

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

Distribution Service Rate Case

Docket No. DE 19-057

Motion for Rehearing or Reconsideration of the Office of the Consumer Advocate

NOW COMES the Office of the Consumer Advocate (“OCA”), a party in this docket, and moves pursuant to RSA 541:3 for rehearing or reconsideration of certain determinations made by the Commission in its secretarial letter of July 7, 2020. In support of this Motion the OCA states as follows:

I. Introduction

Public Service Company of New Hampshire (“PSNH”) filed new permanent rate schedules in this docket on May 28, 2019 and, thus, in ordinary times the Commission would have been required pursuant to RSA 378:6, I(a) to rule on the Company’s proposed new rates by May 28, 2020. However, in light of the COVID-19 pandemic and the resulting state of emergency declared by Governor Sununu, *see* Executive Order 2020-04 (March 13, 2020),¹ on April 9, 2020 the Governor used his

¹ Available at <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-04.pdf>.

emergency powers to extend this statutory deadline to November 28, 2020. *See* Emergency Order #29 (April 9, 2020)² and Exhibit D thereto.³

On June 16, 2020, the Commission issued Order No. 26,363 in this docket, directing PSNH to update its prefiled rate-of-return and capital structure testimony in light of pandemic-related changes in economic conditions. *See* Order No. 26,363 at 9 (setting a 30-day deadline for this filing). The Commission invited (but did not require) other parties to update their prefiled testimony on these subjects contemporaneous with the PSNH submission, and provided for a limited period of written discovery thereafter. *Id.* The discovery period closes in mid-August.

By secretarial letter issued on July 7, 2020, the Commission scheduled 20 days of hearings, commencing on August 19, 2020 and running intermittently through October 30, 2020. The secretarial letter concluded with a determination that this merits hearing “will be conducted in accordance with the Commission’s Remote Hearing Guidelines, which will be issued in due course.” It is this latter determination to which the OCA objects, and of which the OCA seeks rehearing or reconsideration.

² Available at <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/emergency-order-29.pdf>.

³ Available at <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/emergency-order-29-d.pdf>.

II. Remote Hearings at the Commission

The Commission closed its offices (including its hearing rooms) to the public in mid-March and directed most of its employees to work remotely. At the same time, the Commission transitioned all of its scheduled public events, including any hearings in both contested and non-contested matters, to the WebEx online videoconferencing platform.⁴ The OCA, which appears in the majority of the Commission's proceedings on behalf of residential ratepayers, has participated in most of these hearings and technical sessions. The OCA has also participated in numerous settlement meetings and informal gatherings, convened either by the Commission Staff or by the OCA itself (which is also WebEx-enabled).

It is obvious that the Commission, working with the vendor that is responsible for WebEx, has labored mightily and heroically to transition hearings and other events to the online video platform. The Commission has adopted a routine practice of requiring parties to inform the agency in writing, two business days before each online hearing, of which witnesses will be testifying and which if any confidential materials will be discussed at the hearing. The Commission also requires the parties to create a pre-filed, sequentially paginated edition of all exhibits to be introduced into evidence, for ease of electronic reference during the

⁴ Ordinarily, of course, this would be illegal under the open meetings provisions the Right-to-Know Law, RSA 91-A, when the three commissioners are present. This is because the commissioners collectively comprise a "public body" within the meaning of RSA 91-A. *See* RSA 91-A:1-a, VI (defining "public body") and :2, III(b) (authorizing members of public bodies to participate in public meetings remotely but requiring a quorum of the public body to be present at a specified physical location, except in emergencies). The Governor has determined that the COVID-19 pandemic comprises such an emergency. *See* Emergency Order No. 12 and Executive Order 2020-04, available at <https://www.governor.nh.gov/news-and-media/emergency-orders-2020>.

hearing. The Commission relies on a staff attorney with expertise in WebEx to serve as its hearing platform moderator; his role is analogous to that of a stage manager in a theatrical production.

