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May 1, 2020

Ms. Debra A. Howland
Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301

Re: Docket No. DE 19-057
Public Service Company of New Hampshire d/b/a Eversource Energy
Distribution Service Rate Case
AARP Petition Requesting Supplemental Testimony and Suspension of
Temporary Rate Increase

Dear Ms. Howland:

As you know, on April 17, 2020 an intervenor in the above-referenced proceeding, AARP, filed a petition requesting that the Commission (1) direct the subject utility, Public Service Company of New Hampshire (PSNH), to provide supplemental testimony, and (2) suspend the temporary rate increase awarded to the utility via Order No. 26,265 (June 27, 2019). PSNH filed a pleading in opposition to these requests on April 27, 2020. The purpose of this letter is to provide the position of the Office of the Consumer Advocate (OCA) with respect to the issues discussed in these pleadings.

The residential utility customers whose interests the OCA represents before the Commission pursuant to RSA 363:28 are reeling in light of the COVID-19 pandemic and the resulting need to bring the economy of the state and the nation to a virtual halt as a public health measure. It is no longer possible to treat this proceeding as a garden variety rate case that should proceed to a conventional conclusion and, indeed, that is no longer even possible, as explained *infra*. Therefore, the Commission should either grant the sensible interim measures proposed by AARP or, at the very least, convene an additional prehearing conference so that the parties may be heard on the critical question of how to proceed with this case in the midst of crisis. *See* RSA 541-A:31, V(b) (“to facilitate proceedings . . . the presiding officer may . . . schedule one *or more* prehearing conferences”) (emphasis added).

Moving forward with the previously approved procedural timeline and rubric is no longer even remotely appropriate. On April 24, 2020, Governor Sununu issued Exhibit D to Emergency Order No. 29, which concerns “any rate schedule filed with the Public Utilities Commission by a public utility, which schedule represents a general rate increase in rates and is currently under

investigation . . . during the declared state of emergency.”¹ Exhibit D extends the 12-month rate case investigative period for rate cases specified in RSA 378:6, I(a) to 18 months. Since PSNH filed its rate schedules in May 28, 2019, the effect of Exhibit D is to extend the statutory deadline for resolving this rate case to November 28, 2020.

In light of the governor’s decision, the sensible proposal for additional prefiled testimony as advanced by AARP, or something very much like it, is clearly in the public interest. As PSNH correctly points out, a traditional rate case such as the instant proceeding is a retrospective investigation in many respects, focusing in this instance on the utility’s expenses and revenues during the “test year” of 2018, subject to adjustment for known and measurable changes subsequent to the test year. But not everything at issue in a rate case is historical.

As noted by AARP, the permanent rates to be fixed by the Commission in this proceeding will also be informed by the utility’s cost of capital, particularly its allowed return on equity (ROE), as well as projections of retail sales. PSNH continues to press for the allowed ROE recommended in the testimony it filed nearly a year ago of 10.4 percent. This was a bloated figure on the day it was requested; now that the economy is in free-fall, with interest rates at or below zero, it can charitably be described as ludicrous.² Moreover, confining nearly every person in the Granite State to her or his home, and drastically curtailing economic activity in a manner that nearly or totally shuts down most workplaces, obviously raises the possibility that PSNH’s revenue requirement is being misallocated among rate classes under the Company’s proposed rate schedules.

Given these circumstances, the OCA agrees with AARP that it would be inconsistent with the public interest for the Commission simply to convene a hearing for the purpose of allowing cross-examination and commissioner questioning based on the written testimony already on file. Past practice would suggest that, unless the Commission rules otherwise, PSNH will indeed update its testimony as suggested by AARP, but will do so on a live basis from the witness stand. This would be gravely unfair in the circumstances. “Other parties deserve to see any such changes to testimony early enough to respond, and to have an opportunity to test any estimates

¹ Exhibit D to Emergency Order No. 29 is available at <https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-29-d.pdf>. Emergency Order No. 29, which generally authorizes the temporary modification of executive branch deadlines and requirements, is available at <https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-29.pdf>.

