

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. _____

**ELECTRIC AND GAS UTILITIES
2021-2023 Triennial Energy Efficiency Plan
NH PUC Docket No. DE 20-092**

**APPEAL OF CONSERVATION LAW FOUNDATION AND
CLEAN ENERGY NEW HAMPSHIRE
PURSUANT TO RSA 541:6 AND RSA 365:21
FROM DECISIONS AND ORDERS OF THE PUBLIC UTILITIES
COMMISSION DATED NOVEMBER 12, 2021 AND JANUARY 7,
2022**

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I. Certificate of Issues Preserved.....30

A. PARTIES AND COUNSEL

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B. ADMINISTRATIVE AGENCY’S ORDERS AND FINDINGS SOUGHT TO BE REVIEWED

This Rule 10 appeal by Conservation Law Foundation (“CLF”) and Clean Energy New Hampshire (“CENH”) pursuant to RSA 541:6 and RSA 365:21 is from (1) a November 12, 2021 decision and order of the New Hampshire Public Utilities Commission (“PUC”) (“2021 Final Order”) denying a request by the NH Utilities,¹ Office of Consumer Advocate, CLF, CENH, and Southern New Hampshire Services (collectively the “Settling Parties”) to approve the proposed 2021-2023 New Hampshire Energy Efficiency Plan (“Triennial Plan”), as modified by a December 3, 2021 Settlement Agreement (“Settlement Agreement”) (Appendix page 1); and (2) a January 7, 2022 decision and order of the PUC (“Rehearing Order”) denying the Settling Parties’ joint motion for rehearing, clarification, and stay (Appendix page 53).

C. QUESTIONS PRESENTED FOR REVIEW

1. Did the Commission err as a matter of law by basing its decision on issues for which it failed to provide notice, thereby depriving the parties of fair and meaningful participation in the adjudicatory process?
2. Did the Commission err as a matter of law by failing to apply the relevant laws governing New Hampshire’s energy efficiency programs when it rejected the 2021-2023 Triennial Plan and dismantled the EERS framework?

¹ This includes New Hampshire Electric Cooperative, Inc.; Public Service Company of New Hampshire d/b/a Eversource Energy; Unitil Energy Systems, Inc. (UES); Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty; Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty; and Northern Utilities, Inc. (Northern).

3. Did the Commission act unreasonably and arbitrarily where its decision reversed longstanding Commission practices and prior orders and the Commission failed to provide adequate explanation for this reversal?

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

The statutes involved in this case, which are included in the Appendix at pages 77-84, are: RSA 378:37; RSA 365:28; RSA 374-F:3 (VI) and (X); and RSA 541-A:31 (III).

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

The relevant documents filed with this appeal include the Order of Notice in NH PUC Docket No. 20-092, dated September 8, 2020 (Appendix page 85); the 2021-2023 Triennial Plan, filed with the Commission on September 1, 2021 (Appendix page 90); and the Settlement Agreement in NH PUC Docket No. 20-092, filed with the Commission on December 3, 2020 (Appendix page 322).

F. CONCISE STATEMENT OF THE CASE

This appeal is about the future of energy efficiency in New Hampshire. Energy efficiency is an essential tool for creating a clean energy economy and clean energy jobs, reducing families' and businesses' energy costs, and reducing pollution. Essentially, energy efficiency is based on the premise that it is cheaper to reduce energy use than it is to spend money on additional, unneeded units of energy. The Commission's decision to reject the NH Utilities' proposed 2021-2023 Triennial Energy

Efficiency Plan, and from which CLF and CENH appeal, represents a sharp reversal in a framework that has governed energy efficiency programs in the state since 2016: New Hampshire’s Energy Efficiency Resource Standard (“EERS”).