In the experience of the OCA, these arrangements have worked reasonably well in non-contested evidentiary hearings, *see, e.g.*, Transcript of June 9, 2020 hearing (Tab 77) in Docket No. DE 19-064 (proposed settlement agreement in Granite State Electric Co. rate case), and tolerably well in contested hearings with few participants, witnesses, and disputed issues, *see e.g.*, Transcript of April 23, 2020 hearing (Tab 132) in Docket No. DW 17-165 (water utility rate case expenses involving five parties and a panel of three witnesses). But a review of these transcripts, and others like them, confirms that these WebEx hearings are hardly business as usual for Commission proceedings. There are numerous interruptions for technical reasons, inasmuch as Chairwoman Martin has adopted the practice of pausing the hearing whenever it appears there may be connectivity problems involving any of the Commissioners, participating attorneys, and witnesses (at least while testifying). Such interruptions, combined with other minor glitches (such as the court reporter having difficulty understanding what was said, or a participant attempting to speak while her audio is muted) typically mean a contested hearing takes at least twice as long as it would have taken if held in Hearing Room A at the Commission's offices.

Indeed, for such hearings to proceed in this somewhat flawed manner requires help and forbearance from the participants. For example, the presiding

officer does not always notice when a key participant has disappeared. In that situation, or when connectivity issues arise generally, the ‘vanished’ party typically must take to her telephone to seek help via text or phone call. Ironically, the connectivity problems seem particularly acute when one or more participants (typically, one or more commissioners or the consumer advocate) is accessing the hearing while physically present at the state office building that houses the Commission and the OCA.

These observations about how WebEx hearings have worked at the Commission since mid-March are not intended as an exhaustive list of the issues that has arisen; the transcripts speak for themselves and, of course, the commissioners themselves are the biggest experts on these problems having presided at every single one of these online events. More importantly, as suggested *supra*, these observations are not intended as a criticism of the Commission; to the contrary, the OCA is grateful to the Commission for its flexibility, its adaptability, and the can-do spirit it has clearly engendered in challenging times.

III. The Unique Challenge of this Proceeding

Rather, it is the respectful contention of the Office of the Consumer Advocate that the WebEx platform and the limitations it imposes would create an unworkable situation for a set of hearings as long and complex as those that have been scheduled, and are required, in the instant case. The docket entries for prefiled written testimony suggest that more than 30 witnesses will be testifying.

In addition to the usual participants in rate cases (the utility, the OCA, and the Commission Staff), intervenors (in order of appearance) consist of Clean Energy New Hampshire, The Way Home, Acadia Center, Walmart, the Department of Environmental Services, AARP New Hampshire, and ChargePoint. Including Staff, that is ten parties overall.

As the Commission is well aware, any individual participant's ability to connect successfully to the platform with full video and audio is inversely proportional to the number of participants. Three commissioners, one court reporter, one clerk, one web moderator, and one representative of each party would already comprise 16 participants without accounting for the fact that some parties (e.g., Staff, OCA, PSNH) have more than one attorney, or the fact that others (witnesses, potential witnesses, non-testifying employees and consultants, to say nothing of the public) will want and need to access the hearings. There is the very real risk that the platform will become overwhelmed at various times, and when this happens there will be no advance notice.

Even when WebEx is functioning as intended, it is ill-suited to large gatherings with many active participants. In these situations, the platform is unable to display the video image of all participants on the same screen; one must toggle to separate screens in order to see everyone who is participating. This may account for why one of the Commission's staff attorneys complained recently (near the conclusion of the Commission's July 14, 2020 hearing in Docket No. IR 20-089) that he had lost access for approximately 15 minutes without anyone noticing.

