy to support this arbitrary and unprecedented shift in funding, and nothing in the record supports this decision. Moreover, nothing in legislation requires eliminating carryforward funds, and doing so is inconsistent with the intention of RSA 378:37 to favor

maximizing the use of cost-effective energy efficiency and demand side resources. In view of these deficiencies, the determination to eliminate the carryforward of underspent funds should be reconsidered.

Similarly, the decision to have budget overspending paid for by utility shareholders[13] is equally unsupported by reasoning, the record, Commission policy or law. It is unreasonable to hold the NH Utilities responsible at the end of the year for the risk of under-recovery from a Commission-approved and prudently operated program. For example, the cause of the deviation from budget could be due to the fact that the utility's actual sales were lower than forecasted at the beginning of the year. Such a practice raises the specter of confiscatory rates, particularly because it would not require a showing of imprudence or bad management. With respect to overspending budgets, the Order states, "[i]f the Utility has spent more than the budget, or actual amount collected, in any program year, whichever is less, the cost shall be borne by the Utility's shareholders." Order at 41-42. Nothing else is said on this matter. There is nothing in the Order or the record providing any legal citation, grant of authority, or even any reasoning to support this arbitrary decision. Much the opposite, not only is this decision contrary to the goal of putting energy efficiency on equal footing with other available utility investments, as the Initial EERS Order held it should be, it creates a marked disadvantage for energy efficiency as an all-risk endeavor for the utilities. This construct creates a paradigm where a utility could execute its energy efficiency plan perfectly, spending precisely to the penny the budgeted amount, yet still be in a position of under-recovering its costs strictly due to a reduction in sales volumes due to forecasting variability. Both prior to and after the creation of the EERS, overspending, within the boundaries approved by the Commission, of successful program budgets has been reconciled during the

[13] As a not-for-profit, member-owned electric cooperative, NHEC does not have "shareholders"; it is therefore unclear what the Commission intended with regard to NHEC's overspent budgets.

following program year.[14] To reverse course without notice, legal authority or sufficient justification is not just or reasonable and runs contrary to Commission precedent, all without sufficient due process. The Order, therefore, must be reconsidered.

Lost Base Revenue

Furthermore, although the Order explicitly rejects the Proposed Plan and Settlement Agreement, the Commission does adopt part of the Settlement Agreement that applies to LBR to the extent it is consistent with the DOE's recommendations. The basis for rejecting other portions of the Proposed Plan and Settlement Agreement, while accepting this portion, is unclear. Also, even though the Commission purports to adopt this portion of the Settlement Agreement, the Order "further directs" that a number of adjustments be made to the way LBR is calculated. Order at 40. However, some of the required adjustments lack the explanations necessary for the utilities to actually implement them. The need for explanation is further discussed in the request for clarification below; however, even with clarity, the decision is improper. In the Order, as noted, the Commission has modified LBR, and it has done so without notice or record support. Although the decision regarding how LBR ought to be calculated certainly falls within the Commission's general regulatory purview, nothing in the record addresses how LBR is calculated because, significantly, it was not an issue noticed at the outset of this docket. Therefore, these adjustments should be reconsidered even if further clarification might be provided.

[14] https://www.puc.nh.gov/Regulatory/Docketbk/2012/12-262/ORDERS/12-262%202013-02-01%20ORDER%20NO%2025-462%20APPROVING%20ENERGY%20EFFICIENCY%20PROGRAMS.PDF 105% of sector budget approved in DE 12-262 (Page 6) 105% of total budget in 2019 PI working group final report (Page 12), incorporated for 2020 Plan assumptions and going forward:https://www.puc.nh.gov/EESE%20Board/EERS_WG/20190913-EERS-WG-PI-FINAL-REPORT.pdf

Home Energy Assistance Cap

As a final matter, the proposed increase to the cap on Home Energy Assistance ("HEA") projects from $8,000 to $20,000 was summarily rejected without support or reasoning. The HEA Program is a fuel-neutral weatherization program designed to reduce energy use from both electric and gas appliances, lighting, and HVAC systems in the homes of income-qualified customers – *i.e.*, people who confront challenges in paying for the energy they need to heat and light their homes. Under the Plan Proposal as modified by the Settlement Agreement, the per-project incentive cap was included at $20,000 to accommodate additional and more comprehensive energy efficiency improvement measures for these customers, consistent with the requirements of RSA 378:37 that the use of cost effective energy efficiency be maximized.

As with many of the issues discussed above, the Order simply states that the Moving Parties failed to meet their burden and that increasing the cap would result in "unequal benefits to program participants." Order at 43. There is no standard that creates any requirement of equal benefits to program participants and all program participants will almost certainly have differing benefits to various extents depending on the energy efficiency opportunities available. But aside from the reliance on claimed unequal benefits, the Order simply states the Moving Parties failed to meet their burden; no explanation follows. As the Proposed Plan speaks directly to the merits of increasing this cap, (*See* Exhibit 1, part 1, Bates pages 130-136), and as the Commission cites to no evidence (or lack of specific evidence) to justify its decision, the increase on the HEA cap should be reconsidered.