1. Brief Overview of Energy Efficiency in New Hampshire

The Commission established New Hampshire’s EERS on August 2, 2016, in Order No. 25,932 (“2016 EERS Order”). *Gas and Electric Utilities*, DE 15-137, Order No. 25,932, 2016 WL 4138160 (N.H.P.U.C., Aug. 2, 2016). Until the 2016 EERS Order was issued, the Commission primarily implemented energy efficiency programs for 15 years through the Core programs. *Id.* at *1. The Core programs were mainly funded through the system benefits charge (“SBC”) and were designed to deliver as much energy efficiency savings as possible within a set SBC funding level. *Id.* Unlike the Core programs, however, an EERS sets “*savings goals based on savings potential* in addition to consideration of the funding level.” *Id.* Thus, in contrast to the Core programs, the EERS is “based on the setting of savings targets, not dollars spent.” *Id.* at *37. In adopting the EERS, the Commission concluded that the use of energy efficiency savings targets, rather than budgets alone, would help New Hampshire achieve the substantial energy efficiency savings potential that had been identified, which would reduce utility customers’ energy bills and, consequently, make a “significant step toward addressing the business communities’ concerns about remaining competitive in today’s economy.” *Id.* at *32, 37.

In approving the implementation of an EERS in the 2016 EERS Order, the Commission concluded that the record in that docket “support[e]d a finding that cost-effective energy efficiency is a lower cost resource than other energy supply.” *Id.* at *29. Moreover, despite approving SBC rate increases as part of the approval of the EERS, the Commission found that “participating electric and gas customers will spend less on energy usage and, in the long run, all customers will spend less on energy supply.” *Id.* at *32. The Commission further noted that it was confident that “any short-term rate impacts will be outweighed by the benefits to customers, the grid, and the New Hampshire economy.” *Id.* Such benefits include “lower utility bills now and in the future, improvements in comfort, health, and safety, more customer control and understanding of energy use, increased reliability of the grid and avoidance of new generation capacity, and job creation and reduced pollution.” *Id.* at *30.

Accordingly, in the 2016 EERS Order, the Commission established the EERS as the framework within which it would implement energy efficiency programs. *Id.* at *1. As mandated by the Commission, this framework consists of “three-year planning periods and savings goals as well as a long-term goal of achieving all cost-effective energy efficiency.” *Id.*² Thereafter, on January 2, 2018, the Commission approved the first three-year energy efficiency plan (“2018-2020 Triennial Plan”). *Gas and*

² According to the Commission, all cost-effective energy efficiency means any energy efficiency measures that can be obtained where the cost to acquire the measure is cheaper than the cost of the unit of energy that would otherwise be needed. *Gas and Electric Utilities*, DE 15-137, Order No. 25,932, 2016 WL 4138160, at *29 (N.H.P.U.C., Aug. 2, 2016).

Electric Utilities, DE 17-136, Order No. 26,095, 2018 WL 466608 (N.H.P.U.C., Jan. 2, 2018).

2. The Proposed 2021-2023 Triennial Plan

Beginning in late 2019, the NH Utilities and other stakeholders, including both CLF and CENH, began meeting as part of the EERS Committee of New Hampshire's Energy Efficiency and Sustainable Energy Board to develop the 2021-2023 Triennial Plan.³ Based in large part on a framework developed by the EERS Committee, on September 1, 2021, the NH Utilities filed a proposed Triennial Plan for ratepayer funded energy efficiency programs for 2021, 2022, and 2023. CLF, CENH, and several other parties filed petitions to intervene, which were granted on September 14, 2021. Following discovery, on December 3, 2021, the Settling Parties entered into and filed with the Commission a Settlement Agreement that called for approval of the Triennial Plan with certain modifications. (2021 Final Order at 3).

The Commission held hearings on the proposed Triennial Plan, as modified, on December 10, 14, 16, 21, and 22. *Id.* On December 29, 2020, the Commission issued an order maintaining the current SBC rates and structure of the existing energy efficiency programs until the issuance of a final order in the proceeding. *Gas and Electric Utilities*, DE 20-092, Order

³ This Committee was tasked with developing the 2021-2023 Triennial Plan pursuant to an earlier order of the Commission. See *Gas and Electric Utilities*, DE 17-136, Order No. 26,207, 2018 WL 6927717, at *1 (N.H.P.U.C., Dec. 31, 2018).

No. 26,440 (N.H.P.U.C., Dec. 29, 2020). The Commission stated that it expected to issue a final order within eight weeks. *Id.* at 4.