The record in this proceeding will include thousands of pages of documents. In an ordinary rate case heard in Hearing Room A, each party would arrive with boxes and boxes of pleadings, exhibits, and potential exhibits. Even for those tech-savvy participants inclined to access documents electronically, there would be hard-copy backup right handy. In a WebEx hearing, particularly given the Commission's (reasonable) insistence on sequentially paginated exhibits, the ability of any individual participant to keep up (in terms of accessing whatever page from whatever document might be under discussion at any given time, to say nothing of numerous related documents to which one might need to refer simultaneously) will be compromised to the breaking point. Finally, in a large and complex case it is often necessary for participants to confer with each other. Attorneys must confer with clients or employees and agents of clients, particularly witnesses, both during the hearing and when there is a break. Parties must confer with each other from time to time. No videoconferencing platform can replicate the ability to hold such conversations in or adjacent to a hearing room. WebEx seems particularly ill-suited to this challenge, inasmuch as the Commission's moderator routinely admonishes parties that they cannot rely on the platform's 'chat' function for confidential communications.

In isolation, and/or at a smaller scale, these difficulties are usually surmountable. In a large, complex, high-stakes proceeding such as this rate case, the risk is unacceptably great that unwelcome situations will arise that would be

outcome-determinative and likely to undermine both public and participant confidence in the process.

IV. Rehearing Standard

RSA 541:3 provides that within 30 days of “any order or decision” of the Commission, a party to the proceeding or “any person directly affected” by the decision may seek rehearing. The Commission’s secretarial letter of July 7 is a decision within the meaning of RSA 541:3. Therefore, the Commission may, pursuant to the statute, grant a rehearing request upon a showing of “good reason” by the movant. For the reasons that follow, there is an ample degree of good reason for rehearing.

V. Violation of Procedural Rules

The applicable provision of the Commission’s procedural rules, N.H. Code Admin. Rules Puc 201.02(a), specifies that the Commission “shall conduct all hearings at its offices in Concord.” Administrative agencies enjoy considerable discretion, but one thing they cannot do is ignore their own rules. *Appeal of Collins*, 171 N.H. 316, 319 (2018).

Although the Governor, via Emergency Order No. 12, waived the requirement in RSA 91-A:2, III(b) for in-person *meetings* of public bodies, his emergency order did not reference *hearings*. Assuming, *arguendo*, that the Governor’s emergency powers under RSA 4:45 would allow him to abrogate Rule Puc 201.02(a), a point the

OCA does not concede, neither Emergency Order No. 12 nor any other determination made by the Governor in connection with the pandemic authorizes the Commission to ignore its procedural rules.

There is, of course, a provision in the Commission’s rules that allows for rules waivers in appropriate circumstances, Puc 201.05. The Commission has not invoked this waiver provision. Even if it did, the standard for rules waiver cannot be met here. Puc 201.05 authorizes a rules waiver only when the waiver “serves the public interest” and “will not disrupt the orderly and efficient resolution of matters before the commission.” In this instance, migrating the merits hearing in a complex rate case to the WebEx platform would amount to a significant disruption to the “orderly and efficient resolution” of the case.⁵

VI. Violation of Enabling Statutes

This rate case is an exercise of the Commission’s authority to determine “just and reasonable rates” pursuant to RSA 378:7. This statute explicitly provides that the Commission may only determine just and reasonable rates “after a *hearing* had upon its own motion or upon complaint” (emphasis added). A WebEx videoconference is not a “hearing” within the meaning of RSA 378:7.

RSA 378:7 was initially adopted in 1913 and was recodified in 1951. There was no such thing as a videoconference in 1913 or 1951 and, therefore, the General

⁵ The OCA takes no position on the question of whether waiving Puc 201.02(a), by conducting hearings via WebEx, would disrupt the orderly and efficient resolution of other proceedings at the Commission. Our argument here is based solely on the complexity and challenges of this particular rate case.