IV. REQUEST FOR CLARIFICATION AND STAY

In addition to the issues for rehearing and reconsideration outlined above, the NH Utilities require clarification on numerous elements within the Order before any compliance filing

contemplated by the Order can reasonably be made with the Commission.[15] The Moving Parties acknowledge the Commission's December 6 order denying Liberty's December 3, 2021, motion for a stay. However, due to the lack of clarity on the items discussed below, the NH Utilities cannot reasonably comply with the December 15th filing date. Therefore, the Moving Parties respectfully request that the effect of the Order be stayed pending clarification of the issues below, as well as resolution of the rehearing/reconsideration issues discussed above, and that the terms of the previous governing order, Order No. 26,440, be reinstated during the interim to maintain the status quo until the issues raised by the Order are resolved.

For example, the Order requires that the December 15th program proposal include "only programs consistent with this order." (Order at 28). However, there is either insufficient or conflicting information throughout the Order that makes it impossible to know with any reasonable certainty whether any filing made on December 15 will actually comply with the Order. To be certain, the NH Utilities have no intent to be out of compliance with the Order regardless of whether the NH Utilities agree with the outcome. However, compliance at this time requires further clarity on the following items, at a minimum:

1) The Order requires that any new plan show "commensurate" benefits, but does not define the term "commensurate." Order at 33. For example, it is not clear whether program benefits are to be compared between programs; between participants and non-participants; between customer sectors; between customer rate classes, or some other comparison or balance.

[15] The NH Utilities currently are required to submit a compliance filing on December 15, 2021.

2) As noted, the Commission revised the benefit-cost test, but did not indicate the manner in which benefit-cost tests are to be applied. The Order indicates that the recently approved Granite State Test is now insufficient, but then directs the Utilities to use this test as well as the Total Resource Cost Test to determine which programs to offer in 2022 and beyond. It is not clear whether the NH Utilities are to use both of the benefit-cost tests identified or how the results of each test will be used to determine which programs may be implemented. In addition, the Order states that any benefit-cost test is to be "fully objective" (Order at 39), but the Order does not define or specify what "fully objective" means.

3) The terms "equal" and "equitable" benefits are seemingly used interchangeably in the Order. Order at 11, 35, 43. However, equal benefits to all customers, or even all program participants, are not possible. Further detail is needed as to what constitutes equitable benefits, particularly if standards established in prior Commission decisions no longer apply. This is necessary so that programs can be properly designed.

4) EM&V spending is to be "significantly reduced" in the program proposal, and to be completed by the end of 2022. However, the term "significant" is not defined. Order at 46. Without knowing the level of approved spending, it is not possible to construct budgets for the overall program. It is also unknown what to do with evaluation work that was scoped to provide insight and recommendations for program year 2023 and beyond given the requirement that "all EM&V work [is] to be completed by December 31, 2022."

5) Elimination of EM&V also significantly impacts the ability for the programs to meet the requirements of ISO-NE's Forward Capacity Market Rule 1, which mandates that all passive demand resources from energy efficiency programs be certified prior to being entered into the forward capacity market ("FCM"), in order to receive funding. This is because savings from energy efficiency measures need to be verified to be bid into the FCM, and thus receive payment. Refer to Exhibit 1, Part 1, Bates 30 for the projected FCM revenues for 2021-2023. It is unclear whether the impact on FCM revenues was an intended side effect of the other required cost reductions. Should the electric utilities fall short of cleared capacity obligations in the future due to reduced energy efficiency portfolios, the utilities will have to shift their obligation to other market actors or face penalties in the Forward Capacity Market.

6) The Order references, without context, the concept of "found revenues" relating to LBR. Order at 40. The Order does not define such revenues, nor describe what makes those revenues "found." The Order does not discuss why those revenues should apply to the calculation, nor specify how they are to be calculated or counted in determining LBR. Without further clarity on this issue, LBR cannot be definitively calculated.

7) The Order directs that the eliminated performance incentive budget be "redirected" to the energy efficiency programs. Order at 41. However, there is no budget to redirect, as the Settlement Agreement and Proposed Plan were rejected, along with the corresponding budgets. The EERS directs savings goals to be set first; then budgets; and lastly, rates are set based on those goals. By setting the rate first, there

are no budgets or funds to redirect from one place to another, so additional clarity is required.

8) The Order determines that the programs in the Proposed Plan are, in general, not just, reasonable and in the public interest, but does not establish threshold criteria for what other programs or proposals would meet the just and reasonable standard. It is necessary for the NH Utilities to have clarity on the criteria to be evaluated when designing programs for Commission consideration.

9) Clarity is needed on whether the prior Commission requirement for the electric utilities to produce at least 55% of their savings as kWh savings still exists or if it has changed in light of the changes to the programs.

10) Non-electric and non-gas savings are not referenced in the Order. However, information is needed on how to value these savings, particularly in light of the concerns relating to benefit-cost testing, noted above.

