

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Northern Utilities, Inc.

Request for Change in Rates

Docket No. DG 21-104

Motion to Cancel March, 28, 2022 Hearing

NOW COMES the Office of the Consumer Advocate (“OCA”), a party to this docket, and pursuant to N.H. Code Admin. Rules Puc 203.07, moves for cancellation of the evidentiary hearing presently scheduled in this docket for March 28, 2022. In support of this request, the OCA states as follows:

This is a natural gas distribution service rate case in which the Commission conducted a prehearing conference on September 16, 2021, after which the parties submitted an agreed-upon procedural schedule for Commission approval. The Commission adopted the proposed schedule via a procedural order entered on October 13, 2021 (tab 30) – with one significant change. Specifically, the Commission added an evidentiary hearing – originally scheduled for March 3, 2022, later rescheduled to March 28, 2022 – to “provide an opportunity for the Commission to ask questions about record request responses and receive related evidence, as well as to get an update on the status of the proceeding.” This extra hearing falls roughly in the sixth inning of the permanent rate phase of the docket,

prior to the deadline for submission of non-utility testimony, the subsequent deadline for rebuttal testimony from the utility, and the merits hearings presently scheduled for early June of this year.

This hearing should not take place because it is not authorized under the Administrative Procedure Act (RSA ch. 541-A), the Commission's enabling statutes, or the Commission's procedural rules (N.H. Code Admin. Rules ch. Puc 200). Indeed, convening a hearing at a seemingly random point in the middle of a contested administrative proceeding is so far beyond what the Administrative Procedure Act contemplates that the statute simply does not refer in any way to such a possibility. Rather, RSA 541-A:31, which sets forth the requirements for adjudicative proceedings, simply and implicitly assumes that a merits hearing will take place following the conclusion of all matters preliminary to such a hearing including discovery and "one or more informal prehearing conferences." RSA 541-A:31, V(b).

Confusion and uncertainty abound in the run-up to the March 28, hearing. What matters will be at issue? Who will testify? Will there be opportunities for cross-examination? What effect, if any, of a party's failure to raise issues and/or to conduct cross-examination? What about materials exchanged in discovery which the utility has provisionally designated as confidential? *See* Rule Puc 203.08(d)(2) (requiring a party so designating discovery materials to make a motion for confidential treatment "at or before the commencement of hearing" in the proceeding).

The reference to “record requests” in the Commission’s procedural order is impossible to square with the applicable procedural rule. Puc 203.30(a) contemplates the submission of exhibits “after the close of a hearing” when “late submission of additional evidence” will “enhance” the Commission’s “ability to resolve the matter in dispute.” The rule does not contemplate or permit the Commission to make “record requests” in the middle of a proceeding or to convene evidentiary hearings to explore such record requests.

It is possible, of course, that any such hearing in the middle of a rate case has no significance whatsoever; under this theory, nothing forecloses a party from doing what it would otherwise have done, including adducing evidence, at the customary hearing convened at the conclusion of the docket. If so, that arguably makes a mid-case hearing even more egregious from a ratepayer perspective given that RSA 365:38-a authorizes the Commission to allow a utility to recover “costs associated with utility proceedings before the commission” from customers, provided that such costs are “just and reasonable and in the public interest.” It will, obviously, be an uphill struggle for the OCA to argue that this utility’s costs incurred in connection with producing all of its witnesses on March 28 is not just and reasonable given that all of those lawyers, utility employees, and outside consultants will be appearing at the express direction of the Commission.

The OCA shares the concerns underlying the Commission’s decision to begin convening evidentiary hearings in the middle of rate cases. Prior to the reorganization and down-sizing of the Commission as an agency last year, the

Public Utilities Commission participated actively (through its staff) in proceedings as they developed. Commission employees conducted discovery, wrote and filed testimony, and participated in technical sessions as well as settlement negotiations. Absent designations as staff advocates, such employees were free to keep the commissioners themselves apprised of developments. Now the Commission is fully screened off from such activities and, thus, confronts the disquieting prospect of not really knowing “what’s coming” as the evidentiary hearings at the end of rate cases approach.

The solution contemplated by the Administrative Procedure Act in such circumstances is for the agency to convene additional prehearing conferences as explicitly authorized by RSA 541-A:31(V)(b). This is analogous to case management conferences convened by judges in civil proceedings as a means of their continuing to exercise a measure of supervisory control over judicial proceedings. Another option – arguably overdue at this point – would be for the Commission to commence a rulemaking proceeding for the purpose of causing the Puc 200 rules to comport once more with the realities of how the Commission must operate given the current state of its enabling statutes. What the Commission should not do – indeed, what the Commission arguably may not do, depending on the results – is invent procedural mechanisms on an ad hoc basis. The Due Process implications of such an approach are too worrisome to contemplate.

I. Conclusion

For the reasons stated above, the Commission should cancel the evidentiary hearing presently scheduled for March 28, 2022 and replace it with one or more prehearing conferences to give the Commission the opportunity to assess the progress of the rate case toward its resolution.

Sincerely,



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March 21, 2022

Certificate of Service

I hereby certify that a copy of this pleading was provided via electronic mail to the individuals included on the Commission's service list for this docket.



Donald M. Kreis