Court could not have had such a technological phenomenon in mind when it used the word “hearing.” Indeed, a separate section of the Commission’s enabling statute with a similar provenance, RSA 363:15 (originally enacted in 1911), requires a “suitable *room* in which [the Commission] may hold hearings” (emphasis added). There could not be a more plain and direct statement of an expectation by the General Court that Commission hearings would always take place in a room.⁶

Just days ago, the New Hampshire Supreme Court reiterated its longstanding guidance to “ascribe the plain and ordinary meaning to the words used” in a statute. *Monadnock Regional Sch. Dist. v. Monadnock Dist. Education Assn.*, 2020 WL 3815884 (N.H. Supreme Ct., July 8, 2020) at *3 (citation omitted). A “room,” particularly as that word would have been understood in 1911, is a physical place inside a building. Because RSA 363:13 (requiring the Commission to have a “room” for its hearings) and RSA 378:7 (requiring the Commission to conduct a “hearing” before determining just and reasonable rates) are part of a common statutory scheme (i.e., the Commission’s basic enabling statutes), they must be construed together so as to harmonize with each other. *See, e.g., In re Pennichuck Water Works, Inc.*, 160 N.H. 18, 27 (2010) (“We interpret statutes not in isolation, but in the context of the overall statutory scheme”) (citations omitted). Thus, the General Court has required the Commission to resolve rate cases by convening a

⁶ The Commission can and should take administrative notice of the commonly accepted facts relating to the history of the telephone in the United States. The technology was well-established by 1911. Therefore, when the General Court specified that Commission hearings would take place in a room, it could have but did not authorize remote hearings via telephone.

hearing in an actual room, not in the boundless and unpredictable realm of cyberspace.⁷

VII. Violation of Due Process

The protections of the due process clauses of the New Hampshire and federal constitutions apply to proceedings at the Commission. *See, e.g., Appeal of Concord Steam Corp.*, 130 N.H. 422, 428 (1988) (requiring “meticulous compliance” with due process requirements by the Commission when the agency acts in adjudicative capacity) (quoting *Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1073 (1982)).⁸

⁷ The OCA takes no position on the question of whether this statutory provision would allow the Commission to rely on WebEx, or another videoconferencing platform, in a different rate case, particularly one in which all parties agreed to such arrangements.

⁸ Although the New Hampshire Supreme Court ruled in *Appeal of the Office of the Consumer Advocate*, 148 N.H. 134 (2002), that residential utility customers do not have a vested property interest sufficient to trigger due process protections in certain RSA 378 proceedings, *see id.* at 139, this case is distinguishable from the 2002 determination. In the 2002 case, the OCA argued unsuccessfully that residential customers had a vested property interest in the outcome of a special contract proceeding.

Special contracts – i.e., deviations from a utility’s Commission-approved rates and terms of service of general application – are permissible when “special circumstances” render such a departure “consistent with the public interest.” RSA 378:18. The situation in *Appeal of OCA* was the classic, pre-restructuring special contract scenario in which a vertically integrated electric utility agreed to discount its regular rates in an effort to increase load and thus promote economic development while spreading fixed costs over a wider customer base. *See Appeal of OCA*, 148 N.H. at 135 (summarizing underlying facts). In concluding that no vested property interest of other ratepayers was at issue for due process purposes, the Court cited a 1936 *Lochner*-era decision of the U.S. Supreme Court, three subsequent decisions of federal district courts, a 1998 decision of the Kentucky Supreme Court (involving the inclusion of scrubber costs for coal plants in electric rates), and a 1990 decision of an intermediate appellate court in Pennsylvania, all for the general proposition established in those jurisdictions that “utility customers do not have a vested property interest in the setting of utility rates sufficient to invoke the procedural protections of the Fourteenth Amendment.” *Id.* at 139. Notably, however, the New Hampshire Supreme Court stopped short of adopting such a blanket holding itself. Thus, *Appeal of OCA* should be read for the much narrower proposition that when a utility submits a special contract with a customer for Commission approval, the members of the remaining customer base have no vested property interest in the outcome. It is the emphatic

The classic formulation as to when and how due process rights apply in the administrative context is as stated by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). The New Hampshire Supreme Court has routinely relied on the principles articulated in *Mathews*, both as to federal and state constitutional due process claims. *See, e.g., State v. Korean Methodist Church of N.H.*, 157 N.H. 254, 258 (2008); *Petition of Kilton*, 156 N.H. 632, 637 (2007); *Auger v. Town of Strafford*, 156 N.H. 64, 68 (2007); *In re Reiner's Case*, 152 N.H. 163, 167-68 (2005).

