

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 19-057

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY**

MOTION OF THE OCA FOR REHEARING OR RECONSIDERATION

Order Denying Motion for Rehearing or Reconsideration

ORDER NO. 26,392

August 10, 2020

In this order, the Commission denies the Office of the Consumer Advocate's motion for rehearing or reconsideration of a Secretarial Letter dated July 7, 2020. This order also waives New Hampshire Code of Administrative Rules Puc 201.02(a) as it pertains to web-enabled remote hearings to be conducted in this matter.

I. PROCEDURAL HISTORY

On March 22, 2019, Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource or the Company) filed a Notice of Intent to File Rate Schedules. On March 25, the Office of the Consumer Advocate (OCA) filed a letter of participation, notifying the Commission that it would participate in this matter on behalf of residential ratepayers.

On May 28, 2019, Eversource filed a Petition for Permanent Rates, along with supporting testimony and related exhibits and attachments. In that filing, Eversource requested approval of an increase of approximately \$70 million in distribution revenue and a rate plan including four annual step increases based on the prior year's capital investment. The filing included supporting testimony and related exhibits, proposed tariffs, and schedules. On June 7, the Commission suspended Eversource's proposed tariffs, and opened an investigation into the

proposed increase in distribution revenue and distribution rates. *See Public Service Company of New Hampshire d/b/a Eversource Energy*, Order No. 26,256 (June 7, 2019).

On March 13, 2020, as a result of the intervening Novel Coronavirus (Covid-19) pandemic, Governor Sununu issued Executive Order 2020-04 declaring a state of emergency. Ordering clause eight of Executive Order 2020-04 stated “[s]tate and local government bodies are permitted and encouraged to utilize the emergency meetings provision of RSA 91-A to conduct meetings through electronic means while preserving, to the extent feasible, the public’s right to notice of such meetings and ability to observe and listen contemporaneously.”

On March 23, the Governor issued Executive Order #12, pursuant to Executive Order 2020-04, (Executive Order #12) suspending the requirements in RSA 91-A:2, III(c)-(d). Those provisions otherwise require physical presence of a quorum of a public body unless immediate action is imperative, and that each part of the meeting be audible at the location specified in the meeting notice. Pursuant to those orders, the Commission has regularly utilized the WebEx videoconference platform to conduct web-enabled remote meetings and hearings since early April.

On April 24, 2020, the Governor issued Exhibit D to Executive Order #29, pursuant to Executive Order 2020-04 (Executive Order #29, Ex. D), extending the Commission’s authority to suspend rate schedules by six months, from 12 to 18 months. *See RSA 378:6, I(a)*. On June 16, the Commission invoked this authority, suspending Eversource’s rate schedule for an additional 6 months, resulting in a full 18-month period of suspension. *See Public Service Company of New Hampshire d/b/a Eversource Energy*, Order No. 26,363, at 9-10 (June 16, 2020). In that Order, the Commission also directed Commission Staff (Staff) to work with the

parties to develop and propose a procedural and hearing schedule in order to resolve this matter as expeditiously as possible. *Id.* at 10.

On June 19, 2020, Staff submitted a proposed procedural schedule for hearings on the merits. Staff stated that it expected the matter to be fully litigated, and requested 20 days for hearings in August, September, and October. On July 7, the Commission issued a Secretarial Letter (Secretarial Letter) approving Staff's proposed procedural schedule. The Commission scheduled 20 days of hearings beginning on August 19, and ending October 30. The Commission found that the schedule was in the public interest, and stated that the merits hearings would be conducted in accordance with the Commission's remote hearing guidelines for the merits hearings in this docket, which would be issued in due course.

On July 17, 2020, the OCA filed a Motion for Rehearing or Reconsideration (Motion) of the July 7 Secretarial Letter. On the same date, Clean Energy New Hampshire filed a response to the Motion stating that it supported and joined the Motion. No other party filed an objection or response to the Motion.

The Motion and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted on the Commission's website at <https://www.puc.nh.gov/Regulatory/Docketbk/2019/19-057.html>.

II. SUMMARY OF THE OCA'S MOTION

The OCA requested rehearing or reconsideration of the Commission's Secretarial Letter. Motion at 1. The OCA identified inconveniences and delays related to web-enabled remote hearings including technical interruptions, issues relating to audio quality, delays attributable to court reporter interruptions, and participant challenges to mute and unmute. *Id.* at 3-4. The OCA stated that the Secretarial Letter is a "decision" within the meaning of RSA 541:3. *Id.* at 8.

