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

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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,

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[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

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[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]

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.

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[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.

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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 15^{th} 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

Date: December 10, 2021

By: ___________________________
Jessica A. Chiavara
Counsel

NEW HAMPSHIRE ELECTRIC COOPERATIVE
By its Attorneys,
Orr & Reno, P.A.

Susan S. Geiger

By:_ __
Susan Geiger, Esq.

UNITIL ENERGY SYSTEMS, INC.

By:__ _
Patrick H. Taylor, Esq.
Senior Counsel

NORTHERN UTILITIES, INC.

By:_ _
Patrick H. Taylor, Esq.
Senior Counsel

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP. D/B/A LIBERTY UTILITIES

By:___/s/ Michael Sheehan_____________
Michael Sheehan, Esq.
Senior Counsel

LIBERTY UTILITIES (GRANITE STATE ELECTRIC) CORP. D/B/A LIBERTY UTILITIES

By:____/s/ Michael Sheehan_____________
Michael Sheehan, Esq.
Senior Counsel

OFFICE OF THE CONSUMER ADVOCATE

By:__
Donald M. Kreis, Esq.
Consumer Advocate

CONSERVATION LAW FOUNDATION

By:___/s/ Nicholas Krakoff_______________
Nicholas Krakoff, Esq.
Staff Attorney

CLEAN ENERGY NEW HAMPSHIRE

By:___ ___
Samuel Evans-Brown
Executive Director

SOUTHERN NEW HAMPSHIRE SERVICES, INC.

By:__________________________________
Ryan Clouthier
Deputy Director

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