Mathews requires the tribunal to consider three things: (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.” *Mathews*, 424 U.S. 334-35.

To the best of our knowledge, there is yet no caselaw in any jurisdiction to provide guidance with respect to how the *Mathews* factors apply to a situation in which the pandemic leads an administrative agency to suspend in-person hearings and resort to videoconferencing. While a rate case may not, at first glance, seem as consequential as, for example, a proceeding to terminate parental rights or to disbar

position of the OCA here that *both* customers *and* utility shareholders have a vested property interest, sufficient to trigger due process protections, in a case where a utility’s rates of general applicability are at issue.

an attorney, the Commission should be cautious about comparing an individual's private interests of the gravest sort to *every* individual's collective interest in what it costs to obtain as vital a service as electricity. That collective interest, as represented here by the OCA as well as AARP New Hampshire and other intervenors, is significant indeed.⁹ With respect to the second *Mathews* factor, it is self-evident that the risk of erroneous deprivation of a cognizable property interest is huge in circumstances where technological limitations (e.g., a balky broadband network to which an attorney is connected while participating at home, a suddenly uncooperative laptop computer issued to a member of the OCA staff by the Department of Information Technology with inadequate real-time technical support, difficulties in being recognized because the WebEx platform "unmute" button is not cooperating, delays in audio or video for some but not all participants, and any number of other problems already experienced or yet to be experienced) interfere with a party's participation. While the Commission is to be commended for already doing its best to offer "substitute procedural safeguards" (e.g., noticing when a party is in technological distress and halting the proceedings, offering technical assistance via the moderator), that assistance can only go so far. But, as to the last *Mathews* factor, the fiscal and administrative burdens of other approaches are minimal in circumstances where the utility (and, indirectly, ratepayers) ultimately bear the costs associated with rate cases.

⁹ In that regard, the OCA requests that the Commission take administrative notice here, pursuant to Rule Puc 203.27(a)(2), of the information recently adduced in Docket No. IR 20-089 concerning difficulties experienced by ratepayers, particularly residential customers, in paying their electric bills in light of the economic cataclysm induced by the pandemic.

Last month, the Administrative Conference of the United States (ACUS)¹⁰ published a Staff Report entitled “Legal Considerations for Remote Hearings in Agency Adjudications” in an effort to assist agencies striving to continue their work in the face of the pandemic.¹¹ Although the ACUS Staff Report focuses on federal law and federal agencies, the analysis is directly applicable here (particularly given that the due process protections of the New Hampshire and federal constitutions are coextensive). According to the ACUS Staff Report, “[a] growing body of anecdotal and empirical research suggests that private parties in some mass adjudication programs may be more likely to prevail when they participate in person rather than by VTC [i.e., video conferencing].” ACUS Staff Report at 12 and n. 58 (citations omitted). The ACUS provided a list of “several possible explanations” that have been advanced by critics of video conferencing:

- technical issues affecting a party’s opportunity to be heard in a meaningful manner are more likely to arise when a party participates through the hardware and software systems required by VTC;
- adjudicators may have greater difficulty assessing the credibility, trustworthiness, demeanor, presentation, or symptomology of parties who participate by VTC due to a video screen’s constraints on an adjudicator’s field of vision, diminished eye contact, or difficulty interpreting nonverbal cues such as body language, facial expressions, and tone of voiceover video;
- parties may feel greater discomfort interacting or communicating with other participants by VTC;

¹⁰ According to its web site, the ACUS is “an independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure.” See <https://www.acus.gov/administrative-conference-united-states-acus>.

¹¹ The ACUS Staff Report is available at https://www.acus.gov/sites/default/files/documents/Legal%20Considerations%20for%20Remote%20Hearings%20in%20Agency%20Adjudications_1.pdf.

