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October 22, 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 20-092
Electric and Natural Gas Utilities
2021-2023 Energy Efficiency Plan

Dear Ms. Howland:

This letter follows up on the pleading filed by the Office of the Consumer Advocate (OCA) on October 16, 2020, seeking rehearing of Order No. 26,415 issued in the above-referenced docket on October 8, 2020. In Order No. 26,415, the Commission denied an OCA motion for RSA 363:32 designation of Staff advocates on the ground that the instant proceeding is an exercise of the Commission's "quasi-legislative authority pursuant to the general court's delegation, rather than its adjudicative authority." Order No. 26,415 at 7.

Pursuant to RSA 91-A:2, the OCA requests the opportunity for the public (including representatives of our office) to attend any Commission deliberations related to this docket, whether before, during, or after the merits hearing that is presently scheduled to take place in December. Although the Commission's deliberative processes are exempt from the open-meeting provisions of RSA 91-A pursuant to RSA 363:17-c, this exemption applies only to adjudicative proceedings.

RSA 91-A:2, I(b) allows the Commission (and other public bodies) to engage in "[c]onsultation with legal counsel" privately by excluding such consultations from the definition of "meeting" in the open meetings statute. The OCA is aware that, prior to adoption of the RSA 363:17-c deliberative exemption in 2007, the "consultation with legal counsel" exclusion was frequently used as the basis for allowing the Commission to conduct private deliberations.

The Department of Justice has put public bodies on notice that they may not abuse the "consultation with counsel" provision of RSA 91-A:2, I(b) in such fashion. According to the most recent edition of

the Attorney General's Memorandum on New Hampshire's Right-to-Know Law,¹ when a public body is consulting with legal counsel (and thus not conducting a public meeting) "[e]veryone except the members of the public body should be excluded from the room" and such consultation "should be limited to discussion of legal issues." Attorney General's RSA 91-A Memorandum at 9. "Deliberation about the matter on which advice is sought may not occur during consultation with legal counsel" and a public body must "conduct deliberation[s] in public session." *Id.*

For the reasons stated in our rehearing motion, the OCA strongly believes that this docket and others in which the Commission exercises its authority to set the rates and charges of public utilities are adjudicative proceedings within the meaning of the Administrative Procedure Act, RSA 541-A. If so, then the Commission may deliberate privately in such dockets pursuant to RSA 363:17-c. However, the OCA cannot assume that our rehearing motion and any of the positions taken therein will prevail. In these circumstances, it seems prudent to make clear the OCA's intention to attend and monitor Commission deliberations in this and other non-adjudicative proceedings related to the setting of rates.

Please feel free to contact me in the event there are any questions or concerns about the foregoing. Consistent with the Commission's recent directive related to the ongoing pandemic-related state of emergency, we are filing and serving this letter in electronic form only.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Maurice Kreis".

D. Maurice Kreis
Consumer Advocate

cc: Service List, via e-mail

¹ The Attorney General's RSA 91-A Memorandum, dated March 20, 2015, is available at <https://www.doj.nh.gov/civil/documents/right-to-know.pdf>.