The OCA argued that good reason exists to grant rehearing of the Secretarial Letter. The OCA asserted that rehearing is appropriate because the Commission's decision violates: (1) its own procedural rules; (2) its enabling statutes; and (3) the due process clauses of the New Hampshire and federal constitutions.

Regarding the Commission's procedural rules, the OCA argued that web-enabled remote hearings violate N.H. Admin. R., Puc 201.02(a). *Id.* at 8. The OCA stated that this provision specifies that the Commission "shall conduct all hearings at its offices in Concord." *Id.* The OCA argued that there is a distinction between meetings and hearings, and that Executive Order #12 applies only to meetings. *Id.* The OCA argued that the standard for rules waiver under Puc 201.05 cannot be met in this case because use of the WebEx platform would amount to a significant disruption to the "orderly and efficient resolution" of the case. *Id.* at 9.

Regarding the Commission's enabling statutes, the OCA argued that RSA 378:7 requires that the Commission determine just and reasonable rates after a hearing, and that a WebEx videoconference is not a hearing. *Id.* at 9-10.

Regarding its claim of due process violation, the OCA stated that the "classic formulation" of when and how due process rights apply in an administrative law context requires the consideration of: (1) "the private interests that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Id.* at 11-12 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)) (*Mathews*). The OCA argued that the collective interests of individuals in the cost to obtain electricity, as represented by the OCA, is significant. *Id.*

at 13. The OCA acknowledged that the Commission already offers substitute procedural safeguards such as halting proceedings in response to technological issues and offering limited technical assistance. *Id.*

The OCA requested that the Commission grant rehearing and convene the parties to discuss alternatives to proceeding through web-enabled remote hearings on the WebEx platform. *Id.* at 15-16. The OCA suggested that those alternatives might include in-person hearings at an alternative location that would allow for social distancing, in-person hearings with designated participants participating remotely, in-person hearings with parties having the option to participate remotely, dividing the hearings into discrete segments that are effectively treated as separate proceedings, and/or taking steps to induce meaningful settlement discussions. *Id.* at 16-17.

III. COMMISSION ANALYSIS

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when a party states good reason for such relief. Good reason may be shown by identifying new evidence that could not have been presented in the underlying proceeding, *O'Loughlin v. N.H. Personnel Comm'n*, 117 N.H. 999, 1004 (1977), or by identifying specific matters that were “overlooked or mistakenly conceived” by the Commission, *Dumais v. State*, 118 N.H. 309, 311 (1978). A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *Abenaki Water Company, Inc. – Rosebrook Water System*, Order No. 26,312 at 8 (November 27, 2019). We find that the OCA has not stated good reason to grant rehearing.

As a preliminary matter, the specific determination for which the OCA seeks rehearing is that the merits hearings “will be conducted in accordance with the Commission’s Remote Hearing Guidelines, which will be issued in due course.” Motion at 2 *quoting* Secretarial Letter

at 1. We have not yet issued a secretarial letter containing remote hearing guidelines for the merits hearings in this proceeding; consequently, the OCA's motion for rehearing is premature, and we deny the motion on that basis. For the sake of administrative efficiency, we nonetheless address the substantive arguments in the OCA's motion, and deny rehearing on those substantive arguments as well.

Pursuant to the terms of Executive Order #29, Ex. D, this matter must be resolved as expeditiously as possible, and no later than 18 months from the date that the tariff was originally proposed to go into effect. Delaying the start of hearings in this matter any further is not feasible.

The COVID-19 public health emergency has made holding in-person hearings at the Commission's Offices in Hearing Room A, especially hearings with multiple parties, physically impossible. The OCA presented no information to indicate this situation is likely to change before the deadline to resolve this matter passes. The Commission's Executive Director sought and was unable to locate alternate privately-owned or State-owned properties to host 20 days of in-person hearings in a socially distanced manner. Web-enabled remote hearings, despite the novel challenges they present, provide the most expeditious and safe way for the Commission to hear and resolve this matter under the applicable deadlines.

Relating to the applicability of Puc 201.02(a), we exercise our authority under Puc 201.05 to waive Puc 201.02(a) to accommodate web-enabled remote hearings. In light of the COVID-19 public health emergency, and the Governor's emergency orders identified above, we find that conducting web-enabled remote hearings protects the health of the public, the parties and witnesses, and the individuals who work for the Commission. In addition, web-enabled remote hearings expand public access to observe and listen to Commission proceedings and

prevent witnesses and party representatives from unnecessarily crossing municipal, county, and state boundaries to attend hearings, decreasing risk of transmission of COVID-19. As such, we find that conducting web-enabled hearings meets the public interest standard and promotes rather than disrupts the orderly and efficient resolution of this matter.