11) Programs that are "not solely ratepayer funded" are not identified or defined. Order at 47. It is not clear that the Order means something other than programming or measures co-funded by customer resources, through third party lenders or on-bill financing, or funded by Regional Greenhouse Gas Initiative ("RGGI") proceeds and FCM revenues, all of which were part of and supported in the 2021-2023 Plan Proposal. Further, information is needed as to what constitutes a program that would qualify under the Commission's definition of "not solely ratepayer funded".

12) The requirement that the NH Utilities propose programs with the "lowest per unit cost" (Order at 47-48) creates confusion regarding overall program structure and offerings. For example, C&I programs generally have a lower per-unit cost than residential programs. The Moving Parties assume that the Commission did not intend to eliminate all or most residential programs. Clarification is therefore required as to the criteria to be applied to determine the lowest per unit cost.

13) There is no flat, per-unit cost for any program. Per-unit costs vary between the individual measures that make up a full program offering, and most customer projects include a variety of eligible measures packaged to maximize energy savings and meet customer needs. Clarification is required for the criteria to be used in evaluating which programs will qualify as the lowest per-unit cost.

14) Clarification is also needed on what is meant by the requirement to report on "calculations on the corresponding dollar savings per unit of energy estimated to have been produced by each program during the prior program year… broken out by participating and non-participating ratepayers, by ratepayer class (Residential or Commercial & Industrial)." Order at 45. "Dollar savings per unit of energy estimated to have been produced" is unclear whether this is the inverse of the utility's cost to save each unit of energy or if it is something new. Energy is not "produced" by the NHSaves programs, it is avoided. Assuming the Commission meant energy avoided rather than energy produced, the directive could be interpreted to mean the amount of benefits resulting from the avoided energy use, but it is unclear whether those benefits should be from a single program year (i.e., annual savings) or the net present value benefits over the life of the measure (i.e.,

lifetime savings). Further, it is unclear whether the benefits are to be calculated based on the Avoided Energy Supply Components ("AESC") as indicated by the NH Utilities' benefit-cost models, or if it should include estimated non-energy impacts related to maintenance and operations, health and environmental impacts or on some other basis. Finally, there are multiple forms of energy that the NHSaves programs avoid, including electricity (and related demand), natural gas, oil, propane, kerosene, and wood. Additional resources related to water and wastewater are also avoided, generating benefits to customers and to municipal water supply and wastewater systems. Therefore "dollar savings per unit of energy" is not specific enough to calculate and clarification is needed.

15) Regarding the second portion of the above requirement that savings be "broken out by participating and non-participating ratepayers, by ratepayer class" (Order at 45), it is unclear how the Commission would have the NH Utilities perform this calculation, or even if it can be calculated. Since the beginning of the programs, measure and program benefits calculated by NH Utilities have relied on the AESC analysis undertaken by a third-party consultant procured by utilities and other parties throughout the New England Region. The results of this study, which is undertaken every three years, enables energy efficiency program administrators to calculate the estimated net present value of benefits related to avoided supply, capacity, distribution and transmission, demand reduction induced price effects ("DRIPE"), fossil fuel resources, wood, water and sewer costs. The benefits resulting from programs therefore do not accrue solely to participating or non-participating customers, but rather reflect benefits that accrue both to participants

through avoided energy use, as well as to the regional grid and natural gas systems. Further explanation is therefore needed before this requirement can be complied with.

16) The Order asserts that 15 percent of program costs being allocated to overhead and administrative costs are of particular concern to the Commission. Order at 44. However, the Order says nothing further about what constitutes appropriate administrative and overhead costs. Also, to the extent the Order is requiring that the administrative and overhead costs be lowered, it is unclear from which of the six categories outlined in the Order these reductions come (i.e. from all equally, or from only select categories by a specific amount). Additionally, it's unclear as to which of these categories are viewed as overhead or administrative costs. Accordingly, the Commission should clarify the degree of adjustment it is requiring and the manner in which the adjustment is to be calculated and applied.

17) Requirements for reporting savings calculations on "gross savings" needs to be clarified (Order at 45), and whether realization rates, in-service rates and net-to-gross factors developed by EM&V to isolate the impact of the energy efficiency programs is to be reported on at all, and if so, in what context.

18) To the extent that the reference to discount rates (Order at 45, 48) and estimated future prices of energy (Order at 48) are distinct from those provided by the NH Utilities as part of their benefit-cost models historically, then clarification is needed.

19) The programs currently operate under the agreement that any unspent HEA funds are to be carried forward into the following year to be spend on HEA projects in

the subsequent year. The NH Utilities need clarification as to whether these carryforwards are eliminated as well.

20) It is unclear whether 2021 carryforward balances should be calculated in the aggregate or that balances be shown for each sector.

