STATE OF NEW HAMPSHIRE

CONSUMER ADVOCATE
Donald M. Kreis

TDD Access: Relay NH
1-800-735-2964

Tel. (603) 271-1172

OFFICE OF THE CONSUMER ADVOCATE
21 S. Fruit St., Suite 18
Concord, N.H. 03301-2429

Website:
www.oca.nh.gov

November 2, 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. DW 20-112
Abenaki Water Company
General Rate Case

Dear Chairwoman Martin:

The Office of the Consumer Advocate ("OCA") is in receipt of the order entered by the Commission this morning in the above-referenced docket, cancelling today's scheduled hearing in light of "sudden unforeseen circumstances" and indicating that the hearing will be "rescheduled as soon as possible."

We respectfully request that the Commission not reschedule this hearing, which was not requested by the parties but was recently placed in the procedural schedule unilaterally by the Commission.

In its procedural order of October 13, 2021, the Commission indicated that it was convening an evidentiary hearing on November 2 "to consider evidence related to the Abenaki rate base," noting that "the condition and value of a utility's rate base is the subject of discovery in any rate case." The OCA heartily agrees that the condition of the existing Abenaki plant-in-service is a critical issue in this proceeding. However, nothing in the Administrative Procedure Act ("APA"), RSA 541-A, or in the Commission's enabling statutes, authorizes the Commission to insert evidentiary hearings at its discretion at what the Commission regards as convenient or appropriate junctures well in advance of the case's final hearing and decision.

Both the key provision of the APA, RSA 541-A:31, and the Commission's procedural rules, N.H. Code Admin. Rules Ch. Puc 200, appear to have been written under the assumption that adjudicative proceedings would proceed largely as civil litigation does, with the taking of evidence and thus the development of an official record only at the conclusion of the process. An evidentiary hearing in the middle of a case gives the party with the burden of proof – in this instance unquestionably Abenaki Water Company – multiple bites at the apple. This is unfair to other parties, particularly the OCA.

At the very least, hearings in the middle of administrative proceedings create uphelpful confusion and uncertainty. Does evidence adduced at such hearings automatically become part of the record that will inform the ultimate merits order? Will such hearings limit what can be introduced, or disputed, at the final merits hearing? Are any objections or issues waived if not raised during these mid-proceeding hearings? What, if any, determinations will or should the Commission make at the conclusion of such a hearing? Even if these uncertainties do not lead to unfair or illegal outcomes, there is still the reality that every single aspect of administrative proceedings at the PUC, including the cost of the Commission itself, is ultimately paid for by customers. Formal hearings are expensive and should not be convened for reasons of convenience or curiosity.

Something the APA does contemplate explicitly is the possibility of several "informal prehearing conferences" at suitable junctures to allow the presiding officer "to facilitate proceedings and encourage informal disposition." RSA 541-A:V, (b) and (c). The Puc 200 rules arguably *require* the Commission to convene at least one prehearing conference in every contested case, at least if requested by a party. *See* N.H. Code Admin. Rules Puc 203.15(a) ("the presiding officer shall, upon motion of any party, or upon the presiding officer's own motion, schedule one or more prehearing conferences"). In our view, prehearing conferences at suitable intervals, not limited to the beginning of cases, are the appropriate procedural vehicle through which the Commission can (and arguably should) keep itself informed about the development of proceedings and focus the attention of the parties on matters that are truly in dispute.

The OCA respects and agrees with the Commission's wish to manage its caseload vigilantly and in a manner that allows commissioners to keep informed as dockets progress. But it is important to address these imperatives in a manner that is consistent with applicable law and promotes regulatory certainty. We remain concerned about *ad hoc*, unilateral efforts to reform adjudicative processes at the Public Utilities Commission and believe that a more consultative process, including but not limited to a rulemaking docket that would update the Puc 200 rules, is the better course of action.

For the foregoing reasons, we request that the Commission not reschedule the November 2 hearing, convene an additional prehearing conference to assess the state of all contested issues in the case including the condition of Abenaki's physical plant, and defer the development of a formal evidentiary record to the hearings presently planned for to-be-determined dates after March 29, 2022.

Please feel free to contact me if there are any questions about the foregoing.

Sincerely,

Donald M. Kreis
Consumer Advocate

Cc: Service list, via e-mail