

STATE OF NEW HAMPSHIRE



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June 14, 2024

Chairman Daniel C. Goldner  
New Hampshire Public Utilities Commission  
21 South Fruit Street, Suite 10  
Concord, New Hampshire 03301

via e-mail to: [ClerksOffice@puc.nh.gov](mailto:ClerksOffice@puc.nh.gov)

Re: Docket No. DE 24-070  
Public Service Company of New Hampshire  
Distribution Service Rate Case

Dear Chairman Goldner:

I write to register the opposition of the Office of the Consumer Advocate ("OCA") to a proposal tendered to the Commission by the subject utility in the above-referenced proceeding, via the June 11, 2024 cover letter to the company's voluminous rate case filing (tab 4). Specifically, the utility proposes that "a process should be put in place to allow for active engagement by the Commission at an earlier state of the proceeding rather than later." Cover letter at 2. According to the company,

the unique magnitude and degree of complexity of the Company's filing drives the conclusion that there would be significant value and administrative efficiency for the Commission to have ongoing access to all data requests and responses issued during the proceeding, as well as for the Company to respond to inquiries from the Commission throughout the docket to facilitate the Commission's information and understanding of the proposals under consideration as the docket progresses.

*Id.*

What this utility has thus blithely and casually requested is the wholesale abandonment of the procedural rules applicable to contested administrative proceedings before the Commission. We do not believe this is appropriate or, indeed, permissible as a matter of New Hampshire law.

As an initial matter, we note that it is no longer clear which rules apply to contested administrative proceedings before the Commission. The existing set of Commission rules dealing with this subject, N.H. Code Admin. Rules Chapter Puc 200, antedate the adoption by the General Court of RSA Chapter 12-P (and related provisions), effective on July 1, 2021, creating the Department of Energy and thereby significantly changing the scope and nature of the Commission's authority. The relevant provision of the Administrative Procedure Act, RSA 541-A:17, II, states that an agency's procedural rules do not expire, but subject to this significant exception: "[I]f the adoption or amendment of a

statute governing the agency renders the agency’s organizational and procedural rules no longer accurate, such rules shall expire one year after the effective date of the statute that makes such change, unless such organizational and procedural rules are amended, superseded, or repealed before such expiration.”

The legislation creating the Department of Energy, and restructuring the Commission accordingly – section 187 of Chapter 91 of the 2021 New Hampshire Laws (effective on July 1, 2021) – rendered the Commission’s procedural rules “no longer accurate” within the meaning of RSA 541-A:17, II. Since the Commission has not amended, superseded, or repealed its Puc 200 rules, these rules are null and void. In such circumstances, the Model Rules of Practice and Procedure as adopted by the Department of Justice, N.H. Code Admin. Rules Chapter Jus 800, apply by operation of law. *See* RSA 541-A: 30-a, II (noting that the Jus 800 rules are adopted “on behalf of agencies . . . that do not have adopted effective rules on adjudicative proceedings”).

Neither the Puc 200 rules nor the Jus 800 rules – nor, indeed, the contested case provisions of the Administrative Procedure Act as they appear at RSA 541-A:31 *et seq.* – contemplate an adjudicative paradigm in which the tribunal is actively involved in the development of the record prior to hearing. Rather, these rules and this statute proceed from the obvious assumption that a contested administrative proceeding closely resembles a lawsuit conducted pursuant to the New Hampshire (or Federal) Rules of Civil Procedure – a process in which it is the role of the parties to conduct discovery, ultimately developing the record by producing evidence and testimony, and it is the responsibility of the tribunal to make findings of fact and draw conclusions of law based on the record as adduced by the parties.

The Commission recently rejected the OCA’s arguments about the extent to which it is permissible for the Commission to transition, on an *ad hoc* basis, to an inquisitorial model of adjudication. *See* Order No. 27,018 (June 14, 2024) in Docket No. DE 22-060 at 5-10 (relying on the Commission’s investigative authority, conferred via RSA 365:19, to conduct independent investigations, and its authority under Rule Puc 203.32 to provide for briefing “at any point in an adjudicative proceeding”). The OCA is unable to agree that RSA 365:19 is, in effect, an exception that swallows up the entirety of the contested case procedures enumerated in the Administrative Procedure Act, the Commission’s procedural rules, and/or the Department of Justice’s Model Rules. Nor are we able to agree that a rule which, by its express terms, authorizes the Commission to “*allow* parties to submit briefs at any point in an adjudicative proceeding” (emphasis added) can serve as the legal justification for *requiring* a party to do anything – particularly a party that is, like the OCA, not a regulated utility subject to plenary oversight by the Commission.

In the context of Docket DE 22-060 – a proceeding whose purpose is the development of new approaches to the compensation of net metered electricity, and whose outcome may well be driven by a settlement agreement – it may or may not be necessary and appropriate to challenge the erroneous rulings made in Order No. 27,018. The stakes are significantly higher here. New Hampshire’s largest utility – serving the vast majority of New Hampshire’s electricity customers – is seeking to increase its distribution revenue by an astonishingly large 42 percent, while at the same time requesting approval of a performance-based regulation paradigm that would radically depart from the principles and assumptions that have driven the development of electric rates since the days of Thomas Edison and Samuel Insull. Therefore, in this docket, it is imperative that the Commission comply strictly with its

statutory authority and the applicable rules, rather than allowing the state's largest utility to lure the agency into an unpredictable, *ad hoc*, untested, and ultimately illegal decisional paradigm.

We do not accuse the subject utility of proposing a descent into chaos. The company's proposed approach to this case appears to resemble the process employed by the Commission's counterpart agency in Massachusetts. That reality makes what this utility is proposing here even more unacceptable. Through its affiliates in Massachusetts, the subject utility is the dominant electric utility in Massachusetts, and thus it has deep and longstanding experience with the decisional paradigm it now seeks to impose in New Hampshire. Thus, even if such a proposal were permissible in New Hampshire without, at least, the formality of rulemaking, such a change would confer an unreasonable advantage on the utility. We would oppose the company's proposal vigorously on that basis alone.

The Office of the Consumer Advocate remains sympathetic to the notion that the Puc 200 rules are not adequately calibrated to a paradigm in which the investigative and policy development functions previously handled by the Commission's Staff are now the province of the Department of Energy and its Regulatory Support Division. But we must reiterate here the argument we have now been making for several years, to no avail, that the appropriate method for updating the Commission's procedures is via the rulemaking process enumerated in the Administrative Procedure Act. Rather than allowing agencies to make up procedures (and interpret their enabling statutes) as they go along, the rulemaking process is thorough, publicly consultative, and subject to meaningful oversight by the legislative branch via the Joint Legislative Committee on Administrative Rules established pursuant to RSA 541-A:2. We are eager to work with the Commission, the Department, the state's utilities, elected officials, and other parties with business before the Commission on finishing the job, begun three years ago, of updating utility regulation in New Hampshire to meet the needs of today's utility customers and utility shareholders. But we will resist efforts to effect those changes on an *ad hoc*, unilateral, catch-as-catch-can basis.

Finally we wish to make clear that the above-referenced concerns are offered on a preliminary basis to the extent they are helpful as the Commission considers how to commence this case and how to frame the issues for purposes of convening a prehearing conference. We reserve the right to submit appropriate motions, respond to the motions of others, and pursue appellate remedies, asserting and extending the arguments made in this letter at appropriate junctures in the future.

Sincerely,

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

Donald M. Kreis  
Consumer Advocate

Cc: Service List, via e-mail