21) The Order makes specific reference to the RSA that legislatively directs use of the state's proceeds from the RGGI auctions. RSA 125-O:23, directs that certain RGGI auction proceeds be used for specific low-income and municipal energy efficiency programs, with the remainder to all-fuels energy efficiency programs "distributed among residential, commercial, and industrial customers based upon each customer class's electricity usage to the greatest extent practicable." The portion of the RSA included in quotes in the Order refers to an all-fuels RFP program that is run currently by the Department of Energy and was previously run by the Commission. This all-fuels program portion of the RGGI funds does not come directly to the NH Utilities and the requirement to distribute the funds based on each customer class's usage is a requirement that falls to the DOE in their administration of the funds, not to the NH Utilities. Given this misapplication of the RSA, further clarification is needed regarding what the Commission intends or requires with respect to the referenced quote. RSA 125-0:23 does designate specific funding amounts to the NH Utilities for low-income and municipal programs, which were included in the Proposed Plan according to legislative direction and past precedent from prior approved Plans. Further clarification is needed regarding whether the Commission intends for the NH Utilities to utilize those RGGI funds in a manner that is different from the Proposed Plan.

22) Pages 42-43 of the Order state that if a utility has spent more than the budget, or actual amount collected in any program year, whichever is less, the cost shall be borne by the utility's shareholders. As a not-for-profit, member-owned electric cooperative, NHEC does not have "shareholders." It is therefore necessary that the Commission clarify how NHEC should treat overspent amounts.

23) The Order sets the energy efficiency portion of the SBC, but not the LBR portion; the NH Utilities that have LBR will require a hearing to set that rate, and the last approved LBR will remain in place until a hearing can be held, or an order *nisi* issued. Also, applicable to all of the NH Utilities, if there are programs for 2022 and 2023 that aren't approved by the Commission in their entirety, the Order says to reduce the SBC rate accordingly – such an adjustment would also require a hearing, but the order is silent as to how this process would occur. Clarification is needed as to the hearing and approval process for these rate changes.

WHEREFORE, the Moving Parties respectfully request that the Commission:

A. Grant rehearing of the issues identified in this Motion for the reasons set forth in Section III, above, which are that the Commission's decision is not in accordance with New Hampshire law; is the product of a proceeding that was not properly noticed as required by law; is based on misapplied legal standards and prior Commission decisions, and rendered conclusions that are unsupported or contradicted by the evidentiary record;

B. Provide clarification of the issues identified in Section IV, above, that arise from the Order and impact the NH Utilities' December 15th compliance filing requirement;

C. Grant a temporary stay of the Order, pending the clarification of the above-listed elements and resolution of this matter;

D. Extend or temporarily suspend the Order's December 15 filing requirement pending the clarification of the above-listed elements and resolution of this matter;

E. Reinstate the terms of Order No. 26,440, extending the 2020 SBC rates and program structure pending the resolution of the above-mentioned requests; and

F. Grant any such further relief as may be just and reasonable.

Respectfully submitted,

The NH Utilities: New Hampshire Electric Cooperative, Inc.; Public Service Company of New Hampshire d/b/a Eversource Energy; Unitil Energy Systems, Inc.; Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty; Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty; and Northern Utilities, Inc.; the Office of the Consumer Advocate; Clean Energy New Hampshire; Conservation Law Foundation; and Southern New Hampshire Services

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

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STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

ELECTRIC AND GAS UTILITIES

2021-2023 Triennial Energy Efficiency Plan

Docket No. DE 20-092

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Parties, testified that this was especially important because low-income customers have higher energy burdens than non-low-income households, which means they spend a larger percentage of their household income on utility costs.[3] Testimony of Kate W. Peters, Transcript of hearing held Dec. 16, 2020 at 198-201. The low-income energy efficiency program has been recognized nationally as an exemplary program[4] and is critical in the state's efforts to reduce energy costs for all New Hampshire ratepayers. The resulting savings help families afford other daily necessities like food and medicine. In addition, studies have shown that energy efficiency programs not only promote more affordable utility service in the long run, but also lead to safer and more comfortable homes and to improvements in health outcomes.

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

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

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

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

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

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

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

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

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

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

WHEREFORE, LISTEN respectfully request that the Commission:

A. Grant rehearing of the issues identified in the Settling Parties' Motion dated December 10, 2021 and in this Motion for the reasons set forth in both motions, which are that the Commission's decision is not in accordance with New Hampshire law; is the product of a proceeding that was not properly noticed as required by law; is based on misapplied legal standards and prior Commission decisions; and rendered conclusions that are unsupported or contradicted by the evidentiary record;

B. Provide clarification of the issues identified in the Settling Parties' Motion dated December 10, 2021 and in this Motion, that arise from the Order and impact the NH Utilities' December 15, 2021 compliance filing requirement;

C. Grant a temporary stay of the Order's December 15, 2021 filing requirement, pending the clarification of the aforementioned issues and resolution of this matter;

D. Reinstate the terms of Order No. 26,440, extending the 2020 SBC rates and program structure pending the resolution of the above-mentioned requests; and

E. Grant any such further relief as may be just and reasonable.

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

Date: December 13, 2021

By: _____

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State Constitution - Bill of Rights

Part 1, Bill of Rights, of the New Hampshire State Constitution.

. . .

[Art.] 2. [Natural Rights.] All men have certain natural, essential, and inherent rights among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.
June 2, 1784,
Amended 1974 adding sentence to prohibit discrimination.
. . .

[Art.] 15. [Right of Accused.] No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.
June 2, 1784
Amended 1966 to provide the right to counsel at state expense if the need is shown.
Amended 1984 reducing legal requirement proof beyond a reasonable doubt to clear and convincing evidence in insanity hearings.

