



OFFICE OF THE CONSUMER ADVOCATE

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August 30, 2021

Ms. Dianne Martin  
Chairwoman and Agency Head  
New Hampshire Public Utilities Commission  
21 South Fruit Street, Suite 10  
Concord, New Hampshire 03301

Re: Docket No. DE 21-119, Public Service Company of New Hampshire d/b/a  
Eversource Energy  
Proposed Tariff Amendments for Residential Time-of-Day Rate

Dear Ms. Martin:

This letter is in response to today's submission from the Department of Energy, transmitting a proposed procedural schedule for the above-referenced docket and addressing certain other issues that arose at the prehearing conference conducted by the Commission on August 25, 2021.

As an initial matter, I would like to take this opportunity to apologize for the non-appearance of the Office of the Consumer Advocate (OCA) at the prehearing conference and ensuing technical session of August 25. I believe the Commission is aware that at present *I comprise the entirety of the OCA's professional staff*. On August 25, I was flying back to New Hampshire and concluding a family vacation that had been planned (including the purchase of nonrefundable airline tickets, etc.) months ago.

The OCA is unable to agree to the procedural schedule proposed by the Department of Energy. The rebuilding of our professional team is under way, the next milestone being the September 10 arrival of our new Director of Rates and Market Policy. Obviously, they cannot participate in the initial round of data requests, the deadline for the submission of which is tomorrow. As a general matter, the OCA believes it is neither helpful nor appropriate for there to be procedural milestones in administrative proceedings at the PUC that occur prior to the approval by the Commission of such milestones. The OCA respectfully requests that the Commission and the Department of Energy discontinue this practice as it is not conducive to the orderly progress of contested administrative proceedings.

According to the letter from the Department of Energy, there was discussion at the prehearing conference of the need to update the process for creating procedural schedules in light of the advent of the Department of Energy and the assumption of a much more narrow and exclusively quasi-judicial role of Commission's employees. In other words, the practice that prevailed prior to July 1 of having a Commission staff attorney superintend informal scheduling discussions, and

then clearing a proposed schedule with Commissioners and other key PUC personnel, is no longer appropriate. Apparently two possible approaches were discussed at the prehearing conference: (1) treating discussions of scheduling matters as one of the “administrative functions” that Department of Energy employees (including, presumably, its staff attorneys) may discuss with Commission personnel without raising *ex parte* issues pursuant to RSA 12:P-5, VII, or (2) having the Department of Energy staff attorney who superintends the informal scheduling discussion at the initial technical session include in the proposed schedule they file with the Commission “a several week placeholder during which a specified number of hearings could be held.”

Regrettably, the OCA does not agree with either approach. The Administrative Procedure Act contemplates that contested administrative proceedings at the PUC will begin with a prehearing conference. *See* RSA 541-A:31, V (noting that the purpose of such prehearing conferences is “to facilitate proceedings and encourage informal disposition”); *see also* N.H. Code Admin. Rules Puc 203.15 (noting that the PUC “shall” convene prehearing conferences “upon motion of any party, or upon the presiding officer’s own motion”). It appears that, by tradition, the ‘old’ PUC (i.e., the PUC as it was constituted prior to July 1, 2021) found it convenient not to address procedural schedules on the record during the prehearing conferences themselves, instead asking the parties to confer informally (at the technical session traditionally following every prehearing conference) and then submit an agreed-upon schedule that the Commission could readily approve thereafter (because, *inter alia*, the PUC Staff Attorney who superintended the discussions was able to determine available hearing dates). If that process is no longer workable or permissible, then in the opinion of the OCA the only alternative is for the Commission to address scheduling matters *on the record* during prehearing conferences themselves. Any other approach would contravene RSA 541-A:31 and Rule Puc 203.15, paragraph (d) of which states that prehearing conferences “shall” include consideration of, *inter alia*, “[e]stablishment of a procedural schedule to govern the remainder of the proceeding.”<sup>1</sup>

According to the Department of Energy, there was also discussion at the prehearing conference and technical session of whether to provide the PUC, and certain other parties as a matter of routine, with “live” versions of Excel spreadsheets when non-live spreadsheets are filed with initial pleadings or circulated in discovery. As the Department of Energy noted, the Commission expressed a preference for receiving live spreadsheets in the body (but not the ordering clauses) of the recently issued Order No. 26,502 in DE 21-117, an unrelated proceeding involving Public Service Company of New Hampshire. According to the Department of Energy letter filed in the instant docket, the parties would “appreciate any guidance the Commission may provide” about “live spreadsheet production matters.”

The OCA shares the Commission’s preference for review of live spreadsheets, hence we request them as a matter of routine during the initial round of discovery in every docket involving such documents. But the submission of live spreadsheets to the Commission as a routine matter has

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<sup>1</sup> In addition, the “include a several week [hearing] placeholder” option is unworkable as a practical matter, particularly for the OCA given our small staff and need to participate in a wide variety of PUC proceedings and federally regulated forums (i.e., NEPOOL, ISO New England, and, ultimately, FERC). The creation of such “placeholders” would require us to encumber vast swaths of our schedule, potentially for extended periods given the dilatory pace at which the Commission currently issues orders.

potential due process implications inasmuch as it raises the possibility of the Commission considering information that is not officially part of the record (and, thus, *inter alia*, not subjected to cross-examination at hearing) when making findings and resolving contested proceedings. In the respectful opinion of the OCA, it is not appropriate for the Commission to resolve this question simply by providing “guidance” in whatever procedural determination the agency makes in the wake of the August 25, 2021 prehearing conference in this docket.

As has now become emphatically obvious, there is a variety of procedural issues – some covered by statute, others by rule, and still others by longstanding but unwritten practices – that must be revisited in light of the sweeping changes that became effective on July 1, 2021. We believe these issues should not be resolved piecemeal and/or by the unilateral issuance of “guidance” from the Commission. A vastly better approach would be for the Commission to conduct one or more informal workshops in which stakeholders could participate, likely as an initial phase in a formal rulemaking proceeding that would serve the useful purpose of updating the Puc 200 rules.

In light of the above, should the Commission proceed as contemplated by the letter filed by the Department of Energy, and/or should the Commission use the initial phase of this or any other proceeding to issue procedural “guidance,” the Office of the Consumer Advocate reserves the right to seek rehearing of any such determination pursuant to RSA 541:3 and/or the right to submit a petition for adoption of rules pursuant to RSA 541-A:4.

Thank you for considering the views of the Office of the Consumer Advocate. If parties have any questions or concerns about this filing, I am available by phone or e-mail. Inasmuch as the Commission has not lifted its directive suspending the rule requiring paper filings, this letter is being submitted in electronic form only.

Sincerely,

A handwritten signature in blue ink, appearing to read 'DKreis', written in a cursive style.

Donald M. Kreis  
Consumer Advocate

Cc: Service List, via e-mail