



OFFICE OF THE CONSUMER ADVOCATE

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May 7, 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
Distribution Service Rate Case

Dear Ms. Howland:

Please treat this letter as the response of the Office of the Consumer Advocate to two recent filings in the above-referenced proceeding: (1) the May 4, 2020 letter from Public Service Company of New Hampshire (PSNH), and (2) your secretarial letter of May 6, 2020.

I. May 4, 2020 Letter from Public Service Company of New Hampshire

In its May 4 letter, PSNH moves to strike a communication submitted by the OCA on May 1, 2020. On May 1, the OCA expressed support for a petition submitted by AARP New Hampshire seeking a directive that PSNH file supplemental direct testimony and requesting that the Commission roll back the temporary rates approved in this docket last summer. PSNH, which apparently does not like the message contained in the May 1 letter, seeks to shoot the messenger on the grounds that (1) the May 1 filing was really a reply to PSNH’s objection to the AARP motion, and such replies are not authorized under the Commission’s procedural rules, (2) the OCA would “undoubtedly object to a similar filing if made by a utility,” PSNH letter at 1 (3) and the OCA is unfairly singling out PSNH given that other rate cases are pending at the Commission.

These arguments are ridiculous and the Commission should reject them.

Assuming *arguendo* that the AARP petition was, in reality, a motion – in which case, as PSNH notes, *objections* were due within ten days pursuant to N.H. Code Admin. Rules Puc 203.07(e) – the OCA was *agreeing with*, and not objecting to, the AARP request. Therefore, Rule Puc 203.07 is unmistakably inapplicable. If Puc 203.07(e) precludes any party from making any

filing related to anything related to the AARP request once ten days have elapsed, then the Commission should also strike the PSNH request that the Commission ignore our submission and/or provide the Company with additional time and opportunity to respond to the positions taken by the OCA on May 1.

In support of its position, PSNH referenced Order No. 25,327, entered by the Commission in Docket No. DT 06-067 on February 3, 2012. In Order No. 25,327, as PSNH notes, the Commission indicated it would disregard a reply tendered by a group of competitive local exchange carriers which had moved to dismiss the proceeding. But their reply proved to be unnecessary since the Commission granted the underlying dismissal request in Order No. 25,327. Ergo, the ruling about the reply was *dictum*. Moreover, as even a cursory examination of the entries in Docket DT 06-067 – 271 tabs over more than seven years, including two appeals to the New Hampshire Supreme Court – reveals, that proceeding was worthy of a Dickens novel (*see, e.g.*, the opening chapter of *Bleak House* and its account of the fictional court case Jarndyce v. Jarndyce, a “scarecrow of a suit” that “has, over the course of time, become so complicated, that no man alive knows what it means”). So, PSNH is drawing precisely the wrong lesson from Order No. 25,327. It does not suggest, as PSNH claims, that earnest requests from the ratepayer advocate should be thrown out. Rather, it suggests that parties to PUC proceedings should work together to address problems effectively and efficiently, eschewing precisely the sort of vexatious and pedantic litigation tactics reflected in the utility’s May 4 letter.

As to the notion that the OCA is “[s]ingling out PSNH” while “offering no justification for doing so,” PSNH May 4 letter at 2, our response is twofold. First, no statute, rule, or legal principle requires the OCA to adopt consistent tactics across its caseload.¹ Second, no intervenor has filed a similar motion in any of the other currently pending rate cases and it is presumptuous of PSNH to assume the OCA would not support a similar motion filed by an intervenor in those other proceedings.

In the main, our message to the Commission as reflected in our May 1 letter is that it is time to get the parties together, either formally (with the Commissioners present, as is our preference) or informally, to figure out where this proceeding goes from here. Too much time, and too much cataclysmic change, has occurred for this rate case to proceed as contemplated in the currently applicable procedural order. PSNH does not contest this assertion; the Commission should take note of that.

II. May 6 Secretarial Letter Concerning InDepthNH.org Opinion Piece

Concerning the May 6 secretarial letter, the OCA wishes to make certain things clear. The subject of the letter is a recent opinion piece that appeared on the news web site InDepthNH.org about this proceeding. According to the letter, Commissioners Bailey and Giaimo read the opinion piece after the latter forwarded it to the former, believing it to be among a compendium of “energy-related news articles” that were “educational in nature.” The opinion piece was

¹ Thus, the claim that the OCA should not have filed its May 1 letter because the OCA would have objected to something similar from a utility is as irrelevant as it is speculative.

critical of Eversource and certain litigation tactics it has employed in this proceeding (beyond those referenced elsewhere in this letter).

I am the author of the opinion piece in question. I am also an attorney admitted to the bar of the New Hampshire Supreme Court. As such, I am subject to the New Hampshire Rules of Professional Conduct, including Rule 3.6. Paragraph (a) of Rule 3.6 states that “[a] lawyer who is participating or has participated in the investigation or litigation of a matter shall not make any extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in a matter.”

Although both the text of Rule 3.6 and the official comments appended to the rule make clear that Rule 3.6 is concerned primarily with judicial proceedings that are criminal in nature and/or triable to a jury, this administrative proceeding is clearly a “matter” within the meaning of the rule. The Commission’s secretarial letter does not mention Rule 3.6 and, of course, enforcement of Rule 3.6 is not within the Commission’s jurisdiction. Nevertheless, I am taking this opportunity to clarify in public fashion my firm belief that no violation of Rule 3.6 has occurred here.

The opinion piece in question is not the first time I have used InDepthNH.org to comment publicly about this case or, indeed, to opine on a variety matters pending before the Public Utilities Commission. All are editions of a column bearing the general title “Power to the People,” which, I respectfully suggest, constitutes fair warning that the views expressed therein are not merely educational in nature but are intended to influence public opinion about controversial matters that are before the Commission and other bodies (e.g., the Federal Energy Regulatory Commission and the New Hampshire General Court).

Any attorney who appears regularly before the Commission, as I certainly do, has every reason to respect the intelligence, discernment, and good judgment of the agency’s Commissioners. Thus I would respectfully suggest, to the Commission and to other readers of this letter, that it is reasonable for attorneys subject to Rule 3.6 to assume that the Commissioners will act affirmatively to maintain their impartiality and avoid reviewing extra-record materials that express opinions about pending matters. Expecting attorneys to make any other assumption would have troubling First Amendment implications.

According to the secretarial letter, Commissioners Bailey and Giaimo are “confident that their objectivity and impartiality are unaffected by having read the article,” “will not consider the contents of the article going forward,” and will decide the case impartially based solely on the facts in the record and the applicable law. The Office of the Consumer Advocate shares the confidence of Commissioners Bailey and Giaimo and is certain of their impartiality and objectivity. Although I emphatically reserve both my right and that of other participants in this proceeding to continue to make public statements about a case that is of great and intensifying public interest, it is my earnest hope that this marks the last time public comments about the rate case are subject to scrutiny before the Commission itself. You may count on my complete cooperation in that regard.

Thank you for this opportunity to respond to the filings discussed herein. 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". The signature is fluid and cursive, with a long horizontal flourish at the end.

D. Maurice Kreis
Consumer Advocate

cc: Service List via e-mail