TITLE X
PUBLIC HEALTH

CHAPTER 125-O
MULTIPLE POLLUTANT REDUCTION PROGRAM

Regional Greenhouse Gas Initiative

Section 125-O:23

125-O:23 Energy Efficiency Fund and Use of Auction Proceeds. –

I. There is hereby established an energy efficiency fund. This nonlapsing, special fund shall be continually appropriated to the department of energy to be expended in accordance with this section. The state treasurer shall invest the moneys deposited therein, as provided by law. Income received on investments made by the state treasurer shall also be credited to the fund. All programs supported by these funds shall be subject to audit by the department of energy as deemed necessary. A portion of the fund moneys shall be used to pay for department of energy and department of environmental services costs to administer this subdivision, including contributions for the state's share of the costs of the RGGI regional organization. No fund moneys shall be used by the department of energy or the department of environmental services to contract with outside consultants. The department of energy shall transfer from the fund to the department of environmental services such costs as may be budgeted and expended, or otherwise approved by the fiscal committee of the general court and the governor and council, for the department's cost of administering this subdivision.

II. All amounts in excess of the threshold price of $1 for any allowance sale shall be rebated to all retail electric ratepayers in the state on a per-kilowatt-hour basis, in a timely manner to be determined by the commission.

III. All remaining proceeds received by the state from the sale of allowances, excluding the amount used for department of energy and department of environmental services administration under paragraph I, shall be allocated by the commission as follows:

(a) At least 15 percent to the low-income core energy efficiency program.

(b) Beginning January 1, 2014, up to $2,000,000 annually to utility core programs for municipal and local government energy efficiency projects, including projects by local governments that have their own municipal utilities. Funding elements shall include, but not be limited to, funding for direct technical and project management assistance to identify and encourage comprehensive projects and incentives structured to assist municipal and local governments funding energy efficiency projects. In calendar years 2014, 2015, and 2016, any unused funds allocated to municipal and local government projects under this paragraph remaining at the end of the year shall roll over and be added to the new calendar year program funds and continue to be made available exclusively for municipal and local government projects. Beginning in calendar year 2017, and all subsequent years, funds allocated to municipal and local government projects under this paragraph shall be offered first to municipal and local governments as described in this paragraph for no less than 4 full calendar months. If, at the end of this time, municipal and local governments have not submitted requests for eligible projects that will expend the funds

allocated to municipal and local government projects under this paragraph within that program year, the funds shall be offered on a first-come, first-serve basis to business and municipal customers who fund the system benefits charge.
(c) The remainder to all-fuels, comprehensive energy efficiency programs administered by qualified parties which may include electric distribution companies as selected through a competitive bid process. The funding shall be distributed among residential, commercial, and industrial customers based upon each customer class's electricity usage to the greatest extent practicable as determined by the commission. Bids shall be evaluated based on, but not limited to, the following criteria:
(1) A benefit/cost ratio analysis including all fuels.
(2) Demonstrated ability to provide a comprehensive, fuel neutral program.
(3) Demonstrated infrastructure to effectively deliver such program.
(4) Experience of the bidder in administering energy efficiency programs.
(5) Ability to reach out to customers.
(6) The validity of the energy saving assumptions described in the bid.
IV. The division of policy and programs of the department of energy shall conduct a competitive bid process for the selection of programs to be funded under subparagraph III(c), with such funding to begin January 1, 2015. The department of energy may petition the governor and council to extend existing contracts until such time as the competitive bids are approved by the governor and council, but in no event later than July 1, 2015. The competitive bid process shall be repeated every 3 years thereafter. Before extending any existing program, public comment on the proposed extension shall be accepted.
V. Each entity receiving funding under subparagraph III(c) shall file an annual report on the performance of the entity's program. The department of energy shall establish the format, content, and the methodologies used to provide the content of the reports. The department of energy shall make use of, as applicable and appropriate, the monitoring and verification requirements used in the natural gas and electric utility core programs. The annual reports shall be delivered to the governor, the president of the senate, the speaker of the house of representatives, the chairmen of the senate and house standing committees with jurisdiction over energy matters, the commissioner of the department of energy and the chairperson of the public utilities commission. The reports shall include, but not be limited to, the following:
(a) Program expenditures, including direct customer installation costs.
(b) Resulting actual and projected energy savings by fuel type and associated CO2 emissions reductions.
(c) Any measurement and verification data that corroborate projected savings.
(d) The number of customers served by the programs.
(e) Other data as required by the commission in order to determine program effectiveness.

Source. 2008, 182:2. 2009, 236:2. 2012, 281:4. 2013, 236:11, 240:1; 269:2. 2014, 330:1, 2, eff. Oct. 3, 2014. 2021, 91:293, eff. July 1, 2021.

TITLE XXXIV
PUBLIC UTILITIES

CHAPTER 365
COMPLAINTS TO THE DEPARTMENT OF ENERGY AND PROCEEDINGS BEFORE THE COMMISSION

Proceedings Before the Commission

Section 365:28

365:28 Altering Orders. – At 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. This hearing shall not be required when any prior order made by the commission was made under a provision of law that did not require a hearing and a hearing was, in fact, not held.