- parties and adjudicators may become distracted when they communicate using VTC;
- VTC participation may not foster the same degree of interpersonal rapport or emotional connection among hearing participants;
- non-local adjudicators, who frequently conduct hearings in which a party participates by VTC, may have less familiarity with regional conditions than local adjudicators who frequently preside over in-person hearings; [and]
- members of the public or press may be less likely to attend or face greater difficulty attending hearings conducted using VTC.

Id. at 13 (citations omitted). While the referenced issues related to symptomatology and non-local adjudicators are not germane here, the remaining list of potential procedural pitfalls arising out of reliance on WebEx should give the Commission pause. One element not mentioned by the ACUS Staff Report, but familiar to any participant in proceedings involving Public Service Company of New Hampshire, is the ability of the state's largest utility to tilt the playing field in its favor by devoting more resources (including more personnel) to Commission proceedings than any other party is able to marshal. There is a point at which such disparities become constitutionally significant. We may be about to reach it.

VII. Relief Requested

Although the OCA cannot rule out the pursuit of an interlocutory appeal in the event the Commission declines to grant rehearing, it is more likely that any judicial consideration of the issues raised in this motion would only be heard after the Commission has conducted the hearings and issued an order on the merits. *See*

id. at 14 (noting that “[t]o succeed on a due-process claim, courts have typically required parties to demonstrate that their participation by VTC actually resulted in substantial prejudice”) (citations omitted). That is cold comfort indeed, given the undesirability of litigating this huge rate case on a fully contested basis to its conclusion only to have the result potentially upended as the result of procedural infirmities.

In these circumstances, the Commission should grant rehearing and convene the parties forthwith. *See* RSA 541-A:31, V(b) (authorizing “one or more informal prehearing conferences” to address “matters which aid in the disposition of the proceeding”).¹² At that time, the parties could discuss with the Commissioners the alternatives the agency might pursue to its current plan to rely on WebEx. Those alternatives might include some combination of (1) in-person hearings at a temporary location that would allow for appropriate social distancing, (2) in-person hearings in which only a very limited number of people (i.e., commissioners, attorneys, witnesses while actually testifying) are in the hearing room at any one time with everyone else participating remotely, (3) in-person hearings in which any party (or representative of a party) has the option of participating remotely, to protect themselves from exposure to infection or for any other reason, (4) dividing the hearings into discrete segments that are effectively treated as separate proceedings, *see* RSA 363:33, and (5) undertaking an aggressive effort by the Commission to head off this crisis by inducing the parties to hold meaningful

¹² The OCA has no objection to such a prehearing conference being convened via WebEx and/or telephone.

settlement discussions, perhaps by designating a hearings examiner as the equivalent of a settlement judge, as is clearly contemplated by RSA 363:32, II (referencing designations that “may increase the likelihood of a stipulated agreement by the parties”). Such a designation would, of course, create an *ex parte* wall between the hearings examiner and the Commissioners with respect to this proceeding, *see* RSA 363:34, as is appropriate.

VIII. Conclusion

Via the instant motion, it is not the purpose of the Office of the Consumer Advocate to impede the progress of this rate case to its conclusion in spite of the pandemic or to criticize any efforts that have been undertaken by the Commission and others to date to prevent the pandemic from grinding utility regulation to a halt in New Hampshire. Rather, the OCA is simply concerned, deeply so, about the practical implications of relying on WebEx to hear what is, by far, the largest and most important proceeding currently on the agency’s active docket. For the reasons stated above, we contend that these practical implications raise issues under the Commission’s rules, its enabling statutes, and its constitutional obligations. We are eager to work in good faith with the Commission, and the other parties, to address this challenge in a manner that safeguards the rights, the interests, and the health of all concerned.

WHEREFORE, the OCA respectfully request that this honorable Commission:

- A. Grant rehearing pursuant to RSA 541:3 of the key determination in the Commission's July 7, 2020 secretarial letter,
- B. Schedule and convene a prehearing conference in this proceeding on an expedited basis pursuant to RSA 541-A:31, V(c), and
- C. Grant any other such relief as it deems appropriate.

Sincerely,



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July 17, 2020

Certificate of Service

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



D. Maurice Kreis