3. The Final Order

On November 12, 2021, more than 10 months after the December 29, 2020 order, the Commission issued an order rejecting the proposed Triennial Plan and Settlement Agreement. In its order, the Commission concluded that the record did not establish by a preponderance of the evidence that the proposed increases in the Triennial Plan were “just, reasonable, or in the public interest.” (2021 Final Order at 27). In reaching this conclusion, the Commission relied on a Commission order that preceded by nearly 16 years, and that was largely superseded by, the 2016 EERS Order establishing EERS as the governing framework for energy efficiency in New Hampshire. That earlier order had concluded that “[t]he most appropriate policy is to stimulate, where needed, the development of market-based, not utility sponsored and ratepayer funded, energy efficiency programs” and that “[t]he benefits of a retail electric market will not be fulfilled without a competitive wholesale market and a vibrant, unsubsidized energy efficiency market.” *Id.* at 32-33 (citing *Re Electric Utility Restructuring—Energy Efficiency Programs*, DE 96-150, Order No. 23,574, 2000 WL 33253134 (N.H.P.U.C., Nov. 1, 2000)).

Regarding the proposed funding for the 2021-2023 Triennial Plan, which recommended an increase to the SBC rate, the Commission not only rejected an increase to the SBC rate, but ordered that the SBC rates “descend gradually year-on-year until they return to a reasonable level, and

transition toward market-based programs.” (2021 Final Order at 36). Under the Commission’s order, SBC rates will progressively decrease each year from 2021 to 2023, reaching rates equivalent to the level set in 2018 by 2023. *Id.* Likewise, with the local delivery adjustment clause (“LDAC”) rates, which fund the natural gas portion of the EERS, the Commission set the LDAC rates on a downward trend from 2021-2023. *Id.* at 38. By focusing solely on SBC and LDAC rates for the years 2021-2023, rather than savings targets, the Commission signaled a sharp departure from the EERS framework established in the 2016 EERS Order that mandated that the EERS be based on the setting of savings targets, not dollars spent.

As for benefit-cost testing, despite adopting what is known as the Granite State Test (“GST”) as the preferred test for determining the cost-effectiveness of energy efficiency programs less than two years before, the Commission concluded that the GST “is overly dependent upon subjective factors such that any desired outcome could potentially be obtained from its application” and “[a]s such, cannot be solely relied upon for benefit-cost testing. *Id.* at 39. The Commission ordered that going forward, the parties are required “to calculate and report benefit-cost using the Total Resource Cost (TRC) test that was historically used until the [GST] was recently established,” but which had been discarded by the Commission in 2019. *Id.*

The Commission also prohibited the NH Utilities from using year-to-year budget carryforwards to fund energy efficiency programs. *Id.* at 42. Although the use of carryforward budgets to fund energy efficiency was a longstanding practice that predated the 2016 EERS Order, the Commission

concluded 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.” *Id.*

4. The Rehearing Order and Motion

Subsequently, on December 10, the Settling Parties filed a joint motion for rehearing, clarification, and stay (“Rehearing Motion,” Appendix Page 356) pursuant to RSA 541:3 and RSA 541:5. In their motion, the Settling Parties argued that the Commission failed to provide adequate notice, as required by law, with respect to the Commission’s decision to, *inter alia*, revisit its prior orders regarding the establishment of the EERS framework, the carrying forward of budgets from one year to the next, and the proper cost-benefit test to employ when determining the cost-effectiveness of energy efficiency programs. (Rehearing Motion at 8-14). The Settling Parties also argued that the Commission misapplied the relevant statutes governing New Hampshire’s EERS and unreasonably modified its prior orders regarding the EERS. *Id.* at 14-18. The Rehearing Motion argued that the November 12, 2021 Order was unsupported or contradicted by evidence in the record. *Id.* at 18-30. Finally, the Rehearing Motion requested clarification on a number of issues relating to implementation of the Commission’s Order.