Source. 1915, 99:4. PL 238:26. RL 287:27. 1951, 203:11 par. 28. 2001, 237:5, eff. July 1, 2001.

TITLE XXXIV
PUBLIC UTILITIES

CHAPTER 374
GENERAL REGULATIONS

General Public Utility Duty

Section 374:1

See Emergency Order #3 (NH LEGIS E.O. 2020-3-Emerg. (2020, 2003:1.)) as terminated by Emergency Order #58 (NH LEGIS E.O. 2020-58-Emerg. (20200 [2058]) effective as of July 15, 2020, issued pursuant to Executive Order 2020-04 (NH LEGIS E.O. 2020-04 (2020, 1004:1.)) as extended by Executive Orders 2020-05 (NH LEGIS E.O. 2020-05 (2020, 1005:1.)); 2020-08 (NH LEGIS E.O. 2020-08 (2020, 1008:1.)); 2020-09 (NH LEGIS E.O. 2020-09 (2020, 1009:1.)); 2020-010 (NH LEGIS E.O. 2020-010 (2020, 1010:1.)); 2020-014 (NH LEGIS E.O. 2020-014 (2020, 1014:1.)); 2020-015 (NH LEGIS E.O. 2020-015 (2020, 1015:1.)); 2020-016 (NH LEGIS E.O. 2020-016 (2020, 1016:1.)); 2020-017 (NH LEGIS E.O. 2020-017 (2020, 1017:1.)); 2020-018 (NH LEGIS E.O. 2020-018 (2020, 1018:1.)); 2020-020 (NH LEGIS E.O. 2020-020 (2020, 1020:1.)); 2020-021 (NH LEGIS E.O. 2020-021 (2020, 1021:1.)); 2020-022 (NH LEGIS E.O. 2020-022 (2020, 1022:1.)); 2020-023 (NH LEGIS E.O. 2020-023 (2020, 1023:1.)); 2020-024 (NH LEGIS E.O. 2020-024 (2020, 1024:1.)); 2020-025 (NH LEGIS E.O. 2020-025 (2020, 1025:1.)); 2021-01 (NH LEGIS E.O. 2021-01 (2021, 1001:1.)); 2021-02 (NH LEGIS E.O. 2021-02 (2021, 1002:1.)); 2021-04 (NH LEGIS E.O. 2021-04 (2021, 1004:1.)); 2021-05 (NH LEGIS E.O. 2021-05 (2021, 1005:1.)); 2021-06 (NH LEGIS E.O. 2021-06 (2021, 1006:1.)); 2021-08 (NH LEGIS E.O. 2021-08 (2021, 1008:1.)); and 2021-010 (NH LEGIS E.O. 2021-010 (2021, 1010:1.)), related to the COVID-19 State of Emergency, for potential impact on the terms of this section. The state of emergency was allowed to expire on June 11, 2021. See also 2021, 91:301, eff. July 1, 2021, regarding application of Emergency Orders.

374:1 Service. – Every public utility shall furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable.

Source. 1911, 164:4. PL 240:1. RL 289:1. 1951, 203:21, eff. Sept. 1, 1951.

TITLE XXXIV
PUBLIC UTILITIES

CHAPTER 374-F
ELECTRIC UTILITY RESTRUCTURING

Section 374-F:3

374-F:3 Restructuring Policy Principles. –

. . .

V. Universal Service.
(a) Electric service is essential and should be available to all customers. A utility providing distribution services must have an obligation to connect all customers in its service territory to the distribution system. A restructured electric utility industry should provide adequate safeguards to assure universal service. Minimum residential customer service safeguards and protections should be maintained. Programs and mechanisms that enable residential customers with low incomes to manage and afford essential electricity requirements should be included as a part of industry restructuring.
(b) As competitive markets emerge, customers should have the option of stable and predictable ceiling electricity prices through a reasonable transition period, consistent with the near term rate relief principle of RSA 374-F:3, XI. Upon the implementation of retail choice, transition service should be available for at least one but not more than 5 years after competition has been certified to exist in at least 70 percent of the state pursuant to RSA 38:36, for customers who have not yet chosen a competitive electricity supplier. Transition service should be procured through competitive means and may be administered by independent third parties. The price of transition service should increase over time to encourage customers to choose a competitive electricity supplier during the transition period. Such transition service should be separate and distinct from default service.
(c) Default service should be designed to provide a safety net and to assure universal access and system integrity. Default service should be procured through the competitive market and may be administered by independent third parties. Any prudently incurred costs arising from compliance with the renewable portfolio standards of RSA 362-F for default service or purchased power agreements shall be recovered through the default service charge. The allocation of the costs of administering default service should be borne by the customers of default service in a manner approved by the commission. If the commission determines it to be in the public interest, the commission may implement measures to discourage misuse, or long-term use, of default service. Revenues, if any, generated from such measures should be used to defray stranded costs.
(d) The commission should establish transition and default service appropriate to the particular circumstances of each jurisdictional utility.
(e) Notwithstanding any provision of subparagraphs (b) and (c), as competitive markets develop, the commission may approve alternative means of providing transition or default services which are designed to minimize customer risk, not unduly harm the development of competitive markets, and mitigate against price volatility without creating new deferred costs, if the

