CONSUMER ADVOCATE
D. Maurice Kreis

ASSISTANT CONSUMER ADVOCATE
Pradip K. Chattopadhyay

STATE OF NEW HAMPSHIRE

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

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

Tel. (603) 271-1172

Website:
www.oca.nh.gov

December 4, 2020

Ms. Debra A. Howland
Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301

Re: Docket No. DE IR 20-089
Investigation into Effects of the COVID-19 Emergency on Utilities and Utility Customers

Dear Ms. Howland:

The Office of the Consumer Advocate (OCA) submits the following comments on behalf of the state's residential utility customers in response to the November 13, 2020 recommendations of Commission Staff in the above-referenced proceeding. Staff recommended that the Commission authorize electric, gas, water, and wastewater utilities "to create a regulatory asset for incremental bad debt, with conditions, and *not* authorize a regulatory asset for waived fees" (emphasis in original). "Incremental bad debt" refers to bad debt caused by the COVID-19 pandemic. Likewise, "waived fees" refers to late payment charges authorized pursuant to the utilities' tariffs, which Governor Sununu suspended via an emergency order issued on March 13, 2020. The Commission's secretarial letter of November 24, 2020 authorized responsive comments if filed by December 4, 2020.

On behalf of residential utility customers, the OCA concurs with Staff's recommendation that the Commission not authorize the creation of a regulatory asset for waived fees. However, the OCA does not believe it would be appropriate for the Commission to authorize the creation of regulatory assets for incremental bad debt at this time.

According to the Regulatory Assistance Project, a "regulatory asset" is "[a] utility investment that is allowed in rate base, but for a non-physical item determined by the regulator to be appropriate for recovery from consumers."[1] The Harvard Electricity Policy Group defines "regulatory asset" as "[a]n intangible (deferred debt cost, accelerated depreciation, etc.) that appears on a regulated utility's balance sheet and that can be recovered from ratepayers under regulation."[2] Staff has offered a more vague definition of "regulatory assets and liabilities,"

[1] Jim Lazar et alii, *Electricity Regulation in the U.S.: A Guide* (Regulatory Assistant Project, 2011) at 116
.

[2] Regulatory Asset | Harvard Electricity Policy Group.

describing them as assets and liabilities that "arise from specific revenues, expenses, gains, or losses that would have been included in net income determination in one period under the general requirements of the Uniform System of Accounts but for it being probable that . . . such items will be included in a different period(s) for purposes of developing the rates the utility is authorized to charge for its utility services; or . . . in the case of regulatory liabilities, refunds to customers, not provided for in other accounts, will be required."[3]

Regardless of which of these definitions apply, it would not be appropriate for the Commission to determine, at this time and in this particular non-adjudicative (i.e., investigative) proceeding, that what Staff describes as "bad debt expense related to COVID" should automatically be deferred for future recovery and accounted for on that basis. According to Staff's analysis, "[t]o date, utilities have not seen an increase in bad debt expense due to the pandemic and may actually experience a short-term *decrease* as a result of Emergency Order 3 and the Agreement."[4] Staff concludes that incremental bad debt expense related to COVID "qualifies as an extraordinary expense in that it is infrequent, unusual and *potentially* material in size.[5] Thus, according to Staff, the incremental bad debt "*may* create a substantial financial burden on the Utilities that warrants extraordinary relief."[6]

In other words, as of last month Staff saw no evidence of any incremental bad debt attributable to the pandemic and considers any such incremental bad debt in the future to be hypothetical rather than inevitable. In these circumstances, there is absolutely no basis for the Commission, as the statutory arbiter between the interests of utility shareholders and utility ratepayers pursuant to RSA 363:17-a, to *guarantee* that all customers will hold shareholders harmless for some customers' inability to pay bills because of the pandemic-induced devastation.

Staff conditions its recommendation with a proviso that the proposed regulatory asset "should be subject to a prudence review when the utility requests recovery in rates."[7] This is insufficient from a ratepayer perspective. Prudence disallowances are so rare as to approach the vanishing point in New Hampshire and even a strict application of a prudence standard would, without more, fail to take into account all of the factors that inform decisions on just and reasonable rates under RSA 378. It is not surprising that utilities would seek plenary indemnification on behalf of their shareholders for the effects of the pandemic but that is exactly what New Hampshire law does not permit. *See Appeal of Public Service Company of New Hampshire*, 130 N.H. 748, 755

---

[3] Staff Memorandum of August 18, 2020 (Tab 45) at 6 and n.1, citing "FERC USofA Definition 31." This is apparently a reference to the definition of "regulatory assets and liabilities" in the FERC Uniform System of Accounts, codified at 18 CFR Part 101.

[4] Staff Memorandum of November 13, 2020 (Tab 80) at 4, referring to Governor Sununu's Emergency Order of March 13, 2020 and the Agreement filed in this docket (Tab 57) on September 10, 2020. The Agreement was entered into among 16 public utilities, the OCA, New Hampshire Legal Assistance, LISTEN, and the Staff of the Commission.

[5] *Id*. (emphasis added).

[6] *Id*. (emphasis added).

[7] *Id*.

(1988) (Souter, J.) (holding that shareholders are entitled to a "reasonable rate of return" but not "plenary indemnification").[8]

On behalf of residential ratepayers, the OCA does not contend there can never be circumstances in which a New Hampshire utility could recover from all customers the cost of incremental, COVID-related bad debt. Rather, the OCA's position is simply that such a determination is premature as the pandemic still rages around us. The question is best addressed in the context of each utility's next rate case, when any such costs can be appropriately considered in the context of the company's full revenue requirement in light of its overall rate of return. At the very least, any such determinations should take place after public notice and opportunity to be heard.

Finally, the OCA respectfully requests that the Commission clarify a statement in the November 13 Staff Memorandum. In that document, at page 3, Staff states that its updated review "takes into account the Agreement between the Utilities and the Consumer Services and External Affairs Division, governing utility late payment charges." The Agreement to which Staff refers is attached to the memorandum and was actually entered into among 16 utilities, the Staff of the Commission, as well as the OCA, New Hampshire Legal Assistance and LISTEN Community Services (a nonprofit provider of community services based in Lebanon). The distinction is important because, as the OCA has emphatically argued previously, New Hampshire law does not allow utilities to obtain binding regulatory determinations by negotiating agreements with individual divisions of the Public Utilities Commission. The Commission's secretarial letter of October 5, 2020 approved the agreement as consistent with the Governor's Emergency Order #58. It is not necessary for the Commission to reexamine the question of what legal authority underlies the agency's approval of the referenced agreement; our request is simply for clarity – to avoid setting unhelpful precedents – about the parties to the agreement.

Thank you for the opportunity to comment about Staff's recommendation. Please feel free to contact me if there are any questions or concerns about the foregoing. Consistent with the Commission's emergency directive, we are filing this letter in electronic form only.

Sincerely,

D. Maurice Kreis
Consumer Advocate

Cc: Service List, via e-mail

[8] In the case of the New Hampshire Electric Cooperative (NHEC), the shareholders and the customers are identical. Thus, the OCA agrees with the contention in the December 4, 2020 pleading of the NHEC that the accounting treatment and rate recovery of COVID-related incremental bad debt for that utility should be left to the member-elected Board of the NHEC.