On January 7, 2022, the Commission denied the Rehearing Motion. In its order denying the Rehearing Motion, the Commission concluded that its order of notice in the docket, issued on September 8, 2020, provided

adequate notice of the issues raised in its final order (Rehearing Order at 8-9). The Commission held that it provided the statutorily required notice for the proceedings and that the parties were not entitled to constitutional due process. *Id.* at 9. The Commission also determined that it had applied all applicable statutory standards and that its order was supported by evidence in the record. *Id.* at 11-14. Additionally, the Commission clarified several issues from its initial order. *Id.* at 11-22. This appeal follows.

G. JURISDICTIONAL BASIS FOR APPEAL

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

H. A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON WHETHER THE COMMISSION, IN REJECTING THE 2021-2023 TRIENNIAL PLAN, FAILED TO PROVIDE ADEQUATE NOTICE TO THE PARTIES OF THE ISSUES RAISED IN ITS ORDER, MISAPPLIED THE RELEVANT LEGAL STANDARDS, AND ISSUED AN UNREASONABLE ORDER THAT WAS UNSUPPORTED BY EVIDENCE IN THE RECORD. THE ACCEPTANCE OF THIS APPEAL WOULD PROVIDE AN OPPORTUNITY TO CORRECT PLAIN ERRORS OF LAW AND CLARIFY ISSUES OF GENERAL IMPORTANCE TO THE CITIZENS OF NEW HAMPSHIRE AND ADMINISTRATION OF JUSTICE

This appeal provides an opportunity for the Court to address important questions involving the Commission's decision rejecting the proposed 2021-2023 Triennial Plan and altering the well-established course of energy efficiency in New Hampshire. As set forth below, such questions include the Commission's misapplication of relevant legal standards,

including important notice requirements, and arbitrary disregard of its prior orders regarding New Hampshire's EERS.

1. The Commission Failed to Provide the Parties with the Statutorily Prescribed Notice of Issues on Which It Based Its Decision

a. The Commission Failed to Provide Notice Pursuant to RSA 365:28

The Commission failed to provide the parties with the notice mandated by RSA 365:28. RSA 365:28 provides, in relevant part, as follows: “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.*” *Id.* (emphasis added).

This Court has determined that under RSA 365:28, where the Commission seeks to modify a prior order, “the modification must satisfy the requirements of due process and be legally correct.” *Appeal of Office of Consumer Advocate*, 134 N.H. 651, 658 (1991). Further, the statutory notice requirements of RSA 365:28 extend beyond constitutional due process requirements. For example, *In Re Union Telephone Co.*, 160 N.H. 309 (2010), the court held that under a separate statute involving the granting of franchises, RSA 374:26, a party was entitled to notice and a hearing, irrespective of any constitutional due process right. *Id.* at 317-318, 323. By analogy, here, RSA 365:28 provides a similar statutory due process right.

Here, the Commission failed to provide notice that it was altering, setting aside, and otherwise modifying key orders governing New

Hampshire’s energy efficiency programs, as it was required to do under RSA 365:28. The Commission’s 2021 Final Order clearly demonstrates that it was amending and modifying both the initial 2016 EERS Order, as well as the 2019 order that established the GST as the main cost-benefit test for assessing the cost-effectiveness of the energy efficiency programs included in the Triennial Plan.

As the Commission noted in establishing the EERS in the 2016 EERS Order, New Hampshire’s Core programs, under which the Commission had implemented energy programs for 15 years before it established the EERS, were designed to deliver as much energy efficiency savings as possible *within a set SBC funding level*. *Gas and Electric Utilities*, DE 15-137, Order No. 25,932, 2016 WL 4138160, at *1 (N.H.P.U.C., Aug. 2, 2016) (emphasis added). In contrast, however, the EERS sets “*savings goals based on savings potential* in addition to consideration of the funding level.” *Id.* (emphasis added). Thus, unlike the Core programs, the EERS is “*based on the setting of savings targets, not dollars spent*.” *Id.* at *37 (emphasis added). The Commission also explained that the EERS “framework consists of *three-year planning periods and savings goals* as well as a long-term goal of achieving *all cost-effective energy efficiency*.” *Id.* at *1 (emphasis added). Accordingly, in initiating an EERS that was based on the setting of specific triennial *savings targets*, the Commission signaled a sweeping departure from the Core programs, which were merely designed to fund as much energy efficiency savings as possible under a fixed SBC level.