Next, the OCA's statutory arguments do not state good cause for rehearing. Even if the Administrative Procedures Act were the only applicable statute, that statute does not require a particular location or physical presence for hearings. *See, RSA 541-A et seq.* Although RSA 363:15 requires the Commission be provided "with a suitable room in which it *may* hold hearings" (emphasis added), a plain reading of this statute creates a permissive option for the Commission, not a requirement of a physical presence within a particular room. The State of New Hampshire has provided the Commission with the Webex platform to host meetings and hearings during this public health emergency, as such it is analogous to a State provided room suitable to hold hearings.

Lastly, we turn to the OCA's due process arguments. *Mathews* identifies appropriate factors to consider in evaluating due process within an administrative forum under normal circumstances. Regarding the second factor, we note that the OCA made no claim that web-enabled remote hearings deprive it of notice or the ability to present its case. The OCA's alleged due process violations boil down to the argument that technological limitations, difficulties, and delays may make participation more challenging. We do not agree that the inconveniences identified by the OCA, which will be experienced by all parties, amount to a due process violation. We also question whether the *Mathews* factors are the proper standard to evaluate a process that is tailored to executive orders issued in response to a public health emergency. We note that New Hampshire trial courts, which also use WebEx for web-enabled

remote hearings, have applied a more deferential standard to review constitutional claims against the State during this public health crisis. In *Cooper v. Sununu*, the Court considered plaintiff's constitutional challenges to an emergency mask ordinance, including a due process challenge, under a more deferential standard of review established under *Jacobson*.¹ *Cooper v. Sununu*, Hillsborough Cty. Super. Ct., Southern Dist., 226-2020-CV-00266, at 7-11 (July 13, 2020). In *Binford, et. al. v. Sununu*, the Court applied a more deferential two-prong test from *Avino*² to determine whether executive orders suspending civil liberties pass constitutional muster during a state of emergency. *Binford, et. al. v. Sununu*, Merrimack Cty. Super. Ct., 217-2020-CV-00152, at 11-12 (June 18, 2020). We are not persuaded that the OCA made a substantial showing of a due process violation under the *Mathews* factors, let alone under the standards that take into consideration the public health emergency that is the proximate cause of the challenged procedures. As such, we find that the OCA's due process arguments do not state good cause to grant reconsideration or rehearing.

As the OCA acknowledged, we proactively provide procedural safeguards during web-enabled remote hearings. Past practices of stopping proceedings when parties or members of the public cannot participate or observe, as well as utilizing a web moderator to aid in technical matters, will continue to be implemented throughout the hearings in this matter. Additional safeguards and processes will be outlined in a forthcoming Secretarial Letter.

The Commission also plans to facilitate a technology day event on WebEx to allow all parties, witnesses, and members the public who will attend the hearings to learn more about the web-enabled remote hearing platform, and to have their technical questions answered by the appropriate Commission and State staff. This event shall take place on August 12, 2020,

¹ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)

² *Smith v. Avino*, 91 F.3d 105 (11th Cir 1996)

beginning at 10:00 a.m., and be available for not less than one hour. Parties will be provided with a link to this event. All parties and participants are encouraged to participate.

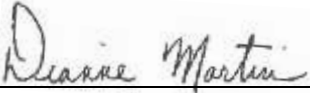
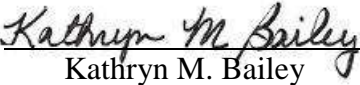

Based upon the foregoing, it is hereby

ORDERED, that the Motion for Rehearing or Reconsideration of the Office of the Consumer Advocate is hereby DENIED; and it is

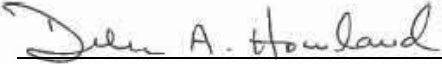
FURTHER ORDERED, that N.H. Admin. R., Puc 201.02(a) is WAIVED as necessary to accommodate web-enabled remote hearings in this matter; and it is

FURTHER ORDERED, that Commission Staff shall facilitate a technology day event on August 12, 2020, at 10:00 a.m. as described in the body of this order.

By order of the Public Utilities Commission of New Hampshire this tenth day of August, 2020.

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|  _____ Dianne Martin Chairwoman |  _____ Kathryn M. Bailey Commissioner |  _____ Michael S. Giaimo Commissioner |
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Attested by:



Debra A. Howland
Executive Director

Service List - Docket Related

Docket#: 19-057

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