² The OCA acknowledges that a utility’s allowed ROE is influenced by the degree of investment risk incurred by shareholders. There have been widespread reports of decreased overall electricity sales in light of the pandemic, generally in the range of 5 percent for New England. As PSNH recites at great length in its pleading, the Governor has used his emergency powers to declare a utility disconnection moratorium and to require utilities to give customers six months (subsequent to whenever the official state of emergency concludes) to pay arrearages. While these changes *may* affect PSNH’s riskiness from a shareholder perspective, it is also possible they will have no such effect – particularly in relative terms. Electricity is, after all, an essential commodity and PSNH is the monopoly provider of the network that delivers this commodity – not just to businesses but to residences that are now perpetually occupied by electricity-using human beings under lockdown. The state’s restaurant owners, hoteliers, manufacturers, private educational institutions, hair salons, construction firms, energy efficiency installers, minor league baseball teams, entertainment venues, retailers, health clubs, transportation providers, and every other type of enterprise that has been substantially or entirely shut down by the pandemic would welcome the opportunity to operate under the modestly stressed business conditions pursuant to which PSNH continues to exercise its monopoly on behalf of its investors.

and projections, rather than have that information provided at the last minute before the rate case hearing.” AARP Petition at 3.

In arguing to the contrary, PSNH complains that any requirement to file supplemental written testimony would “prejudice” the utility. PSNH Objection at 2. The OCA is aware of no constitutional principle, statute, or rule that precludes testimony because it would prejudice a party; in a sense, that is precisely what makes evidence relevant and material. *Cf.* N.H. R. Evid. 403 (allowing courts to exclude evidence whose probative value is substantially outweighed by danger of, *inter alia*, “unfair” prejudice). Here, the only elaboration on its “prejudice” argument offered by PSNH is that such a supplemental filing would be subject to pre-hearing discovery and responsive testimony on a “compressed time frame.” PSNH Objection at 3-4. The Governor’s extension of the deadline for resolving the rate case has attenuated the persuasiveness of this argument considerably. In any event, the mere existence of deadline pressure or inconvenience is not of legal significance.

PSNH concedes that “using the best information available is appropriate in a rate-setting proceeding.” *Id.* at 2. What the company resists is not updating its testimony but, rather, providing the opportunity for other parties with a full and fair opportunity to investigate and critique that testimony. The Commission should reject this argument.

Somewhat more novel than sensibly updating the procedural schedule is AARP’s call to roll back the temporary rate increase the Commission granted PSNH last July. But here, too, PSNH’s arguments are unpersuasive.

As it must, PSNH concedes that RSA 378:29 explicitly authorizes temporary rates to be “terminated sooner” than the end of the rate case. The utility also acknowledges that RSA 378:9, also invoked by AARP, explicitly authorizes the Commission to impose rate changes on an “emergency” basis. But, in essence, PSNH takes the position that these provisions are only intended to protect utility shareholders and do not allow any relief that favors customers. This flies in the face of the Commission’s statutory mission. *See* RSA 363:17-a (“The commission shall be the arbiter between the interests of the customer and the interests of the regulated utilities as provided by this title”). Thus the established canons of statutory construction would never allow such a one-sided gloss on the temporary or emergency rate-setting statutes. *See, e.g., Appeal of Old Dutch Mustard Co.*, 166 N.H. 501, 509-10 (2014) (noting that statutes should be construed so that they “do not contradict each other” and that “statutes *in pari materia* should be read as a part of a unified cohesive whole”) (citations and internal quotation marks omitted).

Relying on the 59-year-old opinion of the New Hampshire Supreme Court in *State v. New England Telephone & Telegraph Company*, 103 N.H. 394 (1961), PSNH contends that the temporary rate statute is intended to guard against confiscatory rates and thus the Commission cannot do as AARP proposes. The Court’s observations to that effect in the 1961 decision are *dicta*, since the actual determination was that the Commission did not abuse its discretion by fixing a utility’s temporary rates at their then-current level (i.e., at the rates prevailing prior to the rate case) while requiring the utility to post a bond to assure that ratepayers would be made whole if the new permanent rates were lower than the temporary ones. In reality, when the General Court authorized temporary rates in 1941, the purpose “was to permit a temporary order

effecting a *reduction* in rates.” *Public Service Co. of N.H. v. State*, 102 N.H. 66, 68-69 (1959) (noting that, in 1941, the need for rate reduction was the “immediate problem”). The 1941 enactment remains in effect without amendment.