The Commission's 2021 Final Order effectively reverses its previous order establishing the EERS and reverts New Hampshire to the state of energy efficiency that existed under the Core programs. In particular, whereas the Initial EERS Order stated that the EERS is based on the setting of savings goals, rather than only funding levels, the Commission's 2021 Final Order determines the scale of New Hampshire's energy efficiency programs based on SBC levels alone.

Specifically, in, rejecting the proposed savings targets in the 2021-2023 Triennial Plan and establishing progressively decreasing SBC rates for 2020-2022, the Commission did not establish alternate savings targets or, in fact, even mention what savings targets would be achieved with the alternative rate schedule. The Commission also did not explain how its rejection of the proposed savings targets, failure to adopt alternative savings targets, and significant reduction of energy efficiency program funding comport with its long-term goal of establishing all cost-effective energy efficiency that it established in the 2016 EERS Order. In sum, the Commission's silence on savings targets and decision to base its energy efficiency decision solely on SBC rates, represents a significant alteration, suspension, and modification of the 2016 EERS Order.

The Commission did not provide notice in either its Order of Notice or at any other point in time during the proceedings that the very foundation of the 2016 EERS Order would be at issue in this docket. Thus, because the Commission failed to provide notice that it would suspend, alter, and modify the 2016 EERS Order, it violated RSA 365:28.

Likewise, the Commission’s decision to reverse its prior adoption of the GST represents an alteration of a prior order for which notice was not provided. In Order 26,322, issued on December 30, 2019, the Commission adopted a new cost-effectiveness screening framework for New Hampshire’s ratepayer funded energy efficiency programs (“2019 Cost-Benefit Order”). *Gas and Electric Utilities*, DE 17-136, Order No. 26,322, 2018 WL 8160414 (N.H.P.U.C., Dec. 30, 2019). Specifically, the Commission abandoned the prior “total resource test” (“TRC”) and adopted the GST for determining the cost-effectiveness of energy efficiency programs. *Gas and Electric Utilities*, DE 17-136, Order No. 26,322, 2018 WL 8160414 (N.H.P.U.C., December 30, 2019). In adopting the GST, the PUC found that “[u]se of the GST as the primary test will improve energy efficiency program screening by placing a greater emphasis on the utility system impacts than [its] current test.” *Id.* at *5.

In its 2021 Final Order, however, the Commission criticized the GST “as overly dependent upon subjective factors such that any desired outcome could potentially be obtained from its application” and concluded that “it cannot be solely relied upon for benefit-cost testing.” (2021 Final Order at 39). The Commission also denounced the GST on the grounds that “its growing complexity cannot be understood by the general public,” finding that “ratepayers are entitled to a fully objective and understandable measure of the cost-effectiveness of the proposed programs.” *Id.* Thus, the

Commission ordered the utilities to thereafter calculate and report benefit-cost using the TRC test. *Id.*⁴

The Commission's decision to require the utilities to again use the TRC to determine the cost-effectiveness of energy efficiency programs, less than two years after discarding it in the 2019 Cost-Benefit Order, exhibits another instance of the Commission altering a prior order, without providing notice. In designing the proposed 2021-2023 Triennial Plan, the utilities and stakeholders relied on the GST to determine the cost-effectiveness of the proposed programs. Neither in its Order of Notice initiating proceedings, nor at any other point in the proceedings, did the Commission provide notice that it intended to revisit its order abandoning the TRC and adopting the GST. Therefore, the Commission's decision to alter and modify the Cost-Benefit Order and again require the utilities to demonstrate the cost-effectiveness of energy efficiency using the TRC, without providing notice to the parties in the proceedings, constitutes another violation of RSA 365:28.

b. The Commission Failed to Provide Notice Pursuant to RSA 541-A:31 (III)

RSA 541-A:31(III) provides, in relevant part:

In a contested case, all parties shall be afforded an opportunity for an adjudicative proceeding

⁴ In its order on the rehearing motion, the Commission clarified that the utilities were required to conduct a benefit-cost analysis using *both* the TRC and GST. (Rehearing Order at 15).

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.

Id.