commission determines such means to be in the public interest.
(f)(1) For purposes of subparagraph (f), "renewable energy source" (RES) means a source of electricity, as defined in RSA 362-F:2, XV, that would qualify to receive renewable energy certificates under RSA 362-F, whether or not it has been designated as eligible under RSA 362-F:6, III.
(2) A utility shall provide to its customers one or more RES options, as approved by the commission, which may include RES default service provided by the utility or the provision of retail access to competitive sellers of RES attributes. Costs associated with selecting an RES option should be paid for by those customers choosing to take such option. A utility may recover all prudently incurred administrative costs of RES options from all customers, as approved by the commission.
(3) RES default service should have either all or a portion of its service attributable to a renewable energy source component procured by the utility, with any remainder filled by standard default service. The price of any RES default service shall be approved by the commission.
(4) Under any option offered, the customer shall be purchasing electricity generated by renewable energy sources or the attributes of such generation, either in connection with or separately from the electricity produced. The regional generation information system of energy certificates administered by the ISO-New England and the New England Power Pool (NEPOOL) should be considered at least one form of certification that is acceptable under this program.
(5) A utility that is required by statute to provide default service from its generation assets should use any of its owned generation assets that are powered by renewable energy for the provision of standard default service, rather than for the provision of a renewable energy source component.
(6) Utilities should include educational materials in their normal communications to their customers that explain the RES options being offered and the health and environmental benefits associated with them. Such educational materials should be compatible with any environmental disclosure requirements established by the department.
(7) For purposes of consumer protection and the maintenance of program integrity, reasonable efforts should be made to assure that the renewable energy source component of an RES option is not separately advertised, claimed, or sold as part of any other electricity service or transaction, including compliance with the renewable portfolio standards under RSA 362-F.
(8) If RES default service is not available for purchase at a reasonable cost on behalf of consumers choosing an RES default service option, a utility may, as approved by the commission, make payments to the renewable energy fund created pursuant to RSA 362-F:10 on behalf of customers to comply with subparagraph (f).
(9) The commission shall implement subparagraph (f) through utility-specific filings. Approved RES options shall be included in individual tariff filings by utilities.
(10) A utility, with commission approval, may require that a minimum number of customers, or a minimum amount of load, choose to participate in the program in order to offer an RES option.

VI. Benefits for All Consumers. Restructuring of the electric utility industry should be implemented in a manner that benefits all consumers equitably and does not benefit one customer class to the detriment of another. Costs should not be shifted unfairly among customers. A nonbypassable and competitively neutral system benefits charge applied to the use of the distribution system may be used to fund public benefits related to the provision of electricity. Such benefits, as approved by regulators, may include, but not necessarily be limited to, programs for low-income customers, energy efficiency programs, funding for the electric

utility industry's share of commission and department expenses pursuant to RSA 363-A, support for research and development, and investments in commercialization strategies for new and beneficial technologies. Legislative approval of the New Hampshire general court shall be required to increase the system benefits charge. This requirement of prior approval of the New Hampshire general court shall not apply to the energy efficiency portion of the system benefits charge if the increase is authorized by an order of the commission to implement the 3-year planning periods of the Energy Efficiency Resource Standard framework established by commission Order No. 25,932 dated August 2, 2016, ending in 2020 and 2023, or, if for purposes other than implementing the Energy Efficiency Resource Standard, is authorized by the fiscal committee of the general court; provided, however, 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. Energy efficiency programs should include the development of relationships with third-party lending institutions to provide opportunities for low-cost financing of energy efficiency measures to leverage available funds to the maximum extent, and shall also include funding for workforce development to minimize waiting periods for low-income energy audits and weatherization.

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X. Energy Efficiency. Restructuring should be designed to reduce market barriers to investments in energy efficiency and provide incentives for appropriate demand-side management and not reduce cost-effective customer conservation. Utility sponsored energy efficiency programs should target cost-effective opportunities that may otherwise be lost due to market barriers.

Source. 1996, 129:2. 1998, 191:5. 2000, 249:3. 2001, 29:5, 6. 2002, 212:6; 268:4. 2006, 294:3. 2007, 26:4, eff. July 10, 2007. 2009, 236:1, eff. Nov. 13, 2009. 2018, 374:1, eff. Oct. 2, 2018. 2019, 346:77, eff. July 1, 2019. 2021, 91:281, eff. July 1, 2021.

TITLE XXXIV
PUBLIC UTILITIES

CHAPTER 378
RATES AND CHARGES

Least Cost Energy Planning

Section 378:37

378:37 New Hampshire Energy Policy. – The general court declares that it shall be the energy policy of this state to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost while providing for the reliability and diversity of energy sources; to maximize the use of cost effective energy efficiency and other demand side resources; and to protect the safety and health of the citizens, the physical environment of the state, and the future supplies of resources, with consideration of the financial stability of the state's utilities.