Thus it is simply not correct for PSNH to contend that any effort to roll back temporary rates in the face of the pandemic crisis would automatically transgress the utility’s constitutional right to avoid a regulatory taking of its property. Temporary rates in this docket were implemented via a settlement agreement which explicitly provided that Commission acceptance of the settlement did not “constitute continuing approval of or precedent regarding any particular issue in this proceeding.” Settlement Agreement of June 13, 2019 (Tab 22) at 8.

Separately, PSNH objects to the invocation of RSA 378:9, governing emergency rate orders, in support of the relief requested by AARP. PSNH contends that RSA 378:9 by its terms only authorizes rate changes when requested by a utility and does not permit the Commission to act on its own motion or upon the request of another party seeking rate relief. The utility draws a distinction between the language of RSA 378:9, which state that the Commission may “authorize any public utility” to change its rates in the face of an emergency, and the language of RSA 378:7, the general rate statute providing the Commission with authority to “fix” rates at a just and reasonable level. Sophistry of this sort flies in the face of the oft-repeated principle that statutes should be construed in a manner that effectuates their purposes and avoids results that are “unjust” and absurd.” *Polonsky v. Town of Bedford*, 2020 WL 1974144 (N.H. Supreme Ct., April 24, 2020) at *3 (citation omitted). It would also ignore the explicit determination of the New Hampshire Supreme Court that RSA 378:9 “grants the Commission broad discretionary powers” allowing the agency to “determine whether a state of emergency exists for a public utility *or the public*, [and] increase *or decrease* rates.” *Petition of Public Service Co. of N.H.*, 130 N.H. 265, 283 (1988) (citation omitted, emphasis added).

“Emergency,” by the way, is “synonymous with crisis,” *id.* (citation omitted), and the COVID-19 pandemic is nothing if not a crisis. PSNH’s observation that the current situation is without precedent, and the Company is unaware of any previous scenario in which the Commission has invoked RSA 378:9 to reduce rates, is of no significance.

Whether characterized as an exercise of the Commission’s explicit statutory authority to roll back temporary rates or as an exercise of explicit statutory authority to reduce rates on an emergency basis in the face of a crisis, the Commission can and should proceed as AARP proposes. In its objection, PSNH complains of the “adverse financial impacts” the pandemic and the statewide disconnection moratorium are having on the company. PSNH Objection at 6. The utility laments that its cash flow, revenue, and pandemic-driven costs are “currently the subject of inquiry from the financial and investment community.” *Id.* Perhaps the investment community is also pondering the April 27, 2020 report from the Energy and Policy Institute, documenting that during the 2017-2019 period the CEO of PSNH parent company Eversource Energy was the third most highly compensated electric utility CEO in the country even though Eversource is most assuredly not the third biggest utility in the country by any measure.³

³ The cited report of the Energy and Policy Institute is available at <https://www.energyandpolicy.org/utility-ceo-compensation-2017-2019/>. According to the report, Eversource Energy CEO James Judge received \$50,646,930 in compensation over the three years, second only to his counterparts at utility giants NextEra Energy and Southern

In light of the foregoing, the OCA believes the next appropriate step is for the Commission to gather the parties, either formally via an additional prehearing conference or informally by having the Staff convene a conference of counsel, in quest of consensus on how to proceed from here. The AARP has made a compelling case for rate relief and the submission of additional written testimony followed by discovery and response. PSNH is entitled to develop the concerns it lays out in its reaction to the AARP. All parties need clarity about where this case proceeds from here, in light of the significance of the issues in the rate case against the backdrop of an unprecedented economic and public health crisis.

Thank you for considering the views of the Office of the Consumer Advocate. Persons with questions or concerns should feel free to contact me via my direct line at 603.271.1174. Pursuant to the Commission's directive of March 17, 2020, I am transmitting this letter to you electronically without submitting a paper filing as would ordinarily be required.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Maurice Kreis".

D. Maurice Kreis
Consumer Advocate

Cc: Service List via e-mail

Company (and ahead of the CEOs of Duke Energy, Exelon, Xcel, Dominion Energy and Consolidated Edison – the latter, of course, once slated to become PSNH's parent company).