Here, the Order of Notice, issued by the Commission on September 8, 2020, stated that the NH Utilities' filing raised the following issues:

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).

The Order of Notice failed to inform the parties that the Commission intended to revisit the framework established in the 2016 EERS Order or the adoption of the GST in the 2019 Cost-Benefit Order.⁵ The Order of Notice also did not inform the parties that the Commission intended to discontinue the longstanding practice of allowing carryforward budgets to fund energy efficiency programs in subsequent years. As a result of the Commission's failure to provide notice of these issues, none of the parties presented evidence on these issues.⁶ Thus, the lack of notice of these issues in the Order of Notice constitutes a violation of RSA 541-A:31(III).

2. The Commission Misapplied the Relevant Law in Issuing an Order that Dismantles the Previously Established EERS Framework

In issuing its 2021 Final Order, the Commission, concluded that “the benefits of a retail electric market will not be fulfilled without a competitive wholesale market and a vibrant, unsubsidized energy efficiency market.” (Final Order at 33). Moreover, in decreasing SBC rates, the Commission

⁵ In contrast to the Order of Notice, here, the Order of Notice for the docket that culminated in the 2016 EERS Order provided, in relevant part, that the Commission opened that proceeding to: “establish an Energy Efficiency Resource Standard (EERS), a policy to establish specific targets or goals for energy savings that utilities must meet in New Hampshire. The EERS will require electric and/or natural gas utilities to achieve, within short- and long-term time frames, energy-type-specific levels of customer energy savings (efficiency goals), based on sales volumes for the baseline year of 2014.” *Gas and Electric Utilities*, DE 15-137, Order of Notice (N.H.P.U.C., May 8, 2015). Further, in a December 31, 2018 order, the Commission stated that a Benefit/Cost Working Group would study the ways to improve cost-benefit testing for energy efficiency programs and would make recommendations for use in developing the 2021-2023 Triennial Plan. *Gas and Electric Utilities*, DE 17-136, Order No. 26,207 (N.H.P.U.C., December 31, 2018). These recommendations were later incorporated into the 2019 Cost-Benefit Order.

⁶ Because the parties were not put on notice that the 2016 EERS framework, carryforward practices, and use of the GST would be at issue, they did not present evidence on these issues and, therefore, there is no evidence in the record on which the Commission could base its decision with respect to these particular issues. Consequently, the Commission's order on these issues is not supported by evidence in the record.

stated that the SBC rates would “descend gradually year-on-year until they return to a reasonable level, and *transition toward market-based programs.*” *Id.* (emphasis added). The Commission’s preference for market-based energy efficiency programs was, at least in part, based on RSA 374-F:3 (X). However, the Commission interpreted this statute out of context and ignored other statutes governing New Hampshire’s EERS.

RSA 374-F:3 is titled “Restructuring Policy Principles.” RSA 374-F:3 (X) provides, in full, the following: “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.” *Id.* Additionally, RSA 374-F:3 (VI) provides, in relevant part, as follows:

“Benefits for All Consumers. . . . 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 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

Id. Finally, RSA 378:37 states, in relevant part, that it is the energy policy of New Hampshire 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; [and] to maximize the use of cost effective energy efficiency and other demand side resources.” *Id.*

In relying on RSA 374-F:3 (X) to conclude that New Hampshire should transition to market-based energy efficiency programs, the Commission misapplied the statutes governing energy efficiency programs in New Hampshire. Although RSA 374-F:3 (X) states that restructuring should “reduce market barriers to investments in energy efficiency,” this is followed by a clause that provides that “[*u*]tility sponsored energy efficiency programs should target cost-effective opportunities that may otherwise be lost due to market barriers.” *Id.* (emphasis added). Thus, because RSA 374-F:3 (X) indicates that utility sponsored energy efficiency programs should target cost-effective programs that may be lost due to market barriers, the statute recognizes that the market alone cannot achieve cost effective energy efficiency in New Hampshire and that utility-sponsored energy programs will play a role in accomplishing this.