Source. 1990, 226:1, eff. Jan. 1, 1991. 2014, 129:1, eff. Aug. 15, 2014.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541-A
ADMINISTRATIVE PROCEDURE ACT

Section 541-A:31

541-A:31 Availability of Adjudicative Proceeding; Contested Cases; Notice, Hearing and Record. –

I. An agency shall commence an adjudicative proceeding if a matter has reached a stage at which it is considered a contested case or, if the matter is one for which a provision of law requires a hearing only upon the request of a party, upon the request of a party.

II. (a) An agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction, except that no disciplinary proceeding against an occupational licensee shall be initiated unless such action is commenced within 5 years of the date upon which the alleged violation of an applicable rule or statute occurred, or within 5 years of the date upon which the violation could reasonably have been discovered.

(b) The time limitation provided in subparagraph (a) shall be tolled (1) during the period of time during which a criminal action on the matter is pending in a trial court of this state, or of another state, or of the United States, (2) during the time in which a complainant is a minor or incapacitated, and (3) during any time which the accused prevents discovery of the subject matter of the alleged violation.

(c) The time limitations established in this paragraph shall not apply to the commencement of actions initiated by the real estate appraiser board under RSA 310-B.

III. In a contested case, all parties shall be afforded an opportunity for an adjudicative proceeding after reasonable notice. The notice shall include:

(a) A statement of the time, place, and nature of the hearing.

(b) A statement of the legal authority under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the issues involved. Upon request an agency shall, when possible, furnish a more detailed statement of the issues within a reasonable time.

(e) A statement that each party has the right to have an attorney present to represent the party at the party's expense.

(f) For proceedings before an agency responsible for occupational licensing as provided in paragraph VII-a, a statement that each party has the right to have the agency provide a certified shorthand court reporter at the party's expense and that any such request be submitted in writing at least 10 days prior to the proceeding.

IV. Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

V. (a) Unless precluded by law, informal disposition may be made of any contested case, at any time prior to the entry of a final decision or order, by stipulation, agreed settlement, consent order or default.

(b) In order to facilitate proceedings and encourage informal disposition, the presiding officer

may, upon motion of any party, or upon the presiding officer's own motion, schedule one or more informal prehearing conferences prior to beginning formal proceedings. The presiding officer shall provide notice to all parties prior to holding any prehearing conference.
(c) Prehearing conferences may include, but are not limited to, consideration of any one or more of the following:
(1) Offers of settlement.
(2) Simplification of the issues.
(3) Stipulations or admissions as to issues of fact or proof, by consent of the parties.
(4) Limitations on the number of witnesses.
(5) Changes to standard procedures desired during the hearing, by consent of the parties.
(6) Consolidation of examination of witnesses by the parties.
(7) Any other matters which aid in the disposition of the proceeding.
(d) The presiding officer shall issue and serve upon all parties a prehearing order incorporating the matters determined at the prehearing conference.
VI. The record in a contested case shall include all of the following that are applicable in that case:
(a) Any prehearing order.
(b) All pleadings, motions, objections, and rulings.
(c) Evidence received or considered.
(d) A statement of matters officially noticed.
(e) Proposed findings and exceptions.
(f) Any decision, opinion, or report by the officer presiding at the hearing.
(g) The tape recording or stenographic notes or symbols prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding.
(h) Staff memoranda or data submitted to the presiding officer, except memoranda or data prepared and submitted by agency legal counsel or personal assistants and not inconsistent with RSA 541-A:36.
(i) Matters placed on the record after an ex parte communication.
VII. The entirety of all oral proceedings shall be recorded verbatim by the agency. Upon the request of any party or upon the agency's own initiative, such record shall be transcribed by the agency if the requesting party or agency shall pay all reasonable costs for such transcription. If a transcript is not provided within 60 days of a request by a person who is a respondent party in a disciplinary hearing before an agency responsible for occupational licensing, the proceeding shall be dismissed with prejudice. Any party may record an oral proceeding, have a transcription made at the party's expense, or both, but only the transcription made by the agency from its verbatim record shall be the official transcript of the proceeding.
VII-a. At the request of a party in any oral proceeding involving disciplinary action before an agency responsible for occupational licensing except for an emergency action under RSA 541-A:30, III, the record of the proceeding shall be made by a certified shorthand court reporter provided by the agency at the requesting party's expense. A request shall be submitted to the agency in writing at least 10 days prior to the day of the proceeding.
VIII. Findings of fact shall be based exclusively on the evidence and on matters officially noticed in accordance with RSA 541-A:33, V.

Source. 1994, 412:1. 1999, 331:2-4. 2000, 288:20, eff. July 1, 2000. 2014, 34:2, eff. Jan. 1, 2015.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541-A
ADMINISTRATIVE PROCEDURE ACT

Section 541-A:35

541-A:35 Decisions and Orders. – A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request, a copy of the decision or order shall be delivered or mailed promptly to each party and to a party's recognized representative.

Source. 1994, 412:1. 2000, 288:21, eff. July 1, 2000.