Further, RSA 374-F:3 (VI) allows the SBC to fund energy efficiency programs and codifies the Commission’s implementation of the “3-year planning periods of the Energy Efficiency Resource Standard framework.” *Id.* RSA 374-F:3 (VI) was amended after the Commission established the EERS in 2016. The amendment indicates that the legislature recognized that energy efficiency in New Hampshire would be accomplished through the EERS and that it would be funded by the SBC. Additionally, RSA 378:37 states that it is the state’s energy policy to maximize cost-effective energy efficiency, not that it is the state’s energy policy to achieve market-based energy efficiency. In sum, because RSA 374-F:3 (VI) and (X) provide a statutory basis for utility-based energy efficiency programs, as well as effectively codifying the establishment of the EERS, and RSA 378:37 makes it the state’s energy policy to maximize cost-effective energy efficiency, the Commission misapplied 374-F:3 (X) by relying on it to conclude that New Hampshire should transition away from the EERS and, instead, toward market-based programs.

3. The Commission Acted Unreasonably and Arbitrarily Where its Decision Reversed Longstanding Commission Practices and Prior Orders and the Commission Failed to Provide Adequate Explanation for this Reversal

The Supreme Court may grant relief from an agency’s decision where the agency has “abused its discretion, or has acted arbitrarily, unreasonably, or capriciously.” *Milette v. New Hampshire Ret. Sys.*, 141 N.H. 342, 344 (1996). The First Circuit has noted that although an agency is free to interpret, supplement, revise, or even depart from previous decisions or practices, where an agency chooses to do so, it must offer an

adequate, and adequately supported, explanation. *Shaw's Supermarkets, Inc. v. N.L.R.B.*, 884 F.2d 34, 35-37 (1st Cir. 1989); *Distrigas of Massachusetts Corp., v. FERC*, 737 F.2d 1208, 1210, 1219 (1st Cir. 1984); see also *Henry v. I.N.S.*, 74 F.3d 1, 6 (1st Cir. 1996) (noting that an “agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along”). Thus, an agency acts arbitrarily and unreasonably where it departs from a prior decision without adequate justification or explanation. *Shaw's Supermarkets*, 884 F.2d at 35-37; *Distrigas*, 737 F.2d at 1210, 1219.

a. The Commission Acted Unreasonably and Arbitrarily when it Departed from the EERS Framework Without Justification

Here, the Commission failed to provide adequate explanation for why it departed from the EERS framework it established 5 years earlier and, instead, relied on cases decided more than twenty years ago. In the 2021 Final Order, the Commission cited to an order from November 1, 2000, (which in turn quoted an earlier decision from 1998) stating that “[t]he most appropriate policy is to stimulate, where needed, the development of market-based, not utility sponsored and ratepayer funded, energy efficiency programs,” and that “efforts during the transition toward market-based [demand-side management] programs should focus on creating an environment for energy efficiency programs and services that will survive without subsidies in the future.” (2021 Final Order at 32) (quoting *Re Electricity Utility Restructuring—Energy Efficiency Programs*, DR 96-150, Order No. 23,547, 2000 WL 33253134 (N.H.P.U.C., Nov. 1, 2000)). Based on this order from 2000, the Commission drastically cut

funding for New Hampshire’s energy efficiency programs and ordered the utilities to explore the potential for energy efficiency programs that are not solely ratepayer funded.

The Commission, however, did not explain why it largely ignored the 2016 order establishing the EERS framework and, rather, relied on the 2000 decision. While the 2000 order signaled a preference to transition to market-based energy efficiency programs, in contrast, the 2016 EERS Order recognized limitations with a strict market-based approach. In particular, the 2016 EERS Order stated that “the EERS, and the energy efficiency market needed to support it, requires stable funding to grow and function optimally” and that the SBC and LDAC provided stable sources of revenue. *Gas and Electric Utilities*, DE 15-137, Order No. 25,932, 2016 WL 4138160, at *34 (N.H.P.U.C. Aug. 2, 2016). The Commission also found that at that time “private funding [was] limited and not as stable and reliable as the SBC and LDAC, . . . private funding alternatives ha[d] not been adequately investigated,” and “private funding increases followed increased funding of an EERS.” *Id.*

Here, the Commission did not explain why its determination from the 2016 EERS Order that “private funding [was] limited and not as stable and reliable as the SBC and LDAC” was no longer valid and why private funding was now a more reliable source of funding for energy efficiency programs than in 2016. More importantly, however, the Commission’s 2021 Final Order also effectively abandoned the EERS framework of setting savings based on “savings targets, not dollars spent” and of

achieving a “long-term goal of achieving all cost-effective energy efficiency.” *Id.* at *1, *37. In particular, the Commission abandoned the EERS framework by focusing on SBC rates alone, rather than savings targets, in determining the trajectory of New Hampshire’s energy efficiency programs, and in ignoring the precept of establishing all cost-effective energy efficiency in favor of a transition toward market-based programs. In sum, the Final Order and Rehearing Order did not explain why the Commission decided to reverse the 2016 EERS Framework and instead base its decision on an order from 2000 that was issued long before the EERS was implemented, rendering the decisions arbitrary and unreasonable.

b. The Commission Acted Arbitrarily and Unreasonably when it Reversed the Longstanding Practice of Carryforward Budgets and Failed to Provide Explanation for Discontinuing the Practice

The Commission also failed to explain why it determined unspent funds could no longer be carried forward to fund energy efficiency programs in subsequent years. Under the 2016 EERS Order, the Commission’s order approving the 2018-2020 Triennial Plan, and the Commission’s order approving the 2019 update to that plan, the Commission permitted any unspent funds from the preceding year to be carried forward to fund energy efficiency programs in the succeeding year. *Id.* at 23; *Gas & Elec. Utilities*, DE 17-136, Order No. 26,207, 2018 WL6927717 (N.H.P.U.C. Dec. 31, 2018); *Gas and Electric Utilities*, 17-136, Order No. 26,095, 2018 WL 466608, at *2 (N.H.P.U.C. Jan. 2, 2018). In fact, the practice of carrying forward unspent budgets to fund energy

efficiency programs in subsequent years was a practice that was continued from the earlier Core programs. *Gas and Electric Utilities*, DE 15-137, Order No. 25,932, 2016 WL 4138160, *23 (N.H.P.U.C. Aug. 2, 2016).

The Commission failed to provide any explanation whatsoever for abandoning the longstanding practice of allowing the utilities to carry forward unspent energy efficiency funding budgets into subsequent years. The Commission's decision to do so was also unreasonable in light of the fact that carryforwards were a longstanding practice that provided funding for energy efficiency programs (and on which the utilities and contractors depended and relied), and the Commission suddenly, and without warning, decided to eliminate this important and stable source of funding a mere six weeks before the end of the budget cycle when any unspent funds would have been expected to be carried forward to the next year.

In reversing the 2016 EERS framework and reverting to a position it supported in 2000, as well as in deciding to discontinue the longstanding practice of carryforward budgets, the Commission provided no real explanation nor justification. An agency acts arbitrarily and unreasonably where it reverses or departs from an earlier decision or practice without adequate explanation. *Shaw's Supermarkets*, 884 F.2d at 35-37; *Distrigas*, 737 F.2d at 1210, 1219. As the First Circuit astutely recognized in *Henry*, 74 F.3d at 6, "[a]n agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along." *Id.* The Commission's decision, here, to effectively discontinue the EERS and other well-established practices, without

explanation—and in the case of the carryforward budgets a mere six weeks before such budgets were expected to be allocated to the next year’s energy efficiency programs—constitutes unreasonable and arbitrary decision-making for which relief from this court is warranted.

I. CERTIFICATION OF ISSUES PRESERVED

The issues raised herein were presented to the Commission and have been properly preserved for appellate review by a properly filed pleading. Specifically, the issues were presented and preserved in the Settling Parties’ Rehearing Motion (Appendix page 356).

J. CONTENT OF RECORD ON APPEAL

The Appellants request that the Court require the PUC to transmit to the Court the entire record for appeal in NH PUC Docket No. DE 20-092.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that consistent with Supreme Court Rule 26 and Supplemental Supreme Court Rule 18, on February 7, 2022, I served the foregoing Notice of Appeal electronically, by email, to those parties listed above in Section a.2. of this notice.

/s/ Nicholas A. Krakoff

Nicholas A. Krakoff